THE HITCHHIKER'S GUIDE TO MULTIJURIDICTIONAL ESTATE ADMINISTRATION: INTERSTATE

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CHAPTER 3.2

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I. INTRODUCTION

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
Tenth Amendment to the Constitution of the United States

The law of the disposition of property rights upon an individual's death, whether by will or intestacy, has long been reserved to the States respectively. Although aspects of federal transfer taxation create some nationwide constancy in the administration of estates, much of the relevant law – like what constitutes a will, the interpretation of a will, how is property distributed in the absence of a will, or what proof is necessary to empower an individual to effectuate transfers by reason of death – remains squarely within the purview of each state (and territory) of this great Union. Given the patchwork of laws amongst the states and our ever more connected world, interstate multijurisdictional estate administration can create problems for the attorney who is representing the fiduciary or a beneficiary of an estate that crosses over state lines.[1]

A. Scope of Article

While considerations in representing clients with multijurisdictional estate administration issues are often specific to the states at issue, the purpose of this paper is to provide a general framework for thinking about multijurisdictional estate administration both 'outbound' (the Texas domiciliary decedent with assets in another state) as well as 'inbound' (the domiciliary decedent of another state with assets in Texas).[2] Part II of the Article provides thoughts and considerations in issue spotting estates that will require multijurisdictional estate administration. Part III discusses several questions related to applicability of law in an estate with potential multijurisdictional issues, including domicile and choice of law. Part VI is intended as a primer for, and in no way the definitive work on, estate administration under the Uniform Probate Code for potentially 'outbound' interstate multijurisdictional estate administrations. Part V discusses Texas ancillary probate procedures available for the 'inbound' interstate multijurisdictional estate administration. Part VI reviews some ancillary estate administration avoidance techniques (estate planning opportunities). Part VII of the paper discusses ethical considerations related to assisting clients beyond the confines of a jurisdiction in which attorney is admitted to practice.

II. INITIAL CONSIDERATIONS FOR INTERSTATE MULTIJURISDICTIONAL ESTATE ADMINISTRATION

An estate may require interstate multijurisdictional estate administration under several factual circumstances. The goal of this portion of the Article is to provide a framework to think about the initial client interview in order to begin the representation with the end in mind, namely the final distribution of the estate. Thinking about potential interstate multijurisdictional estate administrations early in the representation will often reduce the length of administration as well as save fees and expenses.

A. Issue Spotting for Multijurisdictional Estate Administration

What follows are some of the most common facts which can raise issues of multijurisdictional estate administration.

1. Decedents with Property Outside their Domiciliary State

Perhaps the most common example is the client who is a resident of one state with property located in another state. This may be a condominium on the shores of Florida, oil and gas interests in the Permian Basin of Texas, or a cabin in the mountains of Colorado. Whatever the purpose or origination of the property interest, outright ownership, even fractional, in real property is perhaps the biggest driver of interstate multijurisdictional estate administration for reasons discussed in Section III.B.1. below.

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[1] This article is written specifically on interstate multijurisdictional estate administrations. The author is also licensed in New Mexico and maintains an interstate practice; however, the author does not have an international practice. For information on international multijurisdictional estate administration the author directs you to the article of his co-presenter at the 48th Annual Estate Planning and Probate Course sponsored by TexasBarCLE, Steven Hare with Ytterberg Deery Knull, whose practice includes international estate planning and administration.

[2] Given that the author is a domiciliary and resident of Texas and initial presentation occurred in Houston, Texas with TexasBarCLE, general law (i.e. the Uniform Probate Code) will be used for 'outbound' multijurisdictional issues while Texas law will be used for 'inbound' multijurisdictional estate administration issues.

2. Decedents with Beneficiaries (or Heirs) Outside the Decedent's Domiciliary State

Probate attorneys are also often called upon to provide advice related to the beneficiaries or heirs of a decedent who live in another states. For instance, clients may have children or parents in another jurisdiction and have questions about the effect a gift to or from those individuals might affect the estate administration of each generation or simply the process to deal with mom's estate when she passed from this world.

3. Decedents with Interstate Moves During Life

Another example is the decedent who moved from one state or another (perhaps several times over). This can have a large effect upon the marital property status of certain property subject to administration or even the process for determining the rights of others in the property.

B. Interstate Multijurisdictional Estate Administration Considerations

With these potential factual scenarios creating an opportunities for interstate multijurisdictional estate administration, the earlier an attorney determines the need (or just advisability) of counsel in any jurisdiction where the attorney is not admitted to practice law, it is generally the better the results for the client. For discussion of ethical considerations and limitations to practicing law across state lines for an interstate multijurisdictional estate administration see Section VII. below.

One example of how speaking to counsel in another state earlier rather than later in an estate with interstate multijurisdictional estate administration issues, even when an attorney knows they will not have any representation across state lines, would be the choice of procedure in the domiciliary jurisdiction of the decedent. Under the Uniform Probate Code, there is a summary procedure to locally appoint a personal representative who has already qualified in the domiciliary jurisdiction of the decedent which is known as a Proof of Authority of Domiciliary Foreign Personal Representative; however, this procedure is unavailable if the will was probated as a muniment of title pursuant to Texas law because no personal representative is appointed in the Texas procedure. Early discussions with counsel from a UPC state could have allowed the personal representative to choose whether or not a muniment of title for Texas assets was the best option, all things considered.

C. The Federal Aspects of Estate Administration

The practice of estate administration has some universal aspects as a nationwide practice specifically related to issues of transfer taxation. To the extent a decedent had estate planning designed to avoid or eliminate a federal estate burden or to ensure maximum benefit of the basis adjustment for purposes of capital gains taxes, the requisite knowledge on both a planning and probate side is related to federal law as contained in the Internal Revenue Code, enforced by the Internal Revenue Service, and interpreted by the Tax Court. Therefore, many estate planning techniques are used throughout the country in very similar situations with generally similar results. It is undoubtedly the case that a knowledgeable and experienced probate attorney has the tools necessary to understand the planning for tax reasoning and therefore certain aspects of distribution, but it is important to remember that each state can have an effect on a perfectly well reasoned plan which should always be in the forefront in the mind of an attorney with a interstate multijurisdictional estate administration issues to avoid unintended and potentially unfortunate results.

III. INTERSTATE MULTIJURISDICTIONAL ESTATE ADMINISTRATION

When an estate creates questions relating to interstate multijurisdictional estate administration, there are several additional considerations for both the 'outbound' and 'inbound' estate.

A. Domicile

Domicile is the cornerstone consideration for questions related to the management of interstate multijurisdictional estate administration. It has great affect upon the application of state law to the interstate multijurisdictional estate administration in everything from venue and jurisdiction to proper procedures to choice of law and effect of language in a testamentary instrument as further discussed herein.

Under Texas law, a will is a "foreign will" depending on whether the decedent was domiciled in Texas at death. Tex. Estates Code §501.001(a "foreign will" is the will of a testator who was not domiciled in Texas at the time of death). Therefore, in Texas, domicile is synonymous with fixed place of residence. Tex. Estates Code §33.001(a)(1)(relating to venue); *see also Maddox v. Surber*, 677 S.W.2d 226, 228 (Tex. App.—Houston [1st Dist.] 1984, no writ). An individual's domicile is where the individual has an actual place of residence and an intention to make that residence his or her home. *In re Graham*, 251 S.W.3d 844, 850 (Tex. App.—Austin 2008, orig. proceeding). Length of residence is not determinative; the salient factors are "the actual fact as to the place of residence and [the] decedent's real attitude and intention with respect to it as disclosed by his entire course of conduct." *Graham*, 251 S.W.3d at 850 (quoting *Texas v. Florida*, 306 U.S. 398, 425 (1939)).

An individual can only have one domicile or fixed place of residence at any one time, even if the person owns several homes in which he or she spends a significant amount of time. *In re Estate of Steed*, 152 S.W.3d 797, 803 (Tex. App.—Texarkana 2004, pet. denied)("A person may establish only one domicile, whereas he or she may have several residences."). Finally, an individual's domicile does not necessarily change when a person is moved from one location to another for medical care after becoming incapacitated. *See Thomas v. Price*, 534 S.W.2d 730, 733 (Tex. Civ. App.—Waco 1976, no writ).

B. Applicable Law

When reviewing matters of interstate multijurisdictional estate administration, the applicable law is likely to have an effect to the interpretation and implementation of the estate administration and ultimate distribution. Generally speaking, the largest determination of the applicable law is a determination as to whether the property interest is real property or personal property.

1. Real Property

The law of the situs controls over real property. *See Toledo Soc. for Crippled Children v. Hickok*, 152 Tex. 578, 585-86 (1953)(Texas courts have "ultimate power over land situated within [this] state"); *see also Haga v. Thomas*, 409 S.W.3d 731, 736 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). "[T]he Legislature of one state has no power to confer jurisdiction over property situated in another state." *De Tray v. Hardgrove*, 52 S.W.2d 239, 240 (Tex. Comm'n App. 1932).

The law of the situs governs disposition of real property even whether a foreign will is valid with respect to the real property. *See Crossland v. Dunham*, 135 Tex. 301, 140 S.W.2d 1095, 1097 (1940). As illustration, in *Haga*, the Texas Court of Appeals ruled that Texas held exclusive jurisdiction to construe the effect of Texas law upon the will of the decedent as it relates to the distribution of Texas property. *Haga*, 409 S.W.3d at 737. Specifically therein, the Texas statute automatically revoking testamentary gifts to a former spouse, and former spouse's descendants, upon divorce was applicable to divest a former step-son of any interest in Texas real property in spite of the fact that the decedent was a domiciliary of North Carolina at the time of his death where no similar law existed. *Id.*

2. Personal Property

Unlike real property, it is generally the law of the decedent's domicile at death governs the disposition of personal property wherever it might be located. *See Crossland*, 140 S.W.2d at 1097 ("the law of the actual domicile of a testator is to govern in relation to his testament of personal property, whether the property is situated within the domicile of the testator or in a foreign country"); *see also Owen v. Younger*, 242 S.W.2d 895, 897 (Tex. Civ. App.—Amarillo 1951, no writ) ("It is now the well settled doctrine that the law of the actual domicile is to govern in relation to his testament of personal property, whether the property is situated within the domicile of the testator or in a foreign country.").

C. Marital Property Law

As it relates to issues of marital property characterization in interstate multijurisdictional estate administration, Texas law recognizes the law of the "matrimonial domicile" at the time the property is acquired as governing the rights of the spouses. *Estate of Hanau v. Hanau*, 30 Tex. Sup. Ct. J. 442, 730 S.W.2d 663, 665 (1987) (in the context of a will). Logically this follows with the legal concept of inception of title. As such, if the funds to used purchase the Texas property were the separate property of the decedent based upon the law of the matrimonial domicile at the relevant time, then the Texas property will continue to be the separate property of that spouse. However, if the funds were community property, the Texas property will likewise be community property at death.

D. Issues of Taxation

As much as the substantive law of each state has a profound effect in the area of interstate multijurisdictional estate administration, the tax systems in each state can be just as dangerous a trap for the counsel representing a fiduciary or beneficiary in an estate with interstate multijurisdictional estate administration considerations.

1. Estate/Inheritance Tax Considerations

While the Federal Estate Tax is always a consideration for the wealthy clients, state death taxes (both estate and inheritance taxes) present a quagmire for the unwary attorney in an estate with interstate multijurisdictional estate administration issues. Information from the Tax Foundation notes eighteen jurisdictions within the United States impose some form of death tax (twelve impose an estate tax, five impose an inheritance tax, and one (Maryland) imposes both an estate and inheritance taxes). *See Does Your State Have an Estate or Inheritance Tax*, Andrey Yushkov, October 10, 2023, Tax Foundation, https://taxfoundation.org/data/all/state/state-estate-tax-inheritance-tax-2023/, accessed May 15, 2024.[3] The vast majority of those states imposing an estate tax have an exemption amount far below the Federal Estate Tax Lifetime Exemption amount. *Id.*

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[3] See also State Death Tax Chart, Stephen Murphy, ACTEC, Revised April 7, 2024, https://www.actec.org/resources-for-wealth-planning-professionals/state-death-tax-chart/, accessed May 15, 2024.

2. Income Tax Considerations

In addition to questions of state death taxes for interstate multijurisdictional estate administrations, there are also many states that impose a fiduciary income tax on estates (and trusts). *See State Individual Income Tax Rates and Brackets, 2024*, Andrey Yushkov, February 20, 2024, Tax Foundation, https://taxfoundation.org/data/all/state/state-income-tax-rates-2024/, accessed May 15, 2024. Many of these apply to estates as fiduciary income. For example, New Mexico imposes a fiduciary income tax if the estate is of a decedent of New Mexico or if the estate has income from: (a) a transaction of business in, into or from New Mexico, (b) property in New Mexico, or (c) compensation in New Mexico. *See Fiduciary Income Tax for Trusts and Estates*, Taxation & Revenue New Mexico, https://www.tax.newmexico.gov/all-nm-taxes/2020/10/23/fiduciary-income-tax-for-trusts-and-estates/, accessed May 17, 2024. While an in depth analysis of each states fiduciary income taxation system is beyond the scope of this article, the potential tax consequences of failing to file a necessary tax return for an interstate multijurisdictional estate administration are an important consideration.

IV. UNIFORM PROBATE CODE BASICS

In order to discuss, generally, issues and options when an administration has 'outbound' interstate multijurisdictional estate administration issues, this article will use the Uniform Probate Code (the "UPC") for general information and discussion.[4] There are nineteen (19) jurisdictions, which have enacted legislation substantially similar to the UPC as promulgated by the Uniform Law Commission. As every state must make deviations from the uniform law necessary for the structure of the court system and idiosyncrasies of practice in the state, for the purposes of this article the language of the UPC as promulgated by the Uniform Law Commission will be used.[5]

A. Choosing the Court

Whether filing an ancillary or original probate, it is important to determine the proper court, both in terms of venue and subject matter jurisdiction.

1. Venue

The appropriate application initiating administration of an estate should be filed in: (1) the county where the decedent was domiciled at the time of death; or (2), if the decedent was domiciled outside of the state, then any county where the decedent owned property at the time of death. UPC §3-201(A). While domicile is not expressly defined in the UPC, it is generally the location where the person held residence with the intent to do indefinitely, see Section III.A. above. Such a definition leaves flexibility for the individual who died in a hospital or care facility in another county with full intent to return to their home or other similar circumstances unique to the decedent.

2. Jurisdiction

The UPC envisions a court structure wherein the court has subject matter jurisdiction over matters related to estate administration, protection of minors or incapacitated persons and trusts. *See* UPC §1-302. However, many states (like Texas) have much more complicated court structures with potentially concurrent jurisdiction and exclusive jurisdiction for various matters in different courts. These provisions of the UPC are often amended to apply to the existing court structure within a UPC state.

B. Ancillary Probate

When a domiciliary decedent dies owning assets in another jurisdiction, the UPC provides three differing options as to how a domiciliary foreign personal representative may proceed depending on the nature of the assets and needs of an estate.

1. Affidavit for Delivery of Personal Property

A domiciliary foreign personal representative has the power to receive payment of debts owed to the decedent or to accept delivery of personal property belonging to the decedent. UPC §4-201. At any time after the expiration of sixty days from the death of a non-resident decedent, the domiciliary foreign personal representative may prepare an affidavit stating: (a) the date of the death of the non-domiciliary decedent; (b) that no local administration or application is pending in the state; and, (c) the domiciliary foreign personal representative is entitled to payment or delivery. *Id.* Payment or delivery made in good faith on the basis of the affidavit releases the debtor or personal having possession of the personal property of his obligation as if payment or delivery had been made to a locally appointed personal representative. UPC §4-202. However, payment or delivery pursuant to

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[4] Significant portions of this Section were taken and updated from the author's prior work *When the Estate Reaches the Land of Enchantment: Issues of Estate Planning and Probate Across State Lines*; Intermediate Estate Planning & Probate: Practical Applications, TexasBarCLE, State Bar of Texas; June 12, 2018; Dallas, Texas. The prior article focused on New Mexico law in comparison with Texas.

[5] A copy of the Final Act of the Uniform Probate Code is available at:

https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=38f2a846-f6d0-41ea-86c2-3435d81f86da.

the affidavit may not be made if a resident creditor of the non-domiciliary decedent has notified the debtor or person in possession of property belonging to the decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative. UPC §4-203.

2. <u>Proof of Authority of Domiciliary Foreign Personal Representative</u>

If no local administration or application is pending in the state, a domiciliary foreign personal representative may file authenticated copies of the domiciliary foreign personal representative's appointment, and bond, if any, together with a statement of the domiciliary foreign personal representative's address with the court in any county where the non-domiciliary decedent owned property. UPC §4-204. For ease of reference, the article will refer to the necessary documents as a "probate transcript"). Upon completion of the filing of the Affidavit and the probate transcript, the domiciliary foreign personal representative may exercise all powers of a local personal representative of the state as to all assets in the state and may maintain actions and proceedings. UPC §4-205.

3. <u>Full Ancillary Local Administration</u>

Lastly, a domiciliary foreign personal representative may initiate a proceeding for local administration in the estate. *See* UPC §4-207. While more time consuming and costly than either of the preceding options, it may be preferable to have a local administration proceeding in certain files, particularly those with significant debts or where family dynamics or other concerns have already arisen and may follow the estate across jurisdictional lines. For information related to full ancillary local administrations, see Section IV.C. below.

4. <u>Other Ancillary Concerns</u>

In addition to the choice of ancillary work necessary for the domiciliary foreign personal representative of an estate, there are additional considerations as to the powers and liabilities of a domiciliary foreign personal representative.

a. *Property Located Outside County of Probate Filing*. Similar to Texas, if a decedent owns real property in any counties outside the county in which administration is pending or a proof of authority is filed, a domiciliary foreign personal representative may need to file notice in each county where the decedent owned real property. *See e.g.* NMSA §45-1-404(A)(The Notice should by recording with the county clerk and include: (1) the name of the decedent; (2) the title, court and docket number of the pending estate; (3) a description of the type of administration; (4) the name, address and title of the domiciliary foreign personal representative; and, (5) a complete description of the real property situate in the county of recording). While such recorded notice may constitute full and complete notice of all proceedings, it is often advisable to prepare domiciliary foreign personal representative distribution deeds to fully evidence transfer, particularly in estates in which the terms of the will leave unclear the final distribution such as formula gifts or class gifts with questions as to the members of the class.

b. *Jurisdiction Over Domiciliary Foreign Personal Representative*. A domiciliary foreign personal representative submits to personal jurisdiction of the courts of the state in any proceeding related to the estate of the decedent. UPC §4-301. However, if the affidavit procedure described in Section IV.B. above is used, the domiciliary foreign personal representative is only subject to jurisdiction up to the amount of the money or value of personal property collected. *Id.* Note: a foreign personal representative is subject to the jurisdiction of the state to the same extent that the decedent was immediately prior to death. UPC §4-302.

c. *Effect of Adjudication*. An adjudication rendered in any jurisdiction in favor of or against any personal representative of an estate is binding on the local personal representative as if he or she were a party to the adjudication. UPC §4-401.

C. Local Administration

1. <u>Formal or Informal Proceedings</u>

The UPC provides for the administration of an estate to be through either formal or informal proceedings. Informal proceedings are an efficient manner of administration assuming that they are available and court intervention is not anticipated; however, they are not available in all circumstances. Informal proceedings are not available for the following:

- To determine heirs in an intestacy;
- To probate a copy of a lost will;
- To probate a will after the third anniversary of the decedent's death;
- To appoint personal representative to the exclusion of another person with equal priority;
- To appoint a personal representative without priority;

- To contest the appointment of another personal representative;
- To seek removal of a personal representative; or
- To contest a will.

a. *Informal Proceedings*. An informal proceeding is a finding that the submitted application is complete and the original, duly executed and apparently unrevoked will is in the possession of the court. *See* UPC §3-303(A)(listing the required findings for informal probate of a will), and UPC §3-308(A)(listing the required findings for the informal appointment of a personal representative). However, the Registrar may decline an application for informal appointment of a personal representative for any reason. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings. UPC §3-309.

b. *Formal Proceedings*. An interested person may bring a formal proceeding regardless of the existence or status of informal proceedings. *See* UPC §§3-401 and 3-414. The filing of a formal proceeding automatically stops the informal proceedings, and requires that the informally appointed personal representative refrain from exercising any power except that which is necessary to preserve the estate. UPC §3-401. Further, the mere filing of an issue matter which requires formal proceedings automating transforms the informal probate to a formal one. *Id.*

c. *Bonds*. In an informal proceeding, an appointed personal representative is not required to provide bond, unless: (1) the person is appointed as a special administrator; (2) the will specifically requires bond; or, (3) an interest person demands bond pursuant to Section 3-605. UPC §3-603(A).

In the context of the formal proceeding, the court may order bond *sua sponte*, unless the will specifically relieves the personal representative of obtaining a bond. UPC §3-603. Further, an interested person may request bond pursuant to Section 3-605, however, the court may relieve the personal representative of the obligation of bond, or lower the amount, even when bond is required in the will. UPC §§3-603 and 3-604.

2. <u>Supervised or Unsupervised Administration</u>

The default administration is unsupervised unless the will provides otherwise or the court finds a necessity under the circumstances. UPC §3-502. A court has the authority to order a supervised administration (1) if the decedent's will directs supervised administration, unless the district court finds that circumstances have changed since the execution of the will and that there is no necessity for supervised administration; (2) if the decedent's will directs unsupervised administration, only upon a finding that supervised administration is necessary for protection of persons interested in the estate; or (3) in other cases if the district court finds that supervised administration is necessary under the circumstances. *Id.*

In an unsupervised administration, the personal representative has the authority to act within the scope of their authority under the UPC and the will without the necessity of approval for each action by the court. *See* UPC §§3-704 and 3-711. Generally, informal proceedings under the UPC can be analogized to the concept on independent administration under Texas procedures.

3. <u>Appointment and Issuance of Letters</u>

The personal representative is without power and the administration of an estate is not commenced until letters are issued. UPC §3-103. Prior to the issuance of letters, the appointed personal representative must accept the appointment by filing any ordered bond and a statement of acceptance of the duties of the office. *Id.;* UPC §3-601. While the personal representative's powers and duties commence upon appointment, they may related back in time to give legal effect to action of the appointed personal representative, which occurred prior to the appointment. UPC §3-701.

4. <u>Notices to Heirs and Devisees</u>

The appointment of a personal representative through informal proceedings may be achieved without prior notice, unless notice is demanded pursuant to Section 3-204. UPC §§3-306 and 3-310. However, notice of appointment as personal representative must be provided to beneficiaries of the will within ten (10) days of the appointment. UPC §§3-310 and 3-705. However, notice of the informal probate is only required within thirty (30) days. UPC §3-306.

Formal proceedings may not proceed without formal notice. UPC §3-403. Notice must be sent to the following:

- The surviving spouse;
- The decedent's children and other heirs;
- The devisees under the will, if any;
- A previously appointed personal representative, if any; and,

- All unknown interested persons.

UPC §3-403. Notice is to be effected upon those persons with a known address pursuant to UPC 1-401.

5. Powers and Duties of the Personal Representative

A personal representative has broad powers to administer the estate. UPC §3-710. To the extent, that a personal representative has power over estate property "that an absolute owner would have, subject only to his trust to use and apply the property for the benefit of creditors and others interested in the estate." *Id*. Unless a personal representative is operating in a supervised administration, they may exercise their powers "without notice, hearing or order of court." *Id*.

Broadly speaking, the personal representative has the specific duty to settle and distribute the estate in accordance with the will. UPC §3-703. The personal representative is to make distribution "as expeditiously and efficiently as is consistent with the best interests of the estate." *Id*. Generally, the personal representative also is subject to the same standards of care as a trustee. UPC §3-703. These standards of care include the duties of loyalty and impartiality to the estate beneficiaries. *Id*.

The UPC also imposes a fiduciary duty upon a personal representative duty to administer the estate for the benefit of *both creditors and beneficiaries*. *See* UPC §3-711 (a personal representative has full power over estate property, "subject to his trust to use and apply the property for the *benefit of creditors and others interested in the estate*" (*emphasis added*)).

6. Inventory

A personal representative has an obligation to prepare an inventory of the decedent's date of death property within three months of their appointment. UPC §3-706. The inventory must list each piece of property and its estimated value on the date of death, with reasonable detail. *Id*. A personal representative is not required to file the inventory with the court and generally should not for the preservation of confidentiality in most cases. UPC §3-706. However, a personal representative must provide a copy of the inventory to interested persons upon request. *Id*.

7. Notice to Creditors

The UPC provides for two types of notices to creditors: required and permissive.

a. *Required Notice*. A personal representative has a duty to give written notice to any known creditor or any creditor who is reasonably ascertainable by mail or other delivery. UPC §3-801. The notice to known creditors must be provided within three months of appointment. *Id*. The notice shall (a) instruct the creditor to present its claim within two months of the later of (i) the mailing of the notice, or (ii) the publication of a general notice to creditors, if made, and (b) inform the creditor that failure to present the claim within the stated time periods bars the claim. *Id*.

b. *Permissive Notice*. A personal representative may publish notice to other creditors. UPC §3-801. The publication must appear once a week for two successive weeks in a newspaper of general circulation in the relevant county. *Id*. The publication must: (1) announce the appointment, (2) list the address of the personal representative, (3) provide the name of the decedent and, (4) notify the estate's creditors to present their claims within two months after the date of the first publication of the notice or be forever barred. *Id*. It is the practice and recommendation of the author that all personal representatives publish the notice pursuant to Section 3-801 even if there are believed to be no creditors in order to bar any potential claimants as noted below.

8. Creditor Claims and Limitations

a. *Presenting a Claim*. A creditor may present a claim in three different methods. UPC §3-804(A). With respect to the first two methods of presentment, the statement must include: the creditor's name and address; the amount claimed; the basis of the claim; if the claim is not yet due, the date on which the claim is due; if the claim is contingent or unliquidated, the nature of the uncertainty; and, if the claim is secured, a description of the security.

   (1) The creditor may mail or otherwise deliver the claim to a personal representative. *Id.*
   (2) The creditor may file the claim with the court where the matter is pending. *Id*. Presentment is effective upon receipt by the PR or filing with the court. *Id.*
   (3) The creditor may simply sue in an appropriate court with jurisdiction over a personal representative. *Id*.

b. *Limitations*. All claims must be presented within one year of the decedent's death, whether or not an administration of the decedent's estate has commenced and whether or not the creditor knew about the decedent's death. UPC §3-803. There is no tolling period for claims against a decedent. *Id.* However, the notices discussed in Section IV.B.7. above shorten the one-year statute of limitations to within two months of the notice. UPC §3-803.

c. *Dealing with the Personal Representative*. Third parties who deal with the personal representative in good faith are protected from liability that might arise from the personal representative's own breaches of fiduciary duty or some defect in the judicial process that provided the personal representative with authority beyond what might have been proper. UPC §3-714.

9. <u>Distribution</u>

A personal representative's most fundamental duty is to distribute the estate in accordance with the decedent's will "as expeditiously and efficiently as is consistent with the best interests of the estate". UPC §3-703. Unless personal representative is under a supervised administration, they may proceed without court order. *Id.*, UPC §3-704. However if a personal representative needs guidance, they may invoke the jurisdiction of a district court to resolve any question regarding the estate or its distribution. *Id.* Absent language in the will, the UPC contains the following logistical structure as to distributions.

a. *In-Kind Distribution*. A personal representative is to distribute estate property in kind absent some necessity in administration dictating otherwise. UPC §3-906.

b. *Attributable Income*. In a jurisdiction which has adopted the Uniform Principal and Income Act ("UPIA"), net income attributable to property which is the subject of a specific bequest is to be distributed to the recipient of that property; otherwise, net income is to be distributed among all the beneficiaries, but excluding those that received outright pecuniary bequests, based on the beneficiary's proportionate share of the estate. UPIA §§201 and 202.[6]

c. *Interest*. Recipients of pecuniary gifts are entitled to receive interest at the legal rate, beginning one year after the date of appointment. UPC §3-904.

d. *Residue*. A personal representative may distribute the residuary estate in "any equitable manner." UPC §3-906.

e. *Proposal of Distribution.* A personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. UPC §3-906(b). Distributees lose their right to object to the distribution on the basis of the kind to be distributed or the value of the assets to be received if they fail to object, in writing, within 30 days of receiving the proposal. *Id.* A personal representative may also recover an asset improperly distributed to a beneficiary. UPC §§3-908 and 3-909.

10. <u>Closing</u>

The UPC requires a personal representative close the estate. A personal representative may choose between a formal proceeding or filing a sworn statement with the court. Generally, the choice between these two options will be predicated upon the cooperativeness of the beneficiaries throughout the process of administration.

a. *Formal Proceedings*. A personal representative has the right, at any time, to petition the court for an order of complete settlement of the estate. UPC §§3-1001(a) (requiring notice to all interested persons, including heirs and devisees) and 3-1002(A) (in the context of an informal probate, where heirs might be omitted). The petition may request the court, among other things, to consider and to approve a personal representatives final account and distribution of the estate, and to adjudicate the final settlement and distribution of the estate. *Id.* and UPC §3-1001. The court's order may include a discharge of a personal representative "from further claim or demand of any interested person." UPC §3-1004(a).

b. *Sworn Statement*. A personal representative also may close the estate by filing a sworn statement with the court. UPC §3-1003. The sworn statement may not be filed any earlier than three months after the date the personal representative was first appointed. *Id.* Unlike formal closing proceedings, the closing statement does not discharge a personal representative. In fact, a personal representative continues to have authority to administer the estate for a one year period after filing the closing statement. *Id.* Potential claimants also have six

[6] Copy of the Uniform Principal and Income Act is available at https://www.uniformlaws.org/viewdocument/committee-archive-109?CommunityKey=b20aa74e-cae7-4557-b93b-a4b416c17407&tab=librarydocuments.

months after the date of filing of the closing statement to bring breach of fiduciary duty claims against a personal representative. *Id.;* UPC §3-1005.

c. *Reopening the Estate*. An estate may be reopened if property is discovered after the estate is closed. UPC §3-1008.

For a more in depth look at ancillary probate issues from Texas to another interstate jurisdiction (including US territories and the District of Columbia) see *Ancillary Probate in Every State* written by Shelli A. Harveson and updated by Megan E. McIntyre published in the Bonus Materials for the Intermediate Estate Planning and Probate Course in 2023 sponsored by TexasBarCLE.

V. TEXAS ANCILLARY ADMINISTRATION

On the flip side of the coin, Texas can also be the 'inbound' jurisdiction for interstate multijurisdictional estate administration when a decedent domiciled in another jurisdiction dies owning a property interest in Texas. Therefore, we next turn to the basic options for a Texas ancillary administration under the Texas Estates Code.

A. Determination of Heirship

There is no procedure specifically created for the foreign domillicary who dies intestate and owns a property interest in Texas. While personal property is subject to the administration and laws of the domiciliary jurisdiction, Texas law governs the intestate succession of real property within its borders. See Section III.B. above for a more detailed discussion.

Therefore, in order to effectuate legal transfer of a real property interest held by a foreign domiciliary who dies intestate in another jurisdiction, a determination of heirship proceeding pursuant to Subchapter A, Chapter 202 of the Texas Estates Code is necessary. *See* Tex. Estates Code §202.002("A court may conduct a proceeding to declare heirship when: (1) a person dies intestate owning or entitled to property in this state and there has been no administration in this state of the person's estate . . ."). A determination of heirship may also be necessary in Texas, even if the decedent died testate, when a will has been probated in Texas, or elsewhere, but there is Texas property omitted from the will. Tex. Estates Code §202.002(2). The court may grant a local administration if there is a necessity and four years have not elapsed since the decedent's death. Tex. Estates Code §202.006.

B. Probate of Foreign Wills

When a foreign domillicary dies testate, and that will is sufficiently drafted to transfer real property located in the state of Texas, then Texas law provided three mechanisms for the ancillary probate of a foreign will. A foreign will is the "written will of a testator who was not domiciled in this state at the time of the testator's death" and such may be "admitted to probate if the will would affect any property in this state" *See* Tex. Estates Code §501.001. The methods listed below are in order from least complex to most complex.

1. <u>Recording of Probate Transcript</u>

The least complex procedure available is the recording an authenticated copy of a foreign will, along with a copy of the order by which the will was admitted to probate into the deed records of the county, or counties, in which the non-domiciliary decedent owned real property interests. *See* Tex. Estates Code, Subchapter A, Chapter 503. This procedure effectively operates as a muniment of title allowing the will to serve as the title transfer evidence of public record. To be properly authenticated, probate transcript must: (i) be attested by and with the original signature of the court clerk or other official who has custody of the will or is in charge of the probate records, (ii) include a certificate with the original signature of the judge or presiding magistrate of the court stating that the attestation is in the proper form, and (iii) have the court seal affixed, if a court seal exists. Tex. Estates Code §501.002(c).

By recording the Probate transcript pursuant to Section 503.001 in the county where the non-domiciliary decedent owned real property, the recordings "take effect and are valid as a deed of conveyance of all property in this state covered by the instrument; and have the same effect as a recorded deed or other conveyance of land beginning at the time the instrument is delivered to the clerk to be recorded." Tex. Estates Code §503.051.

Note, however, that a will which is unclear as to the distribution of assets, specifically those containing formula clauses for tax planning purposes or if the domiciliary jurisdiction attempted to make certain distributions of Texas property in settlement of claims or rights and protections under domiciliary marital property law, may raise questions on the proper legal title to real property requiring further action or another ancillary procedure.

2. <u>Texas Ancillary Probate</u>

The second available method is a "true" ancillary probate pursuant to Chapter 501 of the Texas Estates Code. This may be the most useful option when some matter requires the appointment of a local personal representative to handle some matter like the sale of property or to confirm title when the will leaves ambiguity in the takers of the real property in Texas for some reason.

The ancillary probate proceedings require an application, together with authenticated copies of the probate transcript from the foreign jurisdiction, to be filed in a county having probate jurisdiction in a county in Texas in which the non-domiciliary decedent owned an interest. Tex. Estates Code §501.002. The first step following the filing is to prove the will under Section 501.002. On the issue of proof, it matters whether or not the will was originally admitted in the decedent's jurisdiction of domicile.

a. *Foreign Will Originally Probated in Domiciliary Jurisdiction*. If the foreign will was originally admitted to probate in the domiciliary jurisdiction of the decedent, then prove up is limited to the filing of an application with the properly authenticated probate transcript, then "it is the ministerial duty of the court clerk to record the will and the evidence of the will's probate or other establishment in the judge's probate docket." Tex. Estates Code §501.004. Further, no notice is required in this instance. Tex. Estates Code §501.003.
b. *Foreign Will Originally Probated in Non-domiciliary Jurisdiction.* However, if the decedent's will was originally probated in a jurisdiction other than the domiciliary jurisdiction of the decedent, then there are additional steps. First, the application must contain (i) all the information as is required for the original probate of a Texas will, and (ii) the names and addresses of each devisee under the will and each person who would be an intestate heir. Tex. Estates Code §501.002(b). Citation must also be served upon each of these persons. Tex. Estates Code §501.003(b). Once served, the interested individuals have an opportunity to contest the will in the same manner as if the decedent had been domiciled in Texas. Tex. Estates Code §§501.004(b) and 504.002. If no contest is filed, the clerk then shall record the will and other documents in the judge's probate docket. Tex. Estates Code §§501.004(b) and 504.003(a). Upon recording in the probate docket, the will is deemed probated. Tex. Estates Code §501.005.

If ancillary letters testamentary are required then the court may enter an order directing that ancillary letters testamentary be issued upon a showing that the executor named in the will is qualified as executor in the foreign jurisdiction and is not disqualified to serve in Texas. Tex. Estates Code §501.006. Even if more than four years has elapsed since the date of the non-domiciliary decedent's death and the application for letters testamentary, the court may issue letters testamentary to the foreign executor so long as the executor proves that they continue to serve as executor in the jurisdiction in which the will was previously admitted to probate. Tex. Estates Code §501.006(a)(3).

Further, a foreign executor is not required to give bond if the will waives the bond requirement. Tex. Estates Code §505.051(a). However, if the foreign will is silent or requires a bond, the bond provisions applying to domestic representatives shall apply. Tex. Estates Code §505.051(b).

One question unanswered by Chapter 501 is whether or not an ancillary executor serve as independent or dependent. Therefore, analysis as to whether the will contains language sufficient to provide for independent administration must be analyzed under the same legal framework as under the will of a domillicary decedent under Texas law.

3. <u>Original Probate of Foreign Will</u>

Lastly, a foreign will may be probated in the same manner as a domestic will in accordance with Chapter 502. A foreign will may be originally probated in Texas even if it has already been probated elsewhere. Tex. Estates Code §§502.001(b) and 502.002(c). One difference would be that the proponent of the foreign will in Texas may rely upon an authenticated copy of the will unless ordered by the court to produce the original. Tex. Estates Code §502.002(c). Interestingly, Chapter 502 requires that the foreign will be valid under the laws of the state of Texas, including the necessary formalities and solemnities. Tex. Estates Code §502.001(a)(2). If the foreign will has not been admitted in the decedent's domiciliary jurisdiction, then the court can require that the proponent to secure probate of the will in the testator's domicile by delaying a ruling until that time. Tex. Estates Code §502.001(c). Whether or not a foreign will has been admitted to probate in the decedent's domiciliary jurisdiction is not determinative on the Texas court in an action under Chapter 502. Tex. Estates Code §502.001.

VI. PROBATE AVOIDANCE OPPORTUNITIES (ESTATE PLANNING, SHH!)

The axiom that "the best defense is a good offense" has been attributed to many sources; however, the principles underlying the saying are is useful in the avoidance of interstate multijurisdictional estate administration. A little planning can go a long way.

A. Changing Ownership

One method of avoiding the need for ancillary probate, it to change the ownership of real property during the lifetime of the non-domiciliary client.

1. Revocable Trusts

The use of a revocable trust, funded with assets from at least the non-domiciliary jurisdiction of a client, can avoid the necessity of ancillary estate administration. As discussed above in Section IV and V, ancillary estate administration, may be an expensive and cumbersome. Additionally, "while a revocable trust will not generally avoid the imposition of inheritance taxes in the jurisdiction in which the real property is located, by placing real estate and other assets held outside the state of domicile in a revocable trust, the settlor minimizes the risk that more than one state will attempt to treat the settlor as a domiciliary and, therefore, seek to impose multiple inheritance taxes upon all of the settlor's assets." *See Planning for No Probate: Special Issues with Revocable Trust and Nonprobate Assets*, Mickey R. Davis and Melissa Willms, 27th Annual Advanced Estate Planning Strategies Court, TexasBar CLE, Chapter 6.4, pg. 2.

2. Other Inter Vivos Transfer

Additionally, an inter vivos transfer from the non-domiciliary client to another individual, or trust, will prevent the necessity for ancillary estate administration and connected retitling of assets upon the death of the non-domiciliary client. This could be gratuitous or a sale for consideration depending on the needs and desires of the client.

B. Changing Nature of Assets

The importance of the distinction in property characterization as discussed in Section III.B. above is an opportunity to eliminate of the necessity of ancillary probate even if it does not eliminate the interstate multijurisdictional estate administration concerns entirely.

1. Making Real Property Interests Into Personal Property

While not always the most advantageous decision for purposes of taxation (both income and capital gains) or marital property law, it is also possible to avoid ancillary estate administration by essentially converting a real property interest into personal property. With the creation of a legal entity, such as a limited partnership or limited liability company, any real property interests placed inside the entity are now owned by the entity and the non-domiciliary client holds a personal property interest in the entity thus created and funded. This effective change in the nature of the assets can avoid any need for ancillary probate so long as the non-domiciliary client holds no legal interest in record title at their death.

2. Changing the Nature of the Ownership

While it is possible in Texas for two or more persons who jointly hold an interest in property (other than community property) to agree in writing that their real property interest shall transfer to the surviving joint owner, it has historically been rare. *See* Texas Estates Code §111.001. This rarity may be almost entirely explained by the fact that the creation of a joint tenancy with rights of survivorship precludes holding the property in the community estate and therefore may not be advantageous for other reasons. However, a deed may be sufficient as the agreement in writing for property that is not community property so long as it is signed by all tenants. *See Wagenschein v. Ehlinger*, 581 S.W.3d 851 (Tex. App. – Corpus Christi 2019, pet. denied).

Also of note would be that spouses can agree in writing that their community property shall pass to the surviving spouse and the rights under a community property survivorship agreement. Tex. Estates Code §112.051.

C. Non-Testamentary Transfers

As it relates to real property interests and the avoidance of interstate multijurisdictional estate administration issues, there are tools available in some jurisdictions to provide for a non-testamentary transfer of the interest that will avoid the need for ancillary probate.

1. Transfer on Death Deeds

One non-probate transfer of real property interests by a transfer on death deed ("TODD") or similar instrument authorized by the jurisdiction in which the real property interest lies. Presently twenty-one jurisdictions have enacted the Uniform Law Commission's Real Property Transfer on Death Act ("RPTODA").[7] As allowed under the laws of these jurisdictions, a non-testamentary transfer can be accomplished by the recording of a TODD which states the beneficiary of the property at the death of the owner. *See* RPTODA §5*; see also* Tex. Estates Code Chapter 114. These instruments are revocable during the life of the owner. RPTODA §6. These instruments have no effect upon the rights or interests of the owner during their lifetime. RPTODA §12. Further, the property passes to the beneficiary upon the death of the owner. RPTODA §13.

2. Lady Bird Deeds

Another long standing technique to avoid the necessity of probate is the use of an enhanced life estate deed, or a Lady Bird Deed. Although often used in the context of benefits planning, it can also be an effective probate avoidance technique. For an

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[7] A list of the states having enacted the Real Property Transfer on Death Act can be found at https://www.uniformlaws.org/committees/community-home?CommunityKey=a4be2b9b-5129-448a-a761-a5503b37d884.

enhanced life estate deed, the owner executes a revocable deed naming one or more persons to receive the real property when the owner dies. Because the owner does not actually transfer any interest when the deed is signed, the owner remains the full owner of the real property and is not a life tenant. Upon the death of the owner, full title vests in the named beneficiaries, provided the owner did not amend or revoke the deed. The concept of vesting subject to divestment under a ladybird deed was upheld in the recent case. *See In Re the Estate of Maggie Williams Turner, No. 06-17-00071- CV* (Tex. App. —Texarkana 2017) (mem. op.).

VII. ETHICAL CONSIDERATIONS IN MULTIJURISDICTIONAL ESTATE ADMINISTRATIONS

Anytime our practice approaches the border of another estate, incoming or outgoing, the opportunities to run afoul of the limits of our bar admissions become a serious consideration. Often, failure to respect the territorial limits of the practice of law can lead to unforeseen legal consequences to the client which can further mean potential liability or disciplinary issues for the attorney. This section discusses, in broad terms, the potential ethical considerations in interstate multijurisdictional estate administrations.

For the purposes of this article, we will examine the language of the American Bar Association's Model Rules of Professional Conduct ("MPRC"). All fifty states, the District of Columbia, and several territories have used the MPRC to craft local rules with relevant omissions and additions by each jurisdiction. *See* "Alphabetical List of Jurisdictions Adopting Model Rules". *American Bar Association*. Archived from the original on 2018-12-05. Retrieved 2024-05-18 at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/. Additional information and perspective is available from The ACTEC Commentaries on the Model Rules of Professional Conduct, Sixth Ed. 2023.

A. Practice of Law by Non-Admitted Attorneys

Model Rule 5.5 is the rule on the unauthorized practice of law and multijurisdictional practice of law. Specifically, Rule 5.5 states "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."

Further, Comment [1] expounds that a "lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice." However, Comment [2] notes that the definition of the practice of law is established by law and varies from jurisdiction to jurisdiction.

1. <u>Texas Definition of the Practice of Law</u>

In Texas, the practice of law means "means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined." Tex. Gov't Code §81.101(a).[8] However, subsection (b) makes clear that the definition is not exclusive, nor does it deprive the Texas Supreme Court of its' power and authority to determine whether other services or acts, not expressly listed, also constitute the practice of law. §81.101(b). "The practice of law embraces, in general, all advice to clients and all action taken for them in matters connected with the law. *Crain v. Unauthorized Practice of Law Comm. of Supreme Court of Tex.*, 11 S.W.3d 328, 333 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) *citing Brown v. Unauthorized Practice of Law Comm.,* 742 S.W.2d 34, 41 (Tex.App.—Dallas 1987, writ denied).

Further, as it relates to estate planning, and by extension estate administration, Texas Courts have held the preparation of wills, trusts, and related areas of the law with special reverence. "Because a will secures legal rights and involves the giving of advice requiring the use of legal skill or knowledge, the preparation of a will involves the practice of law. *Fadia v. Unauthorized Practice of Law Comm.*, 830 S.W.2d 162, 164 (Tex. App.—Dallas 1992, writ denied) "There is no phase of the law which requires more profound learning than on the subject of trusts, powers, the law of taxation, legal and equitable estates, perpetuities, etc." *Palmer v. Unauthorized Practice of Law Comm. of the State Bar of Texas,* 438 S.W.2d 374, 376 (Tex.Civ.App.—Houston [14th Dist.] 1969, no writ).

Additionally, agreeing not to appear before a tribunal may not be enough to insulate an attorney from discipline or liability. The mere drafting or giving advice which touches upon the law of another jurisdiction may be the unauthorized practice of law in and of itself. "The practice of law involves not only appearance in court in connection with litigation, but also services rendered out of court, and includes the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract or other instrument, the legal effect of which under the facts and conclusions involved must be carefully

[8] Further, the unauthorized practice of law is a criminal offense pursuant to Section 38.123 of the Texas Penal Code.

determined." *Davies v. Unauthorized Practice Comm. of State Bar of Tex.*, 431 S.W.2d 590, 593 (Tex. App.—Tyler 1968, writ ref'd n.r.e.).

2. Reasoning for Limitation

"Whatever the definition of the practice of law, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." Cmt [2], MRPC 5.5.

a. *Competent Representation*. The primary purpose of unauthorized practice of law statutes is to protect the public from losing, or limiting, legal rights and remedies due to legal advice or action from incompetent legal representation. This limitation of unauthorized practice is not limited to those without any legal knowledge or training, but also those without specific knowledge or training in the law of the jurisdiction at issue. While legal representation by persons who have not been trained in the law, and are, therefore, presumably unable to recognize legal issues pertaining to the client's particular situation, can significantly limit the rights of an individual or entity, so too can action taken by attorneys admitted in another jurisdiction based not about their lack of skill, but lack of knowledge of the unique aspects of legal practice in that jurisdiction. *See* Fox, IV, Charles D., "Is Crossing State Lines Ethically Challenging to Estate Planners?", Thirty-Third Annual Philip E. Heckering Institute on Estate Planning, University of Miami, School of Law, Miami, Florida, (1999) ¶ 1501.1. Therefore, the rendition of competent legal representation, further discussed in Section VII.D. below, requires a level of knowledge and skill the baseline of which is subject to policing by the jurisdiction in question.

b. *Ethical Representation*. Aside from the legal competence to handle any matter, there are also ethical considerations to limiting the practice of law to those admitted in each jurisdiction. A locally admitted attorney has met all ethical standards to practice in that jurisdiction and has sworn their oath to follow the constitution, laws, and rules of the jurisdiction. *Id.* Further, knowledge of the local court or practice customs makes one a more ethical, and effective, attorney.

3. Reasoning as it Relates to Multijurisdictional Practice

There are many resources on the reasoning of limited allowance of the practice of law by attorneys admitted and in good standing in other jurisdictions. *See id.; see also* Wolfram, Charles W., "Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers" (1995). *Cornell Law Faculty Publications*. Paper 1314. Fundamentally, Model Rule 5.5 strikes a balance between protecting the public from incompetent representation while also allowing the public to hire their attorney of choice and potentially minimize costs thereby allowing multijurisdictional practice in limited circumstances where there is no "unreasonable risk to the interests of [the lawyer's] clients, the public or the courts." Cmt [5], MRPC 5.5.

B. Multijurisdictional Practice of Law and the Unauthorized Practice of Law

As it specifically relates to the authorization of an attorney licensed to practice in one state to provide services in another state, MPRC 5.5 allows an attorney "admitted in another United States Jurisdiction, and not disbarred or suspended from practice in any jurisdiction" to provide legal services within another jurisdiction in two instances most relevant to estate administration.[9]

1. Admittance for Court Appearances

Pursuant to MPRC 5.5(c), a qualified out of state attorney may seek temporary admittance, when the representation is:

> "(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
> (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 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 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; . . ."

[9] For a list of states which have implemented the American Bar Associations Multijurisdictional Practice Policies see https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/recommedations.pdf

Comment [6] to MPRC 5.5 notes the lack of any single test to determine whether an attorneys services are "temporary." However, the comment continues that the services "may be 'temporary' even though the attorney provides services in the jurisdiction on a regular basis, or for an extended period of time, as when the attorney is representing a client in a single lengthy negotiation or litigation." *Id.*

So long as it is on a temporary basis, Subparagraph (c) allows a non-admitted attorney to represent a client before a tribunal subject to admittance *pro hac vice* before a tribunal outside their jurisdiction of admittance. Therefore, an attorney asked to assist or handle and estate administration that has multijurisdictional issues may provide related services in preparation of an appearance pursuant to this rule. "While this exception is available to allow the lawyer to investigate the matter before seeking admission, the lawyer should not rely on the exception except where necessary. Instead, the lawyer should seek and obtain admission *pro hac vice* at the earliest opportunity." ACTEC Commentaries, pg 215.

2. <u>Estate Planning or Other Transactional Representation</u>

Further, pursuant to MPRC 5.5(c)(4) a qualified out of state attorney may provide legal services in another jurisdiction without admittance as it relates to transactional work as well. "(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." MPRC 5.5(c)(4).

a. *Related to Out of State Practice.* While MPRC 5.5(c)(4) allows a non-admitted attorneys to provide legal services outside of a tribunal, Comment [14] elaborates that it is required "that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted." Comment [14] continues that a variety of factors can be used to establish the requisite connection between an attorney's practice in a jurisdiction where he or she is admitted and the services requested elsewhere:

(i) The client may have been previously represented by the attorney;
(ii) The client may be a resident in or have substantial contacts with the jurisdiction where the attorney is admitted;
(iii) The matter, although involving other jurisdictions, may have a significant connection with the jurisdiction where the attorney is admitted;
(iv) The work, or significant aspects thereof, might be conducted in the jurisdiction where the attorney is admitted, or may significantly involve the law of that jurisdiction; or,
(v) The services may draw on the attorney's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal or nationally uniform law.

Although the list is not definitive, it provides further insight into the purpose of MPRC 5.5. Comment [14] recognizes the extent to which many areas of the law are based upon federal law. Therefore, services rendered by a qualified Texas practitioner on issues of implementation of federal estate and gift tax planning through estate administration may provide an attorney with opportunity to counsel on these issues when assisting with estate administration for the client with out of state property. "In addition, since this exception is based on 'recognized expertise,' a lawyer who chooses to rely on this exception should take steps to insure that the lawyer is recognized as an expert. These steps could include: obtaining certification as a specialist in those jurisdictions offering such programs; participating actively in bar sections related to the lawyer's expertise; participating in national associations of lawyers related to the lawyer's expertise; writing scholarly articles; teaching; participating in seminars and panel discussions; or any other activity that demonstrates the lawyer's expertise." ACTEC Commentary, pg 214.

b. *Authorized by Federal Law.* An attorney providing legal services regarding estate administration often represents clients in disputes with the Internal Revenue Service. An attorney "may practice before the Internal Revenue Service by filing with the Internal Revenue Service a written declaration that he or she is currently qualified as an attorney and is authorized to represent the party or parties on whose behalf he or she acts." 31 CFR §10.3; *see generally* 31 CFR Part 10, §10.0 *et seq.* (published as a pamphlet as Treasury Department Circular No. 230). In addition, an attorney may practice before the United States Tax Court by complying with its requirements for admission (Tax Court Rule 24). "Pursuant to paragraph (d)(2) of MRPC 5.5, a lawyer who is authorized to practice before the IRS or the Tax Court would be able to practice in any non-admitted jurisdiction adopting MRPC 5.5(d)(2)." ACTEC Commentary, pg. 216. Moreover, unlike MRPC 5.5(c), there is no requirement that the practice in the non-admitted jurisdiction be on a "temporary basis." *Id.* While the text of MRPC 5.5(d)(2) appears expressly to permit multijurisdictional practice in these circumstances, given the ease with which an attorney can qualify to practice before the Tax Court or the IRS, the attorney should consider seeking an opinion of the non-admitted jurisdiction's bar counsel. ACTEC Commentary, pg. 216.

C. Duty to Disclose

Comment [20] to MPRC 5.5 notes that in some circumstances a lawyer practicing law in a jurisdiction in which they are not admitted may have to inform the client that the attorney is not licensed to practice law in that jurisdiction. "For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction." Cmt. [20], MPRC 5.5. Reference is therein made to MPRC 1.4 wherein an attorney is obligated to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Cmt. [20], MPRC 5.5 citing 1.4. "Under MRPC 5.5, a lawyer engaged in a multijurisdiction practice necessarily offers limited services in jurisdictions in which the lawyer is not admitted to practice law. Thus, if a lawyer intends to render services in or concerning a jurisdiction in which the lawyer is not admitted to practice law, the lawyer should consider the need to obtain the client's informed consent to do so." ACTEC Commentary, pg. 211.

D. Duty of Competence

After a decision is made by an attorney to provide any legal advice or service related to the law of another jurisdiction, the non-admitted attorney subjects themselves to the rules of the jurisdiction at issue. "Even though authorized by MRPC 5.5 to provide services in a non-admitted jurisdiction, the lawyer remains subject to all other ethical provisions" of the Rules." ACTEC Commentary, pg 211. In particular, "the lawyer must provide competent representation regarding the laws and rules applicable in the non-admitted jurisdiction." *Id.* An attorney who initially lacks the skill or knowledge required to meet the needs of a particular client may overcome that lack through additional research and study. The fundamental bed rock of the unauthorized practice of law is to prevent representation of the public by unqualified individuals. "A lawyer shall provide component representation to a client." MPRC 1.1. "Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. *Id*.

An attorney, in determining whether he or she is capable of providing competent representation as it relates to legal knowledge and skill for a matter, may look to the following relevant factors: (i) the relative complexity and specialized nature of the matter; (ii) the lawyer's general experience; (iii) the lawyer's training and experience in the field in question; (iv) the preparation and study the lawyer is able to give the matter; and, (v) whether it is feasible to refer the matter to, or associate or consult with, a lawyer of establish competence in the field in question. Cmt. [1], MPRC 1.1.

E. Subject to Disciplinary Authority of in both Jurisdictions

An attorney who has not been admitted into practice in a jurisdiction nevertheless becomes subject to discipline in that jurisdiction when the attorney "provides or offers to provide any legal services" in this jurisdiction. MRPC 8.5. This includes attorneys representing clients within the safe harbor of MPRC 5.5. *See* Cmt [19], MRPC 5.5. In addition to disciplinary action in the jurisdiction where the attorney was not admitted, an attorney may be subject to discipline in the jurisdiction(s) in which they are admitted for the same facts and circumstances. MPRC 8.5. This affirms the long-standing principle that an attorney licensed in a jurisdiction is subject to the disciplinary authority of that jurisdiction no matter where the attorney's conduct occurred. Thus, if an attorney engages or attempts to engage in unauthorized practice in a jurisdiction where he or she is not admitted, the jurisdiction where the attorney is admitted will be able to initiate disciplinary proceedings against the attorney under MRPC 5.5 (unauthorized practice) and 8.4(a) (violating or attempting to violate a rule oneself or assisting or inducing another to do so). ACTEC Commentary, pg 210.

VIII. CONCLUSION

With ever increasing ease of travel since the foundation of our republic, comes an ever increasing number of estates with interstate multijurisdictional estate administration concerns. Although these considerations when representing clients with multijurisdictional estate administration issues are specific to the jurisdictions involve, hopefully this article has provided a general framework for thinking about multijurisdictional estate administration issues and ways to improve your practice with those clients unwilling to be bound by the imaginary jurisdictional lines of our 50 states.