Interjurisdictional Practice and the In-House Lawyer: The Application of Unauthorized Practice of Law Regulations to In-House Counsel
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I. Application to the Work of In-House Counsel of the Current Regulations Prohibiting the Unauthorized Practice of Law.

In most jurisdictions in the U.S., all out-of-state lawyers are subject to regulations which permit only those persons who have been admitted to the bar there to give legal advice in that state. The UPL regulations apply to in-house counsel employed by corporations and lawyers working at government agencies as well as to lawyers working at law firms. The wording of the prohibition varies by state, but the regulations typically provide that it is unlawful to practice law or give legal advice in the state if you are not a member of that state's bar. The highest court in each state articulates which activities constitute the practice of law. Applying the UPL regulations to in-house counsel who are licensed in other states is not necessary to achieve the policy goals the regulations are intended to protect. Out-of-state attorneys working exclusively as in-house counsel should be eligible for an admission category, or exempted from the reach of the UPL regulation. The complexities of regulation in this area can be revealed through consideration of the following hypothetical scenarios:

Hypo 1.

In-house counsel Lawyer A, licensed in another state, has worked in Maryland for the past seven years. Maryland's rule permits him to work there without becoming admitted in Maryland. Lawyer A now wants to apply for admission in a third state, which requires him to have been engaged in the practice of law for five of the previous seven years. Does his time working in Maryland qualify him for admission in the third state?

If Lawyer A had spent the seven years working in California, would his time working there qualify him for admission in the third state?

Hypo 2.

General Counsel, licensed in the jurisdiction where his office is located, issues an opinion letter on behalf of the company to a regulatory body in a jurisdiction where he is not licensed. Is this act the unauthorized practice of law?

Hypo 3.

Lawyer B, an in-house lawyer licensed only in New York, travels to Detroit, Michigan to attend a meeting at the office of one of the divisions of the corporation. While at the meeting, he advises the managers of the division regarding compliance with Michigan state law and federal environmental regulations.

What is the logic of the analysis if Lawyer B is permanently transferred to an office in Michigan rather than simply attending a meeting there?

Hypo 4.

Lawyer C, licensed in New York and California, travels to a meeting in D.C. While waiting for a connecting flight at O'Hare Airport, he responds to e-mail messages and makes telephone calls during which he provides legal advice to people at the company.

Is he engaging in the unauthorized practice of law in Illinois?
Is there a difference if the executives he advises are located outside New York and California when he talks to them?

Hypo 5.

ABC Company hires a new General Counsel, licensed only in Pennsylvania. The new G.C. moves to corporate headquarters in White Plains, New York.

Are the other lawyers in the company's legal department aiding and abetting the unauthorized practice of law by the General Counsel simply by staying in their jobs and reporting to him? How can the other attorneys avoid possible sanctions?

Would the analysis be different if the G.C. maintained an office in Pennsylvania as well as an office in New York?

Hypo 6.

Lawyer H, licensed in the District of Columbia, New York and Connecticut, participates by conference call in a meeting held in Los Angeles, California. He gives advice regarding California law, federal tax law and New York law while sitting in his office in New York.

Is Lawyer H committing UPL in California?

II. Precisely How Should the UPL Regulations be Changed?

A variety of different approaches might be considered. Each has its strengths and weaknesses. Some of the most frequently considered alternatives are discussed below.

A. Specifically exempt in-house counsel.

Some states have adopted separate regulations specifically exempting in-house counsel from their UPL rules. States which have adopted a special admission category for in-house counsel typically require that the lawyers give legal advice only to the corporation which employs them.[1]

These jurisdictions include: Alabama,[2] the District of Columbia,[3] Florida,[4] Kansas,[5] Kentucky,[6] Maryland, [7] Minnesota,[8] Missouri,[9] North Carolina,[10] Ohio,[11] Oklahoma,[12] and South Carolina,[13] Virginia,[14] and Washington.[15] These regulations typically also apply to lawyers who practice exclusively for associations, governmental entities and forms of business organization other than corporations.[16]

The primary benefit of the specific exemption approach is that it creates a reliable safe harbor for in-house attorneys. They can be absolutely certain that they will not be subject to discipline for providing legal advice in the state.

In addition, these regulations are an improvement over most of the provisions allowing admission on motion. The number of years in practice required in many states' on motion rules can be problematic for in-house counsel.[17] If the years in practice are intended to protect the public by demonstrating that the out-of-state attorney has practiced adequately elsewhere, this additional requirement is not necessary for in-house lawyers. There is less need to protect the public in the case of in-house counsel, since they will be working only for a single client, typically a sophisticated consumer of legal services.[18]

The specific exemption approach does have some problematic aspects, however. The most important of these is that it is not a complete solution for the in-house attorney. In order to qualify for the admission category, the attorney must be employed within the state. Therefore, an attorney who travels across the country may run afoul of the UPL prohibitions in states in which he attends meetings, but does not maintain an office.

In addition, the exemption distinguishes between in-house counsel and lawyers practicing in law firms. Historically, a significant number of in-house counsel have objected to differential treatment. In states in which in-house counsel refrained from strongly endorsing such separate treatment, the lack of interest stalled efforts to enact a separate admission category.

In those states which require pro bono work, the separate category also presents a practical problem. How can in-house counsel satisfy pro bono requirements if they are only supposed to provide legal advice to their employers? In states which allow lawyers to satisfy the requirement by paying a set amount to agencies which provide legal services to under-served populations, the lawyers can simply pay. The question remains whether this amounts to a tax on those lawyers who are prevented from providing the advice themselves. Other states, such as Missouri, explicitly allow in-house counsel to provide pro bono legal services.[19]

Finally, by satisfying the needs of in-house lawyers who move from another state permanently, such regulations divert support away from a more complete reforms. A comprehensive approach which applies to all out-of-state lawyers would lead to a more logical set of regulations rather than piece-meal solutions.

B. Exempt occasional practice .

A handful of states, notably Michigan[20] and Virginia[21] have revised their regulations to permit occasional practice by out-of-state lawyers. This safe harbor applies to in-house counsel as well as to lawyers who practice in firms. The lawyer described in Hypo 3 above would not be prosecuted if he entered Michigan (or Virginia) for a limited period of time to advise a client who had employed him before he entered the state. Similarly, the lawyer returning telephone calls and sending e-mail while at an airport in Hypo 4 would not violate the UPL regulation in these states, since he is only temporarily working within the state.

Although UPL prohibitions should not penalize an out-of-state attorney in this situation, on their face the language of most UPL regulations other than Michigan's and Virginia's would not permit this activity. On balance, the exemption for occasional practice is better than a complete prohibition. However, it does not provide adequate protection for in-house counsel who frequently travel to provide legal services in a state in which they are not licensed or who are transferred to an office in such a state.

C. Create an exemption for advice on federal law.

A third option would be to allow all out-of-state lawyers to give advice on federal law and on the law of the states in which they are admitted. In light of the difficulty of a national solution, action in each state will be needed. The Florida Supreme Court in *Florida Bar v. Savitt*[22] and *Chandris v. Yanakakis*[23] has allowed out-of-state lawyers to give advice regarding federal law when they are temporarily in the state and to give advice regarding other non-Florida law. The competing interests involved, and the analysis of the sources of the power to admit attorneys have been discussed elsewhere.[24] The concept is mentioned here to indicate one comprehensive solution to the problems facing in-house counsel whose client wants legal advice when the attorney travels throughout the U.S.

D. Maintain the status quo.

Keeping the regulations as they are now written is an option.[25] However, this would maintain the current inequitable treatment of in-house counsel. Lawyers working at law firms are permitted to escape UPL prosecution by associating with another lawyer licensed in the state. Although this approach represents a shallow analysis which has been discussed elsewhere,[26] in-house counsel licensed out-of-state are still disadvantaged to the extent that disciplinary authorities will not allow them to escape UPL prosecution by associating with another lawyer in the legal department who is licensed in the state. The scenario in Hypo 5 above illustrates some of the implications of treating in-house counsel differently from law firm lawyers.

E. Enact federal legislation.

It is conceivable that Congress could be prodded to enact federal legislation which would exempt out-of-state lawyers from prosecution for the unauthorized practice of law. Once in place, the operation of the Supremacy Clause would require the states to accept the federal regulation.[27] Congressional action is a possibility; one of its advantages is that those pushing for

change could focus their attention only on the House and Senate rather than mounting 50 separate campaigns lobbying the appropriate decision-makers in each of the 50 states.

However, it is politically unrealistic to expect to see federal legislation in this area. No group is currently committed to organizing constituent pressure on this issue. A significant amount of time and resources would have to be spent to have even a chance at getting federal legislation passed. In addition, few representatives would be interested in taking up the cause and sponsoring the needed legislation.

III. Changes Indicated by the California Supreme Court.

Under the traditional analysis, Lawyer H, in Hypo 6 above, would not have been in danger of prosecution for a UPL violation. As long as he remained physically located within a jurisdiction in which he is licensed, a lawyer was thought to be able to properly give legal advice, including advice regarding the laws of other jurisdictions. However, for lawyers who give legal advice regarding California law, a new analysis is needed in light of the California Supreme Court's opinion in Birbrower.[28] By indicating that Calif. Bus. & Prof. Code section 6125 can be triggered when an out-of-state lawyer gives advice on California law even when he is not physically present in the state, the court takes the position that a lawyer can violate California's UPL prohibition even if he gives his legal advice while located elsewhere. The court states, "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."[29] The court's opinion makes it clear that no out-of-state lawyer in that situation will be able to confidently predict whether his actions will be held to violate the UPL prohibition. Declaring that each case must be decided on its individual facts, the court says, "[A]lthough we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person automatically practices law "in California" whenever that person practices California law anywhere, or "virtually" enters the state by telephone, fax, e-mail or satellite."[30] Under the Birbrower "sufficient contacts" test, an out-of-state attorney is deemed to be practicing law "in California" whenever the attorney engages in "sufficient activities in the state or create[s] a continuing relationship with the California client that include[s] legal duties and obligations."

The language of the opinion should not be read to prevent in-house counsel employed by non-California companies from giving legal advice on California law.[31] However, lawyers not licensed in California who advise California companies must recognize that California courts may find that their work violates the Birbrower standard.

If other states adopt this approach and begin regarding advice concerning their state's law to be practicing law "within the state" even when the lawyer does not provide the advice while located there, a new category of UPL prosecution will be opened. For example, if Delaware adopted it, a lawyer giving advice to executives at a Delaware corporation about procedures for a Board of Directors meeting would be viewed as interpreting Delaware law. He could be prosecuted for engaging in the unauthorized practice of law even if he was licensed in the state in which he gave the advice. In the twenty-two months since the California Supreme Court issued its opinion, no

other state's highest court has adopted the expansive interpretation of "practicing law in the state" which California pioneered in the Birbrower opinion. However, lawyers with a multijurisdictional practice are well-advised to take an active interest in developments in this area of law.

IV. Conclusion.

The issues presented here are meant to stimulate discussion and reflection. Regulatory changes proposed in connection with multidisciplinary partnerships are still under discussion. The ABA 2000 Commission will be considering new issues throughout the coming year. Many states will evaluate their disciplinary regulations and related opinions in light of the views presented in these forums and in the ALI's recently completed Restatement of the Law Governing Lawyers. We have an opportunity to urge for change in the regulations and opinions prohibiting out-of-state in-house counsel from practicing law. The current increased focus on multijurisdictional practice creates an opportunity to improve those regulations now.

Notes

1. Some states' regulations, such as that in Missouri, explicitly permit the in-house lawyers to engage in pro bono work in addition to work for their employers. Mo. Sup. Ct. R. 8.105 (d).
2. Alabama Op. RO-86-52.
3. D.C. Rule 49 (c) (6).
4. Fla. Stat. Ann. section 17. The status must be renewed annually, with no cap on the maximum number of years it is available.
5. Kan. Sup. Ct. R. 706. The permit to practice in Kansas expires if the attorney terminates his in-house employment, but it is not time-limited.
6. Ky. Sup. Ct. R. 2.111. Attorneys who receive this status are not eligible to appear in court.
7. Md. Bus. Occ. & Prof. Code Ann. section 10-206(d). Attorneys practicing with this status cannot appear in court.
8. Minn. Sup. Ct. R. 6(C) provides a one year temporary license.
9. Mo. S. Ct. R. 8.105. The rule now provides that the authorization to practice for the corporate employer can be renewed for successive five year periods. The time an in-house lawyer practices under this rule cannot be used to fulfill the conditions for admission without examination under Rule 8.10.
10. N.C. Admin. Code Title 21 Ch. 30 section .0500
11. Ohio Sup. Ct. R. VI section 4(A). Renewable two-year terms.
12. Okla. Stat. Ann. App. 5 title V, section 6 (allows an in-house lawyer to practice under this exemption for an open-ended period of time.)
13. S.C. Sup. Ct. R. 405.
14. The definition of the unauthorized practice of law excludes practice by in-house counsel. UPL Op. 178 (Aug. 12, 1994).
15. Wash. Ct. Rule 8 (f) creates an exception for in-house counsel, but still requires that the out-of-state lawyer pass the professional responsibility portion of the state's bar exam.
16. The regulations typically include the caveat is that the entity must not provide legal services to outside clients.
17. For a discussion of the application of the rules governing admission without examination to in-house counsel, see Carol A. Needham, "The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice." 36 S. Tex. L. Rev. 1075, 1089-90 (1995).
18. It bears mention that not all businesses operating as corporations are sophisticated consumers of legal services, while some individuals, such as Warren Buffett, clearly are.
19. The lawyer must perform his pro bono work only with an organization which has been approved by the Missouri Bar for this purpose. Mo. S. Ct. R. 8.105(d).
20. Mich. Comp. Laws section 600.916 (1948); Mich. Stat. Ann. section 27 A (Callaghan 1986).
21. See section I (C) of the Rules for Integration of the Virginia State Bar, Part Six of the Rules of Court and Virginia State Bar UPL Advisory Opinions 158 and 178.
22. 63 So. 2d 559 (Fla. 1978).
23. 668 So. 2d 180 (Fla. 1995).
24. Amy R. Mashburn, "A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts," 8 Geo. J. Legal Ethics 473, 475 (1995); Charles W. Wolfram, "Lawyer Turf and Lawyer Regulation--The Role of the Inherent Powers Doctrine," 12 U. Ark. Little Rock L.J. 1, 6 (1989); Carol A. Needham, "Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law," 44 Kansas Law Review 453 (1997).
25. For additional discussion, see e.g., Daniel A. Vigil, "Regulating In-House Counsel: A Catholicon or a Nostrum?" 77 Marq. L.

Rev. 307 (1994); Note, "We Can't All Be Lawyers ... Or Can We? Regulating the Unauthorized Practice of Law in Arizona," 34 Ariz. L. Rev. 873 (1992).

26. The implausibility of the idea that a first-year lawyer would be vetting the advice given by a major authority in an area of law has been explored by Charles W. Wolfram, "Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers," 36 S. Tex. L. Rev. 665, 678 (1995).
27. See U.S. Const. art. VI, section 2.
28. Birbrower, Montalbano, Condon & Frank P.C. v. Superior Ct. (ESQ Business Services Inc.), 17 Cal. 4th 119, 128-31 70 Cal. Rptr.2d 304, 309-11 (Cal. 1998), modified by, No. S057125, 1998 WL 81551 (Cal. Feb. 25, 1998)(the modification does not affect the judgment in the case).
29. 117 Cal.4th at 128-29, 70 Cal. Rptr.2d at 309.
30. Id.
31. Support for this view can be found in Condon v. McHenry, 65 Cal. App.4th 1138, 76 Cal. Rptr.2d 922 (Ct. App. 1998)(involving a non-California client).
