Wednesday, November 3, 2021
2:00 PM – 3:15 PM

Workshop 1

Practical Tips for Avoiding Trouble When Working Remotely: *Privilege, Confidentiality, Technology Competence and More*

Presented to

2021 U.S. Law Conference
San Francisco Marriott Marquis
San Francisco, CA
November 3-5, 2021

by:

John G. Cameron Jr.
Member
Dickinson Wright PLLC
200 Ottawa Ave., N.W., Suite 1000
Grand Rapids MI 4950
JCameron@dickinsonwright.com

Pamela Westhoff
Partner
Sheppard Mullin
333 South Hope Street, 43rd Floor
Los Angeles, CA 90071
pwesthoff@sheppardmullin.com

The COVID-19 pandemic has been a monumental challenge on so many levels. But as the saying goes, "change is good" and with challenge comes to the opportunity to test ourselves, expand our skill sets, and increase our resilience and flexibility. This workshop is designed to explore both what we have learned from working remotely and virtually, and how we can incorporate those lessons into our law practices in the future. Bar Associations across the nation also rose to the challenge to provide us with guidance regarding best practices and strategies to address the new realities of our practice in a manner that is consistent with our ethical obligations as attorneys.

The Basic Concepts: So What are the Rules?

State Bar Guidance: Remote practice does not alter a lawyer's ethical duties in any respect. Here is a California example in the form of a Draft Formal Opinion Interim No. 20-0004 Ethical Obligations When Working Remotely: https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000027511.pdf

American Bar Association: Formal Opinion 495, Lawyers Working Remotely, issued December 16, 2020 and Formal Opinion 498, Virtual Practice, provides numerous guideposts for working remotely, and that state bars look to for guidance in state rules. See https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility /aba-formal-opinion-495.pdf

Several principles can be elucidated from the ABA Opinion of relevance, even if not adopted directly by state bars. *First,* all the rules regarding UPL (unauthorized practice of law) still apply – you are practicing law in the jurisdiction you are actually sitting in while working remotely, but there is flexibility in the rules. *Second,* technology is a blessing and a curse – exercise care and focus on cybersecurity. *Third*, a lawyer must always uphold their duties of clear communication, diligence and competence, regardless of the technology used and the location where they are using it. *Fourth*, the ABA has a Cybersecurity Handbook that lawyers can familiarize themselves with, and have their IT staff familiarize themselves with in order to implement security protocols: "The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals, Second Edition"

Model Rule 5.5: The key consideration is how the lawyer holds herself out to the public. *Appendix 1* provides the text of the Rule. In essence, an attorney may not establish "an office or other systematic and continuous presence" where they are not properly licensed. However, every attorney potentially engaged in such practices should check their local rules, including both those of the state where they are sitting and the places where they are presumptively practicing as both may have rules that apply. Particularly in light of the recent past, the local rules

continue to evolve. *Appendix 2* provides a cautionary tale: No Good Deed Goes Unpunished – a Harsh Lesson on Multi-Jurisdictional Practice.

California Rules of Professional Conduct – Rule 1.1 Competence. California's Rule 1.1 concerning competence was updated as of March 22, 2021 – *see Appendix 3.* It made a key addition concerning the duty of the lawyer to keep abreast of changes, ***including the benefits associated with relevant technology.*** The Rule also references a lawyer's obligation to supervise subordinate lawyers and nonlawyers, a practice made more challenging in a remote environment.

Other Jurisdictions: Various other jurisdictions have enacted new rules on "working from home" and they cover a variety of practical scenarios.

The **Pennsylvania Bar Association** has issued guidance that includes advice on handling client information in a home environment. *See Pennsylvania Bar Association Formal Opinion 2020-300*. https://www.pabar.org/members/catalogs/Ethics%20Opinions/formal/f2020-300.pdf

The **District of Columbia Court of Appeals Committee on Unauthorized Practice of Law** issued an opinion concluding that "persons who are not District of Columbia bar members may practice law from personal residences or other locations within the boundaries of the District of Columbia, as that practice constitutes "incidental and temporary practice" *See Opinion 24-20: Teleworking from Home and the COVID-19 Pandemic. http://dccourts.insomnation.com/sites/default/files/2020-03/CUPL-Opinion-24-20_0.pdf*

In **Florida**, the UPL Standing Committee issued an advisory opinion finding that an out-of-state licensed attorney working remotely from his Florida home for his out-of-state law firm on matters of federal law was not engaged in the unlicensed practice of law. Key to this determination was the fact that the lawyer did not have or create a public presence or profile in Florida as an attorney. *See Opinion No. SC20-1220 issued May 20, 2021 by the Supreme Court of Florida*. https://www.floridasupremecourt.org/content/download/743446/opinion/sc20-1220.pdf

In **New York**, the Rules of the Court of Appeals for the Temporary Practice of Law in New York allow a lawyer not admitted in the State to provide legal services on a temporary basis provided that:

> (a) A lawyer who is not admitted to practice in this State may provide legal services on a temporary basis in this State provided the following requirements are met.
>
> (1) The lawyer is admitted or authorized to practice law in a state or territory of the United States or in the District of Columbia, or is a member of a recognized legal profession in a non-United States jurisdiction, the members of which are admitted or authorized to practice as attorneys 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; and
>
> (2) the lawyer is in good standing in every jurisdiction where admitted or authorized to practice; and
>
> (3) the temporary legal services provided by the lawyer could be provided in a jurisdiction where the lawyer is admitted or authorized to practice and may generally be provided by a lawyer admitted to practice in this State, and such temporary legal services:
>
> > (i) are undertaken in association with a lawyer admitted to practice in this State who actively participates in, and assumes joint responsibility for, the matter; or
> >
> > (ii) 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; or
> >
> > (iii) are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services are not services for which the forum requires *pro hac vice* admission; or

(iv) are not within paragraph (3)(ii) or (3)(iii) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted or authorized to practice. [*Rule 523*]

Putting It Into Practice: The Every Day Realities

While staying abreast of rule changes that may affect your practice is difficult, putting all of these rules into practice is more so. Several considerations should be given to facilitate compliance with the rules that continue to evolve for lawyers engaging in remote practice: ***First,*** if you are not at a "big firm" with a cutting edge IT department, may be necessary to onboard a consultant or other advisor to advise as to use of technology and adopting new technology. ***Second,*** hardware and software systems must be protected from unauthorized access: encryption, anti-virus measures, security updates, secure routers, measures to address stolen identities. ***Third***, the security of "Dropbox" methods is of paramount concern when transmitting confidential documents. You need the surefire ability to lockout unauthorized collaborators, track access and entry. ***Fourth***, confidentiality is more of a challenge when you work virtually. There are benefits and risks of all the virtual communication and videoconferencing platforms – Zoom, Teams, Chime, etc. It is both difficult and necessary to stay up with all the latest security measures. ***Fifth***, an Emergency Preparedness Plan should be prepared. Everyone needs one, regardless of the size or type of your office or company. We are now requiring this in most tenant leases, including law firms. It is easy to have a phone tree, but more complicated to develop and implement a data breach policy and a plan to communicate with clients in the event of a breach. ***Sixth***, there are pitfalls of Smart Speakers as they are always listening! ***Seventh***, for notices and service of process, there should be means to stay in touch with your team. Is anyone checking on what actually came to the office? Many examples over the past year of missed official notices and defaults. ***Eighth***, retention agreements for consultants, vendors and experts need to be analyzed. Likely, these templates all need to change and evolve with the circumstances of remote practice by the lawyers and the experts/consultants. Many clients are requiring law firms to sign and update cybersecurity policies and addressed directly to benefit the client's sensitive information and data. ***Ninth,*** are you engaging in the Unauthorized Practice of Law (UPL)? Double check yourself! ***Tenth***, accessing client systems for collaboration also includes risk. One client recently sent a whole package of cybersecurity rules and key fobs just to allow us to access a status portal. ***Eleventh***, new "hotdocs" style systems and well known forms (e.g., AIR and CAR) may result in client information stored in the cloud. Before commencing use of any system that populates forms through a cloud-based system, complete a thorough review of the security aspects of each program. Who can get to the information you put into "cyberspace"? Are there alternatives that provide better security? ***Twelfth***, if you print at home, don't forget to SHRED!

Action Items and Take-Aways

In preparing for this workshop, we reviewed a wide range of information, new rules, commentary and advice. We look forward to discussing new developments and guidelines with you and invite discussion on the following concepts, we also offer the following action items and take-aways to consider as you return to practice.

A. Sharing information is more important than ever. Participation in workshops at conferences enables us all to tell our "war stories" ("horror stories") and learn about what can go wrong

B. It's ok to be paranoid. Always think about the information you have and who may get it.

C. Be careful how you present yourself – on video and in writing - in a legal practice setting. Review the relevant multi-jurisdictional practice rules and act accordingly. You may want to consider adding additional information and specific disclosures to your electronic communications.

D. If you are not a cybersecurity maven and you don't have a cutting edge IT department, secure a good outside resource, perhaps sharing with your similarly situated colleagues in the profession.

E. Take special care with written and verbal communications when you are outside the office – assume "they" are always listening.

F. Don't skip or gloss over those ethics presentations available online and in newsletters. The legal ethics world is constantly evolving and we all need to pay more attention than ever.

Thank you for joining us. We welcome your comments.

APPENDIX 1
California Rules of Professional Responsibility
Rule 1.1 Competence
(Rule Approved by the Supreme Court, Effective March 22, 2021)

(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

(b) For purposes of this rule, "competence" in any legal service shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (i) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes* to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.

(d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably* necessary in the circumstances.

Comment

[1] The duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology.

[2] This rule addresses only a lawyer's responsibility for his or her own professional competence. See rules 5.1 and 5.3 with respect to a lawyer's disciplinary responsibility for supervising subordinate lawyers and nonlawyers.

[3] See rule 1.3 with respect to a lawyer's duty to act with reasonable* diligence.

APPENDIX 2

No Good Deed Goes Unpunished—A Harsh Lesson on Multi-Jurisdictional Practice
by John G. Cameron, Jr. *

In a decision that many will find surprising, the Minnesota Supreme Court recently held that engaging in e-mail communications with people in Minnesota may constitute the unauthorized practice of law in Minnesota, in violation of Minn. R. Prof. Conduct 5.5(a), even if the lawyer is not physically present in Minnesota.[1] In this sad case, the Colorado lawyer involved represented a Minnesota couple (his in-laws) with respect to a Minnesota judgment and attempted to negotiate, via e-mail, the satisfaction of that judgment with a Minnesota lawyer.[2] Many lawyers, perhaps even some ACREL fellows, may unwittingly engage in similar practices.

Now a more careful approach may be warranted. Many practitioners may not realize that in most jurisdictions being sanctioned out of state triggers a duty to self-report to all jurisdictions admitted and may then result in "hometown" disciplinary proceedings. Discipline may also trigger ACREL sanctions. And unauthorized practice is unlawful in many jurisdictions.[3] Just because others may do it, or that the counseling may, to you, be *de minimus,* that may not satisfy a bar that is "foreign to you"!

Before 1998, many attorneys assumed that unauthorized practice in a state required some degree of physical presence in the state.[4] The *Birbrower* decision changed that. What, then, is the present state of the law on the subject of contacts sufficient to subject a lawyer to the jurisdiction of a state's rules of conduct and disciplinary proceedings under them? In other words, what constitutes "entry" into a state by a lawyer sufficient to constitute the practice of law there?

The best known decision in this arena is indeed *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119; 949 P.2d 1 (1998). In this case, the California Supreme Court held that an out-of-state law firm, not licensed to practice law in California, violated California law when it performed legal services in California for a California-based client under a fee agreement which stipulated that California law would govern all matters in the representation. *Birbrower* is the seminal decision discussing the unauthorized practice of law under these circumstances.

California's Business and Professions Code Section 6125 provided that "[n]o person shall practice law in California unless the person is an active member of the State Bar." In the early 1990's (prior to the prevalent use of e-mail), three attorneys from a New York law firm, each licensed in New York and not in California (none of the firm's attorneys were licensed in California), performed "substantial work" for a California client under California law. 17 Cal 4th at 124-125. The attorneys traveled to California several times in their representation of the client, and in those meetings, they unquestionably practiced law through the giving of recommendations and legal advice and even filing an arbitration demand in California. *Id.*

The client subsequently sued the law firm for legal malpractice, alleging, among other claims, that the firm practiced law without a license in California, making its fee arrangement unenforceable. *Id.* at 126.

The California court discussed at length the definition of the statutory phrases to "practice of law" and "in California." *Id.* at 127-128. It concluded there was no doubt that the firm was practicing law, but noted that there was no authority on what it meant to practice law "in California." The court said:

> the practice of law 'in California' entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California.' The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.

---

* Mr. Cameron is a member of Dickinson Wright PLLC and practices out of its Grand Rapids, Michigan, office. He is a member of the Illinois, Michigan, Colorado and North Carolina bars. The assistance of Christina K. McDonald and Nicholas Curcio, Grand Rapids member and associate, respectively, of Dickinson Wright PLLC, is gratefully acknowledged.

[1] *In re Charges of Unprofessional Conduct in Panel File No. 39302,* 884 N.W.2d 661 (Minn. 2016).

[2] That Minnesota lawyer reported the Colorado lawyer to the Minnesota disciplinary authorities. About the only solace coming out of this decision for the Colorado lawyer is the court's conclusion that the appropriate disposition for this misconduct was an admonition. It is unclear whether the lawyer will be subject to discipline in Colorado.

[3] *See, e.g.,* HRS §§ 605-14, 17; MCL 600.916.

[4] *See* S. Wechsler, "Professional Responsibility," 53 Syracuse L. Rev. 737, 741-43 (2003).

Id. at 128. Thus, the concept of "sufficient activities" was raised, though not specifically defined.

The court adopted a case-by-case approach, noting that an unlicensed lawyer's physical presence in the state is only one factor in deciding whether a person engaged in the unauthorized practice of law. "For example, one may practice law in the state . . . although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means," rejecting "the notion that a person automatically practices law 'in California' whenever that person practices California law anywhere or 'virtually' enters the state by telephone, fax, e-mail or satellite." *Id.* at 128-29.

The court ultimately held that the law firm engaged in the unauthorized practice of law in California. In making its decision, the court said "[a]lthough we are aware of the interstate nature of modern law practice and mindful of the reality that large firms often conduct activities and serve clients in several states, we do not believe these facts excuse law firms from complying with section 6125." *Id.* at 124-25.

The Minnesota court, in evaluating the Minnesota lawyer's allegations of the unauthorized practice of law, leaned on the *Birbrower* analysis. "Appellant contacted 'D.R.,' a Minnesota lawyer, and stated that he represented Minnesota clients in a Minnesota legal dispute. This legal dispute was not interjurisdictional; instead, it involved only Minnesota residents and a debt arising from a judgment entered by a Minnesota court." 884 N.W.2d at 666.

A brief review of decisions around the country reveals that other courts have on other facts also found "sufficient contact" to implicate their rules of conduct:

- *In re Williamson*, 838 So.2d 226 (Miss. 2002): Here, the Mississippi court reviewed the lower court's denial of an out-of-state lawyer's motion for admission *pro hac vice.* The lawyer, who was not licensed in Mississippi, had participated in more than five cases in Mississippi within the immediately preceding one-year period, in violation of Mississippi's rules governing the unauthorized practice of law. The Mississippi court held that the lawyer was engaged in the unauthorized practice because he advertised legal services in Mississippi and retained clients specifically to represent them in litigation in courts of that state, but then used local counsel to handle the actual court appearances in an attempt to circumvent the state's practice of law requirements.

- *In re Babies,* 315 B.R. 785 (Bankr. N.D. Ga. 2004): This decision provides a cautionary tale for lawyers who believe they are appropriately seeking local counsel for their out-of-state clients following preparation of documents or similarly limited representation. In this case, Illinois lawyers who were not licensed in Georgia were retained by debtors through a credit counseling referral service. The Illinois lawyers prepared their bankruptcy filings for the debtors and found local counsel in Georgia to represent them. The Georgia counsel filed the bankruptcy papers and appeared as the debtors' sole counsel. After learning that the debtors had paid Illinois counsel for preparing their papers, the court brought all counsel in to determine whether Illinois counsel was engaged in the unauthorized practice of law in Georgia. The court held that the Illinois counsel had engaged in the unauthorized practice of law, but admitted them *pro hac vice* to eliminate any sanctionable conduct, finding that they had operated in good faith in obtaining Georgia counsel. Interestingly, the court held that the Illinois attorneys had performed legal services in Georgia through their use of the telephone and the mail.

- *In re Tonwe*, 929 A.2d 774 (Del. 2007): In this case, a Pennsylvania lawyer was found to have engaged in the unauthorized practice of law in Delaware. She represented Delaware residents in connection with their personal injury claims under Delaware insurance policies from her Delaware office. The lawyer lived in Delaware, was active in networking with church groups in Delaware, and actively recruited clients in that state.

- *In re Ferrey*, 774 A.2d 62 (R.I. 2001): In this case, a Massachusetts attorney actively practicing law before the Rhode Island Energy Facility Siting Board sought *pro hac vice* admission, *nunc pro tunc*, to the Rhode Island bar. However, the Board before which he had been practicing did not have the authority to grant the attorney permission to practice before it, so the lawyer sought admission through the courts. The court refused to admit the attorney *nunc pro tunc* because he was not authorized to practice law in Rhode Island and did so unlawfully, but did permit a prospective *pro hac vice* admission.

Thus, *Birbrower's* "sufficient-contact" analysis seems to be consistent with the way most courts analyze cases involving contact (i.e. emails,[5] phone calls, etc.) emanating outside of their state. The two key factors seem

[5] Notably, all of the cases discussed above involve a sustained pattern of communications being sent into the state. None of the cases deal with a situation where an attorney sent but a single email message.

to be: (1) whether the attorney advises the client on the law of the state or engages in conduct, like negotiations, that might require knowledge of the law; and (2) whether the client is located in the state where the attorney is unlicensed.[6] Where the answer to both of those questions is "yes," courts tend to find unauthorized practice in the state. But where the answer to at least one of those questions is "no," courts tend find that the attorney did not engage in unauthorized practice in the state.

Two decisions illustrate the latter point:

In *Fought & Co. v. Steel Eng'g & Erection, Inc.,* 87 Haw. 37; 951 P.2d 487 (1998), the law firm at issue, that consulted with the Hawaiian counsel that was in charge of their common client's litigation, was located outside of Hawaii and did not appear in any Hawaii court on Fought's behalf. Its services in connection with the Hawaii litigation did not constitute the unauthorized practice of law because Fought and the law firm were both located in Oregon; hence, the law firm did not represent a Hawaiian client, all services performed by the law firm were in Oregon, and the law firm did not draft or sign any papers filed during the appeal, did not appear in court, and did not communicate with counsel for other parties on Fought's behalf.

According to the Hawaii court, the following did amount to the practice of law, but because none were conducted in Hawaii members of the Oregon firm were not subject to discipline there:

- Consultation with Fought and Fought's Hawaiian counsel regarding an appeal
- Preparation of Fought's statement of position in anticipation of mediation
- Assisting Fought's Hawaii counsel with legal research, analysis of briefs and papers submitted by other parties
- Resolution of issues pertaining to the posting of bond
- Planning Fought's strategy for the appeal
- Reviewing and critiquing briefs and other papers prepared by Fought's Hawaiian counsel

El Gemayel v Seaman, 72 N.Y.2d 701; 533 N.E.2d 245 (1988), involved an attorney admitted to practice in Lebanon and working as a Middle Eastern law consultant in Washington, D.C., who sought fees incurred in New York in connection with a Lebanese legal matter. His contacts with New York were deemed incidental and innocuous:

- Client residing in New York sought his advice on whether Lebanese courts would honor a Massachusetts custody decree
- He made frequent phone calls to client in New York to report on progress of the case
- He made a single visit to New York to return luggage client had left in Lebanon (although they did discuss the bill he was owed during that visit)
- He mailed his bill to New York

The lawyer had contacts in places other than New York:

- He rendered his opinion in a letter addressed to clients in Massachusetts
- The bulk of plaintiff's services were performed in Lebanon
- He accompanied client and her Massachusetts attorney to a Massachusetts court to obtain copy of judgment
- He authenticated documents so that they could be used in Lebanon
- He helped client complete a power of attorney form and in applying for a Lebanese visa[7]

It is important to remember that the rules in many states expressly allow an out-of-state attorney to "occasionally" or "temporarily" represent clients in the state, if the representation arises out of that attorney's authorized practice in his home state. *See* ABA Model Rule 5.5; 8.5. Like the "sufficient contact" test itself, these exceptions seem to turn in large part on whether the client is located in the state where the attorney is unlicensed to practice. *See, e.g., In re Babies,* 315 B.R. 785 (Bankr. N.D. Ga. 2004) (lengthy discussion of when it is appropriate for an attorney to continue advising an existing client in another state).

Finally, although this is not the unanimous opinion of members of the ACREL Committee on Professional Responsibility, it seems that states generally are not concerned with attorneys who represent out-of-state clients

[6] Indeed, the behavior that is most likely to subject an attorney to discipline is the engagement of a new client in a state where the attorney is not licensed, and advising that client or negotiating on behalf of that client in a way that relates to the law of the state where the attorney is not licensed.

[7] The lawyer arguably engaged in the practice of law in Massachusetts, but that wasn't an issue in this case.

with respect to out-of-state matters while vacationing or visiting. See comments to Florida Rule 4-5.5; Maine Professional Ethics Opinion #189. The same two factors that courts consider with respect to extraterritorial activities seem to also be the most relevant when the out-of-state attorney is physically present in the state.

APPENDIX 3
American Bar Association Model Rules
Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

Law Firms And Associations

(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:

(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 arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice 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 paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

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

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

Comment on Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law
***Law Firms And Associations*:**

[1] 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. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer 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.

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

[3] 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 *pro se*.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (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 Rule 7.1.

[5] 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. Paragraph (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 paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] 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 paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) 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. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) 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 on inactive status.

[8] Paragraph (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 paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] 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 paragraph (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.

[10] Paragraph (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.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (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.

[12] Paragraph (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 arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in 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.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (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.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects 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 or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. See also Model Rule on Temporary Practice by Foreign Lawyers. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is

well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See Model Rule for Registration of In-House Counsel.

[18] Paragraph (d)(2) recognizes that a U.S. or foreign 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. See, e.g., Model Rule on Practice Pending Admission.

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

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

[21] Paragraphs (c) and (d) 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 7.3.