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**To: ABA Entities, Courts, Bar Associations (state, local and international),
Law Schools, Individuals and Entities**

**From: ABA Commission on Ethics 20/20 Working Group on Uniformity, Choice
of Law, and Conflicts of Interest**

**Re: For Comment: Issues Paper Concerning Model Rule of Professional
Conduct 5.5 and the Limits on Virtual Presence in a Jurisdiction**

Date: June 19, 2012

Introduction

Traditionally, a U.S.-licensed lawyer who established a physical presence in another U.S. jurisdiction had to obtain a license to practice there. Model Rule 5.5(b)(1) largely reflects this view, requiring a lawyer to obtain a license in a jurisdiction if the lawyer has an office or a “systematic and continuous” presence there, unless the lawyer’s work falls within one of the exceptions identified in Rule 5.5(d). These exceptions, along with conceptually similar ones in Rule 5.5(c) that allow for temporary practice by out-of-state lawyers, were adopted by the ABA House of Delegates in 2002, at the recommendation of the ABA Commission on Multijurisdictional Practice (MJP Commission). The MJP Commission intended for these exceptions to facilitate cross-border practice in “identifiable situations that serve the interests of clients and the public and do not create an unreasonable regulatory risk.”¹

The Issue: Limits on Virtual Practice Under Rule 5.5

The Commission has learned that, since 2002, the proliferation of lawyers’ use of technology has raised new questions about the meaning of the phrase “systematic and continuous presence” in Rule 5.5(b). In particular, technology now enables lawyers to be physically present in one jurisdiction, yet have a substantial virtual practice in another. The problem is that it is not always clear when this virtual practice in a jurisdiction is sufficiently “systematic and continuous” to require a license in that jurisdiction.

Currently, Comment 4 to Model Rule 5.5 identifies the issue, but provides limited guidance as to how to resolve it. The Comment states that a lawyer’s “[p]resence may be systematic and continuous even if the lawyer is not physically present” in the jurisdiction.

¹ See Recommendation 2, ABA Commission on Multijurisdictional Practice, http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html.

Neither the Rule nor the Comment provides any clarity as to when a lawyer who is “not physically present” in a jurisdiction nevertheless has a systematic and continuous presence there.

The Commission’s Prior Proposal

The Commission previously circulated a draft proposal that would have addressed this ambiguity in a general way by adding new sentences to Comment [4] to Rule 5.5. The new sentences would have provided as follows:

For example, a lawyer may direct electronic or other forms of communications to potential clients in this jurisdiction and consequently establish a substantial practice representing clients in this jurisdiction, but without a physical presence here. At some point, such a virtual presence in this jurisdiction may become systematic and continuous within the meaning of Rule 5.5(b)(1).

In response to this proposal, several commenters suggested that the sentences not only provide little additional guidance, but that they might have the unintended effect of deterring lawyers from engaging in forms of virtual practice that should be permissible.

Based on this response, the Commission asked its Uniformity, Choice of Law, and Conflicts of Interest Working Group to evaluate whether it is possible to provide enhanced guidance on this issue, and if so, how. The Working Group has identified several possible approaches.

Possible Approaches

One possible approach is to identify the factors that lawyers and disciplinary authorities should consider when deciding whether a lawyer’s presence has become sufficiently systematic and continuous to trigger Rule 5.5(b)’s requirement that the lawyer become licensed. For example, those factors might include:

- the nature and volume of communications directed to potential clients in the jurisdiction;
- whether the purpose of the communications is to obtain new clients in the jurisdiction;
- the number of the lawyer’s clients in the jurisdiction;
- the proportion of the lawyer’s clients in the jurisdiction;
- the frequency of representing clients in the jurisdiction;

- the extent to which the legal services have their predominant effect in the jurisdiction; and
- the extent to which the representation of clients in the jurisdiction arises out of, or is reasonably related to, the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

A second possibility is for the Commission to make no proposal in this area and to refer the issue to the Standing Committee on Ethics and Professional Responsibility for an opinion on the meaning of "systematic and continuous presence" in the context of virtual law practice.

A third possibility is for the Commission to make no proposal in this area, but identify the relevant issues in an informational report that the Commission could file with the ABA House of Delegates to help educate the profession about this issue.

Before deciding how to proceed, the Commission would like to receive feedback on these possible approaches and hear if there are other approaches the Commission should consider. The Commission also would like to receive comments from lawyers who have a virtual practice and learn if those lawyers have encountered difficulties because of the ambiguous scope of Comment [4] to Rule 5.5(b). The Commission requests that any comments be sent to Natalia Vera at natalia.vera@americanbar.org by July 31, 2012.