

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.  
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5 American Bar Association  
6 Commission on Ethics 20/20

7 Resolution  
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9 **RESOLVED:** that the American Bar Association adopts the *Model Rule on Practice*  
10 *Pending Admission* as follows:

11 ABA Model Rule on Practice Pending Admission  
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13 1. A lawyer currently holding an active license to practice law in another U.S.  
14 jurisdiction may provide legal services in this jurisdiction through an office or  
15 other systematic and continuous presence for no more than [365] days, provided  
16 that the lawyer:

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18 a. is not disbarred or suspended from practice in any jurisdiction and is not  
19 currently subject to discipline or a pending disciplinary matter in any  
20 jurisdiction;

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22 b. has not previously been denied admission to practice in this jurisdiction or  
23 failed this jurisdiction's bar examination;

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25 c. notifies Disciplinary Counsel and the Admissions Authority in writing  
26 prior to initiating practice in this jurisdiction that the lawyer will be doing so  
27 pursuant to the authority in this Rule;

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29 d. submits within [60] days of first providing legal services in this jurisdiction  
30 a complete application for admission by motion or by examination;

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32 e. reasonably expects to fulfill all of this jurisdiction's requirements for that  
33 form of admission;

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35 f. associates with a lawyer who is admitted to practice in this jurisdiction;

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37 g. complies with Rules 7.1 and 7.5 of the Model Rules of Professional  
38 Conduct [or jurisdictional equivalent] in all communications with the public and  
39 clients regarding the nature and scope of the lawyer's practice authority in this  
40 jurisdiction; and

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42 h. pays any annual client protection fund assessment.

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**2. A lawyer currently licensed as a foreign legal consultant in another U.S. jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence for no more than [365] days, provided that the lawyer:**

**a. provides services that are limited to those that may be provided in this jurisdiction by foreign legal consultants;**

**b. is a member in good standing of a recognized legal profession in the foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;**

**c. submits within [60] days of first providing legal services in this jurisdiction a complete application for admission to practice as a foreign legal consultant;**

**d. reasonably expects to fulfill all of this jurisdiction’s requirements for admission as a foreign legal consultant; and**

**e. meets the requirements of paragraphs 1(a), (b), (c), (f), (g), and (h) of this Rule.**

**3. Prior to admission by motion, through examination, or as a foreign legal consultant, the lawyer may not appear before a tribunal in this jurisdiction that requires *pro hac vice* admission unless the lawyer is granted such admission.**

**4. The authority in this Rule shall terminate immediately if the lawyer’s application for admission by motion, by examination or as a foreign legal consultant is denied prior to [365] days or if the lawyer fails to file the application for admission within [60] days of first providing legal services in this jurisdiction. Upon the termination of such authority the lawyer, within [30] days, shall:**

**a. cease to maintain a presence or occupy an office for the practice of law in this jurisdiction unless authorized to do so pursuant to another Rule;**

**b. notify all clients being represented in pending matters, and opposing counsel or co-counsel of the termination of the lawyer’s authority to practice pursuant to this Rule;**

**c. not undertake any new representation that would require the lawyer to be admitted to practice law in this jurisdiction; and**

**d. take all other necessary steps to protect the interests of the lawyer’s clients.**

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**5. Upon the denial of the lawyer’s application for admission by motion, by examination, or as a foreign legal consultant, the Admissions Authority shall immediately notify Disciplinary Counsel that the authority granted by this Rule has terminated.**

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**COMMENT**

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[1] This Rule recognizes that a lawyer admitted in another jurisdiction may need to relocate to or commence practice in this jurisdiction, sometimes on short notice. The admissions process can take considerable time, thus placing a lawyer at risk of engaging in the unauthorized practice of law and leaving the lawyer’s clients without the benefit of their chosen counsel. This Rule closes this gap by authorizing the lawyer to practice in this jurisdiction for a limited period of time, subject to restrictions, while the lawyer diligently seeks admission.

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[2] While exercising this authority, the lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction. See Rule 5.5(b)(2). Because a lawyer with an office in this jurisdiction will typically be assumed to be admitted to practice in this jurisdiction, the lawyer must, under this Rule, disclose the lawyer’s limited practice authority and jurisdiction of licensure in all communications with potential clients, such as on business cards, websites, and letterhead. Further, the lawyer must disclose the limited practice authority to all potential clients before agreeing to represent them. See Rules 7.1 and 7.5(b).

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[3] The provisions of paragraph 4 (a) through (e) of this Rule are necessary to avoid prejudicing the rights of existing clients or other parties. Thirty days should be sufficient for the lawyer to wind up his or her practice in this jurisdiction in an orderly manner.

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

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

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**(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.**

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

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

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

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

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

145 (d) A lawyer admitted in another United States jurisdiction, and not disbarred or  
146 suspended from practice in any jurisdiction, may provide legal services through an  
147 office or other systematic and continuous presence in this jurisdiction that provide  
148 legal services in this jurisdiction that:

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

151 (2) are services that the lawyer is authorized by federal or other law or rule  
152 to provide in this jurisdiction.

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154 **COMMENT**

155 [1] A lawyer may practice law only in a jurisdiction in which the lawyer is  
156 authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a  
157 regular basis or may be authorized by court rule or order or by law to practice for a  
158 limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of  
159 law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting  
160 another person.

161 [2] The definition of the practice of law is established by law and varies from one  
162 jurisdiction to another. Whatever the definition, limiting the practice of law to members  
163 of the bar protects the public against rendition of legal services by unqualified persons.  
164 This Rule does not prohibit a lawyer from employing the services of paraprofessionals  
165 and delegating functions to them, so long as the lawyer supervises the delegated work  
166 and retains responsibility for their work. See Rule 5.3.

167 [3] A lawyer may provide professional advice and instruction to nonlawyers  
168 whose employment requires knowledge of the law; for example, claims adjusters,  
169 employees of financial or commercial institutions, social workers, accountants and  
170 persons employed in government agencies. Lawyers also may assist independent  
171 nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to  
172 provide particular law-related services. In addition, a lawyer may counsel nonlawyers  
173 who wish to proceed pro se.

174 [4] Other than as authorized by law or this Rule, a lawyer who is not admitted to  
175 practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an

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176 office or other systematic and continuous presence in this jurisdiction for the practice of  
177 law. Presence may be systematic and continuous even if the lawyer is not physically  
178 present here. For example, a lawyer may direct electronic or other forms of  
179 communications to potential clients in this jurisdiction and consequently establish a  
180 substantial practice representing clients in this jurisdiction, but without a physical  
181 presence here. At some point, such a virtual presence in this jurisdiction may become  
182 systematic and continuous within the meaning of Rule 5.5(b)(1). Moreover, a lawyer  
183 violates paragraph (b)(2) if the lawyer ~~Such a lawyer must not~~ is not admitted to practice  
184 in this jurisdiction and holds out to the public or otherwise represents that the lawyer is  
185 admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

186 [5] There are occasions in which a lawyer admitted to practice in another United  
187 States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may  
188 provide legal services on a temporary basis in this jurisdiction under circumstances that  
189 do not create an unreasonable risk to the interests of their clients, the public or the courts.  
190 Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified  
191 does not imply that the conduct is or is not authorized. With the exception of paragraphs  
192 (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other  
193 systematic and continuous presence in this jurisdiction without being admitted to practice  
194 generally here.

195 [6] There is no single test to determine whether a lawyer's services are provided  
196 on a "temporary basis" in this jurisdiction, and may therefore be permissible under  
197 paragraph (c). Services may be "temporary" even though the lawyer provides services in  
198 this jurisdiction on a recurring basis, or for an extended period of time, as when the  
199 lawyer is representing a client in a single lengthy negotiation or litigation.

200 [7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in  
201 any United States jurisdiction, which includes the District of Columbia and any state,  
202 territory or commonwealth of the United States. The word "admitted" in paragraph (c)  
203 contemplates that the lawyer is authorized to practice in the jurisdiction in which the  
204 lawyer is admitted and excludes a lawyer who while technically admitted is not  
205 authorized to practice, because, for example, the lawyer is on inactive status.

206 [8] Paragraph (c)(1) recognizes that the interests of clients and the public are  
207 protected if a lawyer admitted only in another jurisdiction associates with a lawyer  
208 licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer  
209 admitted to practice in this jurisdiction must actively participate in and share  
210 responsibility for the representation of the client.

211 [9] Lawyers not admitted to practice generally in a jurisdiction may be authorized  
212 by law or order of a tribunal or an administrative agency to appear before the tribunal or  
213 agency. This authority may be granted pursuant to formal rules governing admission pro  
214 hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph  
215 (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or  
216 agency pursuant to such authority. To the extent that a court rule or other law of this  
217 jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain  
218 admission pro hac vice before appearing before a tribunal or administrative agency, this  
219 Rule requires the lawyer to obtain that authority.

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220 [10] Paragraph (c)(2) also provides that a lawyer rendering services in this  
221 jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in  
222 conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is  
223 authorized to practice law or in which the lawyer reasonably expects to be admitted *pro*  
224 *hac vice*. Examples of such conduct include meetings with the client, interviews of  
225 potential witnesses, and the review of documents. Similarly, a lawyer admitted only in  
226 another jurisdiction may engage in conduct temporarily in this jurisdiction in connection  
227 with pending litigation in another jurisdiction in which the lawyer is or reasonably  
228 expects to be authorized to appear, including taking depositions in this jurisdiction.

229 [11] When a lawyer has been or reasonably expects to be admitted to appear  
230 before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers  
231 who are associated with that lawyer in the matter, but who do not expect to appear before  
232 the court or administrative agency. For example, subordinate lawyers may conduct  
233 research, review documents, and attend meetings with witnesses in support of the lawyer  
234 responsible for the litigation.

235 [12] Paragraph (c)(3) permits a lawyer admitted to practice law in another  
236 jurisdiction to perform services on a temporary basis in this jurisdiction if those services  
237 are in or reasonably related to a pending or potential arbitration, mediation, or other  
238 alternative dispute resolution proceeding in this or another jurisdiction, if the services  
239 arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the  
240 lawyer is admitted to practice. The lawyer, however, must obtain admission *pro hac vice*  
241 in the case of a court-annexed arbitration or mediation or otherwise if court rules or law  
242 so require.

243 [13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide  
244 certain legal services on a temporary basis in this jurisdiction that arise out of or are  
245 reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is  
246 admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal  
247 services and services that nonlawyers may perform but that are considered the practice of  
248 law when performed by lawyers.

249 [14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be  
250 reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is  
251 admitted. A variety of factors evidence such a relationship. The lawyer's client may have  
252 been previously represented by the lawyer, or may be resident in or have substantial  
253 contacts with the jurisdiction in which the lawyer is admitted. The matter, although  
254 involving other jurisdictions, may have a significant connection with that jurisdiction. In  
255 other cases, significant aspects of the lawyer's work might be conducted in that  
256 jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction.  
257 The necessary relationship might arise when the client's activities or the legal issues  
258 involve multiple jurisdictions, such as when the officers of a multinational corporation  
259 survey potential business sites and seek the services of their lawyer in assessing the  
260 relative merits of each. In addition, the services may draw on the lawyer's recognized  
261 expertise developed through the regular practice of law on behalf of clients in matters  
262 involving a particular body of federal, nationally-uniform, foreign, or international law.  
263 Lawyers desiring to provide *pro bono* legal services on a temporary basis in a jurisdiction  
264 that has been affected by a major disaster, but in which they are not otherwise authorized

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265 to practice law, as well as lawyers from the affected jurisdiction who seek to practice law  
266 temporarily in another jurisdiction, but in which they are not otherwise authorized to  
267 practice law, should consult the [*Model Court Rule on Provision of Legal Services*  
268 *Following Determination of Major Disaster*].

269 [15] Paragraph (d) identifies ~~two~~ three circumstances in which a lawyer who is  
270 admitted to practice in another United States jurisdiction, and is not disbarred or  
271 suspended from practice in any jurisdiction, may establish an office or other systematic  
272 and continuous presence in this jurisdiction for the practice of law as well as provide  
273 legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a  
274 lawyer who is admitted to practice law in another jurisdiction and who establishes an  
275 office or other systematic or continuous presence in this jurisdiction must become  
276 admitted to practice law generally in this jurisdiction.

277 [16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide  
278 legal services to the client or its organizational affiliates, i.e., entities that control, are  
279 controlled by, or are under common control with the employer. This paragraph does not  
280 authorize the provision of personal legal services to the employer's officers or employees.  
281 The paragraph applies to in-house corporate lawyers, government lawyers and others who  
282 are employed to render legal services to the employer. The lawyer's ability to represent  
283 the employer outside the jurisdiction in which the lawyer is licensed generally serves the  
284 interests of the employer and does not create an unreasonable risk to the client and others  
285 because the employer is well situated to assess the lawyer's qualifications and the quality  
286 of the lawyer's work.

287 [17] If an employed lawyer establishes an office or other systematic presence in  
288 this jurisdiction for the purpose of rendering legal services to the employer, the lawyer  
289 may be subject to registration or other requirements, including assessments for client  
290 protection funds and mandatory continuing legal education.

291 [18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a  
292 jurisdiction in which the lawyer is not licensed when authorized to do so by federal or  
293 other law, which includes statute, court rule, executive regulation or judicial precedent.  
294 See, e.g., The ABA Model Rule on Practice Pending Admission.

295 [19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or  
296 (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule  
297 8.5(a).

298 [20] In some circumstances, a lawyer who practices law in this jurisdiction  
299 pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not  
300 licensed to practice law in this jurisdiction. For example, that may be required when the  
301 representation occurs primarily in this jurisdiction and requires knowledge of the law of  
302 this jurisdiction. See Rule 1.4(b).

303 [21] Paragraphs (c) and (d) do not authorize communications advertising legal  
304 services to prospective potential clients in this jurisdiction by lawyers who are admitted  
305 to practice in other jurisdictions. Whether and how lawyers may communicate the  
306 availability of their services to prospective potential clients in this jurisdiction is  
307 governed by Rules 7.1 to 7.5.

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## REPORT

The ABA Commission on Ethics 20/20 has examined how globalization and technology are transforming the legal marketplace and fueling cross-border practice. In studying these developments, the Commission has reviewed the existing regulatory framework governing multijurisdictional practice and lawyer mobility and produced several Resolutions and Reports. The Resolutions accompanying this Report contain proposals that are designed to address the ethics and regulatory issues associated with a lawyer's establishment of a practice in a new jurisdiction.

First, the Commission recommends the adoption of a new standalone ABA Model Rule on Practice Pending Admission, which would be cross-referenced in Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law) of the Model Rules of Professional Conduct. The new Model Rule on Practice Pending Admission would enable lawyers to practice in a new jurisdiction while the lawyer actively 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 the reality that in today's legal services marketplace a lawyer licensed in one U.S. jurisdiction may need to relocate to a new U.S. 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 clients and the public, the new Model Rule 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 might be found to have established a systematic and continuous presence in a jurisdiction, even without a physical presence there, if the lawyer routinely 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 significant 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.<sup>1</sup> 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 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. 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 has referred that issue to the Standing Committee for its consideration.

## **I. The New Proposed Model Rule on Practice Pending Admission**

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 need to relocate in order to accommodate the needs of a client who has moved to a new jurisdiction. Or the 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 within a very short timeframe. Lawyers also frequently have to relocate due to changes in personal circumstances, such as the relocation of a spouse or domestic partner due to military deployment or other professional opportunities. In sum, lawyers increasingly need to relocate during their careers, often more than once and frequently without much notice.

The Commission found and heard 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 and professional information that can take weeks or months to compile. In particular, the process typically requires a lawyer to obtain proof

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<sup>1</sup><http://www.coloradosupremecourt.com/pdfs/Registration/Rule%20220.%20Out-of-State%20Attorney%20--%20Conditions%20of%20Practice.pdf>

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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 a marketplace that requires an increasing amount of cross-border practice. Thus, the Commission concluded that, assuming procedural safeguards are put in place, these lawyers should be permitted to establish a continuous and systematic presence in the new jurisdiction for a limited time (not to exceed 365 days) while diligently pursuing formal admission. The proposed new standalone Model Rule on Practice Pending Admission, if adopted, would authorize this form of practice.

The proposed new Model Rule on Practice Pending Admission also includes a separate section that allows a foreign lawyer already licensed in one U.S. jurisdiction as a foreign legal consultant to continue practicing as a foreign legal consultant in another U.S. jurisdiction while an application to become a foreign legal consultant is pending in that new U.S. jurisdiction. It is important to note that this provision does not create any practice authority for foreign lawyers beyond what the Model Rules have already long allowed (e.g., rules relating to licensing and practice by foreign legal consultants and rules governing whether foreign lawyers can sit for a particular jurisdiction's bar examination). The section merely provides (subject to important limitations) that a foreign lawyer who is already admitted in a U.S. jurisdiction as a foreign legal consultant may continue to practice as such while their application for that form of admission is pending in another U.S. jurisdiction.

To make lawyers aware of the new practice authority, the Commission also proposes to amend Rule 5.5(d)(2) of the Model Rules of Professional Conduct to remind lawyers that they can practice in another jurisdiction on a systematic and continuous basis as long as another "rule" so provides. Comment [18] to Rule 5.5 would then make an explicit cross-reference to the proposed Model Rule on Practice Pending Admission.

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.<sup>2</sup> 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.

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<sup>2</sup> 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>

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Missouri also has a similar procedure,<sup>3</sup> and New York recently adopted a similar provision for in-house lawyers.<sup>4</sup> The Commission did not learn of any problems caused by these provisions.

The Commission nevertheless concluded that, to ensure that lawyers do not abuse the proposed exception or use this privilege in ways that would put the public at risk, numerous restrictions and limitations are appropriate. First, the lawyer must not be disbarred or suspended from practice in any jurisdiction and must not currently be subject to discipline or be the subject of a pending disciplinary matter in any jurisdiction.

Second, the lawyer must not have been previously denied admission to practice in the jurisdiction (e.g., due to a failure to satisfy the jurisdiction's 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 the Model Rule on Practice Pending Admission 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. (The Commission considered whether a failure of the jurisdiction's bar exam should be disqualifying for only a limited period of time (e.g., five years), but concluded that a cap would allow a lawyer who failed the jurisdiction's bar examination (and whose competence was, therefore, previously called into question in that jurisdiction) to engage in the practice of law in that jurisdiction without having completed a thorough vetting process, like admission by motion.)

Third, the lawyer must notify Disciplinary Counsel and the licensing authority in writing that the lawyer is taking advantage of the practice authority in the Model Rule on Practice Pending Admission. 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 submit an application for admission by motion, examination, or as a foreign legal consultant within [60] days of first providing legal services.<sup>5</sup> 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.

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<sup>3</sup> 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>

<sup>4</sup> N.Y. Comp. Codes R & Reg. 22, § 522.7.

<sup>5</sup> Registration as in-house counsel is not listed because Rule 5.5(d)(1) already provides authority for lawyers to practice as in-house counsel 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.

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Fifth, the lawyer must have a reasonable expectation that the lawyer will fulfill all of the jurisdiction's requirements for admission. 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.

Sixth, 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 the Model Rule on Practice Pending Admission as well.<sup>6</sup>

Seventh, Section 4 provides that 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 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. Upon denial of the application for admission, Section 5 provides that the Admissions Authority must notify Disciplinary Counsel that the authority granted pursuant to the Rule has terminated. Concurrently, the lawyer must stop practicing in the jurisdiction unless authorized to do so pursuant to another Rule; notify all clients being represented in pending matters in the jurisdiction, as well as opposing counsel or co-counsel, that the lawyer's practice authority has terminated; and not undertake any new representation that would require the lawyer to be admitted to practice law in the jurisdiction. These requirements are analogous to the client protection measures in Rule 27 ("Notice to Clients, Adverse Parties, and Other Counsel") of the ABA Model Rules for Lawyer Disciplinary Enforcement applicable to lawyers disbarred, placed on inactive status due to disability or suspended for more than six months.

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<sup>6</sup>The 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>.

Eighth, a Comment to the proposed Model Rule would remind lawyers about their 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 the Model Rule on Practice Pending Admission cannot “hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.” The proposed new Comments 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.

Finally, Section 3 makes clear that 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.

## **II. Proposed Amendment to Prefatory Language of Model Rule 5.5(d)**

The Commission 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.

## **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

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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 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 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 virtual practice in a jurisdiction and in 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.

#### **IV. 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 Resolutions 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 Resolutions.