Each state has unique rules regulating how attorneys not licensed in that jurisdiction may practice law on a temporary basis. In-house counsel working across multiple jurisdictions must understand whether and under what circumstances they may represent clients or otherwise deal in a state where they are not licensed without first seeking reciprocity, pro hac vice admission, or other special licensing. Noncompliance with licensing requirements is particularly risky for in-house counsel who maintain offices in jurisdictions (host states) in which they are not bar-admitted.

Licensing Alternatives and UPL

For in-house counsel working in a state in which they are not admitted to the bar, there are three basic licensing options: (1) pro hac vice admission for isolated matters pending in the host state’s courts; (2) general admission upon satisfying the host state’s bar requirements, either through reciprocal admission or direct application; or, (3) if available in the host jurisdiction, limited licensing for corporate counsel.¹

Failure to comply with these licensing requirements poses significant perils, the greatest of which is engaging in the unauthorized practice of law (UPL). The unauthorized practice of law in a host state may lead to serious disciplinary action in the host state, the state in which the appearance(s) occurred, or another state in which the attorney is licensed. This is true whether or not counsel is licensed in the host state, so long as in-house counsel is admitted to practice in some jurisdiction. Additionally, the lawyer could face discipline in other jurisdictions in which he or she is licensed.² In many states, the unauthorized practice of law also carries criminal penalties, with multiple violations constituting a misdemeanor.³

“Legal Practice” Requiring Licensing

Most attorneys understand that appearing in court or participating in an official proceeding requires admission to that jurisdiction where the proceeding is located. But many other activities outside the courtroom can be considered
“practicing” law. Generally, whenever an in-house lawyer acts as an attorney rather than a business executive, those activities can be considered “legal practice” requiring some form of licensing. Yet, in-house counsel will often perform diverse functions for a corporation, only some of which place them in the role of legal advisor. Distinguishing between counsel as attorney and counsel as a business advisor or corporate administrator is not always easy. When deciding what constitutes unauthorized practice, courts evaluate numerous factors, including:

- The nature of the services rendered;
- The frequency with which services were provided; and
- Whether counsel maintained an office or resided in the jurisdiction where those services were supplied.4

Because courts often decide UPL claims based on their individual facts, there is no clear rule for determining when a non-licensed attorney’s activities would be considered “legal practice” in a particular jurisdiction. In-house counsel may nonetheless find some guidance in

the following non-exclusive list of activities for which out-of-state counsel have been found to be engaged in the practice of law.

**Arbitrations.** Some jurisdictions place limitations on out-of-state lawyers appearing in arbitration proceedings. For instance, non-Florida lawyers may only appear in Florida arbitrations for clients residing in or having an office in the lawyer’s home state, or for any appearances “arising out of” or “reasonably related” to the lawyer’s home state practice and not requiring pro hac vice admission. Those lawyers must also provide the Florida Bar with notice after paying a filing fee.5 Similarly, California Code of Civil Procedure Section 1282.4 details several prerequisites, including the payment of a filing fee and registration by certificate, for out-of-state attorney arbitration appearances.

**Negotiations.** In one case, a Wisconsin-licensed attorney who actively participated in real estate negotiations and advised sellers on a contract for sale of Illinois property was found to have engaged in unauthorized practice of law in Illinois and was required to pay attorney’s fees.6

**Depositions.** Because depositions are “proceedings in court,” many jurisdictions require out-of-state attorneys conducting local depositions to comply with special licensing or other requirements. For example, a number of “miscellaneous action” jurisdictions, of which there are at least 20, require out-of-state counsel to hire an attorney licensed to practice law in that state to file a miscellaneous action in the court with jurisdiction over the intended deponent.7

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Professional Conduct Rules Relating to Multijurisdictional Practice

In 2002, the American Bar Association adopted Rule 5.5 of the Model Rules of Professional Conduct regarding unauthorized practice of law in multijurisdictional practice, aiming to facilitate attorney practice in states other than those in which they are admitted to the bar. The ABA Commission on Ethics 20/20 is currently updating Rule 5.5 to allow attorneys admitted in at least one state to practice in a new jurisdiction while awaiting full admission by either admission by motion or bar exam passage. The Commission is also adding Rule 5.5(d)(3) to allow licensed attorneys, during a period of no more than 365 days, to provide legal services while working to meet the admissions requirements for a new jurisdiction.

To date, 44 states have adopted some form of Rule 5.5, though there is great variance in the provisions of each jurisdiction’s rules. The following chart highlights some of the key differences in how states treat temporary practitioners from outside jurisdictions.

<table>
<thead>
<tr>
<th>Provision</th>
<th>Sample Jurisdictions Where Applicable</th>
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<tbody>
<tr>
<td>Any temporary legal services provided in the host jurisdiction must be “reasonably related to the representation of an existing client in the jurisdiction where the lawyer is licensed.”</td>
<td>Connecticut, Idaho, Kentucky, Maine, New Jersey, North Carolina, South Carolina, Tennessee</td>
</tr>
<tr>
<td>Out-of-state lawyers must associate with in-state lawyers in transactions involving issues specific to the host jurisdiction’s law.</td>
<td>New Mexico, North Dakota, Virginia</td>
</tr>
<tr>
<td>In-house attorneys admitted and in good standing in another state may provide legal services to their own company, as well as their employees, directors or officers, upon paying a registration fee and fulfilling that jurisdiction’s continuing legal education requirements.</td>
<td>New York</td>
</tr>
<tr>
<td>“Special certificates” or other narrow in-house counsel licensing are required for limited qualification to practice in the state.</td>
<td>Michigan, Pennsylvania</td>
</tr>
<tr>
<td>Out-of-state lawyers must obtain a sales tax license and pay applicable taxes.</td>
<td>South Dakota</td>
</tr>
<tr>
<td>A lawyer will not be disciplined in his or her state of licensure for engaging in conduct in the host jurisdiction that is permitted in the home jurisdiction where licensed.</td>
<td>Minnesota, Wisconsin</td>
</tr>
</tbody>
</table>

Interviewing and Counseling Clients. In a recent matter, New York attorneys, representing a corporation domiciled in California, were found to have engaged in unauthorized practice of law in California when, among other things, they interviewed potential arbitrators for a contract dispute and gave recommendations regarding settlement strategy.8

Working in Association with In-State Attorneys. A subcontractor’s general counsel, who was licensed to practice in Oregon but not Hawaii, assisted attorneys retained by the subcontractor for a trial in Hawaii. The general counsel consulted on appeals, prepared the subcontractor’s position in anticipation of mediation, and assisted counsel with legal research. A reviewing court found that the general counsel was clearly practicing law
when he engaged in these activities; however, no discipline was warranted because the general counsel’s role was strictly one of consultation, a role he fulfilled in Oregon where he was licensed.\textsuperscript{9}

### Potential Impact on the Attorney-Client Privilege

An attorney’s licensure in a state may also bear on the existence of an attorney-client privilege. This interaction is particularly important for in-house counsel, whose communications courts often scrutinize for entitlement to the privilege. In the context of multijurisdictional practice, in-house lawyers need not be licensed in every jurisdiction where they might make or receive a communication in order to be covered by attorney-client privilege protections.\textsuperscript{10} But, because privileges are typically state law creations and because a state in which a lawyer is licensed cannot confer privileges in another state jurisdiction, some courts have questioned whether the attorney-client privilege should apply if counsel is not a member of the state bar where his or her offices are based.

An example from a recent federal trademark infringement case illustrates the potential dangers facing in-house counsel seeking to assert the privilege in the multijurisdictional context. During discovery in that case, a corporate plaintiff filed a privilege log covering e-mail communications with an individual described as the company’s in-house legal counsel. The attorney had also appeared in court and before administrative agencies on the plaintiff’s behalf. Yet sometime during his eight-year employment with the company, the attorney had transferred his California bar licensure to an inactive status. A federal magistrate, reviewing the log in light of this information, ruled that the company’s belief that the in-house attorney was actively licensed was not enough, by itself, to permit the company to “avail itself of the privilege.”\textsuperscript{11} The claims of privilege were ultimately recognized and the magistrate’s ruling was overturned by the district court, but not before some commentators noted that this logic could easily be extended to discipline in-house counsel who fail to perform limited registration in the states in which they work.\textsuperscript{12} For example, states like Pennsylvania permit non-Pennsylvania licensed attorneys to perform in-state legal activities that are neither systematic nor continuous. By expressly requiring in-house counsel to have a limited license if they maintain an office (or systematic or continuous presence) in Pennsylvania, the state places conditions on in-house counsel’s ability to provide legal services there. As a result, a non-licensed in-house lawyer faces the risk of being found engaged in unauthorized practice of law. Though unlikely, an examining court could further conclude that an in-house lawyer so engaged in UPL would not be entitled to attorney-client privilege, particularly if the lawyer holds an office but is not licensed in Pennsylvania.\textsuperscript{13}

### Limiting the Risk

However slight the risk of a UPL determination in the contexts described above, the consequences of such a determination could be disastrous in certain matters. To limit the risk that communications with in-house counsel are not privileged, and to protect against potential disciplinary sanctions, prudent in-house attorneys may wish to acclimate themselves with local admissions and professional conduct rules in the jurisdictions in which they operate and seek limited admission where necessary, depending on the duties they are performing.

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1. See, for example, Mich. Rules for the Board of Law Examiners R. 5(d); Pa. Bar Admission Rule 302.
2. See, for example, Mo. Rule of Professional Responsibility 4(a) (“A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs.”); Mass. Professional Conduct R. 8.5; D.C. Rules of Professional Conduct R. 8.5.
3. 42 Pa. Cons. Stat. Ann. 2524 (“Any person . . . who within this Commonwealth shall practice law, or who shall hold himself out to the public as being entitled to practice law, . . . without being an attorney at law . . . commits a misdemeanor of the third degree upon a first violation. A second or subsequent violation . . . constitutes a misdemeanor of the first degree.”).
5. Rules Regulating the Fla. Bar R. 1-3.11.
7. See, for example, Ariz. R. Civ. P. 30(h) (separate action must be commenced in home state; clerk issues subpoena); D.C. R. Civ. P. 28-1(b) (clerk issues upon judicial approval; file notice with home state court).

SUMMER 2012 | Partnering Perspectives | 7