ATTORNEY PROFESSIONALISM FORUM

To the Forum:

My firm represents Blackacre, a real estate investment trust (REIT) with real estate holdings located throughout many portions of the United States, and has represented the company in almost all of its real estate transactions. A wholly owned subsidiary of Blackacre owns a luxury ski resort development in Utah, and the principals of Blackacre have located a second resort property in Utah that they hope to purchase and add to the company's ever-growing real estate portfolio. My firm only has an office in New York and does not employ any attorneys who are admitted to practice in Utah. Would this transaction require Blackacre to hire local counsel in Utah to assist my firm in the deal? I have heard that if I do not retain local counsel, then I would potentially be engaging in the unauthorized practice of law. Is this true? What are the consequences for engaging in the unauthorized practice of law?

Sincerely,

I. Need Help

Dear I. Need Help:

The unauthorized practice of law is a complicated question, one which at times has been met with fiercely diverging viewpoints. Those who run afoul of unauthorized practice regulations, however, can be subjected to a variety of penalties including disgorgement of legal fees, disciplinary action, and possible criminal sanctions.

Lawyers are often asked by their clients to handle matters that may take them outside their home territory. For example, in the litigation realm, an attorney admitted in New York could be handling the representation of a client in a New York state court action which may require the attorney to conduct discovery in other jurisdictions in connection with the case, even though that attorney may not be admitted in those states. Corporate, real estate and other transactional attorneys admitted in New York may also be asked to represent their New York-based clients in mergers and acquisitions where the transaction at issue involves a purchaser or seller in another state.

Rule 5.5(a) of the New York Rules of Professional Conduct (the RPC) gives attorneys the rules of the road (at least from the New York perspective) when their practices take them to other jurisdictions. The Rule provides that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction."

Comment [1] to Rule 5.5 states:

> A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law in another jurisdiction by a lawyer through the lawyer's direct action, and paragraph (b) prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law.

New York may not always be the friendliest place for out-of-state attorneys who venture into our jurisdiction (even on a temporary basis) as part of their representation of a client. In the words of Professor Roy Simon, "Rule 5.5 is one of the great disappointments in the New York Rules of Professional Conduct." Simon's New York Rules of Professional Conduct Annotated at 1340 (2014 ed.). New York Judiciary Law §§ 478 and 484 make it a crime for a person to practice law in New York when not admitted to practice in this state, and the statutes do not distinguish "between nonlawyers who have never been admitted anywhere and lawyers who have been admitted elsewhere but not in New York." Simon's at 1340. Although enforcement of these statutes may be inconsistent, the message being sent by both the Legislature and the courts is that out-of-state attorneys should engage New York admitted counsel in connection with their matters in New York.

When the RPC was enacted in April 2009, New York did not incorporate many of the "safe harbor" provisions in Rule 5.5 of the American Bar Association's Model Rules of Professional Conduct (the Model Rules) that permit lawyers to do work outside the jurisdiction where they are admitted. Specifically, Rule 5.5(c) of the Model Rules tells our profession:

> A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
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> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
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> (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear

The Attorney Professionalism Committee invites our readers to send in comments or alternate views to the responses printed below, as well as additional hypothetical fact patterns or scenarios to be considered for future columns. **Send your comments or questions to: NYSBA, One Elk Street, Albany, NY 12207, Attn: Attorney Professionalism Forum, or by e-mail to journal@nysba.org.**

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in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Perhaps addressing the needs of a broader audience, the ABA made several comments to Rule 5.5(c) that assist lawyers with multijurisdictional practices. Comment [10] to Rule 5.5 of the Model Rules states:

> Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

In addition, Comment [13] to Rule 5.5 of the Model Rules provides:

> Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

Paragraphs (c)(2) and (c)(3) to Rule 5.5 of the Model Rules clearly were meant to lower the hurdles for attorneys to engage in multijurisdictional practice in both the litigation and alternative dispute resolution (ADR) forums, respectively. Moreover, Paragraph (c)(4) can be interpreted as permitting out-of-state attorneys to engage in the representation of a client in the transactional context in jurisdictions which have adopted this specific provision of the Model Rules. Indeed, one of our neighbors in the tri-state area (Connecticut) adopted these sections of Rule 5.5 of the Model Rules nearly verbatim so as to allow Connecticut to be more hospitable to multijurisdictional practitioners. Taking an even more enlightened approach to embracing out-of-state attorneys, our neighbors in the Garden State have adopted a version of Rule 5.5 which sets forth a number of varying situations where out-of-state attorneys could practice in New Jersey on either an occasional or temporary basis in connection with matters in their respective home states. The relevant provisions of Rule 5.5 of the New Jersey Rules of Professional Conduct provide:

> (b) A lawyer not admitted to the Bar of [New Jersey] who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:
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> (1) the lawyer is admitted to practice pro hac vice pursuant to R. 1:21-2 [of the Rules Governing the Courts of the State of New Jersey (the New Jersey Rules)] or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or
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> * * *
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> (3) under any of the following circumstances:
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> (i) *the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client* in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;
>
> (ii) *the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program and the services arise out of or are reasonably related to the lawyer's practice* in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission pursuant to R. 1:21-2 [of the New Jersey Rules] is required;
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> (iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice;
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> (iv) the out-of-state lawyer's practice in this jurisdiction is occasional and the lawyer associates in the matter with, and designates and discloses to all parties in interest, a lawyer admitted to the Bar of [New Jersey] who shall be held responsible for the conduct of the out-of-State lawyer in the matter; or
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> (v) the lawyer practices under circumstances other than (i) through (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, *provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client* (emphasis added).

As demonstrated above, it appears that our neighbors in the tri-state area are more than happy to allow New

York attorneys on their turf. However, the feeling may not be mutual, and it is uncertain whether New York is likely to change its rules anytime soon.

With that in mind, we turn to your question. Obviously, in addition to being well-versed in the RPC, you should also make yourself familiar with the rules applicable to the jurisdiction where your client's matter may take you; in this case it would be the Utah Rules of Professional Conduct (the Utah Rules). The good news is that Rule 5.5 of the Utah Rules tracks the language of Rule 5.5(c) of the Model Rules and its respective comments.

The Utah Rules appear to have adopted the ABA Model Rules in order to embrace the concept of multijurisdictional practice. Being that your representation of Blackacre in connection with its real property purchase in Utah could be "reasonably related" to your ongoing representation of Blackacre as its New York counsel in its other real estate ventures, your representation of Blackacre under these circumstances would not be considered an unauthorized practice of law and would be permissible under Rule 5.5(c)(4) of the Utah Rules.

That being said, we believe that it is smart for you to engage local counsel in Utah to assist with Blackacre's resort purchase. While local counsel may not be an absolute necessity, we are guided by the competency requirements outlined in Rule 1.1 of the RPC. Rule 1.1 provides:

> (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

Attorneys often feel the need to handle everything on their own for a particular client. Nevertheless, you should not close your eyes to the fact that local counsel would most likely be more familiar with local procedures and requirements relating to this potential purchase by your client. With more and more clients involved in matters in other states and even overseas, the decision to engage local counsel under the circumstances you have described is clearly in line with your obligations under Rule 1.1.

Lawyers, like sailors, often find themselves navigating through the shoals of foreign waters. We have learned to heed the wisdom of an old racing adage: "A sailor knows when you enter a race away from home that local knowledge is always critical and can often determine the outcome of the race."

Sincerely,
The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com) and
Matthew R. Maron, Esq.
(maron@thsh.com),
Tannenbaum Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I graduated law school last year and was just admitted to the bar. With very few job prospects out there for young attorneys, I decided to hang out my own shingle. Lately I have encountered judges and counsel who give me strange looks when they see me in court or at a meeting. I have also lost a few clients and have come to realize – I am not sure why – that this may have something to do with my appearance. I never really understood the need for attorneys to dress formally. So I dress pretty much the way I did in law school. I don't wear a tie when I am in court. I usually sport a nice pair of expensive jeans and then finish the look with some brightly colored shoes. Some of the judges that I have appeared before have openly commented not only on my informal dress but also my piercings and my visible tattoos. To me, the way I dress is an expression of my basic rights to free speech. It is the quality of my arguments, not the way I dress, that should be important. I am the first member of my family to become a lawyer and do not have any mentors to help me. Do I have a professional obligation to wear a suit and tie when I am in court? What about meetings with clients or other lawyers?

Sincerely,
N. O. Fashionplate