TAB A

Proposed Amendment of Rule 5.5 (Unauthorized Practice of Law) (showing proposed amendment of Rule 5.5 as in effect on January 1, 2022; additions underlined; [deletions in brackets])

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Rule 5.5 (Unauthorized Practice of Law)

(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. The practice of law in this jurisdiction is defined in Practice Book Section 2-44A. Conduct described in subsections (c), [and](d) and (f) in another jurisdiction shall not be deemed the unauthorized practice of law for purposes of this subsection (a).

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

(1) except as authorized by 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 which accords similar privileges to Connecticut lawyers in its jurisdiction, and provided that the lawyer is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction, that:

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

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

(3) are in or reasonably related to a pending or potential mediation or other alternative dispute resolution proceeding in this or another jurisdiction, with respect to a matter that is substantially related to, or arises in, a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within subdivisions (c)(2) or (c)(3) and arise out of or are substantially related to the legal services provided to an existing client of the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, who is in good standing in each jurisdiction in which he or she has been admitted, or who has taken retirement status or otherwise left the active practice of law while in good standing in another jurisdiction, may participate in the provision of uncompensated pro bono publico legal services in Connecticut where such services are offered under the supervision of an organized legal aid society or state or local bar association project.

(e) A lawyer admitted to practice in another jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) the lawyer is authorized to provide pursuant to Practice Book Section 2-15A and the lawyer is an authorized house counsel as provided in that section; or

(2) the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(f) To the extent that a lawyer is physically present in this jurisdiction and remotely engages in the practice of law as authorized under the laws of another United States jurisdiction in which that lawyer is admitted and in good standing, and the lawyer is not disbarred or suspended from the practice of law in any jurisdiction, such conduct does not constitute the unauthorized practice of law in this jurisdiction.

([f]g) A lawyer not admitted to practice in this jurisdiction and authorized by the provisions of this Rule to engage in providing legal services on a temporary or remote basis in this jurisdiction is thereby subject to the disciplinary rules of this jurisdiction with respect to the activities in this jurisdiction.

([g]h) A lawyer desirous of obtaining the privileges set forth in subsections (c)(3) or (4):

(1) shall notify the statewide bar counsel as to each separate matter prior to any such representation in Connecticut,

(2) shall notify the statewide bar counsel upon termination of each such representation in Connecticut, and

(3) shall pay such fees as may be prescribed by the Judicial Branch.

COMMENTARY

A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Subsection (a) applies to unauthorized practice of law by a lawyer,

whether through the lawyer's direct action or by the lawyer's assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed as self-represented parties.

Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates subsection (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b). A lawyer not admitted to practice in this jurisdiction who engages in repeated and frequent activities of a similar nature in this jurisdiction such as the preparation and/or recording of legal documents (loans and mortgages) involving residents or property in this state may be considered to have a systematic and continuous presence in this jurisdiction that would not be authorized by this Rule and could, thereby, be considered to constitute unauthorized practice of law.

There are occasions in which a lawyer admitted to practice 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 under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Subsection (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of subdivisions (e)(1) and (e)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here. There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction and may, therefore, be permissible under subsection (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

Subsections (c),[and] (d) and (f) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in subsections (c),[and] (d) and (f) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who, while technically admitted, is not authorized to practice, because, for example, the lawyer is in an inactive status.

Subdivision (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this subdivision to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

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

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

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

Subdivision (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential mediation or other alternative dispute resolution proceeding in this or another jurisdiction, if the services are with respect to a matter that is substantially related to, or arises out of, a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

Subdivision (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction if they arise out of or are substantially related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within subdivisions (c)(2) or (c)(3). These services include both

legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

Subdivision (c)(3) requires that the services be with respect to a matter that is substantially related to, or arises out of, a jurisdiction in which the lawyer is admitted. A variety of factors may evidence such a relationship. However, the matter, although involving other jurisdictions, must have a significant connection with the jurisdiction in which the lawyer is admitted to practice. A significant aspect of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities and the resulting legal issues involve multiple jurisdictions. Subdivision (c)(4) requires that the services provided in this jurisdiction in which the lawyer is not admitted to practice be for (1) an existing client, i.e., one with whom the lawyer has a previous relationship and not arising solely out of a Connecticut based matter and (2) arise out of or be substantially related to the legal services provided to that client in a jurisdiction in which the lawyer is admitted to practice. Without both, the lawyer is prohibited from practicing law in the jurisdiction in which the lawyer is not admitted to practice.

For purposes of subsection (d) and (f), an attorney in "good standing" is one who: (1) has been admitted to practice law in any United States jurisdiction; (2) is not suspended or disbarred in any other jurisdiction; (3) has never resigned or retired from the practice of law while subject to discipline or disciplinary proceedings in any other jurisdiction; (4) has not been placed on inactive status while subject to discipline or disciplinary proceedings in any other jurisdiction; and (5) is not currently subject to disciplinary proceedings in any other jurisdiction.

Subdivision (e)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

A lawyer who practices law in this jurisdiction pursuant to subsections (c), (d), [or] (e) or (f) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

In some circumstances, a lawyer who practices law in this jurisdiction pursuant to subsections (c), (d) or (e) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction.

Subsections (c), (d),[and] (e) and (f) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

Subsection (f) reflects the reality that with the advancement of technology, many lawyers work remotely from locations outside the jurisdiction(s) in which they are admitted to practice law. Subsection (f) allows those lawyers to practice law as

authorized in the jurisdiction(s) in which they are admitted while physically present in Connecticut. This section coordinates with Practice Book 2-44A (c) which provides that a lawyer admitted and in good standing in another United States jurisdiction engaged in the remote practice of law as authorized by that jurisdiction while physically present in Connecticut is not engaged in the unauthorized practice of law.

TAB B

Proposed Amendment of Connecticut Rules of Practice § 2-44A (additions underlined; [deletions in brackets])

§ 2-44A. Definition of the Practice of Law

(a) General Definition. The practice of law is ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person. This includes, but is not limited to:

(1) Holding oneself out in any manner as an attorney, lawyer, counselor, advisor or in any other capacity which directly or indirectly represents that such person is either (a) qualified or capable of performing or (b) is engaged in the business or activity of performing any act constituting the practice of law as herein defined.

(2) Giving advice or counsel to persons concerning or with respect to their legal rights or responsibilities or with regard to any matter involving the application of legal principles to rights, duties, obligations or liabilities.

(3) Drafting any legal document or agreement involving or affecting the legal rights of a person.

(4) Representing any person in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in any administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

(5) Giving advice or counsel to any person, or representing or purporting to represent the interest of any person, in a transaction in which an interest in property is transferred where the advice or counsel, or the representation or purported representation, involves (a) the preparation, evaluation, or interpretation of documents related to such transaction or to implement such transaction or (b) the evaluation or interpretation of procedures to implement such transaction, where such transaction, documents, or procedures affect the legal rights, obligations, liabilities or interests of such person, and

(6) Engaging in any other act which may indicate an occurrence of the authorized practice of law in the state of Connecticut as established by case law, statute, ruling or other authority.

"Documents" includes, but is not limited to, contracts, deeds, easements, mortgages, notes, releases, satisfactions, leases, options, articles of incorporation and other corporate documents, articles of organization and other limited liability company documents, partnership agreements, affidavits, prenuptial agreements, wills, trusts, family settlement agreements, powers of attorney, notes and like or similar instruments; and pleadings and any other papers incident to legal actions and special proceedings.

The term "person" includes a natural person, corporation, company, partnership, firm, association, organization, society, labor union, business trust, trust, financial institution, governmental unit and any other group, organization or entity of any nature, unless the context otherwise dictates.

The term "Connecticut lawyer" means a natural person who has been duly admitted to practice law in this state and whose privilege to do so is then current and in good standing as an active member of the bar of this state.

(b) Exceptions. Whether or not it constitutes the practice of law, the following activities by any person are permitted:

(1) Selling legal document forms previously approved by a Connecticut lawyer in any format.

(2) Acting as a lay representative authorized by administrative agencies or in administrative hearings solely before such agency or hearing where:

(A) Such services are confined to representation before such forum or other conduct reasonably ancillary to such representation; and

(B) Such conduct is authorized by statute, or the special court, department or agency has adopted a rule expressly permitting and regulating such practice.

(3) Serving in a neutral capacity as a mediator, arbitrator, conciliator or facilitator.

(4) Participating in labor negotiations, arbitrations, or conciliations arising under collective bargaining rights or agreements.

(5) Providing clerical assistance to another to complete a form provided by a court for the protection from abuse, harassment and violence when no fee is charged to do so.

(6) Acting as a legislative lobbyist.

(7) Serving in a neutral capacity as a clerk or a court employee providing information to the public.

(8) Performing activities which are preempted by federal law.

(9) Performing statutorily authorized services as a real estate agent or broker licensed by the state of Connecticut.

(10) Preparing tax returns and performing any other statutorily authorized services as a certified public accountant, enrolled IRS agent, public accountant, public bookkeeper, or tax preparer.

(11) Performing such other activities as the courts of Connecticut have determined do not constitute the unlicensed or unauthorized practice of law.

(12) Undertaking self-representation, or practicing law authorized by a limited license to practice.

(c) Remote Practice. To the extent that a lawyer is physically present in this jurisdiction and remotely engages in the practice of law as authorized under the laws of another United States jurisdiction in which the lawyer is admitted and in good standing, and the lawyer is not disbarred or suspended from the practice of law in any jurisdiction, such conduct does not constitute the unauthorized practice of law.

([c]d) Nonlawyer Assistance. Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with Rule 5.3 of the Rules of Professional Conduct.

([d]e) General Information. Nothing in this rule shall affect the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public.

([e]f) Governmental Agencies. Nothing in this rule shall affect the ability of a governmental agency to carry out its responsibilities as provided by law.

([f]g) Professional Standards. Nothing in this rule shall be taken to define or affect standards for civil liability or professional responsibility.

([g]h) Unauthorized Practice. If a person who is not authorized to practice law is engaged in the practice of law, that person shall be subject to the civil and criminal penalties of this jurisdiction.

TAB C

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 495 **December 16, 2020**

Lawyers Working Remotely

Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction. This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules.[1]

Introduction

Lawyers, like others, have more frequently been working remotely: practicing law mainly through electronic means. Technology has made it possible for a lawyer to practice virtually in a jurisdiction where the lawyer is licensed, providing legal services to residents of that jurisdiction, even though the lawyer may be physically located in a different jurisdiction where the lawyer is not licensed. A lawyer's residence may not be the same jurisdiction where a lawyer is licensed. Thus, some lawyers have either chosen or been forced to remotely carry on their practice of the law of the jurisdiction or jurisdictions in which they are licensed while being physically present in a jurisdiction in which they are not licensed to practice. Lawyers may ethically engage in practicing law as authorized by their licensing jurisdiction(s) while being physically present in a jurisdiction in which they are not admitted under specific circumstances enumerated in this opinion.

Analysis

ABA Model Rule 5.5(a) prohibits lawyers from engaging in the unauthorized practice of law: "[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" unless authorized by the rules or law to do so. It is not this Committee's purview to determine matters of law; thus, this Committee will not opine whether working remotely by practicing the law of one's licensing jurisdiction in a particular jurisdiction where one is not licensed constitutes the unauthorized practice of law under the law of that jurisdiction. If a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so.

Absent such a determination, this Committee's opinion is that a lawyer may practice law pursuant to the jurisdiction(s) in which the lawyer is licensed (the "licensing jurisdiction") even from a physical location where the lawyer is not licensed (the "local jurisdiction") under specific parameters. Authorization in the licensing jurisdiction can be by licensure of the highest court of a state or a federal court. For purposes of this opinion, practice of the licensing jurisdiction law may include the law of the licensing jurisdiction and other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. In other words, the lawyer may practice from home (or other remote location) whatever law(s) the lawyer is authorized to practice by the lawyer's licensing jurisdiction, as they would from their office in the licensing jurisdiction. As recognized by Rule 5.5(d)(2), a federal agency may also authorize lawyers to appear before it in any U.S. jurisdiction. The rules are considered rules of reason and their purpose must be examined to determine their meaning. Comment [2] indicates the purpose of the rule: "limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." A local jurisdiction has no real interest in prohibiting a lawyer from practicing the law of a jurisdiction in which that lawyer is licensed and therefore qualified to represent clients in that jurisdiction. A local jurisdiction, however, does have an interest in ensuring lawyers practicing in its jurisdiction are competent to do so.

Model Rule 5.5(b)(1) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." Words in the rules, unless otherwise defined, are given their ordinary meaning. "Establish" means "to found, institute, build, or bring into being on a firm or stable basis."[2] A local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence.[3] Likewise it does not "establish" a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law.

Subparagraph (b)(2) prohibits a lawyer from "hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to practice law in [the] jurisdiction" in which the lawyer is not admitted to practice. A lawyer practicing remotely from a local jurisdiction may not state or imply that the lawyer is licensed to practice law in the local jurisdiction. Again, information provided on websites, letterhead, business cards, or advertising would be indicia of whether a lawyer is "holding out" as practicing law in the local jurisdiction. If the lawyer's website,

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[2] DICTIONARY.COM, https://www.dictionary.com/browse/establish?s=t (last visited Dec. 14, 2020).

[3] To avoid confusion of clients and others who might presume the lawyer is regularly present at a physical address in the licensing jurisdiction, the lawyer might include a notation in each publication of the address such as "by appointment only" or "for mail delivery."

letterhead, business cards, advertising, and the like clearly indicate the lawyer's jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction, the lawyer has not "held out" as prohibited by the rule.

A handful of state opinions that have addressed the issue agree. Maine Ethics Opinion 189 (2005) finds:

> Where the lawyer's practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and clients located in some other jurisdiction. In neither case has the lawyer established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine where the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine.

Similarly, Utah Ethics Opinion 19-03 (2019) states: "what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none."

In addition to the above, Model Rule 5.5(c)(4) provides that lawyers admitted to practice in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in the local jurisdiction that arise out of or reasonably relate to the lawyer's practice in a jurisdiction where the lawyer is admitted to practice. Comment [6] notes that there is no single definition for what is temporary and that it may include services that are provided on a recurring basis or for an extended period of time. For example, in a pandemic that results in safety measures—regardless of whether the safety measures are governmentally mandated—that include physical closure or limited use of law offices, lawyers may temporarily be working remotely. How long that temporary period lasts could vary significantly based on the need to address the pandemic. And Model Rule 5.5(d)(2) permits a lawyer admitted in another jurisdiction to provide legal services in the local jurisdiction that they are authorized to provide by federal or other law or rule to provide. A lawyer may be subject to discipline in the local jurisdiction, as well as the licensing jurisdiction, by providing services in the local jurisdiction under Model Rule 8.5(a).

Conclusion

The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction,

while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

TAB D

Supreme Court of Florida

No. SC20-1220

THE FLORIDA BAR RE: ADVISORY OPINION—OUT-OF-STATE ATTORNEY WORKING REMOTELY FROM FLORIDA HOME.

May 20, 2021

PER CURIAM.

This matter is before the Court for consideration of a proposed advisory opinion from the Standing Committee on the Unlicensed Practice of Law (Standing Committee) regarding an out-of-state licensed attorney working remotely from Florida. We have jurisdiction. *See* art. V, § 15, Fla. Const.; R. Regulating Fla. Bar 10-9.1(g).

Thomas Restaino, an out-of-state licensed attorney, filed with the Standing Committee a request for issuance of an advisory opinion on the issue of whether it constituted the unlicensed practice of law for him to work remotely from his Florida home solely on federal intellectual property matters for a New Jersey

based law firm. The Standing Committee held a public hearing on Mr. Restaino's request, after which it filed with the Court a proposed advisory opinion concluding that Mr. Restaino's remote work activities do not constitute the unlicensed practice of law in Florida.

After the Standing Committee filed its proposed advisory opinion, the Court invited Mr. Restaino and all other interested parties to file either a brief or response in support of or in opposition to the opinion. The Real Property, Probate, and Trust Law Section of The Florida Bar filed a response in support of the proposed opinion. No other briefs or responses were filed.

Having considered the proposed opinion and the response filed, the Court hereby approves the proposed advisory opinion as set forth in the appendix to this opinion.[1]

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, MUÑIZ, COURIEL, and GROSSHANS, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

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1. References in the Appendix to TABS A, B, C, and D, are to the attachments to the proposed advisory opinion originally filed by the Standing Committee in this case on August 17, 2020.

Original Proceeding – The Florida Bar Re: Advisory Opinion

Susanne McCabe, Chair, Jeffrey T. Picker, and William A. Spillias, Standing Committee on Unlicensed Practice of Law, The Florida Bar, Tallahassee, Florida,

On behalf of the Standing Committee on the Unlicensed Practice of Law

William Thomas Hennessey III, Chair, Real Property, Probate and Trust Law Section of The Florida Bar, West Palm Beach, Florida,

Responding

Appendix

THE FLORIDA BAR
STANDING COMMITTEE ON THE
UNLICENSED PRACTICE OF LAW

FAO #2019-4, OUT-OF-STATE ATTORNEY WORKING REMOTELY FROM FLORIDA HOME

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PROPOSED ADVISORY OPINION

August 17, 2020

INTRODUCTION

This request for a formal advisory opinion is brought pursuant to Rule 10-9.1 of the Rules Regulating The Florida Bar. The Petitioner, Thomas Restaino (hereinafter, "Petitioner"), is an out-of-state licensed attorney who asked whether it would be the unlicensed practice of law for him, a Florida domiciliary employed by a New Jersey law firm (having no place of business or office in Florida), to work remotely from his Florida home solely on matters that concern federal intellectual property (hereinafter, "IP") rights (and not Florida law) and without having or creating a public presence or profile in Florida as an attorney (TAB A).

Pursuant to Rule 10-9.1(f) of the Rules Regulating The Florida Bar, public notice of the hearing was provided on The Florida Bar's website, in The Florida Bar News, and in the Orlando Sentinel. The Standing Committee held a public hearing on February 7, 2020. Testifying at the hearing were the Petitioner and Florida attorney Barry Rigby. In addition to the testimony presented at the hearing (TAB B), the Standing Committee received written testimony from three attorneys, which has been filed with this Court (Tab C).

FACTS

Petitioner set forth the following facts in his request for advisory opinion (TAB A) and in his testimony at the public hearing (TAB B): He is licensed to practice law in New Jersey, New York, and before the United States Patent and

Trademark Office (hereinafter "USPTO"). He is not licensed to practice law in Florida. He recently retired from his position as chief IP counsel for a major U.S. Corporation.[1] That position was in New Jersey. He moved from New Jersey to Florida. He started working as an attorney with a New Jersey law firm specializing in federal IP law. The firm has no offices in Florida and has no plans to expand its business to Florida. His professional office will be located at the firm's business address in New Jersey, although he will do most of his work from his Florida home using a personal computer securely connected to the firm's computer network. In the conduct of his employment with the firm, he will not represent any Florida persons or entities and will not solicit any Florida clients. While working remotely from his Florida home, he will have no public presence or profile as an attorney in Florida. Neither he nor his firm will represent to anyone that he is a Florida attorney. Neither he nor his firm will advertise or otherwise inform the public of his remote work presence in Florida. The firm's letterhead and website, and his business cards will list no physical address for him other than the firm's business

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1. In that role, Petitioner was responsible for all IP related advice and counsel to the businesses and divisions of the company. And while he is registered to practice before the USPTO, that was only a small part of the work he had done for the company (TAB B; p. 9, lines 10-17). While the Supreme Court, in *The Florida Bar v. Sperry*, 373 U.S. 397 (1963), held that Florida may not prohibit the representation of clients before the USPTO by USPTO-registered practitioners as the unlicensed practice of law, Petitioner's request does not involve his practice before the USPTO, but other aspects of his work.

address in New Jersey and will identify him as "Of Counsel – Licensed only in NY, NJ and the USPTO." The letterhead, website, and business cards will show that he can be contacted by phone or fax only at the firm's New Jersey phone and fax number.[2] His professional email address will be the firm's domain. His work at the firm will be limited to advice and counsel on federal IP rights issues in which no Florida law is implicated, such as questions of patent infringement and patent invalidity.[3] He will not work on any issues that involve Florida courts or Florida property, and he will not give advice on Florida law.

At the hearing, Petitioner testified "we've tried to set up and utilize the technology in a fashion that essentially places me virtually in New Jersey. But for the fact that I'm physically sitting in a chair in a bedroom in Florida, every other aspect of what I do is no different than where I'm physically sitting in a chair in Eatontown, New Jersey and that's the way I tried to and have structured it so that the public sees a presence in, in Eatontown, New Jersey and no other presence." (TAB B, pp. 27-8; lines 25 – 9).

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2. Phone calls to his law firm and his extension are routed to his cell phone. While clients do not dial his cell phone number directly, Petitioner's cell phone has a New Jersey area code (TAB B; p. 14, lines 5-9 and 13-17).

3. Throughout Petitioner's 32-year legal career, he has limited his practice to federal IP rights, generally, with an expertise in patent rights (TAB B; p. 9, lines 2-6). Petitioner testified that most of his law firm's work is for his former corporate employer and that as a practical matter he would be working for his former employer as outside counsel (TAB B; p. 13, lines 12-15).

Petitioner further explained "the firm employs a cloud-based system. All the files are located in New Jersey. It's actually pretty amazing. I didn't have any appreciation for this technology before I started with the firm. . . . [T]he way it works is . . . my computer in Florida is just a keyboard and a mouse and a screen. But the computer doesn't actually – you don't generate documents on the computer. Everything is actually on a computer in New Jersey, server in New Jersey. And you are just simply supplying that computer with mouse clicks and taps on your keyboard. And the document you're creating, . . . like if I were writing an amendment to USPTO office action, is actually being created in New Jersey. It's just the tapping happens in Florida, if you will." (TAB B; pp. 28-9, lines 11 – 3).

DISCUSSION

Rule 4-5.5(b)(1) of the Rules Regulating The Florida Bar provides that a lawyer who is not admitted to practice in Florida may not establish an office or other regular presence in Florida for the practice of law.

It is clear from the facts in Petitioner's request and his testimony at the public hearing that Petitioner and his law firm will not be establishing a law office in Florida. It is equally clear that Petitioner will not be establishing a regular presence in Florida for the practice of law; he will merely be living here.

The facts raised in Petitioner's request, quite simply, do not implicate the unlicensed practice of law in Florida. Petitioner is not practicing Florida law or providing legal services for Florida residents. Nor is he or his law firm holding out to the public as having a Florida presence. As Petitioner testified, "we . . . tr[ied] to make sure that no Florida citizens, no Florida businesses, certainly not the Florida courts, would have any exposure to me or . . . the work I was doing." (TAB B, p. 13; lines 19-23).

All indicia point to Petitioner's practice of law as being in New Jersey, not in Florida. It is the opinion of the Standing Committee that based on the facts set forth in his request and hearing testimony, and since there is no attempt by Petitioner or his firm to create a public presence in Florida, Petitioner does not have a presence in Florida for the practice of law.

As this Court noted in *The Florida Bar v. Moses*, 380 So. 2d 412, 417 (Fla. 1980), "the single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation." Because Petitioner is not providing legal services to Florida clients, no Floridians are being harmed by Petitioner's activity and there are no interests of Floridians that need to be protected by this Court.[4]

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4. Under Rule 8.5(a) of the New Jersey Rules of Professional Conduct (TAB D), a lawyer admitted to practice in New Jersey is subject to the disciplinary authority of New Jersey regardless of where the lawyer's conduct occurs.

In May 2019, the Utah Ethics Advisory Opinion Committee (hereinafter, "UEAOC"), in Opinion No. 19-03, opined that an individual licensed in another state who establishes a home in Utah and practices law for clients from the state where the attorney is licensed and who neither solicits Utah clients nor establishes a public office in Utah is not engaged in the unauthorized practice of law (TAB E). In coming to this conclusion, the UEAOC found no case in any jurisdiction where an attorney was disciplined for practicing law out of a private residence for out-of-state clients located in the state where the attorney is licensed. It also pointed out that the concern [under Utah's version of Rule 4-5.5] is that an attorney not establish an office or public presence in a jurisdiction where the attorney is not admitted, and that concern is based upon the need to protect the interests of potential clients in that jurisdiction. In paragraph 16 of its opinion, the UEAOC posed the following question: "[W]hat interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? . . . [T]he answer is . . . none."

Like the UEAOC, the Standing Committee's concern is that the Petitioner does not establish an office or public presence in Florida for the practice of law. As discussed above, neither is occurring here. And in answering the same question

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Consequently, Petitioner's clients would be protected by the Office of Attorney Ethics, the investigative and prosecutorial arm of the Supreme Court of New Jersey.

posed by the UEAOC, it is the opinion of the Standing Committee that there is no interest that warrants regulating Petitioner's practice for his out-of-state clients under the circumstances described in his request simply because he has a private home in Florida.

In light of the current COVID-19 pandemic, the Standing Committee finds the written testimony of Florida-licensed attorney, Salomé J. Zikakis, to be particularly persuasive:

> I believe the future, if not the present, will involve more and more attorneys and other professionals working remotely, whether from second homes or a primary residence. Technology has enabled this to occur, and this flexibility can contribute to an improved work/life balance. It is not a practice to discourage.
>
> There are areas of the law that do not require being physically present, whether in a courtroom or a law office. Using the attorney's physical presence in Florida as the definitive criteria [sic] is inappropriate. So long as the attorney is not practicing Florida law, is not advertising that he practices Florida law, and creates no public presence or profile as a Florida attorney, then there is no UPL simply because the attorney is physically located in Florida. There is no harm to the public. These facts do not and should not constitute UPL in Florida.

(TAB C).

CONCLUSION

It is the opinion of the Standing Committee that the Petitioner who simply establishes a residence in Florida and continues to provide legal work to out-of-state clients from his private Florida residence under the circumstances described in this request does not establish a regular presence in Florida for the practice of

law. Consequently, it is the opinion of the Standing Committee that it would not be the unlicensed practice of law for Petitioner, a Florida domiciliary employed by a New Jersey law firm (having no place of business or office in Florida), to work remotely from his Florida home solely on matters that concern federal intellectual property rights (and not Florida law) and without having or creating a public presence or profile in Florida as an attorney.

/s/ Susanne McCabe by Jeffrey T. Picker
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TAB E

Issued by the Committee on the Unauthorized Practice of Law
and the Advisory Committee on Professional Conduct
October 6, 2021

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the Supreme Court of New Jersey

JOINT OPINION

Committee on the Unauthorized Practice of Law Opinion 59
Advisory Committee on Professional Ethics Opinion 742

Non-New Jersey Licensed Lawyers Associated With Out-of-State Law Firms or Serving as In-House Counsel to Out-of-State Companies Remotely Working from New Jersey Home

Many non-New Jersey licensed lawyers have called the attorney ethics research assistance hotline with questions about whether they would be considered to be practicing New Jersey law if they work remotely from their New Jersey homes for law firms, or as in-house counsel for companies, that are located out-of-state. The Committee on the Unauthorized Practice of Law and Advisory Committee on Professional Ethics hereby issue this joint opinion to provide guidance on the issue.

Court Rule 1:21-1(a) states that "no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State." Accordingly, non-New Jersey licensed lawyers may not maintain a "continuous and systematic presence" in New Jersey

for the practice of law. In re Jackman, 165 N.J. 580, 588 (2000) (Massachusetts lawyers practiced law from a New Jersey law firm office). See also Advisory Committee on Professional Ethics Opinion 550 (January 24, 1985) (non-New Jersey licensed lawyers "who have not been admitted to the bar here in accordance with the rules of our Supreme Court are not authorized to conduct a practice in New Jersey, either on their own or through the subterfuge of New Jersey-licensed 'associates'").

While Court Rule 1:21-1(a) refers to practice of law "in" New Jersey, the focus of the analysis under this Rule is: (1) whether a lawyer is practicing New Jersey law; or (2) whether the lawyer maintains a "continuous and systematic presence" in New Jersey for the practice of law. The inquirers on the attorney ethics hotline state that they practice the law of the out-of-state jurisdiction where their law firms, or companies, are located, and they do not practice New Jersey law when working remotely from their New Jersey homes. The question remains whether they maintain a "continuous and systematic presence" in New Jersey for the practice of law.

Non-New Jersey licensed lawyers may practice out-of-state law from inside New Jersey provided they do not maintain a "continuous and systematic presence" in New Jersey by practicing law from a New Jersey office or otherwise holding themselves out as being available for the practice of law in New Jersey. A "continuous and systematic presence" in New Jersey requires an outward manifestation of physical presence, as a lawyer, in New Jersey. As the American Bar Association, Standing Committee on Ethics and Professional Responsibility, recently stated, lawyers do not "hold themselves out to the public" when they are "for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed." ABA Formal Opinion 495 (December 16, 2020). Hence, actions that merely manifest presence in New Jersey in the capacity of a private citizen or resident, and not as a lawyer, do not raise such concerns.

Such outward manifestations of physical presence include, most significantly, practicing from a law office located in New Jersey. See Jackman, supra, 165 N.J. at 588 (Massachusetts lawyer practicing from a New Jersey law firm office). Other outward manifestations include, but are not limited to, any advertisement or similar communication stating that the non-New Jersey licensed lawyer engages in a legal practice in New Jersey; any advertisement or similar communication referring to a location in New Jersey for the purpose of meeting with clients or potential clients; any advertisement or similar communication stating that mail or deliveries to the lawyer should be directed to a New Jersey location; and otherwise holding oneself out as available to practice law in New Jersey.

Accordingly, non-New Jersey licensed lawyers who are associated with an out-of-state law firm, or are in-house counsel for an out-of-state company, and who simply work remotely from their New Jersey homes but do not exhibit such outward physical manifestations of presence, are not considered to have a "continuous and systematic presence" for the practice of law in New Jersey. Such non-New Jersey licensed lawyers are not considered to be engaging in the unauthorized practice of New Jersey law.