Unauthorized Practice of Law: Rule 5.5 in the Age of COVID-19 and Beyond

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Lawyers increasingly practice law remotely or away from their main office. As a result they may unwittingly violate the rules prohibiting the unauthorized practice of law. This article explores the issues and options for travelling and remote lawyers to avoid violating those rules.

What Rule 5.5 permits and forbids is uncertain in many such situations and can vary from jurisdiction to jurisdiction.

Rule 5.5 of the American Bar Association (ABA) Model Rules of Professional Conduct prohibits lawyers from practicing in jurisdictions in which they are not admitted, subject to some exceptions. One exception is for services provided on a temporary basis that are "reasonably related to the lawyer's practice" in their state of licensure. Rule 5.5 seems straightforward, but in practice, its contours are nuanced, and the growing fluidity of multi-jurisdictional practice creates a challenge for lawyers and law firms trying to determine whether they are violating the rule. Lawyers who visit their firm's other offices on a regular basis may breach the rule. Also, especially since the start of the COVID-19 pandemic, lawyers working from their homes in states in which they are not admitted can step over the line into the unauthorized practice of law. It is clear that in most jurisdictions, an attorney can violate Rule 5.5 by doing a lot less than hanging a shingle and opening a practice without a license.

Obvious and Not-So-Obvious Violations

It is easy to identify a violation of Rule 5.5 in extreme cases. In *In re Trester*, the Supreme Court of Kansas indefinitely suspended an attorney who, without a license, practiced law for almost 40 years in California and actively misled clients into believing he was authorized to practice there. A practice that seems to fit perfectly into the temporary-basis exception may also violate Rule 5.5. *In re Charges of Unprofessional Conduct in Panel File No.*39302 concerned a Colorado-based environmental attorney who was found to have engaged in the unauthorized practice of law in Minnesota for communicating with a Minnesota attorney on behalf of his in-laws in connection with a dispute that they were having with their homeowner's association. In a sharply split (4–3) decision, the Minnesota Supreme Court found that the attorney had in fact practiced law in Minnesota. The court reasoned that the dispute was not inter-jurisdictional because it involved Minnesota residents, a Minnesota contract, and a Minnesota judgment; and that the matter was not reasonably related to the attorney's Colorado practice such that it would fall into the Rule 5.5(c) safe harbor for "temporary" practice. While this case may fairly be considered an outlier, it reveals the broad reach of a robustly enforced and broadly interpreted Rule 5.5.

"Temporary Basis" Exception

There are exceptions to Rule 5.5, one of which concerns legal services provided on a "temporary basis." However, the ABA's Multi-Jurisdictional Practice Commission Report acknowledges that there is no bright line distinguishing a "temporary" from a "continuous" practice.

As a result, practitioners should review the rules of the state where they aim to practice even temporarily to avoid issues. For example, in Gould v. Florida Bar, the Eleventh Circuit affirmed the district court's finding that a New York attorney who set up an office in Florida to continue his New York practice did not fall within the temporary- or occasional-practice exception by returning to his New York office at least 90 days per year. Similarly, in a District of Columbia unauthorized-practice-of-law (UPL) opinion, the Committee on Unauthorized Practice of Law found that a contract attorney who regularly performed short-term legal work for lawyers and law firms within the District of Columbia was not practicing "temporarily," and that doing different jobs for a variety of lawyers within the district constituted regular business and therefore required a D.C. license. While these examples may appear easily avoidable with the benefit of hindsight, it is critical that attorneys remain mindful of the nature and duration of their temporary practice in jurisdictions in which they are not barred. The lack of a bright-line rule should inspire practitioners to approach even temporary practice cautiously.

Moving to a New State

Given the ease with which practitioners can use technology to communicate with colleagues and opposing counsel from great distances, it can be easy to forget that state lines are not illusory when it comes an attorney's practice. Many states and the District of Columbia have time limits on how long a lawyer can reside in a state after moving there and before applying for bar admission. Lawyers who delay their application after moving to a new state may find that they are inadmissible to waive into the bar of the new state or take the bar exam. Typically, attorneys who move to another state and plan to take the bar exam of their new state or seek admission are regarded as "nonlawyers" and may not engage in the practice of law in their new state unless they are granted leave to appear *pro hac vice*. However, some states allow such lawyers to practice temporarily as law clerks under the supervision of a locally admitted lawyer.

This problem seems particularly acute in the District of Columbia, where there has been a noticeable increase in individuals seeking bar admission there being "flagged" as potentially out of compliance with local rules regarding unauthorized practice. In many instances, the applicants unwittingly held themselves out as being authorized to practice in D.C., by allowing their name to be used in marketing materials without an appropriate disclaimer, a violation of the prohibition against holding oneself out to be authorized to practice in D.C. The District of Columbia's Rule 49 has a well-earned reputation as one of the most generous rules of its kind, but its 13 exceptions are not a blanket waiver of the requirement of being locally licensed. For instance, an attorney who passes the bar in another state may not be referred to as an "associate" of a D.C. firm without explicitly indicating that the attorney is not admitted in D.C. and is under the supervision of an attorney admitted in D.C. The attorney may do this for up to 360 days before running afoul of the rule that allows for 360 days to seek and obtain admission to the bar. Ensuring that new hires immediately apply for admission is an effective way to avoid these issues.

Licensed in One State, Working from Another

A small handful of states (including Arizona and New Hampshire) have expressly acknowledged that it is not the unauthorized practice of law to practice remotely; that is, being physically present outside the state in which a lawyer is licensed while working on matters in the state of licensure. This seems like an obvious conclusion when many lawyers work almost exclusively through electronic filing, conference or video calls, and similar remote means, but such a result is not required by Rule 5.5 or its comments.

A telling example of this problem comes from Ohio. In *In re Application of Jones*, the Supreme Court of Ohio considered an application for admission submitted by a Kentucky attorney who had been temporarily practicing at her firm's office in neighboring Ohio. The attorney's firm had recently merged with a firm with an office in Cincinnati and the lawyer relocated to Ohio for personal reasons and worked out of the Cincinnati office on Kentucky matters. When she subsequently applied to the Ohio Bar, its Board of Commissioners on Character and Fitness investigated and ultimately opposed her admission based on the unauthorized practice of law in Ohio. The Ohio Supreme Court ultimately held that the attorney was permitted to practice temporarily under Ohio's version of Rule 5.5(c) pending resolution of her application for admission. Despite this result, most practitioners would agree that in these circumstances, the process itself was a punishment enough for relocating across the river and working on home-state matters out your firm's office in a neighboring state.

As such, attorneys should be mindful when telecommuting (if they live in a different state from where they practice) and when working out of an office in a state in which they are not licensed, as was the case in *Jones.*Fortunately for those hoping to work remotely from Florida, the Florida Bar Standing Committee on UPL has just issued a proposed advisory opinion that a New Jersey lawyer physically working from his home in Florida exclusively on matters for his New Jersey law firm is not committing UPL in Florida as long as he does not hold himself or his firm out to the public as having a Florida presence, does not give advice about Florida law, and provides no legal services to Florida residents.

Cross-Border Practice

With the internet, every lawyer has some marketing presence in every state and around the world. When clients are from another state, working for them may constitute unauthorized practice in the state the clients are from. For example, in *Ohio State Bar Ass'n v. Klosk,* a California attorney was sanctioned by the Ohio Supreme Court for mailing a letter on behalf of an Ohio resident in an effort to negotiate a debt reduction. An Ohio resident executed a power of attorney authorizing the lawyer to communicate with his creditors, who then sent a letter on his firm's stationery to his client's creditors identifying the debtor as his client. An Ohio court found this to be a violation of Ohio law prohibiting an individual unlicensed to practice in Ohio from negotiating legal claims on behalf of an Ohio resident, advising a resident of their legal rights, or identifying oneself as a resident's legal representative. Ultimately, the lawyer and his firm were enjoined from practicing law in Ohio and fined $2,000. Notably, the court indicated that the fine was relatively minor because this was a first offense and no one had been harmed as a result of the unauthorized practice.

Some states have tried to define the limits of cross-border representation. For example, Indiana added a comment to its version of Rule 5.5 that specifically warns out-of-state attorneys that "advertising in media specifically targeted to Indiana residents or initiating contact with Indiana residents for solicitation purposes could be viewed as 'systematic and continuous presence'" in Indiana, thus eliminating any protection provided by the rule for "temporary" practice. Ultimately, given the lack of clear guidance on the issue, attorneys and law firms should take a cautious approach to managing their internet presence and be mindful of any specific nuances in the jurisdiction in which they practice—even if that practice is purely virtual.

Broadening Practice and Multi-Office Firms

Law firms with multiple offices must pay particular attention to multi-jurisdictional practice issues. In *In re Gerber*, Gerber referred to himself as a "staff attorney" and a "government relations attorney" working out of the Bismarck, North Dakota, office of a Minneapolis-based firm. Gerber was licensed only in Minnesota, but represented clients before the North Dakota legislature as a registered lobbyist. Gerber was supervised by a Minnesota-based attorney in connection with all of his work and he did not "obtain or retain his own clients with respect to legal work, other than with respect to his lobbying activities." After leaving the Minneapolis firm, Gerber sought admission in North Dakota. He later withdrew that application because he found employment in Minnestoa. Nonetheless, the North Dakota Bar determined that Gerber, through his firm, had established a permanent office in North Dakota and practiced in the state for 13 months without a license, and, thus, Gerber should be "admonished." The North Dakota Supreme Court affirmed. It concluded that, based in large part on the law firm's press release announcing Gerber's hiring and role, he had violated N.D. Rule 5.5(d) ("a lawyer who is not admitted to practice in this jurisdiction shall not represent or hold out to the public that the lawyer is admitted to practice in this jurisdiction") and that the lack of disclaimer on the firm's website concerning Gerber's lack of authorization to practice in North Dakota contributed to this finding. The lesson is that both attorneys and the firms that employ them should be mindful about where an attorney practices and how that practice is being represented to others.

Conclusion

In our virtual age it is possible for most lawyers to work from anywhere, making it tempting to represent clients wherever they may be found. Due to COVID-19, the desire to work in a safe place that happens to be on the wrong side of a border may further entice lawyers to ignore that border. However, what Rule 5.5 permits and forbids is uncertain in many such situations and can vary from jurisdiction to jurisdiction. For lawyers who find that their clients are in one state, their license in another, and themselves in a third, knowing what each state permits and requires is critical to avoiding claims based on the unauthorized practice of law.

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