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Electronic age brings out-of-state opportunities, but know the risks

Now that the world communicates electronically, lawyers are better positioned to expand their work across state lines. Such opportunities could lead to the unlicensed practice of law, particularly by sole practitioners who lack satellite offices or partners admitted in target jurisdictions.

Before you advise that out-of-state client, or settle a dispute beyond Illinois' borders, consider the limits on multijurisdictional practice under Rule 5.5(c) of the Rules of Professional Conduct.

Allowed services for out-of-state practice

Rule 5.5(c), adopted by most states with minor modifications, sets up three safe harbors for out-of-state attorneys who provide "legal services on a temporary basis."

The first two authorized methods are straightforward. Associate with a local attorney who "actively participates in the matter," or if you have a court case, secure pro hac vice admission. Lawyers can perform preparatory work before they are admitted — interviewing clients and witnesses, reviewing documents, etc. — if they "reasonably expect" to obtain leave to appear in the "potential proceeding."

The third permissible ground exists when the temporary services "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."

What sorts of "temporary" services in the foreign jurisdiction are deemed "reasonably related" to the lawyer's in-state practice? The answer vaguely depends on the subjective interpretation of each individual state.

"Temporary basis" and "reasonably related" tests undefined

According to a Rule 5.5 comment, "[t]here is no single test to determine whether a lawyer's services are provided on a "temporary basis" ... and may therefore be permissible under [P]aragraph (c)." The comment underscores the lack of any objective standard, by adding that services provided on a "recurring basis" or "extended period of time" may still be considered "temporary," when they relate to "a single lengthy negotiation or litigation."

The commentary to Rule 5.5(c) is equally unhelpful in defining what services in the foreign jurisdiction are "reasonably related" to the lawyer's in-state practice.

Reference is made to a "variety of factors," such as connections between the client and the lawyer's home state, prior representation of the same client, involvement of multiple jurisdictions in the same case or the application of laws from the home state, federal government or other nationally uniform laws.

In Illinois, the Attorney Registraton & Disciplinary Commission posts a Q&A on its website that addresses whether a local attorney could advise a Milwaukee client on legal issues related to Illinois, Wisconsin and federal law.

Although the discussion predates the inclusion of Rule 5.5(c)'s "reasonably related" provision, the ARDC — after acknowledging the unauthorized practice of law is "not subject to any precise definition" — suggests that merely giving advice to a Wisconsin company "would not be considered engaged in the unauthorized practice of law simply because the client is situated in Wisconsin."

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Other states add their own clarifications or requirements. Indiana, for example, cautions that advertising to its residents may be considered a systematic and continuous presence in violation of Rule 5.5(c).

Wisconsin provides its lawyers will not be disciplined for engaging in conduct in another jurisdiction that would be allowed in Wisconsin under Rule 5.5(c).

Arizona mandates informed client consent before services from out-of-state counsel may be provided.

E-mails to Minnesota considered unlicensed practice of law

Recently the Minnesota Supreme Court reached a high water mark in the enforcement of Rule 5.5(c), when it admonished an out-of-state attorney for sending e-mails to a Minnesota lawyer. *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016).

The trouble started when a Colorado lawyer tried to help his in-laws settle a Minnesota court judgment. The attorney's practice included debt collection matters, and he exchanged two dozen settlement e-mails with the judgment creditor's Minnesota attorney. When no settlement was reached, the disgruntled creditor's attorney complained to the Minnesota authorities regarding the Colorado lawyer's unlicensed practice of law.

After noting that "[w]hether an attorney engages in the practice of law in Minnesota by sending e-mails from another jurisdiction is a matter of first impression," the court determined that the Colorado lawyer impermissibly practiced in Minnesota, by "negotiating the resolution of a claim on behalf of a client."

The services had a substantial nexus to Minnesota, the court said, because the in-laws resided there, and the judgment was based on Minnesota law.

Reasoning that physical presence was not necessary, the court concluded the several months of negotiation was not "fortuitous or attenuated" and consequently there was "ample support ... that appellant practiced law in Minnesota."

Three justices joined in a "reality check" type of dissent, arguing the lawyer was simply assisting his family, and his collection work in Colorado had a sufficient connection to his Minnesota services to meet the "reasonably related" test under Rule 5.5(c).

The dissent continued that the majority decision was "contrary to the principles and policy goals intended by Rule 5.5(c)," by forcing "experienced and competent" lawyers to turn away "family members or friends" despite a "relationship of trust and confidence."

Compelling those clients to hire other in-state counsel — even for "minor, temporary services in which the out-of-state lawyer could have provided efficient, inexpensive and competent service" — does not comport with Rule 5.5(c), the dissent concluded.

When in doubt, call the state first

Given the resounding uncertainty regarding Rule 5.5(c)'s "temporary basis" and "reasonably related" tests, when you receive that next matter with multijurisdictional ties, make no assumptions.

Contact the other state's ethics commission before you act and assess its current position on your intended work. The call could save a lot of grief down the road.

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