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The Corporate Transparency Act: Practical Updates on Compliance

By Michael Walker, Samuels Yoelin Kantor LLP

The Corporate Transparency Act (CTA)[1] is a federal statute that was incorporated, with some amendments, into the National Defense Authorization Act for fiscal year 2021 and passed into law as of January 1, 2021. The Act seeks to harmonize the disparate beneficial ownership reporting laws of the states into one federal system. In theory, a central database containing beneficial ownership information of U.S. business entities will allow the federal government to better combat money laundering and the financing of terrorism. The federal agency tasked with enforcing the CTA is the Financial Crimes Enforcement Network (FinCEN). Because 2024 will be the first year in which business entities in the USA will be required to comply with the CTA, FinCEN is expecting more than 32 million business entities will be subject to compliance and reporting under the CTA in 2024 and 2025.

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Background on the CTA

This is the third article the *Oregon Business Lawyer* newsletter has published about the CTA. For an overview of the CTA, refer to the article published in the March 2023 edition of the newsletter. In addition, one should refer to the *Small Business Compliance Guide* published by FinCEN on September 2023 (and the *Beneficial Ownership Information Reporting: Frequently Asked Questions* published by FinCEN earlier this year and updated in September 2023

This article will focus on updates since the March 2023 article and what is known at this point about the practical aspects of complying with the CTA. As year-end 2023 approaches, it is anticipated that FinCEN will issue additional updates and open its compliance portal and online reporting system.

Timing of CTA compliance

At this writing, FinCEN has not opened its filing and compliance portal, making clear on its website that it will not accept CTA reports before January 1, 2024. A reporting company created or registered to do business before January 1, 2024, will have until January 1, 2025, to file its initial beneficial ownership information report. Under current rules, a reporting company created or registered on or after January 1, 2024, will have 30 days to file its initial beneficial ownership information report.

However, on November 30, 2023, FinCEN finalized a rule providing that reporting companies created or registered in 2024 will have 90 days to file their initial reports, instead of 30 days. 88 Fed. Reg. 83499 (11/30/2023). This rule change is clearly intended to be a transitional rule; entities created or registered on or after Jauary 1, 2025, will have only 30 days to file their initial reports in FinCEN.

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Ideas to consider prior to January 1, 2024

The following is intended to be a noncomprehensive list of issues to consider prior to January 1, 2024.

Identify all reporting companies

Under the CTA, all reporting companies must disclose beneficial ownership information. The Code of Federal Regulations defines "reporting company" as any corporation, limited liability company, or similar entity that is created by the filing of a document with the Secretary of State or a similar office, or formed under the laws of a foreign country and registered to do business in the United States. 31 CF.R 1010.380(c). In general, almost any business entity whose creation requires a filing with the state is subject to the reporting obligations.

Determine if a reporting company falls under an exemption

The CTA exempts certain businesses that have heightened reporting requirements under existing law.[2] Notably, most sole proprietorships, general partnerships, and private trusts will not be reporting companies because those entities usually do not require a filing with the Secretary of State or similar office. Therefore, the owners of these entities will not have any obligation to provide beneficial ownership information. In addition, entities exempt from the CTA reporting requirements include: banks, broker-dealers, insurance companies, public accounting firms registered under the Sarbanes-Oxley Act, nonprofit entities described under 501(c) of the Tax Code and exempt from taxation under 501(a), and any "large operating company." 31 CFR 1010.380(c)(2). In the final regulations, a large operating company is an entity that has more that 20 full-time employees in the United States, has an "operating presence at a physical office" in the United States, and has filed a federal income tax or information return in the United States for the previous year that reports more than $5,000,000 in gross receipts or sales. 31 CFR 1010.380(c)(2)(xxi).

While described as a "large" entity in the regulations, many small businesses that Oregon attorneys represent may fall under this exception.

For each reporting company, identify its "beneficial owners" and "company applicants"

Each reporting company must disclose information about its beneficial owners and each company applicant.

The term "beneficial owner" means an individual who directly or indirectly exercises substantial control over the entity or owns or controls not less than 25% of the ownership interests of the entity. 31 CFR 1010.380(d). The regulations define "substantial control" based on a variety of facts and circumstances, and include control exercised by individuals serving as senior officers, persons having control over the appointment of senior officers or a majority of the board of directors (or similar body), persons having substantial influence over important decisions made by the reporting company, or other form of substantial control. 31 CFR 1010.380(d)(1)(i).

A "company applicant" means anyone who directly files an application to form a domestic reporting company or registers a foreign reporting company to do business in the United States, and any person who directs or controls such filing. 31 CFR 1010.380(e). This requirement should be of particular interest to attorneys who frequently register businesses on behalf of their clients. The FinCEN regulations mandate disclosure from both the company applicant (which can include an attorney, agent, or employee) and the person on whose behalf the company applicant is applying. Thus, under the regulations, both an attorney filing the formation documents of the business and the beneficial owners on whose behalf the attorney works must meet the disclosure obligations.

A company applicant for an entity that is in existence on January 1, 2024, need not be disclosed. 31 CFR 1010.380(b)(2)(iv). Thereafter, only new entities will have to disclose the company applicant's name and other identifying information referenced above. 31 CFR 1010.380(b)(1)(ii) and 1010.380(b)(2)(iv)

Notably, Section E.3 of FinCEN's *Beneficial Ownership Information Reporting: Frequently Asked Questions* mentioned above discusses the question: "Is my accountant or lawyer considered a company applicant?"

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Of particular interest to attorneys and their staff, this section uses the following example:

For example, an attorney at a law firm that offers business formation services may be primarily responsible for overseeing preparation and filing of a reporting company's incorporation documents. A paralegal at the law firm may directly file the incorporation documents at the attorney's request. Under those circumstances, the attorney and the paralegal are both company applicants for the reporting company.

Consider dissolving and liquidating unwanted or inactive entities

Entities that fall under the "inactive entity" exemption are not considered reporting companies. To fall under this exemption, the following requirements must be met:

(A) The entity must have been in existence on or before January 1, 2020

(B) The entity is not engaged in active business

(C) The entity is not owned by a foreign person, whether directly or indirectly, wholly or partially.

(D) The entity has not experienced any change in ownership in the preceding twelve-month period.

(E) The entity has not sent or received any funds in an amount greater than $1,000, either directly or through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding twelve month period.

(F) The entity does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity. 31 CFR 1010.380(c)(2)(xxiii).

Consider forming entities prior to January 1, 2024, to forestall reporting until January 1, 2025

As mentioned above, a reporting company created or registered to do business before January 1, 2024, will have until January 1, 2025, to file its initial beneficial ownership information report. Therefore, if it is known that a new entity will be needed in 2024, consider creating the entity in 2023. One should also consider tax and operational issues alongside the CTA compliance issues.

Gather the necessary reporting information

A reporting company will have to report its legal name; any trade names, "doing business as" (d/b/a), or "trading as" (t/a) names; the current street address of its principal place of business if that address is in the United States (for example, a U.S. reporting company's headquarters), or, for reporting companies whose principal place of business is outside the United States, the current address from which the company conducts business in the United States (for example, a foreign reporting company's U.S. headquarters); its jurisdiction of formation or registration; and its Taxpayer Identification Number (or, if a foreign reporting company has not been issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of the jurisdiction). For each individual who is a beneficial owner or a company applicant, a reporting company will have to provide: the individual's name; date of birth; residential address; and an identifying number from an acceptable identification document such as a passport or U.S. driver's license, and the name of the issuing state or jurisdiction of identification document. The reporting company will also have to report an image of the identification document used to obtain the identifying number in item 4. For further information, see Chapter 4.1 of FinCEN's Small Business Compliance Guide mentioned above.

Consider updating engagement letters

Considering the complexity and risks relating to CTA reporting, attorneys and law firms may want to evaluate their current and new client engagement letters and specify whether the engagement of a business client will include advising the client with respect to reporting under the CTA.

Consider obtaining a FinCEN identifier

Individuals who are beneficial owners or company applicants can obtain a unique FinCEN identification number (FinCEN Identifier) by applying to FinCEN for such number, disclosing the same personal information referenced above. 31 CFR 1010.380(b)(3)(iii)(4); see, also, Fed. Reg. 67449 (Notice dated September 29, 2023, listing the information that will be required in applications for FinCEN identifiers, when available). Once procured, a FinCEN Identifier may be provided to a reporting company in lieu of such personal information. 31 CFR 1010.380(b)(3)(iii)(4)(A). Thus, because of the nature of the information that must be provided in FinCEN reports by company applicants, in order to protect their personal information, business attorneys who assist clients in the formation of business should strongly consider obtaining a FinCEN Identifier as soon as it is possible to do so.

Conclusion

The *Oregon Business Lawyer* newsletter intends to continue to publish information in the future regarding FinCEN's implementation of the CTA reporting regimen. In the meantime, business attorneys should continue to monitor FinCEN's CTA Beneficial Ownership Information Reporting website. ◆

Endnotes

1. Corporate Transparency Act, 31 USCA § 5336
2. For a full list of exempt entities, see 31 USC. § 5336(11)(B) and 31 CFR 1010.380(c)(2)

Healthcare Mergers in Oregon: Focusing on the Triple Aim + Equity Is Key

By Gary Bruce and Jon French, Schwabe, Williamson & Wyatt PC

Gary Bruce works with hospitals, health systems, and other healthcare organizations. Before joining Schwabe, he spent ten years with St. Charles Health System in the role of Vice President and General Counsel. He has taught health-law classes for Willamette Law School, the University of Oregon's Executive MBA Program, and Central Oregon Community College's nursing program..

Jon French represents healthcare systems, hospitals, medical groups, and providers. He also represents a range of business clients, advising them on business formation, entity structures, governance, insurance coverage, regulatory compliance, and privacy and data security matters. Before joining Schwabe, he was Chief Legal Officer for a hospital system in the Seattle area and served as a member of the organization's strategic leadership group.

The Oregon Health Authority's Health Care Market Oversight (HCMO) program, which was launched on March 1, 2022, makes it more difficult and time-consuming than ever to close healthcare merger transactions in Oregon. Keeping their eyes on the prize of the "Triple Aim + Equity" gives parties their best shot at gaining HCMO approval. Engaging in advance planning, exercising patience, and employing tact also can't hurt.

The Triple Aim + Equity

The Triple Aim + Equity is the idea, first advanced by the Institute for Healthcare Improvement in 2007, that healthcare initiatives should improve the patient experience of care, enhance the health of populations, and reduce the per-capita cost of medical treatment. These three goals of giving patients better experiences, access, and costs have recently been supplemented by a healthcare equity component. This add-on represents an acknowledgment that certain populations, including minorities, socioeconomically disadvantaged groups, and rural residents, have limited healthcare options available to them.

History of the HCMO program

The HCMO program was created by the Oregon legislature in response to studies that indicated healthcare mergers tend to drive up consumer prices without producing corresponding gains in healthcare quality, patient satisfaction, access to care, and health equity. The problem is that while consolidation can be bad for healthcare consumers, it may be essential for the survival of some providers.

Without being able to take advantage of diverse networks of specialty providers, tested care protocols, favorable lending terms, well-insured patient populations, and other key resources, many healthcare entities struggle to make ends meet. Small and rural providers are particularly vulnerable. The Center for Healthcare Quality and Payment Reform found that as many as 600 rural hospitals are at risk of closing due to financial pressures in 2023. The drying up of COVID relief funds threatens to increase this number.

All this bad news for sellers would seem to be good news for buyers. But the HCMO program limits the ability of acquiring entities to raise prices or trim unprofitable service lines at the facilities they acquire. As a result, they must find other, often more elusive, ways to generate profitability at target entity sites. The Oregon Association of Hospitals and Health Systems has complained that forcing acquiring entities into this one-handed fight is unfair. In October 2022, the organization filed a federal lawsuit on behalf of its members to challenge the constitutionality of the law that created the HCMO program. The suit is still pending in federal district court.

Applicability and requirements of HCMO rules

The HCMO statute, at ORS 415.500 et seq., and regulations, at OAR 409-070-0000 (collectively, the HCMO rules), apply only to certain types of healthcare transactions involving large entities. Specifically, they regulate mergers, acquisitions, or corporate affiliations that involve a change of leadership or control, and clinical and contractual transactions that may cause an elimination or reduction of "essential services," such as maternity care, substance abuse treatment, and reproductive health services. One party to the transaction must have revenues of at least $25 million; the other must have actual or expected revenues of at least $10 million. Parties who question whether the HCMO rules apply to their transaction may seek a definitive ruling on that issue from the Oregon Health Authority.

An applicant for HCMO approval must fulfill several duties. First, it must file a notice of material change transaction that provides general information about the proposed affiliation and the involved parties, as well as predictions about the anticipated effects of the transaction. The applicant must supplement this information with copies of any term sheets or definitive agreements that have been entered into by the transacting parties. It also must add a table that lists the national provider numbers, if any, affected by the proposed transaction, and any documents specifically requested by the HCMO program.

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These supplemental documents can range from financial statements to copies of charity care policies, and descriptions of initiatives undertaken to help disadvantaged populations in the relevant service area.

Second, the applicant must actively participate in and pay for the review process. The HCMO rules stipulate that proposed transactions may be approved after a preliminary or comprehensive review process, or exempted from approval altogether. These pathways may present applicants with a difficult choice. If they apply for and are granted an exemption—which is available only to applicants whose transactions are urgently needed to prevent harm or losses to healthcare consumers—they may save considerable time and money during the review process. But if their application for an emergency exemption is perceived by their employees and others as a distress call, then it may lead to mass resignations and other adverse consequences.

Third, the applicant must comply, and report on its compliance, with any conditions imposed by the HCMO program. In this regard, the HCMO rules provide that an applicant must not only furnish notice upon closing the proposed transaction, but it must also cooperate with the HCMO program's efforts to conduct compliance checks at the one-year, two-year, and five-year marks. An applicant found to be in violation of the conditions of approval, or who otherwise breaches the promises it made during the application process, may be enjoined, fined, or subject to other penalties under equity and law.

Strategies for gaining prompt approval

The HCMO program is set up to serve as a public representative and watchdog. It is therefore incumbent on the applicant to supply the program with the arguments and tools it needs to convince the public. Specifically, an applicant must persuade the HCMO program—which, in turn, will reassure the public—that its proposed deal will promote the Triple Aim + Equity.

Viewing the HCMO program as a public watchdog can produce several benefits for applicants. First, it can help them frame their proposals and communications in an appropriate and effective manner. Knowing the HCMO program must be able to justify any approval on Triple Aim + Equity grounds, an applicant can focus its time and energy—both before and after filing the notice of material change transaction—on generating evidence of anticipated improvements in healthcare quality and satisfaction, access, cost, and equity. What types of new expertise or equipment will the acquiring entity be able to provide to the target entity? What cost savings might result from the combining of overhead expenses and fixed costs? What diversity and equity programs might become available to the target entity as a result of the transaction? Convincing and compelling answers to these types of questions will help applicants gain expedited approval and robust public support for their proposed transactions.

Second, accepting the watchdog mindset can help applicants anticipate questions and pushback from the communities that could potentially be affected by their affiliation plans. Savvy healthcare entities know their proposals will be evaluated not only in the halls of the HCMO program office, but also in the court of public opinion. Unions will ask about the effect on workers. Reproductive rights advocates will want to know the consequences for abortions and gender-affirming services. Insurance companies and other payers will inquire about the effect of the affiliation on reimbursement rates. The public comments received by the HCMO program as part of the review process, as well as media coverage informed by applications and other documents submitted by the parties, can serve as early warning signals of various concerns. As such, they can give applicants the ability to readjust, reinforce, and refocus their transaction strategies and rationales as they make their way through the approval process.

Finally, treating the HCMO program as a public watchdog can help applicants assess the content and tone of their communications. Having to respond to yet another supplemental information request from the HCMO program staff may seem tedious and even gratuitous. But a little patience, humility, and cooperativeness can go a long way.

Applicants should bear in mind that HCMO program staff members are experts in their respective fields. They have been trained to evaluate critically and objectively the evidence supplied by parties to a proposed transaction. They also have developed through experience some sense of what the public will find convincing. Applicants who partner effectively with HCMO program staff—keeping open lines of communication and cultivating mutual respect—are much more likely than their competitors to avoid unnecessary friction and delays during the evaluation process. They are also more likely to develop the political and reputational capital needed to ensure not only the approval of their pending HCMO application, but the long-term success of their proposed affiliation as well. ◆

A Dance of the Intangibles: The Art of Valuation of Professional Services Firms

By Anthony Micallef, BDO USA

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He has deep roots in the Pacific Northwest, where he graduated with a Bachelor of Science from the University of Oregon, double majoring in Economics and Business Administration. He earned a Master of Science in Finance from Villanova University.

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The practice of business valuation is as much a qualitative exercise as it is a quantitative one. While traditional quantitative methods like a discounted cash flow model or a multi-period excess earnings model are the primary catalysts for value conclusions, a valuation professional must also be able to provide the qualitative reasoning—the "why"—behind the inputs that informed their models. This means it's possible for a pair of valuation professionals to deliver two similar but different answers by using different inputs. But if only one of them can explain the "why," that's the only answer that would hold up to third-party scrutiny

When valuing a professional services firm, a valuation professional must employ a deeper layer of qualitative thinking to overcome two specific hurdles: the lack of widely available public industry data, and the fact that the business's underlying assets exist entirely within the intangible realm. These two factors come into play during the two most common types of valuations a professional services firm would require: valuing the enterprise as a whole and valuing the underlying assets of the firm.[1]

Valuation of the enterprise

There are two primary methods to value a company: the income approach and the market approach.

The income approach is based on the "principle of anticipated economic benefits," which states that value is created by the anticipation of future benefits, which leads in fact to one definition of value as the present worth of future benefits. This method primarily uses a discounted cash flow model, which discounts back the projected "free cash flows to the firm" to their present value using the firm's weighted average cost of capital (WACC) as the required rate of return (i.e., discount rate). The sum of the present value of the subject cash flows would be considered the value of the enterprise.

The market approach uses data from comparable public companies and publicly disclosed transactions within the subject company's industry to apply a multiple to the company's earnings or revenues.

A valuation professional will screen for these public companies and transactions, and create a comparison set that best matches the subject company in terms of industry, size, function, and profitability. A typical data set size would be between five to ten companies or transactions. The observed range of market and transaction multiples from the data sets would then be analyzed and a multiple chosen, based on where the subject company would sit within that range. These two market-based methodologies are then used in tandem to reach a more balanced conclusion via a weighted average. The results of the income and market methods are combined with another weighted average calculation to provide consideration of data at both the firm and market levels, resulting in a more informed enterprise value conclusion.

Due to the partnership model professional services firms employ, it is rare that a firm has a relevant set of comparable public companies and transactions to reference. However, it is possible to find comparable valuation multiples in publicly available reports and private publications from specialized research institutions. Based on research conducted by Evan Bailyn and published on FirstPageSage.com, multiples of earnings before interest, taxes, depreciation, and amortization (EBITDA) (a measure of a company's core profitability calculated by adding interest, tax, depreciation, and amortization to net income), from Q2 2022 through Q3 2023 professional services ranged on average from 8.9x to 10.3x when they generated \$1–3 million in EBITDA, 10.9x to 12.0x when they generated \$3–5 million in EBITDA, and 12.6x to 14.2x for firms at \$5–10 million in EBITDA. (As this is a publication for lawyers, I will specify that multiples for law firms in the above ranges are 10.3x, 12.0x, and 13.7x, respectively).[2, 3] These valuation multiples will continue to grow as the firm size increases up to a point of diminishing returns.

The valuation of the enterprise as a whole is not a proprietary process, and almost all types of professional services firms would use the previously described methods to value their enterprise.

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Valuation *Continued from page 6*

Valuation of the assets

The peculiar challenge business valuation professionals face with regard to professional services firms lies in the valuation of the firm's underlying assets, which exist entirely in the intangible realm. It is easy to look at a piece of physical capital (machinery, buildings, land, etc.) and understand how to assign value to it through market dynamics. But when looking to assign a value to a firm's collective knowledge, its client relationships, or even the reputation of the name on the door, a valuation professional must go beyond first-order thinking to produce a figure.

The valuation of the underlying assets of a firm occurs during the mergers and acquisitions (M&A) process once the transaction has been completed and the acquiror needs to record the target company's assets on its balance sheet. For professional services firms, the acquired assets will primarily be recorded as either intangible assets or goodwill. "Goodwill" is an intangible asset that is generated during the acquisition of one firm by another. It is a catch-all term (encompassing future clients, blue sky/going-concern value, overpayment, etc.) for the value that does not have its own line item but can give the acquiring company a competitive advantage in the market. Goodwill is calculated as the residual between the purchase price of the firm and the net fair value of all the assets purchased and the liabilities assumed.

With regard to professional services firms, a company's trade name, trademarks, copyrights, and customer relationships would be booked to the intangible assets line item on a balance sheet and amortized over time. These assets are referred to as identifiable intangible assets, as they can be sold or transferred without causing a disruption in the acquiror's business dealings. If a company held patents or other internally developed technology, these would also be considered identifiable, and booked as intangible assets — but these are not as common for professional services firms.

In valuing customer relationships, a multi-period excess earnings model would be used. Three important metrics are used in a customer relationship multi-period excess earnings model: the percentage of the firm's revenue attributed to customer relationships, the rate of decay of the customer base, and the cost associated with selling and marketing. These assumptions are used to find relevant cash flows to the firm that can be attributed to existing customer relationships over time. These cash flows are then present-valued using the company's cost of capital as described in the income approach. The sum of the present value of these cash flows over time represents the concluded value of the asset.

The valuation technique commonly used to value the company's trade name or other identifiable intangible assets is the relief-from-royalty method. The primary assumption used in connection with this method is that if a company had to pay a royalty in order to license another party's name—instead of using its own trade name—the assumed cost savings over time would be the concluded value of the acquired trade name. The selected royalty rate is determined by studying published research on historic royalty rates used by other firms in a similar situation, as well as qualitative aspects such as national versus regional reach, longevity of the name, market share, and brand reputation. Once these aspects have been considered, a valuation professional can then determine where within that range of royalties the subject company should fall. This method begins the same way as a multi-period excess earnings model, where the percentage of the revenue that would be attributed to the firm due to the trade name is determined, and the selected royalty rate is then applied to the related revenue. Tax expense is netted out and the after-tax royalty savings over time is present-valued using the firm's cost of capital. The sum of these values over time represents the value of the trade name.

The process of valuing a firm's assembled workforce is referred to as the replacement cost method and is straightforward. As the name implies, the value of an assembled workforce is determined based on the cost to replace them. The total sum of the salaries, benefit load, search/recruiting costs, and lost revenue due to the inefficiency of new hires would make up the concluded value of the in-place assembled workforce.

Once all the intangible assets have been assigned a value, they are subtracted from the purchase price, along with other tangible assets to find the goodwill generated in the transaction, which is then booked to the balance sheet of the acquiror.

In conclusion

The above methods are not specific to the valuation of professional services firms. Valuation professionals use these techniques regardless of industry or sector. Within the valuation profession, professional services firms stand out due to their significant proportion of intangible assets, the large amounts of goodwill they generate in transactions, and the fact that their own human capital is the firm's most valuable asset. A professional services firm that actively acquires other companies would eventually see intangible assets and goodwill swell to be the largest asset on its balance sheet. This makes sense. A law firm, a consulting firm, or an architecture firm derives value from its human capital, its reputation, and the strength of its client base. The people within the firm and their actions drive their valuation—not factories, products, or technology. ◆

Endnotes

1. The word "firm" is used to describe a "professional services firm" throughout, except in specific quoted industry definitions.
2. https://firstpagesage.com/business/consulting-firm-ebitda-valuation-multiples/
3. EBITDA Multiples are calculated by the following: EBITDA Multiple = Enterprise Value / EBITDA

A Multistate Dilemma: The Ethics of Law Practice Across State Lines

By David J. Elkanich and Amber Bevacqua-Lynott, Buchalter PC

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Amber Bevacqua-Lynott is a member of Buchalter's Professional Responsibility Group, and works from the firm's Portland and San Diego offices. Prior to joining Buchalter, she was an assistant disciplinary counsel with the Oregon State Bar, where she was most recently the chief assistant and lead trial attorney.

There is no question that the practice of law has evolved over the past decade. At one time, lawyers would meet mostly with clients in person in their "brick and mortar" offices, and would principally represent clients in their home jurisdiction (where the client was physically located and where the lawyer is licensed). But times have changed. Whether due to the increase in technology, adoption during COVID-19, or other factors, it is easier today for lawyers to practice law remotely from anywhere in the country, while representing distant clients. Two questions therefore arise:

- May lawyers practice law in their home jurisdiction remotely, while physically located in a different jurisdiction?
- May lawyers practice law in their home jurisdiction while representing clients physically located in a different jurisdiction?

Practicing law remotely

Consider a scenario in which a lawyer licensed only in Oregon moves to California for six months out of the year. In California, the Oregon lawyer will exclusively practice law in Oregon through technology such as email, mobile telephone, and video conferencing. The Oregon lawyer will not do work for California clients, will not solicit California clients, and will not otherwise hold herself out to the public as admitted and available to practice law in California.[1]

Oregon Rule of Professional Conduct (RPC) 5.5 states:

> (a) 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.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
>
> > (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
> >
> > (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

Many jurisdictions across the country have recently addressed situations similar to our hypothetical, including the American Bar Association (in Formal Opinion No. 495 (2020)), as well as Oregon (in Formal Opinion 2022-200). The Oregon opinion relied extensively on the ABA opinion, which concluded that under ABA Model Rules 5.5(a)-(b) (similar to Oregon's rules):

> *The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction … unless otherwise authorized.*[2]

In addressing the policy behind the model rule, the ABA Formal Opinion noted:

> *The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible* ***as a lawyer*** *to a local jurisdiction where the lawyer is physically located, but not licensed.* (Emphasis in original.)

Thus, so long as the other jurisdiction—in our hypothetical, California—does not prohibit such remote practice, the lawyer would be able to represent Oregon clients on Oregon matters. Notably, the Bar Association of San Francisco addressed this in Opinion 2021-1 and concluded that our hypothetical Oregon lawyer would not be engaged in the unauthorized practice of law as prohibited by California RPC 5.5(a).[3] It is therefore important to review the rules and ethics opinions before going remote in the other jurisdiction.[4]

Representing the multi-state client

Consider another hypothetical in which our Oregon-licensed lawyer has a thriving corporate and business practice. One day, the lawyer is approached by a startup based in Oregon that needs legal help on a transaction with another business in Washington. Impressed by her work, the startup asks this lawyer to help it purchase a piece of property in Idaho, and

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then to represent a related company on other corporate issues in Arizona. This hypothetical is difficult because, among other reasons, a business lawyer cannot simply ask a court for permission to appear through a motion for pro hac admission. And it would not be cost-effective or efficient to require a client always to retain local counsel whenever a matter touches another jurisdiction.

The lawyer must first consider whether she is engaged in the practice of law in a jurisdiction in which she is not licensed. See RPC 5.5(a) (unauthorized practice of law). Oregon has a conflict-of-law rule in RPC 8.5, which provides in relevant part:

> *In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:*
> *(2) for [non-litigation] conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.*
> ***

Thus, when a lawyer engages in multi-state transactions, "it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule." See ABA Model Rule 8. cmt [5].

Here, it would be reasonable to generally conclude that the Oregon lawyer is engaged in the practice of law in Oregon in advising an Oregon start-up on business and corporate issues, even where the start-up is engaged in a transaction with a Washington business. The line may not be so clear, however, in the other scenarios where the Oregon lawyer is engaged in a transaction in Idaho to purchase a piece of property, or is otherwise representing a client located in Arizona.

If the lawyer concludes that she may be providing legal services in the other jurisdiction, she should then look to determine whether the other jurisdiction has adopted a version of the ABA's temporary practice rule in Model Rule RPC 5.5(c), which would allow such services if they are "temporary," and either are "undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter," or arise "out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[5] In our scenario, Idaho has not adopted such rules, whereas Arizona has done so. As a result, it may be permissible to advise an Arizona client on an issue that reasonably relates to the Oregon lawyer's practice, but there would be greater risk for the Oregon lawyer to dip her toe into Idaho.[6]

There is, unfortunately, a dearth of case law and authority in Oregon regarding when, and whether, an Oregon licensed lawyer is practicing law in Oregon or in another jurisdiction when that lawyer represents an Oregon client on matters that cross into another state, or when the lawyer provides non-litigation legal advice to a client located in another state. As a result, a lawyer might well decide to be cautious to avoid ethical and potential liability concerns. ◆

Endnotes

1. For purposes of this hypothetical, the lawyer does not provide services in federal forums that may be authorized by federal law. See ABA Model RPC 5.5(d)(2) (addressing legal services performed by a lawyer who "is authorized by federal or other law or rule to provide in this jurisdiction"); Oregon RPC 5.5(d) (patterned generally on the corresponding ABA Model Rule); see generally Alaska Bar Ethics Op. 2010-1 (2010) (discusses exclusively federal forum practice by lawyer not licensed in Alaska).
2. Other jurisdictions have reached similar conclusions. See, e.g., Maine Ethics Op 189 (2005); Utah Ethics Op. 19-03 (2019); District of Columbia CUPL Op. 24-20 (2020); Michigan Ethics Op. RI-382 (2021); Wisconsin Ethics Op. EF-21-02 (2021); New Jersey Ethics Op. 742 (2021); Delaware Ethics Op. 2021-1 (2021); Pennsylvania/Philadelphia Joint Advisory Op. 2021-100 (2021); Florida Op. SC20-1220 (2021); Illinois Advisory Op. 22-03 (2022); Virginia Ethics Op. 1896 (2022). And some states have even revised their Rules of Professional Conduct to reflect acceptance of remote practice. See e.g., Utah RPC 05.05; Connecticut RPC 5.5(f) (see Connecticut MJP FAQs).
3. The opinion noted: "Lawyer has no law office in California, is not holding out as a lawyer licensed in California, and is not soliciting or representing California persons or entities. Given these facts, and provided Lawyer is properly practicing law as allowed under the jurisdiction where Lawyer is licensed, Lawyer is likely not practicing law in California under *Birbrower* or *Condon* and California should have no interest in disciplining Lawyer." See, e.g., *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 127 (1998); *Estate of Condon*, 65 Cal.App.4th 1138, 1142-43 (1998).
4. If, however, the lawyer's practice could be considered "temporary," other rules may apply, which is beyond the scope of this article. See, e.g., Oregon RPC 5.5(c) (explains temporary practice); ABA RPC 5.5(c); *In re Harris*, 366 Or. 475, 466 P.3d 22 (2020) (lawyer engaged in the temporary practice of law in Oregon pending his reciprocal admission to practice law); *In re Jones*, 123 N.E.3d 877 (Ohio 2018) (lawyer engaged in the temporary practice of law in Ohio pending admission to practice law).
5. See, supra n.4.
6. Compare Idaho RPC 5.5 with Arizona RPC 5.5.

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Injunction Clauses

By Michael Willes, Tonkon Torp LLP

Michael Willes is a partner in Tonkon Torp's litigation department. His practice includes contract and commercial disputes,corporate and business owner disputes, product liability and complex torts, and shareholder disputes and governance.

This article is part of a series on miscellaneous contract provisions in common business, commercial, and real-estate agreements. When disputes arise, these overlooked provisions can determine the fate of a transaction. If not closely examined in the context of every agreement, they can provide grounds for litigation or threats of litigation.

Injunction clauses frequently appear in written contracts, but they tend to be too broad for their intended purpose. Take, for example, the following provision:

> ***Injunctive and Other Equitable Relief.*** *The parties agree that the remedy at law for any breach or threatened breach by a party would be inadequate, and that the other parties will be entitled, in addition to damages, to a restraining order, temporary and permanent injunctive relief, and other appropriate equitable relief, without showing or proving that any monetary damage has been sustained.*

On its face, this language seems to authorize a judge sometime in the future, when the parties are at odds, to impose any equitable remedy—including injunctive relief—on a party that has breached the contract. Business attorneys would do well to ensure that their injunction clauses are more than boilerplate. By including details about the transaction, the specific harm to be avoided, and the parties' motivations and intentions, a thoughtful drafter may extract some value even if the language falls short of handing one party a decisive victory.

What is equitable relief?

An Oregon practitioner should know that a court holds powers both in law and in equity. When a court has its "law hat" on, it is generally limited to granting relief in the form of money—i.e., damages. When a court exercises its equitable powers, it has broader discretion to shape the remedies to the circumstances—allowing courts to control the parties' activities and declare their rights.

The "quintessential equitable remedy" is the injunction.[1] An injunction is a court order that instructs a person to perform, avoid, or stop doing a certain activity. One famous example of injunctions appears in the series of cases styled *Brown v. Board of Education*, in which the U.S. Supreme Court not only found separate educational facilities to be inherently unequal, but ordered school districts to integrate with "all deliberate speed."[2]

Temporary restraining orders, preliminary injunctions, and permanent injunctions are all variations of injunctive relief. They simply differ in scope. A temporary restraining order is the shortest type of injunction—usually no more than ten days—intended to maintain the status quo between the parties on an emergency basis. A preliminary injunction keeps the status quo until the parties resolve their dispute. Whereas a temporary restraining order can issue on short notice, to obtain a preliminary injunction, a party must make a more exacting showing to the court. And a permanent injunction can be imposed on a party following a trial or other final adjudication. It has the longest time frame.

Whatever its length, an injunction is an extraordinary remedy subject to demanding standards. They are available only if money alone will not make the injured party whole.

Do injunction clauses work?

An injunctive-relief clause on its own is probably insufficient to hand the non-breaching party a win. Courts that have confronted the effect of such clauses have not found them to be dispositive. Indeed, research did not yield a single Oregon state-court opinion that addressed the question. But the Ninth Circuit—along with many other influential courts—has held that contract language alone cannot require a court to grant equitable relief.[3] Even if the parties agree at the beginning of their contractual relationship that the harm from faulty performance would be irreparable, their course of dealing may have changed the facts on the ground. The court still has to be convinced that all elements are met before granting any form of equitable relief.

Although not dispositive, injunction clauses may prove helpful to the party that seeks to enforce a contract—especially when proving the element of irreparable harm. Damage to a company's goodwill, reputational injury, or loss of client relationships can constitute sufficient harm. So a contract to supply essential parts to a manufacturer could specify that, given the limited number of available suppliers, an injunction that requires ongoing order fulfillment is appropriate to avoid the loss of customer relationships.[4] A skilled litigator can assail the other side with language like that. A well-drafted injunction clause can demonstrate that the parties, at least at one point in time, agreed about appropriate injunctive remedies. To maximize the effect, drafters should carefully anticipate how contractual obligations will most likely be breached, how relations could sour, and what consequences will result. When a contract calls for an injunction clause, consider stating why the harm resulting from breach would be irreparable while identifying the specific circumstances that would make legal remedies inadequate. ◆

Endnotes

1. *Deep Photonics Corp. v. LaChapelle*, 368 Or. 274, 285 (Or. 2021)
2. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294, 301 (1955).
3. *Barranco v. 3D Sys. Corp.*, 952 F.3d 1122, 1130 (9th Cir. 2020).
4. *Cf. Sym-Agro, Inc. v. Seipasa, S.A.*, No. 3:21-cv-00429-HZ, at *17 (D. Or. May 5, 2021).

Eva Kripalani: 2023 Recipient of the James B. Castles Leadership Award

Eva Kripalani
Office of General Counsel Network LLC

Eva Kripalani began her legal career at Stoel Rives in Portland, where she became a corporate law partner. She then spent more than 20 years in general counsel and interim general counsel roles, including at KinderCare Learning Centers and FEI Company. Her career has included not only serving in legal capacities, but also in executive operational roles, including government relations, corporate communications, internal audit, and corporate philanthropy.

Eva is a thought leader on the topic of lawyers transitioning into company leadership. She co-authored the book, *The Generalist Counsel: How Leading General Counsel are Shaping Tomorrow's Companies*, published by Oxford University Press in 2013.

Drawing on her experiences, Eva is now the co-founder of The Office of General Counsel Network, an innovative network of attorneys who serve as general counsels to organizations that may not have a legal department and supplement the in-house legal teams of those that do.

Eva's career has also included a rich and generous dedication to public causes. She serves as a trustee for Willamette University and chairs its audit committee. She completed nine years on the board of The Library Foundation, including service as its board chair. She has also sat on the boards of the Oregon Public Employees Retirement System and numerous nonprofits. ◆

The James B. Castles Leadership Award was established in 1998 to recognize an Oregon lawyer for excellence in the practice of business law, professionalism among fellow business lawyers, and outstanding community leadership. It is the highest recognition that the Business Law Section can bestow on one of its members.

Business Law Section Annual Report

By Will Goodling, Executive Committee Chair

Will Goodling
Stoel Rives LLP

Activities and accomplishments:

The Business Law Section hosted two stand-alone CLE seminars and a full-day CLE program for Section members. We published our newsletter, the *Oregon Business Lawyer*, four times. We contributed to the Bar's DEI summer stipend program for law students. We awarded the James B. Castles Leadership Award.

Legislative matters:

The Legislative Subcommittee of the Business Law Section monitored and reported on Oregon legislation that may affect business lawyers.

Plans for upcoming year

The Business Law Section will continue its mission to serve the diverse group of its members throughout the state by:

- providing regular, timely, and useful information about the practice of business law
- promoting quality lawyering and professionalism among business lawyers, in part through facilitating communication and networking among its members
- advocating improvements to Oregon's business laws
- supporting Oregon's business infrastructure and business community. ◆

Follow the new Business Law Section LinkedIn page!

We will be sharing news and events from the Business Law Section Executive Committee.

You can search OSB Business Law Section on LinkedIn, or just click this link to follow the page: https://www.linkedin.com/showcase/business-law-section/posts/?feedView=all

Professional Opportunities

BUCKLEY LAW

Business/Corporate Attorney

Buckley Law is expanding our Business group and looking for attorney candidate(s) who are well-versed in corporate formations, general business advice, transactions, business contracts, real estate, M&A, etc.

The ideal canddate will have 4+ years as a business attorney with an ability to prioritize multiple, concurrent matters and activities and a desire to learn and continuously improve skills and abilities.

Please send a resume to resumes@buckley-law.com with a cover letter and your targeted compensation range.

Business Litigation Attorney

Buckley Law is expanding our business litigation department and looking for experienced attorneys to join our team. Successful candidates include an experienced senior associate to a shareholder-level attorney who can manage complex litigation projects independently, supervise staff and junior associates, and communicate directly with clients. An established book of business is helpful, but not necessary.

The ideal applicant will have 5 to 8+ years as a practicing attorney with experience in business transactions and litigation.

Please send a resume to resumes@buckley-law.com with a cover letter and your targeted compensation range.

Our employees have voted Buckley Law as one of the top workplaces in Oregon and a best company to work for in Oregon. Find out more about these positions and Buckley Law on our careers page: https://www.buckley-law.com/our-firm/careers/.

SUSSMAN SHANK LLP

Business Transactional Attorney

We have an immediate opening in our business practice group for a mid-level business transactional attorney.

The ideal candidate has 6 to 15 years of solid experience handling a broad range of business transactions (e.g., mergers and acquisitions, sales and purchases of real estate and business operations), real and personal property based financing, business formations, and general corporate work. Experience in the areas of IP, tax, securities, land use, and/or environmental law experience is beneficial. Portable book of business is a plus.

The position requires strong academic credentials and excellent written and oral communication skills. An ideal candidate is committed to business development, practice development, and is energetic about client service and developing a book of business.

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The mission of the Oregon State Bar Business Law Section is to provide excellent service to the diverse group of business law practitioners throughout the State of Oregon by providing regular, timely, and useful information about the practice of business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon's business infrastructure and business community.

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