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Unauthorized Practice of Law

Key Concepts

- The practice of law by one without a license or other permission to practice law is the unauthorized practice of law.
- A lawyer who assists another person in the unauthorized practice of law is acting improperly.
- A lawyer may not have an office or other "systematic and continuous" presence in a jurisdiction in which the lawyer is not admitted.
- A lawyer may practice law temporarily if the lawyer seeks the appropriate approval.
- A lawyer may not advertise him or herself as a lawyer admitted in a jurisdiction in which the lawyer is not admitted.

Introduction

The traditional rule tends to be that you may only practice law in jurisdictions where you have been licensed to practice. This makes sense—particularly given the many steps you must take in order to be admitted to the bar of your particular state. The admissions process was created on the theory that the practice of law requires a high level of skill and expertise, and that the public should be protected from people lacking that skill and expertise. It is logical that jurisdictions would allow only those individuals certified as exhibiting the requisite level of skill and expertise to practice law.

The issue of the unauthorized practice of law typically arises in two settings: first, the practice of law by a non-lawyer, a person not admitted to practice in any

jurisdiction; and second, the practice of law by a lawyer admitted to practice in a jurisdiction but not admitted to the jurisdiction in which the lawyer is practicing.

The first setting is obvious. A person with no legal training or expertise, not admitted in any jurisdiction, engages in conduct within the definition of the practice of law. For example, assume Jerry has just graduated college but has no legal training and has not been admitted to practice law in any state. Jerry has created a business that gives estate planning advice and drafts wills in the state he lives in (California). By so acting, Jerry is engaging in the unauthorized practice of law in California. Many states make the unauthorized practice of law a crime. A court could punish Jerry or issue an injunction prohibiting Jerry from engaging in these activities.

In the second situation, Lucy Lawyer is admitted in the state jurisdiction of Washington. Lucy engages in conduct within the definition of the practice of law when she renders legal advice to a client about a contract matter—the client wants to sue for breach of an employment contract that was created in California. If Lucy renders this advice when she visits the movie studio owned by her client, Lucy engages in the unauthorized practice of law under the traditional view. Lucy is practicing law in California, a state that has not admitted Lucy. Like the first example, Lucy's conduct is improper under the ethical rules and possibly criminal as well.

The rules of professional responsibility have modified this approach slightly by allowing certain conduct that might have otherwise constituted the unauthorized practice of law under the traditional rules. Under the recent changes in most states' rules, Lucy's conduct may not be the unauthorized practice of law in California *if she obtained the appropriate permission from a California court to practice law in the state temporarily*.

What's the rationale behind this rule? Some commentators believe that the true rationale for forbidding the practice of law by those not admitted to the bar of a particular state is the need for that state to control competition between lawyers. Others question such restrictions in light of the inability of some individuals to gain access to legal assistance because of economic or other barriers. These commentators argue that any constraint on the supply of legal services is improper. In the first scenario—where a person with no legal training "practices" law—the rationale of protecting the public from the unskilled "pretend" lawyer seems to justify a restraint on a person with no legal training.

The rule governing the unauthorized practice of law is Rule 5.5.[1] Rule 5.5 (a) prohibits a lawyer from practicing law or assisting another in the practice of law

if those actions are a "violation of the regulation of the legal profession in that jurisdiction." The traditional approach has been that any practice of law without admission in the jurisdiction was a violation of the ethical rules. Rule 5.5(b) provides guidelines about what it means to practice law. Rule 5.5(b) prohibits anyone who is not admitted to practice in that state from having a "systematic and continuous presence" in that state or from holding out to the public that the lawyer is practicing law in that state.

Rule 5.5(c) modifies the traditional prohibition on out-of-state lawyers practicing in a particular jurisdiction by providing exceptions to this traditional rule. If a lawyer's situation fits within an exception, then the lawyer may practice law in a jurisdiction in which he or she is not admitted. This modification is helpful to the modern practice of law where lawyers often have clients in many different jurisdictions. Rule 5.5(c) states that a lawyer may provide legal services on a temporary basis in a jurisdiction if the lawyer:

(1) Associates with a lawyer who is admitted to practice in the jurisdiction and who actively participates in the matter;

(2) Is working on a matter related to the pending or existing proceeding before a court when practice before that court is proper;

(3) Is working on activities "reasonably related" to an "arbitration, mediation or other alternative dispute resolution proceeding" in connection with practice in an admitted jurisdiction; or

(4) Is working on activities "reasonably related" to the practice of law in an admitted jurisdiction.

Note that this last ground is a large exception. A lawyer admitted to a bar but not admitted in that particular jurisdiction can practice law in that jurisdiction on a temporary basis if the activities "arise out of or are reasonably related to the lawyer's practice" in an admitted jurisdiction.

Finally, 5.5(d) provides that an admitted lawyer may provide services through an office in the jurisdiction as long as a court does not require formal approval. This is often called the "in-house" lawyer exception. The reality is that in-house lawyers are sometimes required by the employer to move around with the subsidiaries or affiliates of the company so that admission in multiple jurisdictions is overly burdensome. In addition, in-house lawyers may be working in one state but rendering advice and thus "practicing law" in another. Rule 5.5(d) provides flexibility so that

in-house lawyers can render legal advice to the different arms of a corporation that may be located in many jurisdictions.

The Rule

Rule 5.5 prohibits a lawyer from practicing law without authorization. Rule 5.5 (a) states that a lawyer cannot practice law or assist another in the practice of law if those actions are a "violation of the regulation of the legal profession in that jurisdiction."

THE RULE — Rule 5.5

Unauthorized Practice of Law; Multijurisdictional 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 traditional approach has always been that any practice of law in a jurisdiction without admission in that jurisdiction was a violation of this rule. As mentioned above, Rule 5.5 now contains exceptions to this traditional rule. If a lawyer's situation fits within an exception, that lawyer may practice law in a jurisdiction in which he or she is not admitted.

1. What Is the Practice of Law?

For lawyers to know that they are practicing law improperly, they must know what activities are within the definition of the practice of law. So what activities constitute the practice of law? There is no single definition shared by the states. Rather, each state, by rule, statute, or case law, has developed its own definition of the "practice of law." Most states have broad definitions that can be read to include almost any conduct. For example, in *In re Thonert*, 693 N.E.2d 559, 563 (Ind. 1998), the Indiana Supreme Court defined the "practice of law" as follows:

A person who gives legal advice to clients and transacts business for them in matters connected with the law is engaged in the practice of law … . Thus, the practice of law is not defined only as the giving of legal advice or acting in a representative

capacity—it also had been extended by this Court to conducting the business management of a law practice.

The activity of Jerry, the college student in the earlier example, and Lucy, the lawyer giving advice to a client in California, both fall within common definitions of the "practice of law." Consider the following example.

Example. A California corporation sued its New York law firm for legal malpractice, and the firm filed a counterclaim for attorney fees earned for work performed in both California and New York. Lawyers in the New York firm had traveled to California to advise the corporation on various contract issues regarding the corporation's business in California. The California corporation claimed that the firm was not entitled to any legal fees for work done in California because none of the lawyers were actually licensed to practice in California. The New York law firm claimed that they were entitled to fees because any work they had done in California related to the overall work they had done for the client—regardless of geography. Was the New York firm "practicing law" in California? Should the lawyers be able to recover fees for their work?

Analysis. The court in this case analyzed the facts based upon the language in California's Business and Professions Code § 6125: "No person shall practice law in California unless the person is an active member of the State Bar." The court noted that there was no definition of "practice law," but that the common law definition was: "[t]he doing and performing of services in court … including legal advice … in California." The result was that the firm did violate the statute as stated above because the firm practiced law in California by meeting with clients, giving advice, etc. As such, the firm was not allowed to recover under the fee agreement for services rendered in California.

Rule 5.5(a) prohibits a lawyer from practicing law or assisting another in the practice of law if those actions are a "violation of the regulation of the legal profession in that jurisdiction." Subsection (a) and the examples above represent the traditional view that any practice of law without admission to the jurisdiction is a violation of the ethical rules.

2. Assisting in the Unauthorized Practice of Law

Jimmy Smith, a person without legal training and not admitted to the bar in any jurisdiction, engages in the unauthorized practice of law if he engages in conduct within the definition of the practice of law. Rule 5.5(a) forbids a lawyer from assisting a person in practicing law when that person is not admitted in the jurisdiction. If Lisa Lawyer is admitted to practice in Delaware and assists Jimmy, a non-lawyer, in setting up his estate planning and will preparation business, Lisa has assisted Jimmy in the unauthorized practice of law. Lisa has violated Rule 5.5(a).

More commonly, the issue of a lawyer assisting a non-lawyer in the unauthorized practice of law arises regarding the lawyer's employees. A lawyer cannot allow anyone working with or for the lawyer to take action within the definition of the practice of law if the person is not a lawyer. Often paralegals and other law office employees develop skill and expertise. Perhaps lawyers may even allow or require these individuals to perform tasks that are within the definition of the practice of law. Lawyers who allow or require employees to so act without lawyer supervision are violating Rule 5.5 unless the jurisdiction has a special rule allowing the non-lawyer to practice law.

Occasionally, a lawyer may employ an individual who was an admitted lawyer at one time but is now suspended or disbarred. The employee has certain lawyer skills and expertise and the employing lawyer may be tempted to allow the employee to practice law. Allowing such a person to practice law would be assisting in the unauthorized practice of law and would violate Rule 5.5. Lucy may have hired David, a disbarred lawyer, to do legal research, thinking that David could do great work at a bargain price. Lucy must be careful not to rely on David to practice law. David must work under Lucy's supervision at all times.

Finally, a lawyer cannot assist another lawyer in the practice of law in a jurisdiction in which the lawyer is not admitted if the lawyer otherwise is not granted the right to practice in that jurisdiction. So a California lawyer, such as Julie, cannot assist a Georgia lawyer, such as Larry, in practicing law in California if Rule 5.5 does not allow Larry to practice in California.

Example. Petitioner was not a lawyer and had never been admitted to the bar of any state. However, Petitioner was authorized to practice before the United States Patent Office—which does not require a law degree in order to submit patents. As part of that practice, he had for many years represented patent applicants, prepared and prosecuted their applications, and advised them in connection with their applications in the State of Florida.

The Florida Bar sued the Petitioner in the Supreme Court of Florida to enjoin the performance of these and other specified acts within the State, contending that they constituted the unauthorized practice of law. What should the court do?

Analysis. A federal statute expressly permitted non-lawyers to practice before the Patent Office. Because there was a federal law that explicitly granted such authority, Florida may not have a statute that goes against this federal law. In essence, the State of Florida cannot deny Petitioner the right to practice before the Patent Office; the federal law preempts the state law in this circumstance.

Consider the following example involving a fifteen-year old teenager who held himself out as a lawyer and answered questions on an internet message board. Was there a problem with a non-lawyer posting advice on www.AskMe.com?

Example. In the early 2000's, www.AskMe.com was an internet message board. People posted questions on the site and then another person posted a response. The site then ranked responses and identified "experts" based upon those rankings. In June of 2000, the 10th highest ranked legal expert on AskMe.com was a person who went by the name of LawGuy1975, aka Justin Anthony Wyrick, Jr., who fielded thousands of legal questions— sometimes hundreds per day. LawGuy1975 was actually Marcus Arnold, a fifteen-year-old boy. Marcus was not an attorney. He had not yet finished high school. Marcus Arnold's "clients" posed simple questions and Marcus responded with direct answers. Here's an example:

> Q: What amount of money must a person steal or gain through fraud before it is considered a felony in Illinois?
>
> A: In Illinois, you must have gained $5,001+ in an illegal fashion in order to constitute fraud. If you need anything else please write back! Sincerely, Justin Anthony Wyrick Jr.

Was Marcus Arnold practicing law by answering these questions?

Analysis. Yes, Marcus Arnold was engaged in the unauthorized practice of law. The interesting twist in this real-life scenario is that Marcus eventually decided to update his profile on www.AskMe.com to reflect the fact that

he was a fifteen-year-old boy. Immediately, other "legal experts" on the site began to send him emails ranging from threats to giving him intentionally low rankings on his legal advice to lower his high-ranking status on the site. But Marcus also received overwhelming support from his client base. People began to believe that any 15-year-old who had risen so high in the ranks of AskMe.com legal experts must be some kind of genius. Two weeks after Marcus admitted he was only fifteen, he was the single-highest ranked legal expert on AskMe.com.

Could Marcus Arnold have been prosecuted for the unauthorized practice of law in his state? The reality is that Marcus could have been prosecuted by any state in which he was "practicing law." He was not prosecuted but other lawyers have been prosecuted for similar behavior. The interesting thing about Marcus' case is the fact that the internet site on which he was giving his advice reached all the states in the country so Marcus could potentially have been prosecuted by any state in which he was allegedly practicing law. Commentators have suggested that perhaps Marcus Arnold symbolizes the descent of the legal field from a profession to a business that is simply the sum of its parts; one of its parts being nothing more than information. Michael Lewis, who wrote about the Marcus Arnold story in both a book and an article wrote: "Once the law became a business, it was on its way to becoming a commodity: Reduce the law to the sum of its information, and, by implication, anyone can supply it." Even a fifteen-year-old boy.

Rule 5.5(a) is clear. A lawyer cannot allow anyone working with or for the lawyer to take action within the definition of the practice of law if the person is not a lawyer. The key for lawyers working with non-lawyers is to ensure that the admitted lawyer is properly supervising the work of the non-lawyers in the office and approving of their work. Lawyers who allow or require employees to act on their own without lawyer supervision are violating Rule 5.5 unless the jurisdiction has a special rule allowing the non-lawyer to practice law.

3. A Lawyer Admitted to a Bar but Not to the Jurisdiction; No Systematic and Continuous Practice Allowed

What happens if Lucy Lawyer is admitted in Georgia but not Delaware and renders legal advice in Delaware? The traditional analysis would be that Lucy engages in the unauthorized practice of law because she is practicing law in Delaware, a jurisdiction in which she has not been admitted.

Rule 5.5 (b) provides the general rule that a lawyer admitted to a bar but not admitted in the jurisdiction cannot practice in that jurisdiction.

THE RULE — Rule 5.5

Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) …

(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.

As stated above, Rule 5.5(b) initially states the traditional rule that a lawyer admitted in one state cannot practice law in another state in which the lawyer has not been admitted to practice. The rigidity of this rule has been qualified with the exceptions in (c) and (d). Consider how this more rigid interpretation would impact the modern practice of law. Realistically, a lawyer admitted in California may be asked to go to a client's office or factory in Nevada and render legal advice there. Traditionally, this conduct would be improper under the traditional rule yet it is necessary for efficient and proper representation of the client. In addition, the California lawyer's advice is not problematic simply because the lawyer renders that advice in Nevada. Suppose the lawyer deposes a witness in Nevada who has information important to a litigation matter in California. Again, it would be illogical to say that the lawyer is not competent to take the deposition. Yet, the lawyer's conduct would be improper under the historical unauthorized practice notions.

The reality is that lawyers today take these sorts of actions every day in an attempt to provide service for their clients or cases with evidence that exists outside the jurisdiction. In recent times, discipline authorities usually have not disciplined lawyers for this conduct but the inconsistency between rule and practice has been uncomfortable.

Although state boards have not imposed discipline on lawyers, courts have refused to enforce a fee contract if the services for which a client owes a fee constitute the

unauthorized practice of law. Consider the Birbrower case which is the principal case on this issue.[2] A New York law firm with no lawyers admitted in California had a contract for legal services with a company that had offices in both New York and California. The California Supreme Court did not allow the New York firm to enforce a contract for fees for legal services. The court determined that because the legal services were provided in California, the lawyers were practicing law inappropriately in California. With regard to the determination of where the services were rendered, the court noted that physical presence in the state was not required and that a lawyer could practice in California "by telephone, fax, computer, or other modern technological means."

a. Establishing an Office or Other "Continuous Presence"

Rule 5.5(b)(1) also clearly states that a lawyer who is not an in-house lawyer cannot have an office in a jurisdiction in which the lawyer is not admitted and cannot otherwise maintain a "systematic and continuous presence" for the purpose of practicing law. If Larry Lawyer is admitted in Georgia, but not Delaware, Larry cannot have an office in Delaware.

There is an unstated exception to this rule, however. Because a lawyer may have the right to practice federal law in a non-admitted jurisdiction as recognized in Rule 5.5(d)(2), such a lawyer may have an office in a non-admitted jurisdiction for the purpose of conducting the federal law practice. In *Surrick v. Killion*, the Court of Appeals for the Third Circuit stated that a state cannot prohibit a lawyer from operating an office for federal practice even in a state in which the lawyer is not admitted[3] Such a prohibition would violate the Supremacy clause of the United States Constitution. In *Surrick*, the lawyer was admitted in federal court but not admitted in Pennsylvania. Pennsylvania sought to discipline the lawyer for operating an office in Pennsylvania though he was not admitted there.

Example. Lawyer, who is licensed only in New York, decides it is time to make a major life change and moves to Oregon. Not wanting to completely retire from the practice of law, Lawyer retains his affiliation with his New York law firm and establishes an office in his new Oregon home. Lawyer continues to serve his New York firm's clients on various legal matters; all correspondence is by e-mail through the New York firm's server;

the lawyer is also able to send other correspondence remotely to staff at the New York firm who then print it on the New York firm's letterhead.

Is Lawyer practicing law "in Oregon?" Is it practicing in Oregon if the matter involves only the law of another jurisdiction? If Lawyer is only representing New York clients or working on matters involving the law of New York, is he practicing in New York?

Analysis. The answer is likely no—Lawyer is doing something more than just practicing in New York, where he is licensed. The rule seems to suggest that handling a matter involving New York law or New York residents is not the same as practicing "in" New York. The jurisdiction in which a lawyer practices is determined by where he or she is physically located when performing the legal services. If the locus of the client or the applicable law determined where one was practicing, there would be no need for rules like Rule 5.5, which are exceptions to the general rule that a lawyer not licensed in a jurisdiction cannot provide legal services there.

Following that analysis, the answer to the question whether Lawyer is practicing law in Oregon is indisputably "yes." All of Lawyer's legal work is done from an office that is physically located in Oregon, even if some of the technical support comes from or actually takes place in New York. In that case, it would follow that Lawyer is in violation of Rule 5.5 because he is not practicing temporarily in Oregon under the auspices of Rule 5.5, but has established an office and systematic and continuous presence in Oregon.

In 2000, the A.B.A. appointed a Commission on Multijurisdictional Practice to investigate the issue of the unauthorized practice of law in the context of lawyers practicing in multiple jurisdictions. This Commission recognized the disharmony between the rules and the reality of modern law practice. The Commission suggested a new version of the unauthorized practice rule that would take several common scenarios out of the definition of improper conduct while still prohibiting the unauthorized practice of law in general. The A.B.A. adopted a new Rule 5.5 on this issue in 2002[4] and these new policies are reflected in most states' rules, including Rule 5.5 of the Delaware Lawyers' Rules of Professional Conduct.

4. *Pro Hac Vice* Admission

Most jurisdictions recognize the concept of pro hac vice admission. When Rule 5.5 allows a lawyer to practice law "temporarily" in a jurisdiction, the rule may be referring to pro hac vice admission. *Pro hac vice* admission is simply when a lawyer requests that a court admit the lawyer so that the lawyer may appear for the purpose of that matter only. A lawyer not admitted in a jurisdiction may request that a court admit the lawyer so that the lawyer may appear for the purpose of the matter. Pro hac vice admission requirements and procedures are usually stated in general court rules.

Example. Larry Lawyer, a lawyer admitted in Georgia, may have a client with a litigation matter in Delaware. Larry may ask the Delaware court presiding over the matter to allow him to practice law and appear in court for that matter only. Is the court likely to do so?

Analysis. It is likely a court will allow Larry Lawyer to handle the litigation matter in Delaware. Larry will have to apply specifically to the Delaware court where the case is pending and file the appropriate forms. Further, it is likely that Larry will be required to associate with local counsel in Delaware. If Larry meets these requirements, the court will likely grant his pro hac vice admission.

States can have other idiosyncratic rules that allow a lawyer admitted in another jurisdiction to practice law in certain specific settings. For example, a state might have a rule allowing lawyers admitted elsewhere but not in the particular jurisdiction to appear in administrative proceedings. You can check the local court rules in your jurisdiction for more specifics about pro hac vice admission requirements.

5. Legal Services on a Temporary Basis

Rule 5.5 maintains the traditional ban on practicing law where you are not admitted but provides four specific exceptions when conduct which would typically constitute the unauthorized practice of law is allowed to occur on a temporary basis. These temporary practice exceptions are found in Rule 5.5(c) and the four exceptions are: (1) the association of admitted counsel exception—which often involves pro hac vice admission; (2) the proceeding before a tribunal exception; (3) the alternative dispute resolution exception; and (4) the related activities exception. Rule 5.5(c) states as follows:

THE RULE Rule 5.5

Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) …

(b) …

(c) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction,[5] 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 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 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.Association with an Admitted Lawyer.

Rule 5.5(c)(1) allows a lawyer to temporarily practice law if the lawyer associates with counsel who is admitted in the jurisdiction in which the lawyer needs to practice. The specific language of the exception states that a lawyer who is not admitted to the jurisdiction can still practice in that jurisdiction if the services:

(c) …

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

A lawyer admitted to a bar but not admitted in a particular jurisdiction may practice law in that jurisdiction on a temporary basis if the lawyer associates with an admitted lawyer who "actively participates in the matter." Rule 5.5(c)(1).

Larry Lawyer, a lawyer admitted in Georgia, may find himself practicing law in Delaware by taking depositions in Delaware or giving legal advice to a client at the client's Delaware facility. If Larry engages in the practice of law in Delaware only temporarily and if he associates with a Delaware lawyer who remains involved in the litigation or other representation, Larry has not engaged in the unauthorized practice of law in violation of Rule 5.5.

Example. Lawyer Alex was licensed to practice in the State of California. He often works in association with Beatrice regarding legal matters in the State of Wyoming. He is also licensed to practice in Wyoming. Alex was recently disbarred in California. Beatrice recently asked Alex to help her with a case in Wyoming. Alex agreed and they won the case. Is Alex subject to discipline?

Analysis. Yes, Alex is subject to discipline for violating Rule 5.5 because Alex was disbarred in California. Rule 8.5 (c) states: "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." Here, the attorney was disbarred in California which violates this subsection of the rule.

b. Activities "Reasonably Related" to a Proceeding Before a Tribunal When Practice Before the Tribunal Is Proper

The second exception under Rule 5.5(c) is the "reasonably related" exception in which a lawyer admitted to a jurisdiction—but not admitted to the particular jurisdiction involved—can practice law in that jurisdiction temporarily if the conduct is "in or reasonably related to a pending or potential proceeding before a tribunal."

Part (2) of Rule 5.5(c) states that a lawyer not admitted to the jurisdiction may practice in that jurisdiction if the legal services:

> **(c)** …
>
> **(1)** …
>
> **(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; …

Therefore, a lawyer admitted to a bar but not admitted in the particular jurisdiction can practice law on a temporary basis if the legal services are "reasonably related" to a pending proceeding before a tribunal if the lawyer expects to be authorized to appear in the proceeding.

In addition, the rule recognizes that often more than one lawyer works on a matter. Rule 5.5 (c)(2) provides that this tribunal exception applies even if the lawyer does not expect to be authorized to appear but the person the lawyer is assisting expects to be authorized to appear.

Example. Larry Lawyer, admitted in Georgia, needs to take a deposition and interview witnesses in Mississippi relating to a proceeding before a tribunal in Georgia. Can Larry do so?

Analysis. Larry may do so even if the proceeding does not exist yet but is only a "potential proceeding." Larry may participate in these activities in Mississippi even if the matter will culminate in a proceeding before a North Carolina tribunal if Larry expects to be admitted pro hac vice. Larry may take the deposition even if the matter will be tried in Mississippi and even if Larry does not expect to be admitted in any way in Mississippi if he is, for example, an associate preparing a case for another lawyer who does expect to be admitted *pro hac vice*.

c. Activities "Reasonably Related" to an "Arbitration, Mediation or Other Alternative Dispute Resolution Proceeding" in Connection with Practice in an Admitted Jurisdiction

Rule 5.5(c)(3) is the third exception and it provides that a lawyer admitted to a jurisdiction but not admitted in the particular jurisdiction may practice law in that jurisdiction temporarily if the lawyer's conduct is "in or reasonably related" to an alternative dispute resolution process in the admitted jurisdiction.

(c) …

(1) …

(2) …

(3) 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 and are not services for which the forum requires pro hac vice admission;

Accordingly, Rule 5.5(c)(3) provides that a lawyer admitted to a bar but not admitted to the particular jurisdiction may practice law in that jurisdiction on a temporary basis if the lawyer's conduct is "in or reasonably related" to a pending or potential "arbitration, mediation, or other alternative dispute resolution proceeding" if the services arise out of or are reasonably related to the lawyer's practice in an admitted jurisdiction and pro hac vice admission is not otherwise required. The proceeding need not be in a jurisdiction in which the lawyer is admitted as long as the activities relate to the lawyer's practice in an admitted jurisdiction. The lawyer must, of course, follow any particular procedure the jurisdiction in which the proceeding occurs has regarding pro hac vice admission for participation on the proceeding.

Example. Larry Lawyer, a Georgia lawyer, must interview witnesses in Delaware relating to an arbitration in Georgia involving his Georgia client. Is Larry allowed to do this?

Analysis. Yes. Larry can interview witnesses in Delaware because it relates to an arbitration and this falls directly within Rule 5.5(c)(3). Larry may also interview witnesses relating to an arbitration in Delaware if the arbitration relates to the representation of one of his Georgia clients as this falls within Rule 5.5(c)(4), as explained below.

d. Activities "Reasonably Related" to Practice in an Admitted Jurisdiction

The last exception of Rule. 5.5(c) is quite broad. A lawyer admitted to a bar but not admitted in a particular jurisdiction can practice law in that jurisdiction on a temporary basis if the activities are "reasonably related" to the lawyer's practice in an admitted jurisdiction and the tribunal proceeding exception and the alternative dispute resolution exception do not apply. The language of Rule 5.5(c)(4) states that a lawyer providing legal services that:

> **(c)** …
>
> **(1)** …
>
> **(2)** …
>
> **(3)** …
>
> **(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.

Therefore, Larry Lawyer, a Georgia attorney, may render legal advice when he visits his Georgia client's company in Delaware because that advice is "reasonably related" to Larry's representation of the client in Georgia.

6. In-House Counsel

Finally, section (d) of Rule 5.5 deals with the complexities of in-house counsel. Inhouse lawyers may practice law in a jurisdiction in which they are not admitted if they render legal services only for the employer or the employer's subsidiaries or affiliates, if the lawyers are admitted in another jurisdiction. Rule 5.5(d)[6] states that:

THE RULE — Rule 5.5

Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) …

(b) …

(c) …

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any 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 after compliance with Supreme Court Rule 55.5(a) (1)[7] and are not services for which the forum requires pro hac vice admission; or

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

There are two subsections: (d)(1) which deals with in-house lawyers; and (d)(2) which permits conduct when a lawyer is authorized by some other law or statute.

Under Rule 5.5(d)(1), in-house lawyers can practice law in a jurisdiction in which they are not admitted if they are admitted in another jurisdiction and if no pro hace vice admission generally is required for the activity. Even before Rule 5.5 contained this exception for in-house counsel, many states had exceptions for inhouse counsel—simply because of the necessity of representing large corporations or companies that have offices or facilities spread across many states. This treatment of in-house lawyers recognizes that in-house lawyers are sometimes required by the employer to move repeatedly so that admission in multiple jurisdictions becomes a chore with no great benefit given that the only client is the entity requiring the moves.

The in-house counsel exception is also a recognition that in-house lawyers may be working in one state but rendering advice and thus "practicing law" in other states.

It is not uncommon for an in-house legal department for a large corporation to render legal advice to arms of the corporation located in many other states.

Example. Lois Lawyer is an in-house lawyer and works for a corporation in Georgia. Lois is also admitted to practice law in Georgia. Lois finds herself visiting many of the corporate facilities that are located in Delaware. Lois often gives legal advice to the facilities of the corporation in Delaware. Is Lois improperly giving legal advice in violation of Rule 5.5?

Analysis. Lois is allowed to visit facilities of her employer in other states such as Delaware and she can render legal advice in those states. Rule 5.5(d) (1) eliminates any suggestion that Lois is engaging in improper conduct in such a scenario.

Rule 5.5(d)(2) acknowledges that a lawyer may not be admitted in a particular jurisdiction and yet may have the right to practice in the jurisdiction by application of federal law or other specific law. The federal law subsection recognizes that federal courts can set rules that preempt state regulations. For example, the Sixth Circuit Court of Appeals in *In re Desilets*[8] considered the question of whether a lawyer could practice federal bankruptcy law in a jurisdiction in which the lawyer was not admitted. The lawyer was admitted in Texas but not Michigan. He had an office in Michigan and practiced federal bankruptcy law in the Western District of Michigan. The lawyer was admitted to the bar of the Western District of Michigan. The Western District required admission to a state bar but not necessarily to the bar of Michigan. The Sixth Circuit held that the right to practice in federal court included not only the right to appear in federal court in the Western District of Michigan but also the right to engage in activities outside the courtroom, such as consulting with and advising clients. Thus, the Desilets court determined that the state law prohibiting the lawyer from engaging in these activities impermissibly conflicted with federal law.

Example. Can Larry Lawyer, a bankruptcy lawyer admitted in Georgia and admitted to the Western District of Kentucky, practice law in Kentucky if those activities are necessary to Larry's federal practice?

Analysis. Yes. Larry can practice bankruptcy in Kentucky because he is admitted to the federal bar, i.e., the Western District of Kentucky, as long as his activities are related to his federal bankruptcy practice.

In-house counsel often work for organizations that have non-lawyer owners, officers, or directors. The rationale behind allowing in-house counsel exceptions to Rule 5.5 is that organizations may generally represent themselves and that inhouse counsel are assisting in that effort, not representing an outside client as an employee of an organization. Therefore, under Rule 5.5, in-house counsel are provided with the flexibility to represent their employer outside the jurisdiction in which they are licensed. This flexibility serves the interest of their client (the employer) and it 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."

Quick Summary

Rule 5.5 asserts that the practice of law by one having no license or other permission to practice law is the unauthorized practice of law. A lawyer who assists another person in the unauthorized practice of law is acting improperly. A lawyer may not have an office or other systematic and continuous presence in a jurisdiction in which the lawyer is not admitted. A lawyer practicing law in a jurisdiction in which the lawyer is not admitted may practice law temporarily if the lawyer associates with admitted counsel; the lawyer engages in activities "reasonably related" to a proceeding in which the lawyer is admitted; the lawyer engages in activities "reasonably related" to an alternative dispute resolution proceeding in connection with practice in a jurisdiction in which the lawyer is admitted; or the lawyer engages in any activities related to a lawyer's practice in a jurisdiction in which the lawyer is admitted. Finally, an in-house lawyer may practice in a jurisdiction in which the lawyer is not admitted.

Test Your Knowledge

To assess your understanding of the material in this chapter, click here to take a quiz.

1 DLRPC Rule 5.5.

2 *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal.4th 119, 70 Cal.Rptr.2d 304, 949 P.2d 1 (1988).

3 *Surrick v. Killion*, 449 F.3d 520 (3d Cir. 2006).

4 *See* http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice.ht (last visited on 8/23/16).

5 The Delaware Lawyers' Rules of Professional Conduct (DLRPC) are slightly different than the A.B.A. Model Rules in 5.5(c). The DLRPC (c) adds "or in a foreign jurisdiction" after United States jurisdiction.

6 As in subsection (c) discussed above, the DLRPC have added one phrase to the A.B.A. Model Rules: subsection (d) adds "or in a foreign jurisdiction" after "United States jurisdiction."

7 The DLRPC have modified the A.B.A. Model Rule 5.5(d) slightly, by adding "after compliance with the Supreme Court Rule 55.1(a)(1) after "affiliates."

8 *In re Desilets*, 268 B.R. 516 (6th Cir. 2001).