

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

EXPLANATION OF PROPOSED RULE 5.5

Paragraph (a) and Comments [1] – [6] -

Paragraph (a) - For ease of reading and clarity, paragraph (a) in the new text covers the subject matter of the old text of Rule 5.5. The first clause is the same as paragraph (a) of the old text. The second clause is the same in substance as old paragraph (b) and E2K's draft paragraph (c), but is considerably shortened.

Comment [1] – Is similar to the first sentence of E2K's Comment [1] and explains the subjects of paragraphs (a) and (b). "Jurisdiction" for purposes of paragraph (b) is limited to any U.S. state, territory or commonwealth.

Comments [2], [3] [4] and [5] - Include substantially the same changes to current Comments [1], [7], and [8] as are contained in E2K's draft, but the language is revised to provide greater clarity.

Comment [6] – Notes that a lawyer not licensed to practice in the jurisdiction who establishes a continuous presence for the systematic practice of law there violates paragraph (a) unless authorized to do so by paragraph (b) or other law. Comment [6] also reminds that a lawyer not licensed in the jurisdiction would violate Rules 7.1(a) and 7.5(b) were the lawyer to hold out that the lawyer is licensed to practice in the jurisdiction. These limitations appear in the text of MJP's proposal (paragraph (e)), and in the Coalition proposal, and in Comments in other drafts of Rule 5.5.

Paragraph (b), Its Subparagraphs, and Comments [7] – [14]

Paragraph (b) - The Standing Committee recommends presenting the affirmative list of authorized practices in its paragraph (b). It also recommends including in Comment [7], rather than in black letter, the principle of protection of the public and clients from risk of harm. The Committee does so in the belief that "risk of harm" is too indefinite a standard of measurement to be enforceable in black letter text.

Paragraph (b) provides the five (5) generally recognized safe harbors:

- text, paragraph (b)(1) and Comment [8] – appearance before tribunals and preparation for potential proceedings;
- text, paragraph (b)(2)(i) and Comment [9] – in-house counsel practice;
- text, paragraph (b)(2)(ii) and Comments [10] and [11] – temporary provision of legal services;
- text, paragraph (b)(2)(iii) and Comment [12] – association with locally admitted counsel; and
- text, paragraph (b)(2)(iv) and Comment [13] – authorization by federal or other law.

Paragraph (b)(1) - The *pro hac vice* provision in paragraph (b)(1) and Comment [8] is substantially the same as the proposal of the MJP Commission. It is not necessary to specify "administrative agency" in the text because Rule 1.0(m) "Terminology" of the 2002 Model Rules defines tribunal to include "an administrative agency or other body acting in an adjudicative capacity." Added to the black letter text is the Coalition's concept in Comment [1] that would allow an assisting lawyer to perform the services without *pro hac vice* admission if the supervising lawyer is or expects to be so admitted.

Paragraph (b)(2)(i) - The in-house counsel provision in paragraph (b)(2)(i) is substantially similar to this provision in the other drafts of Rule 5.5. The omission of "commonly owned" from "organizational affiliates" and the term's further definition in Comment [9] as "entities that control, are controlled by or are under common control with the employer," is intended to coincide with the S.E.C. Rule definition of "affiliate." See 17 CFR 230.405. Comment [9] also recognizes that representing the employer may include representing other employees but only "in connection with the employer's matters."

Paragraph (b)(2)(ii) - Is substantially similar to the Restatement §3(3) exception respecting temporarily performing services where not admitted. It differs from the safe harbor the MJP Commission proposes by not requiring that either the client or the matter have a substantial connection with a jurisdiction where the lawyer is authorized to practice. Rather, it substitutes the Restatement concept of "*a matter arising out of or reasonably related to the lawyer's practice in a jurisdiction where authorized to practice.*" Comment [11] provides factors applicable in determining a reasonable relationship to the lawyer's practice in the jurisdiction of licensure for the purpose of paragraph (b)(2)(ii) Among several factors in Comment [11] that evidence a relationship to the lawyer's practice is the concept of a client or a matter having substantial contacts with the jurisdiction in which the lawyer is licensed. In this regard, Comment [11] is compatible with the MJP Commission's paragraph (c)(5) and also with E2K's paragraph (b)(2)(ii) that requires that a matter be "reasonably related to the lawyer's representation of a client" in the home jurisdiction. The concept of "temporary presence" is addressed by the Standing Committee's proposed Comment [6] and is further refined in Comment [10].

The Standing Committee's proposed (b)(2)(ii) is narrower than the Coalition's proposal to permit practice of law on a temporary basis, provided the lawyer does not establish a systematic and continuous presence in the jurisdiction for the practice of law and does not hold out to the public that the lawyer is licensed to practice law in this jurisdiction. In adopting the Restatement standard for temporary practice, the Standing Committee's rule is more limited than the MJP Commission's provision under paragraph (b). We believe this standard is compatible with accepted practices.

Paragraph (2)(b)(iii) – Association with local counsel, is essentially the same as the MJP Commission and E2K Commission proposals. Comment [12] is similar to E2K's proposed Comment [6].

Paragraph (2)(b)(iv) – Recognizes that a lawyer may be authorized to practice in a jurisdiction by federal or other law. Comment [13] recognizes that "other law" may include not only statutes, but also court rules, executive regulations, or case law. Examples include the military lawyer, assistant U.S. attorneys, patent lawyers as well as others.

Comment [14] - Cross references the Disciplinary Authority and Choice of Law provisions of Model Rule 8.5(a).