

September 7, 2011

1 **The views expressed herein have not been approved by the House of Delegates or**
2 **the Board of Governors of the American Bar Association and, accordingly, should**
3 **not be construed as representing the policy of the American Bar Association.**

4
5 **American Bar Association**
6 **Commission on Ethics 20/20**

7 **Resolution**
8

9 **RESOLVED: that the American Bar Association adopts the proposed amendments,**
10 **dated August 2012, to Rule 5.5 of the ABA *Model Rules of Professional Conduct* as**
11 **follows (insertions underlined, deletions ~~struck through~~):**

12 **Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law**
13

14 (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the
15 legal profession in that jurisdiction, or assist another in doing so.

16 (b) A lawyer who is not admitted to practice in this jurisdiction shall not:

17 (1) except as authorized by these Rules or other law, establish an office or other
18 systematic and continuous presence in this jurisdiction for the practice of law; or

19 (2) hold out to the public or otherwise represent that the lawyer is admitted to
20 practice law in this jurisdiction.

21 (c) A lawyer admitted in another United States jurisdiction, and not disbarred or
22 suspended from practice in any jurisdiction, may provide legal services on a temporary
23 basis in this jurisdiction that:

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

26 (2) are in or reasonably related to a pending or potential proceeding before a
27 tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is
28 authorized by law or order to appear in such proceeding or reasonably expects to be so
29 authorized;

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

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

38 (d) A lawyer admitted in another United States jurisdiction, and not disbarred or
39 suspended from practice in any jurisdiction, may provide legal services through an office
40 or other systematic and continuous presence in this jurisdiction that ~~provide legal services~~
41 ~~in this jurisdiction that~~:

42 (1) are provided to the lawyer's employer or its organizational affiliates and are
43 not services for which the forum requires pro hac vice admission; ~~or~~

ABA Commission on Ethics 20-20: Initial Resolution Model Rule 5.5 (d)(3)/Continuous and Systematic Presence
September 7, 2011

45 (2) are services that the lawyer is authorized by federal or other law to provide in
46 this jurisdiction-; or

47 (3) are provided for no more than [365] days, but only if the lawyer submits an
48 application for admission by motion, by examination, or as a foreign legal consultant
49 within [60] days of first providing legal services in this jurisdiction, reasonably expects to
50 fulfill all of this jurisdiction's requirements for that form of admission, notifies
51 [disciplinary counsel and the licensing authority] in writing prior to initiating practice
52 pursuant to this Rule that the lawyer is practicing pursuant to the authority in this
53 paragraph, is associated with a lawyer who is admitted to practice in this jurisdiction, and
54 has not previously been denied admission to practice in this jurisdiction or failed this
55 jurisdiction's bar examination. If the lawyer seeks admission as a foreign legal
56 consultant, the lawyer's services must be limited to those that may be provided in this
57 jurisdiction by foreign legal consultants. Prior to admission by motion or examination,
58 the lawyer may not appear before a tribunal in this jurisdiction that requires pro hac vice
59 admission unless the lawyer is granted such admission. The authority in this paragraph
60 shall terminate immediately if the lawyer's application for admission is denied prior to
61 [365] days or if the lawyer fails to file the application for admission within [60] days of
62 first providing legal services in this jurisdiction.

63

64 COMMENT

65 [1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to
66 practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or
67 may be authorized by court rule or order or by law to practice for a limited purpose or on
68 a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer,
69 whether through the lawyer's direct action or by the lawyer assisting another person.

70 [2] The definition of the practice of law is established by law and varies from one
71 jurisdiction to another. Whatever the definition, limiting the practice of law to members
72 of the bar protects the public against rendition of legal services by unqualified persons.
73 This Rule does not prohibit a lawyer from employing the services of paraprofessionals
74 and delegating functions to them, so long as the lawyer supervises the delegated work
75 and retains responsibility for their work. See Rule 5.3.

76 [3] A lawyer may provide professional advice and instruction to nonlawyers whose
77 employment requires knowledge of the law; for example, claims adjusters, employees of
78 financial or commercial institutions, social workers, accountants and persons employed in
79 government agencies. Lawyers also may assist independent nonlawyers, such as
80 paraprofessionals, who are authorized by the law of a jurisdiction to provide particular
81 law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed
82 pro se.

83 [4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice
84 generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office
85 or other systematic and continuous presence in this jurisdiction for the practice of law.
86 Presence may be systematic and continuous even if the lawyer is not physically present
87 here. For example, a lawyer may direct electronic or other forms of communications to
88 potential clients in this jurisdiction and consequently establish a substantial practice
89 representing clients in this jurisdiction, but without a physical presence here. At some
90 point, such a virtual presence in this jurisdiction may become systematic and continuous

ABA Commission on Ethics 20-20: Initial Resolution Model Rule 5.5 (d)(3)/Continuous and Systematic Presence
September 7, 2011

91 within the meaning of Rule 5.5(b)(1). Moreover, a lawyer violates paragraph (b)(2) if the
92 lawyer. Such a lawyer must not be admitted to practice in this jurisdiction and holds
93 out to the public or otherwise represents that the lawyer is admitted to practice law in this
94 jurisdiction. See also Rules 7.1(a) and 7.5(b).

95 [5] There are occasions in which a lawyer admitted to practice in another United States
96 jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may
97 provide legal services on a temporary basis in this jurisdiction under circumstances that
98 do not create an unreasonable risk to the interests of their clients, the public or the courts.
99 Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified
100 does not imply that the conduct is or is not authorized. With the exception of paragraphs
101 (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other
102 systematic and continuous presence in this jurisdiction without being admitted to practice
103 generally here.

104 [6] There is no single test to determine whether a lawyer's services are provided on a
105 "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph
106 (c). Services may be "temporary" even though the lawyer provides services in this
107 jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is
108 representing a client in a single lengthy negotiation or litigation.

109 [7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any
110 United States jurisdiction, which includes the District of Columbia and any state, territory
111 or commonwealth of the United States. The word "admitted" in paragraph (c)
112 contemplates that the lawyer is authorized to practice in the jurisdiction in which the
113 lawyer is admitted and excludes a lawyer who while technically admitted is not
114 authorized to practice, because, for example, the lawyer is on inactive status.

115 [8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if
116 a lawyer admitted only in another jurisdiction associates with a lawyer licensed to
117 practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to
118 practice in this jurisdiction must actively participate in and share responsibility for the
119 representation of the client.

120 [9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law
121 or order of a tribunal or an administrative agency to appear before the tribunal or agency.
122 This authority may be granted pursuant to formal rules governing admission pro hac vice
123 or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a
124 lawyer does not violate this Rule when the lawyer appears before a tribunal or agency
125 pursuant to such authority. To the extent that a court rule or other law of this jurisdiction
126 requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission
127 pro hac vice before appearing before a tribunal or administrative agency, this Rule
128 requires the lawyer to obtain that authority.

129 [10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on
130 a temporary basis does not violate this Rule when the lawyer engages in conduct in
131 anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized
132 to practice law or in which the lawyer reasonably expects to be admitted pro hac vice.
133 Examples of such conduct include meetings with the client, interviews of potential
134 witnesses, and the review of documents. Similarly, a lawyer admitted only in another
135 jurisdiction may engage in conduct temporarily in this jurisdiction in connection with

ABA Commission on Ethics 20-20: Initial Resolution Model Rule 5.5 (d)(3)/Continuous and Systematic Presence
September 7, 2011

136 pending litigation in another jurisdiction in which the lawyer is or reasonably expects to
137 be authorized to appear, including taking depositions in this jurisdiction.

138 [11] When a lawyer has been or reasonably expects to be admitted to appear before a
139 court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are
140 associated with that lawyer in the matter, but who do not expect to appear before the
141 court or administrative agency. For example, subordinate lawyers may conduct research,
142 review documents, and attend meetings with witnesses in support of the lawyer
143 responsible for the litigation.

144 [12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to
145 perform services on a temporary basis in this jurisdiction if those services are in or
146 reasonably related to a pending or potential arbitration, mediation, or other alternative
147 dispute resolution proceeding in this or another jurisdiction, if the services arise out of or
148 are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is
149 admitted to practice. The lawyer, however, must obtain admission *pro hac vice* in the case
150 of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

151 [13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain
152 legal services on a temporary basis in this jurisdiction that arise out of or are reasonably
153 related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are
154 not within paragraphs (c)(2) or (c)(3). These services include both legal services and
155 services that nonlawyers may perform but that are considered the practice of law when
156 performed by lawyers.

157 [14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably
158 related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety
159 of factors evidence such a relationship. The lawyer's client may have been previously
160 represented by the lawyer, or may be resident in or have substantial contacts with the
161 jurisdiction in which the lawyer is admitted. The matter, although involving other
162 jurisdictions, may have a significant connection with that jurisdiction. In other cases,
163 significant aspects of the lawyer's work might be conducted in that jurisdiction or a
164 significant aspect of the matter may involve the law of that jurisdiction. The necessary
165 relationship might arise when the client's activities or the legal issues involve multiple
166 jurisdictions, such as when the officers of a multinational corporation survey potential
167 business sites and seek the services of their lawyer in assessing the relative merits of
168 each. In addition, the services may draw on the lawyer's recognized expertise developed
169 through the regular practice of law on behalf of clients in matters involving a particular
170 body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to
171 provide *pro bono* legal services on a temporary basis in a jurisdiction that has been
172 affected by a major disaster, but in which they are not otherwise authorized to practice
173 law, as well as lawyers from the affected jurisdiction who seek to practice law
174 temporarily in another jurisdiction, but in which they are not otherwise authorized to
175 practice law, should consult the [*Model Court Rule on Provision of Legal Services*
176 *Following Determination of Major Disaster*].

177 [15] Paragraph (d) identifies ~~two~~ three circumstances in which a lawyer who is admitted
178 to practice in another United States jurisdiction, and is not disbarred or suspended from
179 practice in any jurisdiction, may establish an office or other systematic and continuous
180 presence in this jurisdiction for the practice of law as well as provide legal services on a
181 temporary basis. Except as provided in paragraphs (d)(1), ~~and~~ (d)(2), and (d)(3) a lawyer

ABA Commission on Ethics 20-20: Initial Resolution Model Rule 5.5 (d)(3)/Continuous and Systematic Presence
September 7, 2011

182 who is admitted to practice law in another jurisdiction and who establishes an office or
183 other systematic or continuous presence in this jurisdiction must become admitted to
184 practice law generally in this jurisdiction.

185 [16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal
186 services to the client or its organizational affiliates, i.e., entities that control, are
187 controlled by, or are under common control with the employer. This paragraph does not
188 authorize the provision of personal legal services to the employer's officers or employees.
189 The paragraph applies to in-house corporate lawyers, government lawyers and others who
190 are employed to render legal services to the employer. The lawyer's ability to represent
191 the employer outside the jurisdiction in which the lawyer is licensed generally serves the
192 interests of the employer and does not create an unreasonable risk to the client and others
193 because the employer is well situated to assess the lawyer's qualifications and the quality
194 of the lawyer's work.

195 [17] If an employed lawyer establishes an office or other systematic presence in this
196 jurisdiction for the purpose of rendering legal services to the employer, the lawyer may
197 be subject to registration or other requirements, including assessments for client
198 protection funds and mandatory continuing legal education.

199 [18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction
200 in which the lawyer is not licensed when authorized to do so by federal or other law,
201 which includes statute, court rule, executive regulation or judicial precedent.

202 [19] Paragraph (d)(3) recognizes that a lawyer admitted in another jurisdiction may need
203 to relocate to this jurisdiction, sometimes on short notice. The admissions process,
204 however, can take considerable time, thus placing the relocating lawyer at risk of
205 engaging in the unauthorized practice of law and leaving the lawyer's clients without the
206 benefit of their chosen counsel. Paragraph (d)(3) closes this gap by authorizing the
207 lawyer to practice in this jurisdiction for a limited period of time, and subject to several
208 restrictions, while the lawyer diligently seeks admission. While exercising this authority,
209 the lawyer must not hold out to the public or otherwise represent that the lawyer is
210 admitted to practice in this jurisdiction. See Rule 5.5(b)(2). Moreover, given that a
211 lawyer with an office in this jurisdiction will typically be assumed to be admitted to
212 practice in this jurisdiction, the lawyer should ordinarily disclose the lawyer's limited
213 practice authority and jurisdiction of licensure in all communications with potential
214 clients, such as on business cards, websites, and letterhead, and must disclose the
215 lawyer's limited authority to all potential clients before agreeing to represent them. See
216 Rules 7.1 and 7.5(b).

217 [19~~20~~] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or
218 otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

219 [20~~1~~] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to
220 paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to
221 practice law in this jurisdiction. For example, that may be required when the
222 representation occurs primarily in this jurisdiction and requires knowledge of the law of
223 this jurisdiction. See Rule 1.4(b).

224 [24~~2~~] Paragraphs (c) and (d) do not authorize communications advertising legal services
225 to prospective clients in this jurisdiction by lawyers who are admitted to practice in other
226 jurisdictions. Whether and how lawyers may communicate the availability of their
227 services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

REPORT

The ABA Commission on Ethics 20/20 has examined many ways in which globalization and technology have affected the legal profession, including the increasing importance of cross-border practice. In particular, the Commission has examined the existing framework governing multijurisdictional practice and lawyer mobility and has produced several related Resolutions and Reports.¹ The Resolution accompanying this Report concerns Rule 5.5 of the ABA Model Rules of Professional Conduct and is intended to address the ethics issues associated with a lawyer's establishment of a practice in a new jurisdiction.

To develop appropriate recommendations in this area, the Commission's Uniformity, Choice of Law, and Conflicts of Interest Working Group included participants from the Standing Committee on Ethics and Professional Responsibility, the Standing Committee on Client Protection, the Standing Committee on Professional Discipline, and the National Organization of Bar Counsel. They made important contributions to the Working Group's understanding of the issues and the development of the Resolutions accompanying this Report. The Working Group also received valuable input from the Standing Committee on Professional Discipline regarding early drafts of the Working Group's proposals.

The Commission benefited greatly from the efforts of the ABA Commission on Multijurisdictional Practice ("MJP Commission"), which completed its work nearly a decade ago. In August 2002, the ABA House of Delegates adopted as Association policy all nine of the MJP Commission's recommendations,² which reflected a more permissive regulatory framework. This framework allowed lawyers, subject to certain limitations, to practice law on a temporary basis in jurisdictions in which they were not otherwise authorized to practice law.³ In addition, the framework included mechanisms that allowed lawyers, again with limitations, to establish an ongoing practice in a jurisdiction in which they were not otherwise authorized and without the necessity of sitting for a written bar examination.⁴ The Commission has found that this framework has been widely adopted⁵ and that it has enabled lawyers to represent their

¹ In one Resolution, the Commission is recommending changes to the ABA Model Rule on Admission by Motion. Another Resolution recommends changes to Model Rule 5.5, which includes the addition of foreign lawyers to address distinct issues associated with those inbound foreign lawyers (e.g., foreign lawyers as in-house counsel). Finally, the Commission is recommending changes to Model Rule 1.6 that would clarify a lawyer's confidentiality obligations when a lawyer is asked, as part of a lateral hiring process, to provide a firm with information about current and former clients in order to permit the firm to determine if any conflicts would arise from the lawyer's association with the firm.

² See *Client Representation in the 21st Century*, Report of the Commission on Multijurisdictional Practice (2002), http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html.

³ See, e.g., ABA Model Rule 5.5(c); ABA Model Rule for Pro Hac Vice Admission.

⁴ See, e.g., ABA Model Rule 5.5(d); ABA Model Rule for Admission by Motion.

⁵ Since August 2002, forty-four jurisdictions have adopted some form of multijurisdictional practice that is similar to Model Rule 5.5. Chart, State Implementation of ABA Model Rule 5.5 (October 27, 2010), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5_authcheckdam.pdf. Every jurisdiction now has a rule allowing for pro hac vice admission. Chart, Comparison of ABA Model Rule For Pro

ABA Commission on Ethics 20-20: Initial Resolution Model Rule 5.5 (d)(3)/Continuous and Systematic Presence

September 7, 2011

clients more effectively and efficiently, provided clients with more freedom regarding their choice of counsel, and afforded lawyers more professional flexibility.

The current framework has served lawyers and clients well, but the Commission concluded that additional changes are necessary in light of technological developments, economic trends, and client needs and demands. This Report describes two of those proposed changes.

First, the Commission recommends the creation of Model Rule 5.5(d)(3). This provision would enable lawyers to practice in a new jurisdiction while the lawyer pursues admission through one of the procedures that the jurisdiction authorizes, such as admission by motion or passage of that jurisdiction's bar examination. This proposal recognizes that a lawyer licensed in one jurisdiction may need to relocate to a new jurisdiction, sometimes on short notice, and that the admissions process in the new jurisdiction can take considerable time. Subject to several restrictions designed to protect the public, the proposal is designed to permit the relocating lawyer to practice in the new jurisdiction in the interim, thus affording clients their choice of counsel and giving lawyers the ability to practice without the risk of engaging in the unauthorized practice of law.

Second, the Commission is recommending an amendment to Comment [4] to Model Rule 5.5. Comment [4] elaborates on the meaning of Rule 5.5(b)(1), which prohibits lawyers from establishing "an office or other systematic and continuous presence" in a jurisdiction unless the lawyer is authorized to practice law in that jurisdiction. The Commission found that it is not always clear when a lawyer has established such a presence, particularly given the numerous ways in which lawyers now deliver legal services in other jurisdictions without being physically present there, such as through the use of virtual law offices. Thus, the Commission proposes additional guidance in the form of language in Comment [4] explaining that, for example, a lawyer can be found to have established a systematic and continuous presence in a jurisdiction, even without a physical presence there, if the lawyer directs electronic or other forms of communications to potential clients in the jurisdiction and consequently establishes a substantial practice there.

The Commission considered other possible amendments to Model Rule 5.5 that would have resulted in more substantial changes. For example, the Commission seriously considered whether to propose a restructured version of Model Rule 5.5 that would have resembled Colorado's Rule 220.⁶ That Rule permits a lawyer who is licensed in another U.S. jurisdiction to practice freely in Colorado on a temporary basis (subject only to pro hac vice requirements) as

Hac Vice Admission With State Versions and Amendments since August 2002 (May 12, 2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/prohac_admin_comp.authcheckdam.pdf. Seven jurisdictions have adopted a version of the ABA Model Rule for Temporary Practice by Foreign Lawyers, http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/8_and_9_status_chart.authcheckdam.pdf. Forty jurisdictions have adopted a version of the ABA Model Rule on Admission by Motion. Chart, Comparison of ABA Model Rule on Admission by Motion With State Versions (March 11, 2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_motion_comp.authcheckdam.pdf. Finally, thirty-one jurisdictions have adopted a version of the Model Rule for the Licensing and Practice of Foreign Legal Consultants. Chart, Foreign Legal Consultant Rules (December 21, 2010), http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/for_legal_consultants.authcheckdam.pdf.
⁶<http://www.coloradosupremecourt.com/pdfs/Registration/Rule%20220.%20Out-of-State%20Attorney%20--%20Conditions%20of%20Practice.pdf>.

ABA Commission on Ethics 20-20: Initial Resolution Model Rule 5.5 (d)(3)/Continuous and Systematic Presence
September 7, 2011

long as the lawyer does not take up residence in Colorado or establish an office there. Although the Colorado approach has many advantages, the Commission ultimately concluded that the practice authority afforded by the Colorado approach is substantially similar to the practice authority that already exists under Model Rule 5.5. In particular, the Commission had difficulty identifying common scenarios in which a lawyer would be permitted to practice in Colorado on a temporary basis, but clearly precluded from doing so in a jurisdiction that had adopted Model Rule 5.5.

To the extent that the Colorado Rule offers more practice authority than the Model Rule, the Commission thought that the difference might relate to Model Rule 5.5(c)(4). That paragraph permits lawyers to practice on a temporary basis in a jurisdiction if the matter arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Comment [14] elaborates on the meaning of this paragraph, and the Commission considered the possibility of adding clarifying language to that Comment to make clear that Model Rule 5.5(c)(4) should be interpreted liberally. The Commission determined, however, that additional guidance on the scope of Model Rule 5.5(c)(4) would be more appropriate in the form of an opinion from the Standing Committee on Ethics and Professional Responsibility. Accordingly, the Commission will refer that issue to the Standing Committee for its consideration.

I. Proposed Amendment to Prefatory Language of Model Rule 5.5(d)

The Commission first recommends that Rule 5.5(d) be amended to clarify the purpose of the paragraph. In particular, Rule 5.5(d) was intended (and has been interpreted) to permit a lawyer, under limited circumstances, to establish an office or other systematic and continuous presence for the practice of law in a jurisdiction where the lawyer is not otherwise admitted to practice. Except for those limited circumstances, an out-of-state lawyer must become admitted to practice law generally in the jurisdiction in order to establish an office or engage in any other systematic or continuous practice of law there. The Commission concluded that the prefatory language in Rule 5.5(d) is not sufficiently clear in this regard and that the prefatory language should state explicitly that paragraph (d) is intended to explain when a lawyer may "provide legal services through an office or other systematic and continuous presence" in the jurisdiction.

II. Proposal to Add Model Rule 5.5(d)(3) and Amend Comment [19]

The Commission concluded that technological and economic changes have produced an increase in cross-border practice, revealing an important gap in the practice authority granted by Model Rule 5.5(d). That gap affects an increasing number of lawyers who have found it necessary to establish a practice in a jurisdiction where they are not otherwise admitted. For example, a lawyer may receive a job opportunity in a jurisdiction other than the jurisdiction of original licensure or be transferred to another jurisdiction, often requiring relocation on very short notice. Or the lawyer may need to relocate in order to accommodate the needs of an important client who has moved to a new jurisdiction. In sum, lawyers increasingly need to relocate during their careers, often more than once and frequently without much notice.

The Commission found that, despite the increasing need to relocate, the admissions process for these lawyers can take considerable time. For example, the admission by motion process requires an applicant to complete and submit a lengthy application that requires personal

ABA Commission on Ethics 20-20: Initial Resolution Model Rule 5.5 (d)(3)/Continuous and Systematic Presence

September 7, 2011

and professional information that can take weeks or months to compile. In particular, the process typically requires a lawyer to obtain proof of licensure from the lawyer's home jurisdiction, submit evidence of a passing score on the Multistate Professional Responsibility Examination, and accumulate substantial personal and professional information in order to satisfy the character and fitness requirements of the jurisdiction. Similarly, if the lawyer does not qualify for admission by motion (e.g., the lawyer has not satisfied the durational practice requirements), the lawyer will need to sit for the jurisdiction's bar examination, which is administered only twice per year.

The Commission found that this time consuming process can adversely affect lawyers' ability to represent their existing clients effectively and can have adverse consequences on lawyers' careers in an increasingly mobile profession. Thus, the Commission concluded that, assuming procedural safeguards are put in place, these lawyers should be permitted to practice in the new jurisdiction for a limited time (not to exceed 365 days) while diligently pursuing formal admission. Proposed new Rule 5.5(d)(3) is intended to provide for this authority to practice, and Comment [19] elaborates on it.⁷

The Commission's recommendation in this regard is not without precedent. The District of Columbia allows out-of-state lawyers to practice law from a principal office located in the District of Columbia for a period not to exceed 360 days during the pendency of a person's first application for admission to the District of Columbia Bar.⁸ The Commentary to the Rule states that it is designed to provide a one-time grace period for out-of-state lawyers who are moving their principal office to the District of Columbia. Missouri also has a similar procedure.⁹ The Commission found no evidence that either jurisdiction has experienced any problems as a result of their allowing such practice authority.

The Commission nevertheless concluded that, to ensure that lawyers do not abuse the proposed exception or use it in ways that would put the public at risk, the authority to practice under Rule 5.5(d)(3) must include numerous restrictions and limitations. First, the lawyer must "submit an application for admission by motion, examination, or as a foreign legal consultant, within [60] days of first providing legal services" The purpose of this requirement is to ensure that a lawyer is serious about applying for admission in the new jurisdiction and applies promptly upon arriving there. The time frame is placed in brackets so that a jurisdiction can tailor it according to the particular needs of that jurisdiction.¹⁰

⁷ One of the Commission's inbound foreign lawyer proposals recommends that foreign lawyers be included within the scope of Rule 5.5 for purposes of limited practice authority. The Commission's proposed Rule 5.5(d)(3), however, does not create any new avenues for admitting those foreign lawyers beyond what the Model Rules currently allow (e.g., rules relating to foreign legal consultants and rules governing the ability of foreign lawyers to sit for a particular jurisdiction's bar examination).

⁸ District of Columbia Court of Appeals Rule 49(c)(8) (Limited Duration Supervision By D.C. Bar Member) <http://www.dcappeals.gov/dccourts/docs/rule49.pdf> .

⁹ Missouri Supreme Court Rule 8.06 (Temporary Practice by Lawyers Applying for Admission to the Missouri Bar) <http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/0/e0bcf992eb92f9ae86256db7007379ef?OpenDocument> .

¹⁰ In-house counsel are not listed in Rule 5.5(d)(3) because Rule 5.5(d)(1) already provides authority for those lawyers to practice in a jurisdiction without being fully admitted to practice there. Although some jurisdictions require these lawyers to seek registration as in-house counsel, Rule 5.5(d)(1) is sufficient to protect the lawyer from allegations of unauthorized practice while the lawyer completes the registration process.

ABA Commission on Ethics 20-20: Initial Resolution Model Rule 5.5 (d)(3)/Continuous and Systematic Presence
September 7, 2011

Second, the lawyer must have a reasonable expectation that the lawyer will fulfill all of the jurisdiction's requirements for admission. For example, if the lawyer has been disbarred or suspended in another jurisdiction, the lawyer would not have a reasonable expectation of admission and thus would not be able to practice pursuant to the authority in this paragraph. This requirement is analogous to Rule 5.5(c)(2), which permits a lawyer to practice temporarily in a jurisdiction in connection with a litigation matter if the lawyer "reasonably expects to be . . . authorized" to appear before a tribunal in that jurisdiction.

Third, the lawyer must notify disciplinary counsel and the licensing authority in writing that the lawyer is taking advantage of the practice authority of Rule 5.5(d)(3). This requirement is intended to ensure that the disciplinary and licensing authorities are aware of the lawyer's presence and intention to establish an ongoing practice in the jurisdiction under the Rule.

Fourth, the lawyer must associate with a lawyer who is licensed to practice in the jurisdiction. This requirement is designed to ensure that the incoming lawyer has the ability to consult with a lawyer who is licensed in the jurisdiction regarding any issues that may require knowledge of distinctly local laws or procedures. This requirement is similar to the requirement in Rule 5.5(c)(1), which permits an out-of-state lawyer to practice *temporarily* in the jurisdiction if the lawyer associates with a lawyer who is admitted in the jurisdiction. The Commission was reluctant to impose a stricter requirement, such as a requirement to be directly supervised by a lawyer who is admitted in the jurisdiction, because of the particular obstacles such a requirement would impose on solo practitioners. In particular, in-state lawyers may be reluctant to directly supervise a lawyer from another jurisdiction who is not in the same office, because of the administrative difficulties associated with supervising a lawyer in a different law office. For these reasons, the Commission concluded that the "association" requirement, which has worked well in the context of temporary practice under Rule 5.5(c)(1), is an adequate safeguard in the context of proposed Rule 5.5(d)(3) as well.¹¹

Fifth, the lawyer must not have been previously denied admission to practice in the jurisdiction (e.g., due to a failure to satisfy the character and fitness requirements) or previously failed the jurisdiction's bar examination. This requirement is designed to ensure that a lawyer does not use the authority to practice under proposed Rule 5.5(d)(3) to circumvent a prior denial of the right to practice in the jurisdiction. For example, if a lawyer fails the bar examination in one jurisdiction and passes it in another, the lawyer cannot establish a practice in the former jurisdiction while waiting to re-take that jurisdiction's bar examination.

Sixth, the practice authority does not extend to appearances before a tribunal. The lawyer would have to obtain *pro hac vice* admission in order to appear before a tribunal in that jurisdiction.

Seventh, the practice authority terminates immediately if the lawyer's application for admission is denied before the expiration of the 365 day period (e.g., the application for

¹¹The Commission believes that state and local bar associations could provide a great service to the profession and the public by establishing a roster of experienced lawyers who are willing to associate with incoming lawyers under these circumstances. Such an association not only would serve the public and the bar, but it also has the potential to be a source of new work for the in-state lawyer who may be called on to assist the incoming lawyer's clients. In many ways, this process would be analogous to the creation of rosters of lawyers who are willing to serve as mentors for new lawyers or who agree to serve as practice monitors for lawyers conditionally admitted to the practice of law. See <http://bit.ly/pGDDtz>.

September 7, 2011

admission by motion is denied or the lawyer fails the jurisdiction's bar examination), or if the lawyer fails to file an application for admission within 60 days.

Finally, new Comment [19] summarizes the purpose of proposed Rule 5.5(d)(3), and the Comment contains an additional reminder regarding the lawyer's obligations under Rule 5.5(b)(2). In particular, the clear import of Rule 5.5(b)(2) is that a lawyer who practices in a jurisdiction pursuant to the authority contained in Rule 5.5(d)(3) cannot "hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction." Proposed Comment [19] would remind lawyers of this restriction and emphasize that, to avoid misleading potential clients, lawyers also have to disclose their limited practice authority and jurisdiction of licensure in all communications with potential clients, such as on business cards, websites, and letterhead, and explicitly disclose the lawyer's limited authority to all potential clients before agreeing to represent them.

III. Proposed Amendment to Comment [4] to Model Rule 5.5

Rule 5.5(b)(1) provides that, unless a lawyer is authorized to practice in a jurisdiction under Rule 5.5(d), a lawyer must seek admission in that jurisdiction when the lawyer has established "an office or other systematic and continuous presence" there. It is not always clear, however, when a lawyer has established such a presence, particularly given the numerous ways in which lawyers now deliver legal services in other jurisdictions without being physically present there, such as through the use of virtual law offices. Thus, the Commission concluded that lawyers would benefit from more guidance as to when their practices involve a "systematic and continuous" presence in another jurisdiction.

The Commission concluded that Comment [4] already offers some guidance in this regard. It provides that a lawyer may have a "systematic and continuous" presence in a jurisdiction even without establishing a physical presence there. The Commission determined that additional language would give lawyers more clarity as to when a non-physical presence might be considered "systematic and continuous." In particular, the Commission is proposing an amendment to Comment [4] that would specify, by way of example, that a lawyer may have a systematic and continuous presence in a jurisdiction if the lawyer directs electronic or other forms of advertising to clients in the jurisdiction with the intent of representing those clients and establishing a substantial practice in the jurisdiction. The Commission wanted to make clear that, at some point, such a virtual presence can give rise to a systematic and continuous presence within the meaning of Rule 5.5(b)(1).

This amendment does not add or create any new obligations and is not intended to affect the scope of Comment [4], which already makes clear that a lawyer can establish a systematic and continuous presence in a jurisdiction even if the lawyer is "not physically present" there. Moreover, the purpose of this amendment is not to discourage virtual law offices. To the contrary, the Commission found that lawyers who have such practices can offer legal services efficiently and effectively and can improve access to justice.

Rather, the amendment is designed to serve two purposes. First, the amendment makes clear that these new forms of practice are subject to the restrictions of Rule 5.5(b), just like more traditional forms of law practices. And second, the amendment is intended to offer more guidance to lawyers who engage in new forms of law practice as to when the Rule might be triggered. The Commission concluded that this clarification enables lawyers, including lawyers

ABA Commission on Ethics 20-20: Initial Resolution Model Rule 5.5 (d)(3)/Continuous and Systematic Presence

September 7, 2011

who practice virtually, to provide legal services to clients in other jurisdictions on an occasional basis as long as doing so is consistent with Rule 5.5(c), while at the same time prohibiting those lawyers from establishing a more systematic and continuous relationship with a jurisdiction unless they are admitted to practice or are otherwise authorized to practice in that jurisdiction.

The Commission recognizes that the proposed new Comment does not clearly define the line between a permissible temporary practice in a jurisdiction and an impermissible systematic and continuous presence. The Commission concluded that precision in this area is not possible. The Commission, however, believes that the new language will give lawyers more guidance than the Comment currently provides.

In sum, lawyers who practice virtually must comply with the same restrictions as lawyers who have more traditional law offices, and the Commission's proposal is intended to make this point more explicitly while offering lawyers more guidance as to the Rule's application to these newer forms of law practice.

Conclusion

Globalization, changes in technology, and client demands have fueled an increase in cross-border practice as well as a related need for lawyers to relocate to new jurisdictions. The proposals accompanying this Report are intended to permit lawyers to respond to these developments, while providing adequate safeguards for clients and the public. Accordingly, the Commission respectfully requests that the House of Delegates adopt the proposed amendments set forth in the accompanying Resolution.