

CHAPTER 5/E

8 HYPOTHETICALS FOR 8 TITLES OF THE RPCS:

**TITLE 5/LAW FIRMS AND ASSOCIATIONS
(Or, a Look at Multijurisdictional Practice around the Northwest)**

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**I. DISCUSSION HYPOTHETICAL:
Once Upon a Time a Lawyer Crossed State Lines**

II. MULTIJURISDICTIONAL PRACTICE AROUND THE NORTHWEST

Drawn from Mark's July 2006 WSBA Bar News Ethics & the Law column, "Have License, Will Travel: A Roadmap to Licensing Around the Northwest," and his forthcoming chapter on lawyer licensing in the latest edition of the WSBA's Legal Ethics Deskbook

**I. DISCUSSION HYPOTHETICAL:
Once Upon a Time a Lawyer Crossed State Lines**

Once upon a time

A High Tech Co. in the mythical Golden State had a software licensing dispute with another high tech company. The licensing agreement at issue contained an arbitration provision requiring arbitration through BBB in St. Francis, Golden State. High Tech Co. hired Law Firm from Empire State to represent it. None of Law Firm's lawyers were licensed in Golden State. Law Firm's lawyers travelled to Golden State several times to meet with High Tech Co., to investigate the case and to meet with the other side. Law Firm also had many other electronic contacts with High Tech Co. from Empire State. High Tech Co. and Law Firm eventually had a nasty falling-out. High Tech Co. sued Law Firm for malpractice and Law Firm counterclaimed for its fees, which amounted to over \$1 million. High Tech Co. argued that Law Firm couldn't collect its fees because it was a misdemeanor in Golden State to practice law without a license and, so High Tech Co. contended, it would be against public policy to allow Law Firm to collect.

What did the Golden State Supreme Court decide?

(Hint: *See Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal. 4th 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998). *See also* California's subsequent adoption of multijurisdictional practice rules, including Court Rule 9.43 relating to out-of-state arbitration counsel, at www.calbar.org.)

What would happen in Washington?

(Hint: *See* RPC 5.5 as amended in 2006 and related comments.)

II. MULTIJURISDICTIONAL PRACTICE AROUND THE NORTHWEST

Drawn from Mark's July 2006 WSBA Bar News Ethics & the Law column, "Have License, Will Travel: A Roadmap to Licensing Around the Northwest," and his forthcoming chapter on lawyer licensing in the latest edition of the WSBA's Legal Ethics Deskbook

A. INTRODUCTION

The past few years have seen dramatic changes around the Northwest in the ability to practice seamlessly across state lines. From formal reciprocal admission to enhanced temporary authorization to practice, Washington, Oregon, Idaho and Alaska have taken major steps in offering Northwest lawyers the opportunity to work in all four venues with comparative ease. This chapter examines three primary forms of cross-border licensing: (1) reciprocal admission, both in the Northwest and beyond; (2) in-house counsel admission; and (3) temporary "multijurisdictional practice," or "MJP," under both traditional *pro hac vice* admission and under Rule of Professional Conduct 5.5 adopted in 2006.

B. RECIPROCAL ADMISSION

1. The Tri-State Compact

Washington, Oregon and Idaho entered into a novel agreement that went into effect on January 1, 2002 that allows reciprocal admissions among the three states. Although Washington had already adopted a broad "mirror image" reciprocity rule by then, neither Oregon nor Idaho had up to that point offered reciprocal admission to any other state. The "Tri-State Compact" was also unique for its time in its coordination of reciprocal admission among three geographically contiguous states.¹

The specific rules governing the Tri-State Compact are Washington Admission to Practice Rule 18, Oregon Admission Rule 15.05 and Idaho Bar Commission Rule 204A. The text of these rules and accompanying information on admission applications are available at the respective bar web sites: Washington—www.wsba.org; Oregon—www.osbar.org; and Idaho—www.state.id.us/isb.

The rules for all three jurisdictions are substantially similar. To be admitted reciprocally in one of the other jurisdictions, a reciprocal applicant must:

- be a graduate of an ABA-accredited law school;
- have passed the bar exam in at least one of the three participating states²;

¹ Since the Tri-State Compact, Oregon now also has reciprocity with Utah and Alaska, and Idaho now has a "mirror image" reciprocity rule much like its Washington counterpart.

² Because Washington and Idaho now both use "mirror image" reciprocity rules, applicants from those two states seeking admission in the other could base their admission on passage of a bar examination in a "non-Tri-State Compact" state. Lawyers seeking reciprocal admission in Oregon, however, must still show bar passage in Washington or Idaho (or Utah and Alaska) under Oregon AR 15.05(1).

- be an active member of the bar in one of the three participating states;
- have practiced in one of the three participating states for the three years preceding the application³; and
- show good character.

In addition, lawyers seeking reciprocal admission must complete 15 CLE hours in local practice and procedure. Information about specific CLE courses that satisfy this requirement is available from the individual bars in Washington, Oregon and Idaho. The timing of the CLE requirement varies somewhat in each state:

- Oregon requires the 15 hours to be completed before admission.
- Idaho requires the 15 hours to be completed no later than six months following admission.
- Washington’s “mirror image” reciprocity rule requires reciprocal applicants to satisfy the same CLE requirements that Washington lawyers would need to meet to be admitted in, as the case may be, Oregon or Idaho. Washington also requires four hours of Washington-specific preadmission education under APR 5(b).

Finally, Oregon AR 15.05(5) also requires that reciprocal admission applicants comply with the mandatory malpractice insurance requirements of the Oregon State Bar Professional Liability Fund. Under the PLF regulations, if a reciprocally admitted lawyer maintains his or her principal office in Oregon and is in private practice, then the lawyer must participate in the PLF. If a reciprocally admitted lawyer maintains his or her principal office outside of Oregon and is in private practice, then the lawyer “shall obtain and maintain other malpractice coverage covering the applicant’s law practice in Oregon which coverage shall be substantially equivalent to the Oregon State Bar Professional Liability Fund coverage plan.” More information about the PLF is available from its web site at www.osbplf.org.

Once an applicant is admitted reciprocally, the lawyer is a “full-fledged” member of the bar. Therefore, the lawyer must pay all applicable dues and satisfy all MCLE requirements. The MCLE requirement is tempered, however, by a separate compact under which Washington, Oregon and Idaho generally accept compliance with one state’s MCLE requirements as satisfying the requirements in the others.

2. Beyond the Tri-State Compact

For lawyers seeking admission in Washington who do not otherwise meet the requirements of the Tri-State Compact, Washington offers another avenue for reciprocal admission in the form of APR 18. APR 18 is a pure “mirror image” reciprocity rule—*i.e.*, it offers reciprocal admission to out-of-state lawyers on substantially the same basis that the lawyer’s “home” state would allow Washington lawyers to practice there. A current list of reciprocal jurisdictions is available in the licensing section of the WSBA’s web site at www.wsba.org.

³ Washington APR 18(b)(1) simply requires “active legal experience,” but Oregon AR 15.05 requires practice for three out of the prior four years and Idaho BCR 204A(2) requires three of the preceding five years.

To qualify under ARP 18's broader reciprocal formula, an applicant must:

- be an active member in good standing of the bar in a jurisdiction that accords Washington lawyers reciprocal admission;
- show good character;
- pass the Washington Professional Responsibility Exam *if* the lawyer's "home" jurisdiction would require Washington lawyers being admitted there to pass the Multi-State Professional Responsibility Exam; and
- complete any reciprocal education requirements, including the four hours of preadmission education required by APR 5(b).⁴

As with lawyers admitted under the Tri-State Compact, once an applicant is admitted reciprocally, the lawyer is a "full fledged" member of the Washington State Bar Association. Therefore, the lawyer must pay all applicable dues and satisfy all MCLE requirements as well.

In terms of Washington lawyers being admitted in other jurisdictions beyond the Tri-State Compact, Alaska in particular offers reciprocal admission to experienced (having practiced law in five of the past seven years in Washington or other reciprocating jurisdiction) lawyers who have passed the bar exam in the state upon which the lawyer is basing the application. More information on reciprocal admission in Alaska is available on the Alaska Bar's web site at www.alaskabar.org.

C. HOUSE COUNSEL ADMISSION

Washington, Oregon, Idaho and Alaska have taken different paths to house counsel admission but reach the same place: relatively easy admission for in-house corporate counsel.

Until the new RPCs were adopted in 2006, Washington had a specific house counsel admission rule, former APR 8(f), which allowed in-house corporate counsel to be admitted in Washington as long as they were members in good standing of the bar of any other state or the District of Columbia. The Supreme Court's order approving the new RPCs also approved changes to APR 8(f). It is now limited to foreign in-house counsel and allows them to obtain a limited license for work directly for their Washington employers and their affiliates. In-house counsel admitted in other American jurisdictions, by contrast, are now authorized to practice law in Washington by RPC 5.5(d)(1): "A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that . . . are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission[.]" The new in-house counsel rule applies to both corporate and governmental lawyers.

Oregon and Idaho have taken the somewhat different approach of recognizing in-house corporate practice by out-of-state lawyers as being the authorized practice of law under their versions of RPC 5.5, but still requiring those lawyers to register and to pay annual licensing fees. Neither Oregon nor Idaho, however, require out-of-state lawyers to take their full bar exams as a condition of house counsel admission. The Oregon and Idaho house counsel admission rules are,

⁴ Washington relies on its own WPRE rather than the MPRE.

respectively, Oregon AR 16.05 and Idaho BCR 220. Because Oregon does not require in-house counsel to carry malpractice insurance as it does for other lawyers in private practice, in-house counsel, whether admitted generally under the reciprocal admission rule or specially under the house counsel rule, do not have to obtain insurance.

Alaska does not currently have a house counsel admission rule, but has a proposed revision to Alaska RPC 5.5(d)(1) pending as this is written that, like Washington, would authorize the practice of law in Alaska by in-house counsel who are licensed out-of-state and whose work is confined to their corporate employers. If that rule is approved, Comment 17 to the proposed rule notes that the Alaska Bar could still impose licensing, MCLE and other regulatory requirements on those lawyers. More information on the proposed rule and its status is available on the Alaska Bar's web site at www.alaskabar.org.

Although expanded reciprocal admission has lessened the need for house counsel rules in many circumstances, it remains a very useful avenue for admission for in-house lawyers whose licenses are from states, such as California, that do not have reciprocal admission.

D. TEMPORARY MULTIJURISDICTIONAL PRACTICE

1. *Pro Hac Vice* Admission

Pro hac vice admission for court proceedings is the oldest form of cross-border practice and remains alive and well in Washington, Oregon, Idaho and Alaska. In each jurisdiction, there are separate procedures for state and federal court. The two are independent privileges and application must be made to the particular system a lawyer is seeking to appear before. As the United States District Court for the Western District of Washington put it, quoting the Ninth Circuit: “Admission to practice law before a state’s courts and admission to practice before the federal courts in that state are separate, independent privileges. The two judicial systems of courts . . . have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included.” *U.S. v. Paul*, No. C04-0916L, 2004 WL 3250168 at *1 (W.D. Wash. Sept. 17, 2004) (unpublished), quoting *In re Poole*, 222 F.3d 618, 620 (9th Cir. 2000).

In Washington state courts, *pro hac vice* admission is a two-step process. First, the applicant must apply for a temporary license from the WSBA under APR 8(b). Next, the applicant must then seek admission by motion from the particular court that the applicant wishes to appear before. APR 8(b) and detailed instructions (including the current fee) are available on the WSBA's web site at www.wsba.org. In federal court, *pro hac vice* admission is governed in the Western and Eastern Districts by, respectively, General Rule 2(d) and Local Rule 83.2(c). Forms and related instructions (including the current fees) are available on those courts' web sites at, for the Western District, www.wawd.uscourts.gov, and for the Eastern District, www.waed.uscourts.gov.

Oregon, Idaho and Alaska all follow a similar two-step process for state-court admission and their federal district courts likewise have an admission process similar to their counterparts in Washington. The rules and additional information for each are:

Oregon. Oregon Uniform Trial Court Rule 3.170 governs admission in state court and Local Rule 83.3 governs federal court *pro hac vice* admission. Application forms are available from the Oregon State Bar’s web site at www.osbar.org for state court admission and from the District of Oregon’s web site at www.ord.uscourts.gov for federal court admission.

Idaho. Idaho Bar Commission Rule 222 governs admission in state court and Local Rule 83.4(e) governs federal court *pro hac vice* admission. Application forms are available from the Idaho State Bar’s web site at www.state.id.us/isb for state court admission and from the District of Idaho’s web site at www.idd.uscourts.gov for federal court admission.

Alaska. Alaska Civil Rule 81(a)(2) governs admission in state civil proceedings and Local Rule 83.1(d) governs federal *pro hac vice* admission in civil cases. Application forms are available from the Alaska Bar’s web site at www.alaskabar.org for state court and from the District of Alaska’s web site at www.akd.uscourts.gov for federal court admission.

Pro hac vice admission is subject to both challenge by party opponents and revocation for failure to comply with the appropriate admission rules and under standards similar to disqualification in both state and federal court. See *Hahn v. Boeing Company*, 95 Wn.2d 28, 34-35, 621 P.2d 1263 (1980) (challenging admission); *Hallman v. Sturm Ruger & Co.*, 31 Wn. App. 50, 53-56, 639 P.2d 805 (1982) (revocation); *Cole v. U.S. District Court*, 366 F.3d 813 (9th Cir. 2004) (disqualification of counsel admitted *pro hac vice*).

2. RPC 5.5—The Multijurisdictional Practice Rule

Although reciprocal admission is a great tool for lawyers who practice regularly in more than one of the four Northwest states, it does not address some identifiable areas of transitory practice in which the lawyers involved are not called into “out-of-state” matters with sufficient frequency or regularity for it to make practical or economic sense for them to become members of the bar in those other states. Until 2006, there was no mechanism to authorize the comparatively common situation of an out-of-state transactional lawyer who is “in state” on behalf of a “home state” client to negotiate a business transaction involving the “home state” client.

The problems in this “gray area” were illustrated in a pair of California decisions that engendered much discussion of MJP issues nationally. In the first, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal. 4th 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998), the California Supreme Court, in effect, denied over \$1 million in fees to a New York law firm because its lawyers providing services to a California client were not licensed there. In the second, *Estate of Condon*, 65 Cal. App. 4th 1138, 76 Cal. Rptr. 2d 922 (1998), the California Court of Appeal distinguished *Birbrower* and upheld the fees charged by a Colorado lawyer who handled a probate matter in California for a *Colorado client*. Regardless of their relative merits, *Birbrower* and *Condon* illustrate the practical uncertainty that the lack of specific rules engenders and the difficulty courts may have in fashioning consistent authority in the absence of specific rules.

To address this uncertainty, both the ABA and the Northwest states moved to create specific categories of “authorized” MJP. The ABA adopted amendments to its Model Rules in August 2002 to authorize MJP. The ABA amended Model Rule 5.5, which governs the authorized and unauthorized practice of law, and Model Rule 8.5, which addresses the disciplinary jurisdiction of individual states. Oregon and Idaho adopted versions of RPC 5.5 that closely parallel the ABA Model Rule in, respectively, 2005 and 2004. Washington joined them with new RPC 5.5 on September 1, 2006. As this is written, Alaska has a proposed amendment pending. All four also adopted (or, in Alaska’s case, proposes to adopt) substantially similar versions of RPC 8.5, which subjects out-of-state lawyers to disciplinary jurisdiction for in-state conduct and adopts corresponding choice of law rules.

The new Northwest MJP rules recognize six forms of transitory work as the authorized practice of law:

- Out-of-state lawyers are allowed to handle “in-state” matters in association with a local lawyer who participates actively in the representation.
- The practical scope of *pro hac vice* admissions is extended to work, such as pre-filing witness interviews, that occurs before formal *pro hac vice* admission is available.
- Out-of-state lawyers are allowed to handle an arbitration, mediation or similar alternative dispute resolution proceedings if the legal services arise out of or are related to the lawyer’s “home” state.
- Out-of-state lawyers are allowed to handle “in-state” matters that arise out of or are reasonably related to the lawyer’s practice in the lawyer’s “home” state.
- As discussed in more detail earlier, in-house counsel are allowed to provide services to their employers or organizational affiliates (that would not otherwise require *pro hac vice* admission for court appearances).
- Legal work specifically permitted by federal law, such as that of federal prosecutors and patent lawyers admitted to practice before the U.S. Patent and Trademark Office, now falls within the scope of “authorized practice” even if the lawyer involved is not admitted in the jurisdiction involved.⁵

For Washington lawyers handling matters on a temporary basis beyond the Northwest, the ABA Center for Professional Responsibility’s web site at www.abanet.org/cpr offers a regularly updated list of states that have adopted versions of ABA Model Rule 5.5’s MJP provisions.

E. CONCLUSION

The changes to the lawyer licensing rules around the Northwest have transformed what was one a bumpy road into a comparatively smooth ride to a unified practice in all four states.

⁵ The ABA considered, but ultimately rejected, a much broader “federal law” exception that would have authorized MJP if the matter involved “primarily” federal law. See ABA Commission on Multijurisdictional Practice Interim Report (Nov. 2001) (available on the ABA Center for Professional Responsibility’s web site at www.abanet.org/cpr).