

STRANGER IN A STRANGE LAND:

Ethics and Multijurisdictional Practice Issues

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AGENDA

- Review ethical obligations of SALT lawyers in MJP environment
- Consider admission-to-practice requirements for:
 - Pre-litigation process (audits, refunds, informal protests, ruling requests)
 - Litigation proceedings
- Focus on ABA Model Rules and select jurisdictions

HISTORY

- Territorial practice of law
- Emergence of MJP
 - ABA Commission on Multijurisdictional Practice Report (2002): *Client Representation in the 21st Century*
 - *45 states have adopted MJP since 2002*
- ABA SALT Committee Multistate Tax Practice Task Force

PRACTICE OF LAW

- Each state regulates ‘practice of law’ within its jurisdiction
 - Definition varies; state may provide no guidance
 - Admitted vs. authorized practice
- ABA Model Rule 5.5
 - 44± states have adopted in some form since 2002:
 - Verbatim; or
 - Jurisdiction-specific modifications

MODEL RULE 5.5 – *General Rule*

- Lawyer shall not practice law in another jurisdiction in violation of that jurisdiction's regulation of legal profession
- Unless admitted to practice here, shall not:
 - Establish office “or other systematic and continuous presence” for practice of law; or
 - Hold out to public or otherwise represent that lawyer admitted to practice here

MODEL RULE 5.5 – 4 *Exceptions*

- Lawyer in good standing in another jurisdiction may provide legal services on ***temporary*** basis here if:
 - Associate local lawyer who actively participates in matter;
 - Services reasonably related to pending or potential proceeding in this or another jurisdiction if authorized by law or order to appear;
 - Services reasonably related to alternative dispute resolution proceeding arising out of practice in admitted jurisdiction and not requiring pro hac vice admission; or

MODEL RULE 5.5 – 4 *Exceptions*

(cont'd)

- Arise out of or reasonably related to lawyer's practice in jurisdiction where admitted
- 4 exceptions deemed to not create unreasonable risk to clients, courts or public
- 4 exceptions are safe harbor
 - Fact that conduct not identified in MR does not imply that conduct is/is not authorized

MODEL RULE 5.5 (cont'd)

- Lawyer in good standing in another jurisdiction may provide legal services through an office or “other systematic and continuous presence” here if:
 - Services provided to lawyer’s employer or affiliates and do not require pro hac vice admission; or
 - Services authorized by federal or other law or rule
- If employed lawyer establishes office or other systematic presence for purposes of rendering legal services to employer, may be subject to registration and other requirements (*e.g.*, client security fund assessments, mandatory CLE, etc.)

MODEL RULE 5.5 COMMENTS

- Lawyer may only practice law where authorized:
 - Admitted to practice on regular basis; or
 - Authorized by court rule, order or law to practice for limited purpose/restricted basis
- Other than as authorized by law or rule, non-admitted lawyer violates MR 5.5 if establishes office or other ***systematic and continuous presence*** here for practice of law

MODEL RULE 5.5 COMMENTS (cont'd)

- Presence may be systematic and continuous even if lawyer *not physically present* here
- No single test to determine whether lawyer's services are provided on a "temporary basis"
 - Services may be "temporary" even though provided on a recurring basis or for an extended period of time (*e.g.*, single lengthy negotiation or litigation)

MODEL RULE 5.5 COMMENTS (cont'd)

- ‘Reasonably related to lawyer’s practice in jurisdiction where admitted’:
 - Client previously represented by lawyer
 - Client resides in or has substantial contacts with jurisdiction where lawyer admitted
 - Matter has significant connection with jurisdiction where lawyer admitted
 - Significant aspects of lawyer’s work conducted in jurisdiction where admitted

MODEL RULE 5.5 COMMENTS (cont'd)

- Significant aspect of matter involves law of jurisdiction where lawyer admitted
- Client's business or legal issues involve multiple jurisdictions
- Services draw on lawyer's "recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of *federal, nationally-uniform*, foreign, or international law"

MODEL RULE 5.5 COMMENTS (cont'd)

- Lawyer subject to discipline both where practices law (authorized or otherwise) and where admitted to practice
- Authorization to practice here does not authorize communications advertising legal services here

PRE-LITIGATION PROCEEDINGS

- Audits, refunds, informal protests, ruling requests
- Exception per MR 5.5(c), comments 9 & 18
 - Authorized by law or informal practice of tribunal or agency
- Standards of conduct for Qualified Representatives
- **Not** universally accepted that non-admitted attorney can represent taxpayer in all pre-litigation proceedings

PRE-LITIGATION – *Step Carefully*

- *Pro hac vice* admission required to appear before state revenue department
 - IA, MS
 - KS (maybe)
 - NE (contested hearings)
 - OH (UPL to negotiate with ODT if out-of-state attorney?)
 - OR (for informal conference appeals)
 - SD (must associate local counsel)

LITIGATION

- 40 states & D.C. allow admission by motion, since ABA MR 5.5 adopted (2002)
 - Not in: CA, FL, DE, HI, LA, MD, MT, NV, NJ, RI, SC
- Pro Hac Vice Admission
 - Requirements vary by jurisdiction
 - Associate local counsel
 - Limited number of appearances
 - Fees
 - When to file (NASCAR)
 - Notice of appeal to BTA was UPL and dismissed where filed by attorney not authorized to practice law in OH: Marena 4142, Inc.

LITIGATION

- Pro hac vice admission required before tax tribunal/commission/board
 - AL, GA (exc Small Claims Division), IL, KS, KY, LA, MA, MN, MO, MT (maybe), NV, NC, OH (*NASCAR*), OK, OR, SC, WA (if reciprocity by home state)
- Pro hac vice admission required for judicial proceedings
- May not be required for formal administrative (APA) litigation

OTHER CONSIDERATIONS

- Unlicensed practice of law
- Lawyers working in Accounting or Tax Services Firms
- Malpractice insurance coverage
- Alternative dispute resolution
 - MR 5.5, comment 12

DUTY OF COMPETENCY

- *Always* applies
- Duty to inform client that lawyer not licensed to practice in that jurisdiction?
 - MR 5.5, comment 20: *May*, if representation occurs primarily in that jurisdiction and requires knowledge of the law in that jurisdiction
 - MR 1.4(b): duty to explain matter to extent reasonably necessary to permit client to make informed decisions

IRS - REPRESENTATION

- BEFORE THE INTERNAL REVENUE SERVICE
 - Any attorney; certified public accountant; enrolled agent; and with certain restrictions, any enrolled actuary, retirement plan agent, or registered tax return preparer, none of whom are currently under suspension or disbarment from practice before the IRS. *31 CFR 10.3.*
 - Government (including State) officers and employees. *Id.; 31 CFR 10.5.*
 - Pro se. *Id.; 31 CFR 10.7.*

TAX COURT & U.S. DIST COURT

- Before the U.S. TAX COURT
 - Practitioners admitted to the bar of the Tax Court, including attorneys at law, or nonattorney applicants that have filed a duly completed application for admission to practice before the Court. *Tax Ct. XX R.P.P. 200.*
 - Pro se. *Id.*
- Before the U.S. DISTRICT COURTS
 - An attorney that is an active member in good standing of the highest court of any state or the District of Columbia (reciprocity rules), and Law students (see, e.g. USDC LCrR 44.1).

CHALLENGES TO STATE ADMISSION TO PRACTICE RULES IN FED COURTS

- National Association For the Advancement of Multijurisdictional Practice – NAAMPJ
 - Association and Individual Lawyers Challenging U.S. District Court Rules which incorporate State Admission to Practice Rules.
 - Plaintiffs suing State Supreme Court Justices, Federal District Court Judges and the Attorney General in Official Capacity as Promulgators/Administrators of Admission Rules

CHALLENGES TO STATE ADMISSION TO PRACTICE RULES IN FED COURTS

- Third Circuit – (799 F.3d 216) 2015
 - Maryland Attorney denied Admission to practice in Pennsylvania because Maryland did not have reciprocity agreement with PA which would allow a non-PA bar member to practice.
- U.S. Dist. Court for District of Columbia – (180 F. Supp. 3d 46) 2015
 - Attorney with principal law office in Switzerland barred from practicing under D.C. Admission rules.
- Fourth Circuit – (826 F.3d 191) 2016
 - Attorneys challenging Maryland’s rule requiring reciprocity from District Courts in other states before allowing non-MD attorneys to practice in Maryland District Courts.

CHALLENGES TO STATE ADMISSION TO PRACTICE RULES IN FED COURTS

- NAAMPJ Challenged under the following:
 - Fourteenth Amendment – Equal Protection
 - First Amendment – Freedom of Speech
 - Freedom of Association
 - Right to Petition
 - Privileges and Immunities Clause
 - Dormant Commerce Clause
 - Supremacy Clause
 - Due Process
 - Rules Enabling Act

CHALLENGES TO STATE ADMISSION TO PRACTICE RULES IN FED COURTS

- District Courts and Circuit Courts of Appeals Reject all of NAAMPJ Challenges:
 - No Strict Scrutiny; only rational basis analysis required
 - States have compelling state interest to regulate the practice of law within their borders
 - Regulation of Profession and does not regulate speech based on content.
 - No elevation of state law over federal law as nothing prohibits federal law from incorporating state law.
 - Association/Petition not denied as simply remedy is to take bar exam in state where attorney wants to practice.
 - Privileges of one state not guaranteed to be respected by another state.
 - Discriminatory result of admission rules serves legitimate local purpose.

QUESTIONS

- There are many
- There may not be clear answers

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