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## Multijurisdictional Practice of Law under the Revised South Carolina Rules of Professional Conduct

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## I. INTRODUCTION

In the 1998 case, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*,<sup>1</sup> the California Supreme Court shocked the national legal community when it held New York attorneys engaged in the unauthorized practice of law by representing California clients in a proposed arbitration matter that settled.<sup>2</sup> The case spurred the American Bar Association (ABA) to revise and broaden the Model Rules of Professional Conduct to serve attorneys practicing in multiple jurisdictions.<sup>3</sup> After the ABA adopted the revised rules, the South Carolina Supreme Court followed the trend of many other states by studying the revised model rules and adopting similar rules.<sup>4</sup> The new South Carolina rules became effective on October 1, 2005.<sup>5</sup> This Comment provides an overview of revised Rule 5.5 and argues it broadens the opportunities for out-of-state attorneys to practice law in South Carolina. For example, an out-of-state attorney can perform a real estate closing<sup>6</sup> and participate in alternative dispute resolutions in South Carolina without being admitted in South Carolina.<sup>7</sup>

Part II of this Comment discusses the *Birbrower* opinion.<sup>8</sup> Part III explores the ABA's reasons for expanding Rule 5.5. Part IV analyzes the ABA's changes to Model Rule 5.5 to accommodate the multijurisdictional practice of law common in today's society. Part V outlines the multijurisdictional rule that South Carolina adopted, which is substantially similar to the ABA Model Rule. Part VI analyzes hypothetical situations to show how the rule applies to out-of-state lawyers who wish to practice in South Carolina. The conclusion summarizes the issues surrounding South Carolina's adoption of revised Rule 5.5.

## II. THE GENESIS OF THE PROBLEM: *BIRBROWER, MONTALBANO, CONDON & FRANK, P.C. v. SUPERIOR COURT*

"No person shall practice law in California unless the person is an active member of the State Bar."<sup>9</sup> The enforcement of this eighteen-word statute in *Birbrower* "sent shock waves through the [legal] profession as many lawyers

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1. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998).

2. *Id.* at 13.

3. ABA CENTER FOR PROF'L RESPONSIBILITY, CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 3-4 (2002), available at [http://www.abanet.org/cpr/mjp/final\\_mjp\\_rpt\\_121702.pdf](http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf) [hereinafter MJP COMMISSION REPORT].

4. *In re Amendments to Rules of Professional Conduct*, Rule 404, SCACR, Shearouse Adv. Sh. No. 26 at 7 (S.C. June 20, 2005).

5. *Id.*

6. See *infra* note 269 and accompanying text.

7. See *infra* note 227 and accompanying text.

8. *Birbrower*, 949 P.2d at 1.

9. *Id.* at 2 (quoting CAL. BUS. & PROF. CODE § 6125 (West 2003)).

recognized that practice across state lines could violate the rules on unauthorized practice.”<sup>10</sup> In addition to shocking the legal community, the California Supreme Court’s prominence meant the *Birbrower* opinion could potentially influence many other jurisdictions.<sup>11</sup>

In *Birbrower*, a New York law firm, Birbrower, Montalbano, Condon & Frank, P.C. (Birbrower), represented a California client, ESQ Business Services, Inc., in a dispute involving a software development and marketing contract.<sup>12</sup> Birbrower attorneys agreed to represent ESQ in “[a]ll matters pertaining to the investigation of and prosecution of all claims and causes of action.”<sup>13</sup> Birbrower negotiated a contingency fee agreement with ESQ, which required ESQ to pay one-third of all sums received to Birbrower.<sup>14</sup> The parties later modified the fee agreement, providing that ESQ would pay a flat fee of more than one million dollars.<sup>15</sup>

In the course of representing ESQ, Birbrower attorneys visited California several times.<sup>16</sup> During these trips, Birbrower attorneys met with ESQ accountants, interviewed potential arbitrators, and gave legal advice to ESQ.<sup>17</sup> Eventually, ESQ settled the matter before the case went to arbitration or trial.<sup>18</sup>

Almost a year later, ESQ sued Birbrower for legal malpractice in Santa Clara County, California, Superior Court.<sup>19</sup> Birbrower counterclaimed and ESQ moved for summary judgment on the first four causes of action of Birbrower’s counterclaim, which asserted ESQ breached the fee agreement.<sup>20</sup> ESQ argued Birbrower attorneys practiced law without a California license; therefore, the court could not enforce the fee agreement.<sup>21</sup>

The trial court concluded: 1) Birbrower was not admitted to practice law in California; 2) Birbrower did not associate local counsel; 3) Birbrower provided legal services in California; and 4) no one could recover compensation for legal services in California, unless the person was a member of the California Bar at the time the attorney rendered services.<sup>22</sup> Although the trial court prevented Birbrower from recovering fees for services in California, the court did not preclude Birbrower from collecting a fee for work it performed in New York.<sup>23</sup> The trial court also left

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10. NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION, 449 (3d ed. 2004).

11. See Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 691 (2002).

12. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 3 (Cal. 1998).

13. *Id.*

14. *Id.* at 3–4.

15. *Id.* at 4.

16. *Id.* at 3.

17. *Id.*

18. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 3 (Cal. 1998).

19. *Id.* at 4.

20. *Id.*

21. *Id.* (citing CAL. BUS. & PROF. CODE § 6125 (West 2003)).

22. *Id.*

23. *Id.*

open *Birbrower's* fifth cause of action for quantum meruit.<sup>24</sup> The California Court of Appeal affirmed the trial court's decision.<sup>25</sup>

The California Supreme Court began its analysis by stating California's general rule regulating the practice of law: "[A]lthough persons may represent themselves and their own interests regardless of State Bar membership, no one but an active member of the State Bar may practice law for another person in California."<sup>26</sup> The court stressed that regulating the practice of law ensures attorneys provide legal services competently.<sup>27</sup>

The court then analyzed the statute prohibiting the unauthorized practice of law.<sup>28</sup> The statute defined neither the term "practice law" nor the term "in California."<sup>29</sup> However, case law defined the term "practice law" as "'the doing and performing [of] services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure.'"<sup>30</sup>

Case law did not define the term "in California," thus the court provided its own definition.<sup>31</sup> In the court's view, "'in California' entailed sufficient contact with the California client to render the nature of the service a clear legal representation."<sup>32</sup> The court stated further that "mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California.'"<sup>33</sup> The court's definition did not require physical presence in the state.<sup>34</sup> However, the court rejected the idea that one "*automatically* practices 'in California' whenever that person practices California law anywhere, or 'virtually' enters the state by telephone, fax, e-mail, or satellite."<sup>35</sup> The court determined *Birbrower's* extensive practice in California was not "excuse[d]" by its definition of practicing law in California.<sup>36</sup>

*Birbrower* argued the rule should not apply to its attorneys because they were authorized to practice law in another jurisdiction.<sup>37</sup> The court rejected that argument because state laws vary and an attorney's competency in one jurisdiction does not mean the same attorney is competent in another jurisdiction.<sup>38</sup> The court deemed it "irrelevant" whether the attorney was admitted to practice law in another state.<sup>39</sup>

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24. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 4 (Cal. 1998).

25. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 56 Cal. Rptr. 2d 857, 864 (Cal. Ct. App. 1996).

26. *Birbrower*, 949 P.2d at 5.

27. *Id.*

28. *Id.* (citing CAL. BUS. & PROF. CODE § 6125 (West 2003)).

29. *Id.*

30. *Id.* (quoting *People v. Merchants' Protective Corp.*, 209 P. 363, 365 (Cal. 1922)).

31. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 5 (Cal 1998).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 6.

36. *Id.* at 7.

37. *Birbrower, Montalbano., Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 8 (Cal. 1998).

38. *Id.*

39. *Id.*

Although the court concluded *Birbrower* engaged in the unauthorized practice of law in California, *Birbrower* did not invalidate the fee agreement for services the attorneys performed while in New York.<sup>40</sup>

Though the court's decision appears straightforward, it actually "compounded the uncertainty" surrounding the multijurisdictional practice of law.<sup>41</sup> The opinion offered no guidance for a lawyer who is at risk of losing both his license and fee.<sup>42</sup> The lack of guidance prompted the ABA to appoint a commission to study and change the rule affecting lawyers who wish to practice in multiple jurisdictions.<sup>43</sup>

### III. CREATING A SOLUTION: THE ABA APPOINTS A COMMISSION AND CHANGES MODEL RULE 5.5

The practice of law has changed dramatically over the last century. Clients' transactions are more complex, requiring lawyers to specialize in a particular area of law rather than focusing on one state's general laws.<sup>44</sup> In response to the dynamic changes in legal practice, and spurred on by *Birbrower*, the ABA sought to modify and clarify the multijurisdictional practice rule.<sup>45</sup>

In 2000, the ABA created and appointed members to the ABA Commission on Multijurisdictional Practice (MJP Commission).<sup>46</sup> The MJP Commission did not seek to challenge the basic notion that a state has an interest in protecting its residents and justice system from incompetent or unethical lawyers.<sup>47</sup> Instead, the MJP Commission sought to answer a simple question: "When should a lawyer from a United States or foreign jurisdiction be authorized to provide legal services in a United States jurisdiction in which the lawyer is not admitted to practice?"<sup>48</sup> To answer the question, the MJP Commission balanced several competing policies.<sup>49</sup>

States traditionally determine who may practice law within their borders.<sup>50</sup> A state's jurisdictional restrictions ensure professional and ethical lawyers practice in the state.<sup>51</sup> A competing policy promotes client choice. For example, a client may seek a transactional attorney, regardless of where the attorney is licensed to practice, because the attorney specializes in a particular area of law.<sup>52</sup>

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40. *Id.* at 13.

41. Gillers, *supra* note 11, at 688.

42. *Id.*

43. *See id.* at 691.

44. MJP COMMISSION REPORT, *supra* note 3, at 8.

45. Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 819 (2003).

46. Gillers, *supra* note 11, at 685.

47. *Id.* at 686.

48. *Id.* at 685–86.

49. *Id.* at 686.

50. *Id.*

51. MJP COMMISSION REPORT, *supra* note 3, at 8.

52. *Id.* at 10.

States generally concede attorneys cannot effectively serve clients unless they make accommodations for out-of-state lawyers, if only on a temporary basis.<sup>53</sup> However, if an attorney provides legal services in the client's home state, where the attorney is not admitted to practice, the attorney may be engaging in the unauthorized practice of law.<sup>54</sup> As a practical matter, an attorney cannot meet the requirements to practice law in all fifty states.<sup>55</sup> Yet being an attorney in good standing in one jurisdiction does not automatically grant a lawyer "reciprocal" admission in another jurisdiction.<sup>56</sup>

Courts balance states' rights in lawyer regulation with client choice through *pro hac vice*<sup>57</sup> admission after the litigator files a lawsuit.<sup>58</sup> All jurisdictions recognize *pro hac vice* admission.<sup>59</sup> However, some work, such as reviewing documents and interviewing witnesses, that occurs before a court admits the attorney *pro hac vice* might be considered the unauthorized practice of law.<sup>60</sup> Additionally, only a few state courts admit transactional attorneys through a similar measure,<sup>61</sup> even though transactional attorneys often practice in multiple jurisdictions.<sup>62</sup> A transactional attorney who represents clients in the state in which the attorney is licensed often must travel outside the state to negotiate, gather information, and give advice.<sup>63</sup>

Lawyers often need to cross state borders to provide clients adequate representation because of advancing technology and the increasing complexity of legal practice.<sup>64</sup> The need for multijurisdictional practice is increasing so attorneys can represent clients competently.<sup>65</sup> Clients' interests, increasing uniformity of state laws, and technological developments favor authorizing multijurisdictional practice.<sup>66</sup>

The former law governing the multijurisdictional practice of law was an ineffective system for modern lawyers.<sup>67</sup> The former law caused concern for many lawyers and imposed costs on both lawyers and clients.<sup>68</sup> Lawyers turned down clients to avoid or reduce the risks of defending against unauthorized practice of

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53. *Id.* at 8.

54. Gillers, *supra* note 11, at 686.

55. MJP COMMISSION REPORT, *supra* note 3, at 7.

56. *Id.*

57. BLACK'S LAW DICTIONARY 1248 (8th ed. 2004) (defining *pro hac vice*: "For this occasion or particular purpose . . . refers to a lawyer who has not been admitted to practice in a particular jurisdiction but who is admitted there temporarily for the purpose of conducting a particular case").

58. MJP COMMISSION REPORT, *supra* note 3, at 10.

59. *Id.* at 8.

60. *Id.* at 10.

61. *Id.* at 8–9. Several states explicitly allow an attorney to practice in the state temporarily or incidentally. *See id.* at 9 nn.17–20. After *Birbrower*, "California now specifically authorizes out-of-state lawyers to represent clients in arbitrations." *Id.* at 9 n.19.

62. MJP COMMISSION REPORT, *supra* note 3, at 8.

63. *Id.* at 10.

64. *Id.*

65. *Id.*

66. Gillers, *supra* note 11, at 686.

67. *See* MJP COMMISSION REPORT, *supra* note 3, at 3.

68. *See id.* at 12.

law charges, even when the lawyers could have skillfully represented the client.<sup>69</sup> When lawyers would not represent these clients, they deprived the clients of their preferred lawyer.<sup>70</sup> As stated by the MJP Commission, “Cautious lawyers may deny both institutional and individual clients the benefit of an ongoing client-lawyer relationship.”<sup>71</sup>

In its reworking of the rule, the MJP Commission sought to strike a balance between states’ interests in protecting their residents and justice systems with clients’ interests in retaining counsel efficiently and economically in a national economy.<sup>72</sup> The MJP Commission did not create any “mathematical solutions,” yet it tried to accommodate the state-based system of bar admission with the realities of modern life and the tradition of respecting client choice.<sup>73</sup>

Although multijurisdictional practice is increasing, most lawyers have only a general understanding of the laws governing the practice.<sup>74</sup> Conventional wisdom, rather than scant common law or unauthorized practice of law provisions, shapes lawyers’ understandings.<sup>75</sup> For example, most lawyers understand they cannot open a permanent office in a state in which they are not licensed, yet lawyers also recognize they may represent out-of-state clients in connection with transactions that happened in the state where the lawyer is licensed.<sup>76</sup> The revised Rule 5.5 seeks to give attorneys more guidance than the previous Rule 5.5.

#### IV. THE ABA EXPANDS MODEL RULE 5.5

The previous Rule 5.5 was shorter and more general than revised Rule 5.5.<sup>77</sup> The previous rule stated, “A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”<sup>78</sup> The previous rule did not discuss specific situations in which an out-of-state lawyer could practice in a jurisdiction where the lawyer was not admitted. Revised Model Rule 5.5(a) prohibits a lawyer from practicing “law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist[ing] another in doing so.”<sup>79</sup> This change is not a substantive one, as it merely clarifies and strengthens the

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 4.

73. MJP COMMISSION REPORT, *supra* note 3, at 4; *see also* Gillers, *supra* note 11, at 694–99 (noting twelve reasons for modifying the rule).

74. MJP COMMISSION REPORT, *supra* note 3, at 11.

75. *Id.*

76. *Id.*

77. Compare MODEL RULES OF PROF’L CONDUCT R. 5.5 (2001) (containing two short subsections (a) and (b)), with MODEL RULES OF PROF’L CONDUCT R. 5.5 (2004) (containing four extensive subsections (a) through (d)).

78. MODEL RULES OF PROF’L CONDUCT R. 5.5 (2001).

79. MODEL RULES OF PROF’L CONDUCT R. 5.5(a) (2004).

previous version of this rule by prohibiting a lawyer from knowingly assisting another in violating the Rules of Professional Conduct.<sup>80</sup>

Revised Model Rule 5.5(b) has two sub-parts.<sup>81</sup> A lawyer not admitted in a particular jurisdiction shall not (1) establish an office or other systematic and continuous presence or (2) represent that the lawyer is admitted to practice law in the jurisdiction in which the lawyer is not admitted.<sup>82</sup> For example, the rule does not authorize a lawyer to open an office in a jurisdiction in which the lawyer is not admitted.<sup>83</sup> Both provisions promote state regulation of lawyers to protect a state's residents and prevent the unauthorized practice of law within its borders.

Generally, revised Model Rule 5.5(c) allows lawyers authorized to practice in a United States jurisdiction to provide services on a temporary basis in another jurisdiction under four specific circumstances.<sup>84</sup> Previous Rule 5.5 had no similar provision.<sup>85</sup> First, a lawyer may provide services on a temporary basis if the lawyer undertakes the services in association with a lawyer who is admitted to practice in the particular jurisdiction and the admitted lawyer actively participates in the matter.<sup>86</sup> This provision promotes clients' interests in choosing counsel.<sup>87</sup>

Second, a lawyer not admitted in a particular jurisdiction may temporarily provide legal services that are "in or reasonably related to a pending or potential proceeding before a tribunal" if the lawyer is authorized by law to appear in the proceeding, or reasonably expects the court to authorize the lawyer to practice on a temporary basis.<sup>88</sup> The rule allows lawyers to provide services that are ancillary to litigation and permits an attorney's temporary practice if the lawyer performs services in anticipation of litigation and reasonably expects the court to admit the lawyer *pro hac vice*.<sup>89</sup> The rule also covers assisting attorneys' work, even if the assisting lawyers do not seek *pro hac vice* admission.<sup>90</sup>

Third, a lawyer may practice temporarily in a jurisdiction in which the lawyer is not admitted if the legal 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

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80. MJP COMMISSION REPORT, *supra* note 3, at 22, 24 (citing MODEL RULES OF PROF'L CONDUCT R. 5.5 (2001)).

81. MODEL RULES OF PROF'L CONDUCT R. 5.5(b) (2004).

82. MODEL RULES OF PROF'L CONDUCT R. 5.5(b)(1)–(2) (2004).

83. MJP COMMISSION REPORT, *supra* note 3, at 24.

84. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(1)–(4) (2004).

85. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2001).

86. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(1) (2004).

87. MJP COMMISSION REPORT, *supra* note 3, at 24.

88. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(2) (2004).

89. MJP COMMISSION REPORT, *supra* note 3, at 25–26.

90. *Id.* at 26.



which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission . . . .<sup>91</sup>

The rule protects attorneys engaged in an ADR proceeding, who may have an ongoing relationship with a client or who may have expertise in a particular area of law.<sup>92</sup>

Fourth, attorneys may temporarily provide legal services in a jurisdiction in which they are not admitted if the legal services “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.”<sup>93</sup> This rule protects attorneys who practice transactional, counseling, and other non-litigation work.<sup>94</sup>

Revised Model Rule 5.5(d) applies to lawyers admitted to a United States jurisdiction, who are not disbarred or suspended from practice in any jurisdiction.<sup>95</sup> Unlike revised Rule 5.5(c), this provision allows one to practice in the jurisdiction on a permanent basis in certain situations, and allows an attorney to open an office in the jurisdiction.<sup>96</sup> Previous Rule 5.5 had no similar provision.<sup>97</sup> A lawyer who meets the requirement of revised Rule 5.5(d) may provide legal services “to the lawyer’s employer or its organizational affiliates [so long as they are] not services for which the forum requires *pro hac vice* admission.”<sup>98</sup> The provision applies to governmental lawyers, in-house corporate lawyers, and others who provide legal services to the employer.<sup>99</sup> Revised Rule 5.5(d)(2) allows a lawyer who meets the requirements of revised Rule 5.5(d) to provide “services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.”<sup>100</sup>

The ABA House of Delegates adopted revised Model Rule 5.5 in 2002.<sup>101</sup> A national trend to study and adopt the rules followed. Since 2002, fifty-one jurisdictions have studied the new rules.<sup>102</sup> Of those jurisdictions, eight jurisdictions adopted a rule identical to the revised Rule 5.5 and seventeen jurisdictions adopted a rule similar to revised Rule 5.5.<sup>103</sup> The remaining jurisdictions either have

91. MODEL RULES OF PROF’L CONDUCT R. 5.5(c)(3) (2004).

92. MJP COMMISSION REPORT, *supra* note 3, at 26.

93. MODEL RULES OF PROF’L CONDUCT R. 5.5(c)(4) (2004).

94. MJP COMMISSION REPORT, *supra* note 3, at 27.

95. MODEL RULES OF PROF’L CONDUCT R. 5.5(d) (2004).

96. MJP COMMISSION REPORT, *supra* note 3, at 31.

97. MODEL RULES OF PROF’L CONDUCT R. 5.5 (2001).

98. MODEL RULES OF PROF’L CONDUCT R. 5.5(d)(1) (2004).

99. MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 16 (2004).

100. MODEL RULES OF PROF’L CONDUCT R. 5.5(d)(2) (2004).

101. MJP COMMISSION REPORT, *supra* note 3, at 4.

102. *Id.* at ii, 5.

103. See A.B.A., STATE IMPLEMENTATION OF ABA MODEL RULE 5.5, at 1–4 (Multijurisdictional Practice of Law) (2005), [http://www.abanet.org/cpr/jclr/5\\_5\\_quick\\_guide.pdf](http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf) (providing a list of states that have: (1) adopted an identical or modified version of revised Rule 5.5; (2) received recommendation for adoption of revised Rule 5.5; or (3) established a committee to study revised Rule 5.5).

recommendations pending for the highest court to adopt or have committees continuing to study the rule.<sup>104</sup>

## V. SOUTH CAROLINA ADOPTS A VERSION OF REVISED MODEL RULE 5.5

To protect the public, the South Carolina Supreme Court has typically restricted access to South Carolina courts and clients to only attorneys admitted to practice in South Carolina.<sup>105</sup> South Carolina does not recognize a reciprocity provision that allows an out-of-state lawyer to practice in South Carolina without taking the South Carolina bar examination.<sup>106</sup> South Carolina also limits how often an out-of-state attorney may seek *pro hac vice* admission.<sup>107</sup> For example, in a decision involving an attorney licensed in Illinois who petitioned the court several times for *pro hac vice* admission, the South Carolina Supreme Court noted that *pro hac vice* means “‘for this one particular occasion.’”<sup>108</sup> The court further stressed that *pro hac vice* admission “is not a vehicle by which a South Carolina resident, who is a member of an out-of-state bar, may circumvent the rules for admission to practice in this State.”<sup>109</sup>

Given South Carolina’s policy of protecting the public and limiting an out-of-state attorney’s access to the courts, it is surprising that South Carolina expanded its rule regarding the multijurisdictional practice of law. However, the previous South Carolina rule regulating the unauthorized practice of law did not effectively guide attorneys because it provided only general statements that attorneys and courts could not easily apply.<sup>110</sup> The previous Rule 5.5 had two provisions, which limited an attorney from practicing law or assisting another where doing so would violate the legal profession in that jurisdiction.<sup>111</sup> The South Carolina Supreme

104. *Id.*

105. *See, e.g.*, Rule 5.5 cmt. 2, RPC, Rule 407, SCACR (“[L]imiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.”); *In re Brown*, 361 S.C. 347, 355, 605 S.E.2d 509, 513 (2004) (“The ‘central purpose of the disciplinary process is to protect the public from unscrupulous and indifferent lawyers.’” (quoting *In re Hall*, 333 S.C. 247, 251, 509 S.E.2d 266, 268 (1998))).

106. South Carolina once had a reciprocity provision granting out-of-state attorneys admission to practice if they met certain requirements, but the South Carolina Supreme Court repealed this provision in the early 1970s. *See generally* *Hawkins v. Moss*, 503 F.2d 1171, 1174 n.1, 2 (4th Cir. 1974) (noting South Carolina’s former reciprocity provision as well as its repeal).

107. *See* S.C. Med. Malpractice Joint Underwriting Ass’n v. Froelich, 297 S.C. 400, 402–03, 377 S.E.2d 306, 307–08 (1989); Rule 404(h), SCACR (limiting an out-of-state attorney from participating in more than three alternative dispute resolution matters in one year).

108. *Froelich*, 297 S.C. at 402–03, 377 S.E.2d at 307–08 (quoting BLACK’S LAW DICTIONARY 1091 (5th ed. 1979)).

109. *Id.* at 402–03, 377 S.E.2d at 308.

110. *See* Rule 5.5, RPC, Rule 407, SCACR (amended October 1, 2005) (“A lawyer shall not: (a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”); *see generally* MJP COMMISSION REPORT, *supra* note 3, at 3 (stating attorneys expressed concern that if courts applied the rules literally, the laws would impede lawyers’ abilities to meet client needs).

111. Rule 5.5(a)–(b), RPC, Rule 407, SCACR (amended October 1, 2005).

Court recognized the need for formal guidance and adopted a rule substantially similar to ABA Model Rule 5.5.<sup>112</sup>

Paragraphs (a), (b), (c)(1)–(2), and (d) are identical to ABA Model Rule 5.5.<sup>113</sup> South Carolina modified (c)(3) and (c)(4) of the model rule by substituting “representation of an existing client” in place of the word “practice.”<sup>114</sup> The modification permits a lawyer to appear temporarily in a matter involving an existing client but prevents an out-of-state attorney from seeking new clients in South Carolina without seeking admission in South Carolina or complying with the provisions of Rule 5.5(c).<sup>115</sup> This deviation from the model rule reflects South Carolina’s policy of limiting access to out-of-state lawyers.

Revised Rule 5.5(a) clarifies that “a lawyer may not assist another, whether a lawyer or nonlawyer, in the unauthorized practice of law.”<sup>116</sup> This is not a substantive change to the South Carolina Rules of Professional Conduct because it combines the former Rule 5.5<sup>117</sup> with Rule 8.4(a),<sup>118</sup> which prohibits a lawyer from “knowingly assist[ing]” another in violating the Rules of Professional Conduct.<sup>119</sup>

Rule 5.5(b) prohibits an out-of-state lawyer from setting up an office, or otherwise maintaining a continuous and systematic presence in a jurisdiction, unless some other court rule or law so authorizes.<sup>120</sup> The rule also prohibits out-of-state lawyers from representing to the public that they are admitted in South Carolina if, in fact, they are not.<sup>121</sup> The rule does not allow an out-of-state lawyer to open an office or establish a permanent law practice in South Carolina.<sup>122</sup>

Rule 5.5(c)(1) allows an out-of-state lawyer to associate with a South Carolina lawyer who actively participates in the matter.<sup>123</sup> This section of the rule promotes client choice.<sup>124</sup> Examples include a South Carolina lawyer assisting an out-of-state lawyer with “special or particularized expertise” and an out-of-state lawyer representing a client who has confidence in the out-of-state lawyer and with whom the client has an ongoing relationship.<sup>125</sup> The South Carolina lawyer cannot merely serve as a front for the out-of-state lawyer. Rather the South Carolina lawyer must

112. *In re Amendments to Rules of Professional Conduct*, Rule 407, SCACR, Shearouse Adv. Sh. No. 26 at 7, 93–94 (S.C. June 20, 2005).

113. Chief Justice’s Commission on the Ethics 2000 Implementation Report to the Supreme Court Recommending Changes to the South Carolina Rules of Professional Conduct, Shearouse Adv. Sh. No. 41 at 102 (S.C. October 21, 2004).

114. *Id.*

115. *Id.*

116. MJP COMMISSION REPORT, *supra* note 3, at 24.

117. Rule 5.5, RPC, Rule 407, SCACR (amended October 1, 2005).

118. Rule 8.4(a), RPC, Rule 407, SCACR.

119. MJP COMMISSION REPORT, *supra* note 3, at 24; Rule 8.4(a), RPC, Rule 407, SCACR.

120. MJP COMMISSION REPORT, *supra* note 3, at 24.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

"share actual responsibility for the representation."<sup>126</sup> This requirement protects both client choice and South Carolina's interest in regulating its lawyers.<sup>127</sup>

Rule 5.5(c)(2) broadens the opportunities for out-of-state lawyers to practice in South Carolina. A lawyer admitted in good standing in another United States jurisdiction may provide legal services on a temporary basis when the services are "reasonably related to a pending or potential proceeding before a tribunal in this . . . jurisdiction, if the lawyer . . . is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized."<sup>128</sup> The work a lawyer may perform prior to *pro hac vice* admission includes meeting with the client, interviewing potential witnesses, reviewing documents, and deposing witnesses.<sup>129</sup> Additionally, the rule protects subordinate lawyers, who assist an out-of-state lawyer who is admitted *pro hac vice* or reasonably expects the court to grant *pro hac vice* admission.<sup>130</sup> This provision allows a law firm to have several lawyers working on the litigation without any of the attorneys participating in the unauthorized practice of law.<sup>131</sup>

Rule 5.5(c)(3) allows an out-of-state lawyer to provide temporary services in South Carolina in connection with the representation of an existing client in "a pending or potential arbitration, mediation, or other alternative dispute resolution."<sup>132</sup> This provision allows a client to choose a lawyer based on factors such as "confidentiality, consistency, uniformity, costs, and convenience."<sup>133</sup> The out-of-state lawyer's services must be "reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice."<sup>134</sup>

Rule 5.5(c)(4)<sup>135</sup> allows an out-of-state lawyer to provide transactional, counseling and other non-litigation services on a temporary basis if the services "arise out of or are reasonably related to the lawyer's representation of an existing client."<sup>136</sup> This provision protects the out-of-state lawyer who works in South Carolina on matters for an existing client.<sup>137</sup> The rule serves clients' interests by

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126. MJP COMMISSION REPORT, *supra* note 3, at 24.

127. *Id.*

128. Rule 5.5(c)(2), RPC, Rule 407, SCACR.

129. Rule 5.5 cmt. 10, RPC, Rule 407, SCACR.

130. Rule 5.5 cmt. 11, RPC, Rule 407, SCACR.

131. MJP COMMISSION REPORT, *supra* note 3, at 26.

132. Rule 5.5(c)(3), RPC, Rule 407, SCACR; See MJP COMMISSION REPORT, *supra* note 3, at 27.

133. See MJP COMMISSION REPORT, *supra* note 3, at 27 (quoting ABA SECTION OF LITIGATION, PRELIMINARY POSITION STATEMENT ON MULTI-JURISDICTIONAL PRACTICE (June 2001), [http://www.abanet.org/cpr/mjp-comm\\_sl.html](http://www.abanet.org/cpr/mjp-comm_sl.html)).

134. Rule 5.5(c)(3), RPC, Rule 407, SCACR.

135. Rule 5.5(c)(4), RPC, Rule 407, SCACR ("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: . . . are not within paragraph (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice.").

136. *Id.*

137. See MJP COMMISSION REPORT, *supra* note 3, at 27.

allowing a client to retain one lawyer to work on several matters.<sup>138</sup> This provision also protects an out-of-state lawyer who has developed an expertise in a particular area to provide those specialized services for existing clients.<sup>139</sup>

Rule 5.5(d)(1) permits an out-of-state lawyer to provide services to the out-of-state lawyer's employer or its organizational affiliates so long as the services do not require *pro hac vice* admission.<sup>140</sup> This rule contrasts with the requirement for temporary service in 5.5(c)<sup>141</sup> because 5.5(d)(1) "allow[s] an out-of-state lawyer to work permanently from the office of a corporate, government or organizational employer" in South Carolina.<sup>142</sup> This rule applies to "in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer."<sup>143</sup> However, the out-of-state lawyer may not provide personal legal services to employer's employees or officers.<sup>144</sup> If the in-house counsel, or other employed lawyer such as a government lawyer, establishes an office or other systematic and continuous contacts, the out-of-state lawyer may be subject to protecting client funds, attending training for continuing legal education, or other requirements.<sup>145</sup> Rule 5.5(d)(2) permits an out-of-state lawyer to provide legal "services that the lawyer is authorized to provide by federal law or other law of this jurisdiction."<sup>146</sup>

## VI. APPLYING REVISED RULE 5.5

The following Section applies revised Rule 5.5 to different hypothetical scenarios. Once the hypothetical facts are given, this Section explores how the South Carolina Supreme Court would apply the rule in situations where issues and new interpretations are likely to arise. When possible, the hypothetical facts come from cases in other jurisdictions. However, the cases predated revised Rule 5.5, so the application is original. In each scenario, assume a United States jurisdiction, other than South Carolina, has admitted the out-of-state lawyer to practice law, and the out-of-state lawyer has authority to practice law in that jurisdiction.<sup>147</sup> Also, assume the South Carolina lawyer has met all of the requirements to practice law

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138. *See id.*

139. *See id.*

140. Rule 5.5(d)(1), RPC, Rule 407, SCACR.

141. Rule 5.5(c), RPC, Rule 407, SCACR.

142. MJP COMMISSION REPORT, *supra* note 3, at 30; Rule 5.5(d)(1), RPC, Rule 407, SCACR.

143. Rule 5.5 cmt. 16, RPC, Rule 407, SCACR.

144. *Id.*

145. Rule 5.5 cmt. 17, RPC, Rule 407, SCACR.

146. Rule 5.5(d)(2), RPC, Rule 407, SCACR.

147. *See* Rule 5.5 cmt. 7, RPC, Rule 407, SCACR (requiring authorization of an out-of-state lawyer to practice law in another jurisdiction and excluding an out-of-state lawyer who is technically admitted but may be not have authorization to practice law, for instance, because the lawyer is on inactive status).

in South Carolina.<sup>148</sup> Any discussion involving how the court might decide the matter refers to the South Carolina Supreme Court because the South Carolina Constitution gives the Supreme Court original jurisdiction over the admission of lawyers and the discipline of those admitted lawyers.<sup>149</sup>

### *A. An Out-of-State Lawyer Moves to South Carolina*

Normally, a lawyer who moves to South Carolina and takes up residence must take the bar examination and complete other admission requirements to practice in South Carolina.<sup>150</sup> However, revised Rule 5.5 may apply even when lawyers move permanently to this state in some circumstances.

#### *1. Hypothetical 1—Lateral Hire*

An out-of-state lawyer accepts an offer from a South Carolina law firm. The out-of-state lawyer moves to the state and applies for admission to the bar. What practice, if any, may the out-of-state lawyer engage in prior to being admitted to the bar? This situation invokes several sections of Rule 5.5, particularly 5.5(a),<sup>151</sup> 5.5(b),<sup>152</sup> and 5.5(c)(1).<sup>153</sup>

Except for the provisions of (d)(1) and (d)(2), Rule 5.5 does not permit a lawyer to open an office or create and maintain other systematic and continuous contacts in South Carolina without being a member of the South Carolina bar.<sup>154</sup> Therefore, the out-of-state lawyer may not open an office in South Carolina before the court admits the lawyer to practice.<sup>155</sup> The rule also prohibits out-of-state lawyers from holding out to the public that they are admitted to the South Carolina bar.<sup>156</sup> For example, the South Carolina Supreme Court held an Illinois attorney engaged in the unauthorized practice of law in South Carolina when he misled the

148. See Rule 402, SCACR (stating requirements for admission to practice law in South Carolina); Rule 403, SCACR (establishing trial requirements a South Carolina lawyer must complete before practicing alone in a South Carolina tribunal).

149. S.C. CONST. art. V, § 4.

150. Rule 402, SCACR; Rule 403, SCACR.

151. Rule 5.5(a), RPC, Rule 407, SCACR ("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.").

152. Rule 5.5(b), RPC, Rule 407, SCACR ("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.").

153. Rule 5.5(c)(1), RPC, Rule 407, SCACR ("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[.]" ).

154. Rule 5.5 cmt. 5, RPC, Rule 407, SCACR.

155. Rule 5.5(b)(1), RPC, Rule 407, SCACR.

156. Rule 5.5(b)(2), RPC, Rule 407, SCACR.

public by denoting on firm letterhead "licensed to practice in Illinois."<sup>157</sup> The statement misled clients because it did not adequately indicate the jurisdictional limits of the Illinois attorney.<sup>158</sup> Although an out-of-state lawyer may not open an office or purport to be a South Carolina lawyer, Rule 5.5 allows an out-of-state lawyer to practice law temporarily in South Carolina if the out-of-state lawyer associates with a South Carolina law firm.<sup>159</sup>

Rule 5.5(c) allows an attorney admitted in good standing in another U.S. jurisdiction<sup>160</sup> to practice law temporarily in South Carolina.<sup>161</sup> However, this provision does not protect associates "who rotate among a law firm's offices for periods that would be longer than 'temporary.'"<sup>162</sup> So long as the out-of-state lawyer is in a "genuine co-counsel relationship" with the South Carolina lawyer, the rule permits an out-of-state lawyer to provide legal services on a temporary basis in South Carolina.<sup>163</sup>

No single test determines whether a lawyer is providing services on a temporary basis.<sup>164</sup> For example, a class action lawsuit or an antitrust matter could go on for years, but the court may consider the attorney's work on the matter temporary because there is only one matter. That is not to say an out-of-state attorney who participates in more than one matter is practicing law in South Carolina permanently. An attorney may work on several cases involving a single car accident because the attorney represents multiple passengers and each filed a separate lawsuit. In this scenario, the work might still be temporary because all of the lawsuits stem from one incident. As a comment to the rule notes, "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."<sup>165</sup>

Certainly, the out-of-state lawyer waiting for bar admission could not open an office. However, lateral hires from other states do not have to wait for bar examination results before seeking employment. A lateral hire could associate with a firm and perform certain activities under a South Carolina lawyer's supervision. The associate may perform almost all of the same activities as a South Carolina attorney so long as a South Carolina lawyer supervises the work.<sup>166</sup> In addition, the

157. S.C. Med. Malpractice Joint Underwriting Ass'n v. Froelich, 297 S.C. 400, 402, 377 S.E.2d 306, 307 (1989).

158. *Id.* at 402-03, 377 S.E.2d at 307.

159. Rule 5.5(c)(1), RPC, Rule 407, SCACR.

160. The Rule does not protect a bar applicant who has just graduated from law school. *See* Rule 5.5(c), RPC, Rule 407, SCACR.

161. *Id.*

162. MJP COMMISSION REPORT, *supra* note 3, at 25.

163. *Id.*

164. Rule 5.5 cmt. 6, RPC, Rule 407, SCACR.

165. *Id.*

166. Rule 5.5(c)(1), RPC, Rule 407, SCACR (requiring the South Carolina lawyer to "actively participat[e]" in the matter).

associate could seek *pro hac vice* admission to practice before a South Carolina tribunal after becoming a resident of South Carolina.<sup>167</sup>

Nothing in Rule 5.5, however, determines how soon a lawyer must seek admission to the state bar upon moving to a new state. An advisory opinion from the Arkansas Bar Association determined that a law firm may associate a lawyer from another state for a “reasonable period of time,” and during this period, the lawyer should seek admission to the state bar.<sup>168</sup> However, the opinion does not define “reasonable period of time.”<sup>169</sup> In South Carolina, a reasonable period of time would likely be one year, which would give a lateral hire enough time to apply to take the bar examination.

## 2. Hypothetical 2—Corporate Counsel

A corporation with offices in several states transfers an out-of-state lawyer from her home office to South Carolina. What legal work, if any, may the out-of-state lawyer perform in South Carolina without violating the prohibition against the unauthorized practice of law?

The MJP Commission recognized that in-house corporate lawyers’ work had grown nationally along with the business of corporate clients.<sup>170</sup> The Commission sought to protect the corporation’s interest in obtaining efficient and competent legal assistance from a lawyer the corporation trusts.<sup>171</sup> In South Carolina, an out-of-state corporate lawyer can take two routes to practice law in South Carolina. An out-of-state corporate lawyer must look to both Rule 5.5(d)(1)<sup>172</sup> and South Carolina Appellate Court Rule 405<sup>173</sup> to determine which provision best applies to the lawyer’s work. The attorney need not comply with both provisions. The main difference between the two rules involves appearances before a South Carolina tribunal.

Rule 5.5(d)(1) allows corporate counsel to practice in South Carolina so long as the out-of-state lawyer only provides services to the employer and not to the corporation’s employees.<sup>174</sup> When practicing pursuant to Rule 5.5(d)(1), the out-of-state lawyer need not file any paperwork with the South Carolina Supreme Court. Despite Rule 5.5(d)(1), an out-of-state lawyer who becomes a South Carolina

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167. Rule 404(b), SCACR (prohibiting attorneys who are South Carolina residents from appearing *pro hac vice* unless they have applied for South Carolina bar admission pursuant to Rule 402, SCACR).

168. PROF’L ETHICS COMM., ARK. BAR ASS’N, SUBJECT: NON-ARKANSAS LAWYERS IN ARKANSAS LAW FIRMS, ADVISORY OP. 2004-03, available at [http://www.arkbar.com/resources/Advisory%20Opinion\\_04-03.htm](http://www.arkbar.com/resources/Advisory%20Opinion_04-03.htm).

169. *Id.*

170. MJP COMMISSION REPORT, *supra* note 3, at 30.

171. *Id.*

172. Rule 5.5(d)(1), RPC, Rule 407, SCACR (“A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that: (1) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission[.]”).

173. Rule 405, SCACR.

174. Rule 5.5 cmt. 16, RPC, Rule 407, SCACR.



resident may not practice before a tribunal that requires *pro hac vice* admission without first seeking admission to the South Carolina bar.<sup>175</sup> Therefore, an out-of-state lawyer who becomes a South Carolina resident and continues to work for the out-of-state employer cannot practice before a South Carolina tribunal unless the lawyer first attempts to meet the South Carolina bar admission requirements.<sup>176</sup>

Often characterized as the “in-house counsel” exception, Rule 5.5(d)(1) also applies to lawyers employed by the government.<sup>177</sup> A government lawyer must note the applicable provision requires an out-of-state lawyer to obtain *pro hac vice* admission to forums in which the state requires *pro hac vice* admission.

Rule 405 lays out nine requirements an out-of-state lawyer must meet to receive a limited certificate of admission to practice law as in-house counsel.<sup>178</sup> Specifically, one requirement mandates that the out-of-state attorney’s employer cannot provide legal services to citizens or to company employees in South Carolina.<sup>179</sup>

Pursuant to Rule 405, the court may grant a limited certificate of admission to in-house counsel of a corporation, and the out-of-state lawyer may appear before a court or tribunal if the out-of-state lawyer associates a South Carolina lawyer and presents a copy of the limited certificate of admission to the court or tribunal.<sup>180</sup> Upon receipt and presentation of a limited certificate of admission, out-of-state lawyers may represent their employers before a magistrates’ court or before a state agency if the agency’s regulations so permit.<sup>181</sup> The rule further explains the South Carolina lawyer associated with the out-of-state lawyer must be present at “all trials, hearings, depositions, and other proceedings, and shall be required to sign all pleadings, motions, and other documents required to be signed by an attorney.”<sup>182</sup>

175. Rule 404(b), SCACR (prohibiting attorneys who are residents from practicing *pro hac vice* unless they apply for South Carolina bar admission pursuant to Rule 402, SCACR).

176. Rule 402, SCACR; Rule 403, SCACR; Rule 404(b) SCACR.

177. Rule 5.5 cmt. 16, RPC, Rule 407, SCACR.

178. Rule 405(a), SCACR (“The Supreme Court may issue a limited certificate of admission to practice law in South Carolina to any person who: (1) is at least twenty-one years of age; (2) is a person of good moral character; (3) has received a JD or LLB degree from a law school which was approved by the Council of Legal Education of the American Bar Association at the time the degree was conferred; (4) has been admitted to practice law in the highest court of another state or the District of Columbia; (5) is a member in good standing in each jurisdiction where he is admitted to practice law; (6) has not been disbarred or suspended from the practice of law and is not the subject of any pending disciplinary proceeding in any other jurisdiction; (7) is employed in the legal department or under the supervision of the legal department of a corporation, company, partnership, or association (business employer) which does not provide legal services in South Carolina to the public or its employees. If not a South Carolina corporation, company, partnership or association, the business employer must be qualified or otherwise lawfully engaged in business in South Carolina; (8) performs most of his duties for the business employer in South Carolina and has his principal office in South Carolina; and (9) provides legal services in South Carolina solely for the business employer or the parent or subsidiary of such employer.”).

179. Rule 405(a)(7), SCACR.

180. Rule 405(b)(3)(i)–(ii), SCACR.

181. Rule 405(b)(1)–(2), SCACR.

182. Rule 405(3)(i), SCACR.

Rule 405 guides the South Carolina lawyer associating with in-house counsel.<sup>183</sup> A South Carolina lawyer must follow all aspects of the requirements to avoid disciplinary action.

### 3. *Hypothetical 3—Federal Practice*

An out-of-state lawyer has an extensive bankruptcy practice in another United States jurisdiction and then moves to South Carolina. May the out-of-state lawyer open an office in South Carolina and practice only federal bankruptcy law without having to meet the South Carolina requirements for bar admission? This situation invokes Rule 5.5(d)(2), which allows an out-of-state lawyer to practice in a jurisdiction without admission to the bar if the legal services provided are authorized by federal law.<sup>184</sup>

An emerging trend allows an out-of-state lawyer who works strictly in an area governed by federal law to practice in a federal court sitting in a state that has not admitted the lawyer to practice.<sup>185</sup> Case law demonstrates the prevalence of this trend in federal bankruptcy practice.<sup>186</sup> Rule 5.5(d)(2) is not an admission rule; therefore, if an out-of-state lawyer wishes to practice law in the United States Bankruptcy Court in the District of South Carolina, the out-of-state lawyer must follow the court rules.

To practice in the United States Bankruptcy Court for the District of South Carolina, the United States District Court for the District of South Carolina must have admitted the lawyer to practice.<sup>187</sup> Furthermore, “[t]o practice before the United States District Court for the District of South Carolina,” a lawyer “must be

183. *Id.*

184. Rule 5.5(d)(2), RPC, Rule 407, SCACR (“A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that: . . . (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.”).

185. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 3(2) (2000) (“A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client . . . (2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency.”).

186. *See Rittenhouse v. Delta Home Improvement, Inc. (In re Desilets)*, 291 F.3d 925, 927, 931 (6th Cir. 2002) (holding a Texas attorney admitted to practice in Michigan federal district court could practice in federal bankruptcy court in Michigan because the Bankruptcy Code’s definition of attorney does not mean the attorney must be licensed by the state bar in which the court sits, so long as the attorney is admitted by the federal court bar where the court sits and admitted to the bar of another state); *Brown v. Smith (In re Poole)*, 222 F.3d 618, 621 (9th Cir. 2000) (holding an Illinois attorney properly admitted to practice in the Arizona federal district court could represent debtors in bankruptcy court even though the attorney was not admitted to the Arizona state bar). *But see, e.g., Ranta v. McCarney*, 391 N.W.2d 161, 166 (N.D. 1986) (refusing to accept a broad federal practice exception for a lawyer who engaged in tax law); *In re Peterson*, 163 B.R. 665, 675 (Bankr. D. Conn. 1994) (holding an attorney, not admitted in Connecticut, violated Connecticut’s unauthorized practice of law statute by advising and representing clients on federal bankruptcy issues in Connecticut).

187. *Brown v. Goode, Peterson & Hemme (In re Brown)*, 270 B.R. 43, 47 (Bankr. D.S.C. 2001) (citing BANKR. S.C. CT. R. 9010-1).

in good standing with the South Carolina bar.”<sup>188</sup> A lawyer not admitted to the United States Bankruptcy Court for the District of South Carolina may seek *pro hac vice* admission as provided in the court’s local rules.<sup>189</sup> A lawyer who is a member in good standing of any United States District Court Bar as well as any state bar or the District of Columbia Bar may seek *pro hac vice* admission.<sup>190</sup>

Although South Carolina has adopted Rule 5.5(d)(2), the district court rule limits *pro hac vice* admission to lawyers “who do not conduct a substantial portion of their practices in this District.”<sup>191</sup> This rule prevents an out-of-state bankruptcy attorney from practicing extensively in the United States Bankruptcy Court for the District of South Carolina. Furthermore, to determine if the lawyer might violate the *pro hac vice* admission rule, the court may consider, among other factors, whether the lawyer is a resident of South Carolina, how often the attorney practices in the federal and state courts of South Carolina, and the proportion of cases the attorney files in South Carolina.<sup>192</sup> If the out-of-state lawyer has moved to South Carolina, the lawyer likely will become a resident of the state. Additionally, if the out-of-state lawyer opens an office in South Carolina, the lawyer probably will practice or plans to practice, in the United States Bankruptcy Court in the District of South Carolina. Furthermore, if the out-of-state lawyer’s office is in South Carolina, the lawyer likely will file a high proportion of cases in South Carolina. The United States Bankruptcy Court in the District of South Carolina will not grant the out-of-state lawyer *pro hac vice* admission on a regular basis.<sup>193</sup> For these reasons, an out-of-state lawyer who wishes to open an office devoted to bankruptcy practice must apply to be a member of the South Carolina Bar to engage in the authorized practice of law.

Although an attorney may not open an office to practice bankruptcy law in South Carolina, other federal laws may authorize the attorney to practice in South Carolina without being a member of the South Carolina Bar. While the authorization may come from federal law, other laws, including statutes, court rules, executive regulations, or judicial precedent, may also authorize the out-of-state lawyer’s practice.<sup>194</sup>

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188. *Id.* (citing D.S.C. Ct. R. 83.I.02).

189. BANKR. S.C. Ct. R. 9010-1(a)(3).

190. D.S.C. Ct. R. 83.I.05(A).

191. D.S.C. Ct. R. 83.I.05(C).

192. *See* S.C. Med. Malpractice Joint Underwriting Ass’n v. Froelich, 297 S.C. 400, 402–03, 377 S.E.2d 306, 307–08 (1989) (holding an Illinois attorney, not licensed in South Carolina, engaged in the unauthorized practice of law by attending roster meetings and pretrial conferences, participating in numerous depositions, and engaging in settlement negotiations).

193. The South Carolina District courts use *Froelich* as a guide. D.S.C. Ct. R. 83.I.05(C) (noting the rule applies to attorneys who do not conduct a substantial portion of their practice in South Carolina).

194. Rule 5.5 cmt. 18, RPC, Rule 407, SCACR.

For example, in the area of patent law, federal statutes and Patent Office regulations authorize practice before the Patent Office by nonlawyers.<sup>195</sup> In *Sperry v. Florida*, the United States Supreme Court vacated a Florida court's decision that barred a patent agent from prosecuting patents until the agent became a member of the Florida Bar.<sup>196</sup> Sperry opened an office in Tampa, Florida and held himself out to the public as a patent attorney.<sup>197</sup> Although the Court noted the work Sperry performed constituted the practice of law,<sup>198</sup> a federal regulation authorized nonlawyers to practice as patent agents before the Patent Office.<sup>199</sup> Thus, the Court held that under the Supremacy Clause of the United States Constitution, states may not prohibit nonlawyers from practicing before a federal agency if that practice is "within the scope of the federal authority."<sup>200</sup>

Rule 5.5(d)(2) appears to codify the result in *Sperry*.<sup>201</sup> The rule recognizes that federal law authorizes certain forms of practice by lawyers, and in some cases by nonlawyers,<sup>202</sup> who are not admitted to practice in the jurisdiction.<sup>203</sup> What types of practices does this exception cover? If a federal court or federal administrative agency specifically allows practice before the agency by a lawyer admitted in any jurisdiction, then that practice should fall within the 5.5(d)(2) exception. For example, an attorney admitted in any jurisdiction may practice before the United States Tax Court.<sup>204</sup> Likewise, an attorney admitted in any jurisdiction may practice before the Commissioner of Social Security.<sup>205</sup>

Therefore, an attorney authorized to practice in another jurisdiction may move to South Carolina and practice before agencies and courts, including the United States Tax Court and the Social Security Administration, whose rules or statutes authorize the practice. In these circumstances, may the attorney open an office in South Carolina and hold himself out as practicing either federal tax law or Social Security law? The answer should be "yes." The Court in *Sperry* held the attorney could open an office in Florida to practice patent law before federal agencies and treated the opening of an office as incidental to the federal practice.<sup>206</sup> Rule

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195. *Sperry v. Florida*, 373 U.S. 379, 385 (1963) (holding Florida could not enjoin a non-lawyer registered to practice before the U.S. Patent Office from pursuing patent applications in Florida because federal law and Patent Office regulations authorized non-lawyers to practice before the Patent Office).

196. *Id.* at 381.

197. *Id.*

198. *Id.* at 383.

199. *Id.* at 384; see also 37 CFR § 11.6(a)–(b) (2005) (authorizing an attorney or agent to practice before the Patent Office).

200. *Sperry*, 373 U.S. at 385; see also U.S. CONST. art. VI, cl. 2 (establishing the supremacy of federal law).

201. Rule 5.5(d)(2), RPC, Rule 407, SCACR.

202. T.C. R. 200(a)(2)–(3) (2005) (allowing attorneys as well as nonattorneys, such as certified public accountants, to practice before the United States Tax Court); 42 U.S.C. § 406(a)(1) (2000) (allowing nonattorneys to practice before the Social Security Commissioner).

203. Rule 5.5(d)(2), RPC, Rule 407, SCACR.

204. T.C. R. 200(a)(2).

205. 42 U.S.C. § 406.

206. *Sperry v. Florida*, 373 U.S. 379, 381 (1963).

5.5(d)(2) also allows an attorney who is engaged in practice authorized by federal law to open an office in South Carolina.<sup>207</sup>

While Rule 5.5(d)(2) appears to authorize an out-of-state lawyer to open an office in South Carolina for the purpose of practicing federal law, it is unclear how the South Carolina Supreme Court would interpret the rule. Indeed, if confronted with a significant number of “federal practitioners” from out-of-state, the court might even repeal Rule 5.5(d)(2). A narrow interpretation of the rule or an outright repeal would not resolve the matter, however. The issue would then become one of application of *Sperry* to other forms of federal practice. While the South Carolina Supreme Court could decide this issue, final authority on the scope of the *Sperry* exception rests with the United States Supreme Court.<sup>208</sup>

## *B. An Out-of-State Lawyer in Litigation or Alternative Dispute Resolution*

### *1. Hypothetical 4—Litigation*

Under a variety of situations, an out-of-state lawyer may settle disputes in South Carolina. A national corporation claims a South Carolina corporation breached a contract. The contract does not have an arbitration provision. What can an out-of-state lawyer do in South Carolina during the fact gathering, investigating, and litigation stages?

Prior to filing suit, the out-of-state lawyer for the national corporation could gather facts in South Carolina—on a temporary basis—pursuant to two provisions of Rule 5.5(c).<sup>209</sup> Under Rule 5.5(c)(1), the out-of-state lawyer could associate a South Carolina lawyer to actively participate in the matter.<sup>210</sup> If the national corporation has an office in South Carolina and the corporate counsel in that office is admitted to practice law in South Carolina, the out-of-state lawyer could associate that attorney to assist in the matter. However, this option might be impractical if the corporation needs to hire outside counsel at an early stage of litigation because of the expense to the client.

Second, during the investigatory phase, the out-of-state lawyer could practice in South Carolina under Rule 5.5(c)(2) because the matter is “reasonably related to a pending or potential proceeding.”<sup>211</sup> The out-of-state lawyer need not associate local counsel yet because the out-of-state lawyer is merely gathering facts in anticipation of litigation.<sup>212</sup> Rule 404 only requires the out-of-state lawyer to associate South Carolina counsel once the matter is pending before the court.<sup>213</sup>

Suppose the negotiations between the parties break down and the out-of-state lawyer determines the corporation will file suit against the South Carolina

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207. Rule 5.5(d)(2), RPC, Rule 407, SCACR; see MJP COMMISSION REPORT, *supra* note 3, at 31.

208. U.S. CONST. art. VI, § 1, cl. 2.

209. Rule 5.5(c), RPC, Rule 407, SCACR.

210. Rule 5.5(c)(1), RPC, Rule 407, SCACR.

211. Rule 5.5(c)(2), RPC, Rule 407, SCACR.

212. See Rule 404, SCACR.

213. Rule 404(c), SCACR.

corporation. What may the out-of-state lawyer do in South Carolina during litigation?

If the matter is in litigation, the out-of-state lawyer could practice in South Carolina pursuant to Rule 5.5(c)(2)<sup>214</sup> and Rule 404, the South Carolina Appellate Court Rule that guides attorneys who seek *pro hac vice* admission.<sup>215</sup> The out-of-state lawyer must file a written application and associate a South Carolina lawyer to be the attorney of record for the matter.<sup>216</sup> The South Carolina lawyer must be prepared to appear before the court regarding the case, sign all papers filed with the court, and attend all "proceedings in the matter, unless the tribunal specifically excuses the South Carolina attorney of record from attendance."<sup>217</sup>

For a South Carolina lawyer to adhere to Rule 404(f), the South Carolina Bar Ethics Advisory Committee advised that the South Carolina lawyer must do more than act as a "potted plant."<sup>218</sup> Additionally, the committee cautioned the South Carolina lawyer may violate Rules 1.8(h),<sup>219</sup> 3.4(c),<sup>220</sup> and 8.4(e)<sup>221</sup> if she does not follow the requirements of Rule 404(f).<sup>222</sup>

Although the court lays out the requirements for a South Carolina lawyer who is the attorney of record for an out-of-state lawyer to whom the court has granted *pro hac vice* admission, it does not mention depositions in its requirements.<sup>223</sup> However, the rule states the South Carolina lawyer shall "attend all subsequent proceedings in the matter."<sup>224</sup> The rule does not define "proceedings," but, to analogize, Rule 405(b)(3)(i) requires the South Carolina lawyer assisting an out-of-state lawyer with a limited certificate of admission to "be present at all . . . depositions."<sup>225</sup> Therefore, although Rule 404(f) does not mention depositions, a prudent South Carolina lawyer would attend depositions, as well as all court proceedings in the matter to fulfill the Rule 404(f) requirements.<sup>226</sup>

214. Rule 5.5(c)(2), RPC, Rule 407, SCACR.

215. Rule 404, SCACR.

216. Rule 404(a), SCACR.

217. Rule 404(f), SCACR.

218. ETHICS ADVISORY COMM., S.C. BAR, ETHICS ADVISORY OP. 03-01 (2003).

219. Rule 1.8(h), RPC, Rule 407, SCACR ("A lawyer shall not: (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement[.]").

220. Rule 3.4(c), RPC, Rule 407, SCACR ("A lawyer shall not: . . . (c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists[.]").

221. Rule 8.4(e), RPC, Rule 407, SCACR ("It is professional misconduct for a lawyer to: . . . (e) engage in conduct that is prejudicial to the administration of justice[.]"); ETHICS ADVISORY COMM., S.C. BAR, ETHICS ADVISORY OP. 03-01.

222. ETHICS ADVISORY COMM., S.C. BAR, ETHICS ADVISORY OP. 03-01.

223. Rule 404(f), RPC, Rule 407, SCACR.

224. *Id.*

225. Rule 405(b)(3)(i), SCACR.

226. Rule 404(f), RPC, Rule 407, SCACR.

## 2. Hypothetical 5—Alternative Dispute Resolution

Suppose the same facts as in hypothetical four, except the contract had an arbitration provision. Assuming the arbitration provision is valid and enforceable, may the out-of-state lawyer handle the arbitration for the client in South Carolina? This situation invokes Rule 5.5(c)(3).<sup>227</sup>

In contrast to the analogous litigation scenario, Rule 5.5(c)(3) does not require an out-of-state lawyer to associate a South Carolina lawyer in the matter.<sup>228</sup> However, if the issues implicate laws unique to South Carolina, a prudent out-of-state lawyer might associate a South Carolina lawyer, although not required by the rules. Other South Carolina court rules also govern and limit an out-of-state lawyer's right to represent an existing client in an alternative dispute resolution.<sup>229</sup> The court updated Rule 404 at the same time it adopted the new Rule 5.5 to limit the broad reach Rule 5.5(c)(3) might have.<sup>230</sup> The South Carolina Supreme Court presumes that an out-of-state lawyer providing legal services pursuant to Rule 5.5(c)(3) more than three times in one year is practicing law on a permanent, not temporary, basis.<sup>231</sup> Although an out-of-state lawyer who participates in alternative dispute resolution in South Carolina need not apply for *pro hac vice* admission, she must file a verified statement with the South Carolina Supreme Court Office of Bar Admissions declaring she has not participated in more than three ADR proceedings in a 365-day period.<sup>232</sup> The out-of-state lawyer must file the statement even in the fact gathering stage, when "the lawyer seeks to provide legal services pursuant to Rule 5.5(c)(3)."<sup>233</sup> In sum, to meet all the requirements, the out-of-state lawyer must 1) provide the services to a pre-existing client, in a jurisdiction in which the lawyer is admitted,<sup>234</sup> 2) file a fee and statement with the South Carolina Supreme Court

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227. Rule 5.5(c)(3), RPC, Rule 407, SCACR ("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: . . . (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 representation of an existing client in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission[.]").

228. *Id.*

229. Rule 404(h), SCACR ("A lawyer who is not admitted to practice in South Carolina who seeks to provide legal services pursuant to Rule 5.5(c)(3) in more than three matters in a 365-day period shall be presumed to be providing legal services on a regular, not temporary, basis"); Rule 404(g), SCACR (stating the services must be temporary and related to "representation of a pre-existing client in a jurisdiction in which the lawyer is admitted to practice"); Rule 404(i), SCACR (requiring out-of-state lawyer to file a verified statement that the out-of-state lawyer had not participated in more than three arbitrations in a 365-day period).

230. *In re Amendments to Rules of Professional Conduct*, Rule 404, SCACR, Shearouse Adv. Sh. No. 26 at 2–3 (S.C. June 20, 2005).

231. Rule 404(h), SCACR.

232. Rule 404(i), SCACR.

233. See Rule 404(g), SCACR.

234. Rule 5.5(c)(3), RPC, Rule 407, SCACR; Rule 404(g), SCACR.

Office of Bar Admissions,<sup>235</sup> and 3) participate in no more than three ADR proceedings in a 365-day period.<sup>236</sup> Rule 5.5 opens the door for an out-of-state lawyer to participate in ADR proceedings for an existing client; however, Rule 404 limits the representation.<sup>237</sup>

Although the rule presumes that an out-of-state lawyer may participate in only three arbitrations per year, the rule does not define "lawyer." Does the rule limit each lawyer in a law firm or does the rule limit each law firm to three alternative dispute resolution proceedings per year?

The rule is not clear and does not mention the term "law firm," but instead only uses the term "lawyer."<sup>238</sup> Based on a plain reading of the rule, it should only apply to each lawyer and not collectively to a law firm because the rule does not mention "law firm."<sup>239</sup> On the other hand, the court wanted to limit how often an out-of-state lawyer could come into the state because the court enacted Rule 404(h) at the same time it enacted the revised Rule 5.5.<sup>240</sup>

When dealing with novel issues of law, South Carolina courts often look to a neighboring state, like North Carolina, to see how other courts have decided similar issues.<sup>241</sup> In *Smith v. Beaufort County Hospital Ass'n*,<sup>242</sup> the North Carolina Court of Appeals considered the issue of Florida attorneys practicing in North Carolina through *pro hac vice* admission.<sup>243</sup> The court found different lawyers from the same law firm appeared *pro hac vice* sixteen times in the North Carolina courts.<sup>244</sup> The court noted the *pro hac vice* admission rule did not impose a numerical limit.<sup>245</sup> Nevertheless, the court held that "for purposes of *pro hac vice* admission only, an entire law firm can be treated as if it were a single lawyer, and thus the actions of the firm imputed to its members."<sup>246</sup>

235. Rule 404(i), SCACR.

236. Rule 404(h), SCACR.

237. Rule 5.5(c)(3), RPC, Rule 407, SCACR; Rule 404(h)-(i), SCACR.

238. Rule 5.5(c)(3), RPC, Rule 407, SCACR.

239. *Id.*

240. *See In re Amendments to Rules of Professional Conduct*, Rule 404, SCACR, Shearouse Adv. Sh. No. 26 at 7 (S.C. June 20, 2005).

241. *See, e.g., F & D Elec. Contractors, Inc. v. Powder Coaters, Inc.*, 350 S.C. 454, 461, 567 S.E.2d 842, 845 (2002) (looking to a North Carolina Supreme Court decision dealing with mechanic's liens in the landlord-tenant context and following the North Carolina court after noting its language is persuasive); *Lollis v. Lollis*, 291 S.C. 525, 529, 354 S.E.2d 559, 561 (1987) ("We are persuaded by the reasoning of the North Carolina Supreme Court in *Mims v. Mims*, [286 S.E.2d 779 (N.C. 1982)], in which that court overruled earlier cases and held the presumption of gift applies whether the husband or wife receives title to the property."); *McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 182, 41 S.E.2d 872, 876 (1947) (noting the interpretation of a particular worker's compensation statute was a novel issue of law in South Carolina and following the interpretation the North Carolina court used in a similarly worded statute).

242. *Smith v. Beaufort County Hosp. Ass'n*, 540 S.E.2d 775 (N.C. Ct. App. 2000).

243. *Id.* at 778, 782.

244. *Id.* at 782.

245. *Id.* at 783.

246. *Id.* at 782-83.



Although that case is not directly on point because it deals with a limit to *pro hac vice* admission, rather than a limit on ADR proceedings imposed by a court rule, the South Carolina Supreme Court is likely to analogize the situation and find the North Carolina Court of Appeals' reasoning persuasive. Additionally, because the South Carolina Supreme Court considered it important to impose a limitation on the number of ADR proceedings an out-of-state lawyer could participate in, one can legitimately argue the rule applies to an entire law firm and not just to each individual lawyer. If the court interprets the rule in this manner, the rule would prevent out-of-state law firms from using different attorneys to handle different matters. If a law firm could bring in new attorneys as each attorney reached the three-limit mark, firms could circumvent the rule because its lawyers could practice law continually in South Carolina.

Another issue the rule leaves unaddressed is whether an arbitration that settles is considered one of the three matters the court permits an out-of-state lawyer to handle. Rule 5.5(c)(3) specifically addresses "pending" or "potential" arbitration.<sup>247</sup> However, the rule does not define "pending" and one must define that term to understand the rule completely. A pending arbitration should amount to more than negotiation before a lawsuit between the parties. For an arbitration to be pending, one of the parties must have filed a demand to arbitrate. The parties' contract may require the parties to arbitrate and follow the American Arbitration Association's rules and procedures.<sup>248</sup> However, the demand to arbitrate need not adhere to formal rules. So long as one party demands arbitration in writing, the arbitration is considered a pending arbitration. Furthermore, the rule does not define "potential" arbitration. According to *Black's Law Dictionary*, a potential arbitration is one that is "possible" or "capable of coming into being."<sup>249</sup>

If the out-of-state lawyer is involved in pending or potential arbitration, and the matter settles, the court would probably count the settlement against the out-of-state lawyer as one of the three matters in which she could participate. Whether an ADR proceeding is pending or potential, an out-of-state lawyer following the rules may not perform any work in South Carolina until the out-of-state lawyer files a fee and verified statement with the South Carolina Supreme Court's Office of Bar Admissions.<sup>250</sup> Therefore, if an out-of-state lawyer properly follows the South Carolina court rules, a settlement made prior to the ADR proceedings would likely still count as one of the out-of-state lawyer's three matters.

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247. Rule 5.5(c)(3), RPC, Rule 407, SCACR.

248. See American Arbitration Ass'n, Rules and Procedures, <http://www.adr.org/RulesProcedures> (stating various procedural rules for arbitrations in association with the American Arbitration Association).

249. BLACK'S LAW DICTIONARY 1206 (8th ed. 2004).

250. Rule 404(i), SCACR.

### 3. Hypothetical 6—Administrative Proceeding

A South Carolina hospital, recently purchased by a national healthcare chain, wants to hire an out-of-state lawyer to represent it regarding a Certificate of Need in an administrative proceeding in South Carolina. Under the new rule, would the court permit this representation? To determine the answer, one must look to Rule 5.5(c)(2).<sup>251</sup>

Rule 5.5(c)(2) applies not only to court proceedings, but also to proceedings in any tribunal.<sup>252</sup> South Carolina Appellate Court Rule 404(a) defines “tribunal” as “any court of this state, and the South Carolina Administrative Law Court and any South Carolina agency authorized to hear and determine contested cases as defined under S.C. Code Ann. § 1-23-310.”<sup>253</sup> In an administrative proceeding, only South Carolina attorneys or an out-of-state lawyer admitted *pro hac vice* may represent parties.<sup>254</sup> Rule 5.5(c)(2) controls the appearance of out-of-state attorneys in an administrative proceeding. South Carolina allows state agencies to authorize persons who may appear before the agency.<sup>255</sup> The out-of-state lawyer must follow the court rules for *pro hac vice* admission when practicing before a South Carolina tribunal.<sup>256</sup>

The out-of-state lawyer, admitted in another United State jurisdiction, must apply for *pro hac vice* admission by the Department of Health and Environmental Control and file a copy of this application with the South Carolina Supreme Court’s Office of Bar Admissions.<sup>257</sup> The agency has the authority to grant or deny the admission.<sup>258</sup>

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251. Rule 5.5(c)(2), RPC, Rule 407, SCACR (“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: . . . (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[.]”).

252. *Id.*

253. Rule 404(a), SCACR; S.C. CODE ANN. § 1-23-310(2) (1976) (defining agency as “each state board, commission, department or officer, other than the legislature or the courts, but to include the administrative law judge division, authorized by law to determine contested cases”).

254. *In re Unauthorized Practice of Law Rules*, 309 S.C. 304, 306, 422 S.E.2d 123, 124 (1992) (holding that a state agency may authorize persons not licensed to practice law in South Carolina to appear and represent clients before the agency).

255. *Id.* at 306, 422 S.E.2d at 124; *see also* Bellsouth Telecomm, Inc., No. 2005-63-c (S.C. Pub. Serv. Comm’n July 7, 2005) (admitting Georgia attorney *pro hac vice* to appear in an administrative hearing before the South Carolina Public Service Commission).

256. Rule 404(a), SCACR; Rule 5.5(c)(1), RPC, Rule 407, SCACR.

257. Rule 404(c), SCACR; Rule 404(d), SCACR.

258. *See Bellsouth Telecomm., Inc.*, No. 2005-63-c.

C. *An Out-of-State Lawyer Practicing Transactional Law*1. *Hypothetical 7—Negotiating a Contract*

A large, national company hires a New York lawyer to negotiate a contract with a South Carolina corporation.<sup>259</sup> The out-of-state lawyer must cross South Carolina's borders to negotiate the contract. What services may the out-of-state lawyer ethically provide while in South Carolina? This situation invokes Rules 5.5(c)(4)<sup>260</sup> and 5.5(c)(1).<sup>261</sup>

Rule 5.5(c)(4) is understood to protect transactional attorneys.<sup>262</sup> Furthermore, Rule 5.5(c)(4) seems like a "catch-all" for an out-of-state lawyer to provide transactional services in South Carolina for an existing client. However, this provision does not allow an out-of-state lawyer to provide unlimited legal services simply because the out-of-state lawyer has a client in South Carolina. Instead, the rule only allows an out-of-state lawyer to provide services if the work is temporary and related to the representation of an existing client.<sup>263</sup> If the out-of-state lawyer has previously represented the client, the out-of-state lawyer may provide temporary services for the client in South Carolina. However, what happens if this is the first time the national corporation has hired the out-of-state lawyer?

In this situation, the out-of-state lawyer could not provide services pursuant to Rule 5.5(c)(4) because the services do not relate to a preexisting relationship with a client.<sup>264</sup> However, the out-of-state lawyer could enter South Carolina to negotiate the contract pursuant to Rule 5.5(c)(1).<sup>265</sup> The out-of-state lawyer must associate a South Carolina lawyer to participate in the negotiations, and the South Carolina lawyer must "actively participate" in the matter.<sup>266</sup> To comply with the rules, a prudent South Carolina lawyer would attend negotiation meetings, sign correspondence between the two parties, and carefully oversee the drafting of the contract if the negotiations are successful.

259. If the situation were reversed and a South Carolina corporation wanted to hire an out-of-state lawyer, the out-of-state lawyer could not represent the South Carolina corporation in South Carolina because the out-of-state lawyer would not be representing an existing client. *See* Rule 5.5(c)(4), RPC, Rule 407, SCACR.

260. Rule 5.5(c)(4), RPC, Rule 407, SCACR ("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: . . . (4) are not within paragraph (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice.").

261. Rule 5.5(c)(1), RPC, Rule 407, SCACR ("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[.]").

262. MJP COMMISSION REPORT, *supra* note 3, at 27.

263. *Id.* at 28.

264. Rule 5.5(c)(4), RPC, Rule 407, SCACR.

265. Rule 5.5(c)(1), RPC, Rule 407, SCACR.

266. *Id.*

## 2. Hypothetical 8—Estate Planning

An out-of-state lawyer has represented a client in estate planning matters for a number of years. The client trusts the lawyer and values the lawyer's advice. The client moves to South Carolina. Can the estate planning lawyer, licensed in another United States jurisdiction, continue to represent the client in estate planning matters?

Under Rule 5.5(c)(4), the out-of-state lawyer should be able to continue representing the client. However, the main issue will be whether the work is actually temporary. No single test establishes if an out-of-state lawyer's services are temporary.<sup>267</sup> However, even if the out-of-state lawyer provides the estate planning services on a recurring basis, the out-of-state lawyer might still be practicing temporarily.<sup>268</sup> Determining that the out-of-state lawyer's services are temporary promotes the client's choice in counsel, which is a strong reason for allowing the out-of-state lawyer to continue to provide the estate planning services after the client moves to South Carolina.

## 3. Hypothetical 9—Real Estate

An out-of-state lawyer represents an existing client who wishes to buy property in South Carolina. Because the client has always hired the same out-of-state lawyer whenever he needed legal advice, the client would like the out-of-state lawyer to handle the real estate closing for the South Carolina property. Under Rule 5.5, can the out-of-state lawyer ethically perform the real estate closing?

Rule 5.5(c)(4) permits an out-of-state lawyer to provide transactional representation, counseling, and other non-litigation work on a temporary basis.<sup>269</sup> Nothing in Rule 5.5(c)(4) prevents an out-of-state lawyer from participating in a real estate closing, so long as the matter is "reasonably related to the lawyer's representation of an existing client."<sup>270</sup> Although the South Carolina Supreme Court has warned lawyers on several occasions of the perils involved in real estate closings, these opinions dealt with the unauthorized practice of law when office staff or title insurance companies performed the real estate closing.<sup>271</sup> The supreme

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267. Rule 5.5 cmt. 6, RPC, Rule 407, SCACR.

268. *Id.*

269. Rule 5.5(c)(4), RPC, Rule 407, SCACR (An out-of-state lawyer "may provide legal services on a temporary basis in this jurisdiction that: . . . (4) are not within paragraph (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice.")

270. *Id.*

271. *See, e.g., Doe v. McMaster*, 355 S.C. 306, 314, 585 S.E.2d 773, 777 (2003) (holding title search and subsequent preparation of related documentation is permissible only when a licensed attorney supervises the process); *In re Lester*, 353 S.C. 246, 248, 578 S.E.2d 7, 8 (2003) (holding attorney should be physically present at a real estate closing); *State v. Buyers Serv. Co.*, 292 S.C. 426, 432, 357 S.E.2d 15, 18 (1987) (holding the preparation of title abstracts by title companies constituted the unauthorized practice of law because examining title requires expert legal knowledge and skill).

court has been silent regarding whether an out-of-state lawyer may perform a real estate closing.

Two competing policies factor into whether an out-of-state lawyer may perform a real estate closing in South Carolina. As noted, the supreme court has issued several opinions discussing the prohibition against nonlawyers performing real estate closings.<sup>272</sup> However, Rule 5.5 embodies a policy promoting a client's choice in a lawyer.<sup>273</sup> Determining which policy prevails depends on whether an out-of-state lawyer is a nonlawyer for purposes of a real estate closing.

The South Carolina State Bar Ethics Committee, which does not have lawmaking authority, determined a South Carolina lawyer may share fees with an out-of-state lawyer who is in good standing with a state bar and performs work on the matter.<sup>274</sup> This opinion recognizes that the out-of-state lawyer is a lawyer because the Rules of Professional Conduct expressly prohibit a lawyer from sharing fees with a nonlawyer.<sup>275</sup> The supreme court would probably consider out-of-state lawyers to be lawyers because the court allows lawyers from other jurisdictions to practice temporarily in South Carolina via Rule 5.5<sup>276</sup> and the *pro hac vice* admission rule.<sup>277</sup> Based on the trend of allowing out-of-state lawyers to enter South Carolina temporarily and recognizing them as lawyers in various contexts, the court is unlikely to treat out-of-state lawyers as nonlawyers in real estate transactions.<sup>278</sup> However, an out-of-state lawyer might run a risk in performing a real estate closing in South Carolina without some advice from a South Carolina lawyer.

Although Rule 5.5(c)(4) does not require the out-of-state lawyer to associate South Carolina counsel,<sup>279</sup> a prudent out-of-state lawyer would associate a South Carolina attorney in the closing process pursuant to Rule 5.5(c)(1).<sup>280</sup> If the South Carolina lawyer agreed to help with the closing, Rule 5.5(c)(1) requires the South Carolina lawyer to "actively participate in the matter."<sup>281</sup> How much involvement ensures that the South Carolina lawyer "actively participate[s]" to the extent required for the out-of-state lawyer to comply with the rule? In the context of real estate closings, the answer lies in the multijurisdictional practice rule and South Carolina case law.

According to South Carolina case law, a title company may not prepare title abstracts because examining title requires legal knowledge and skill.<sup>282</sup> The out-of-

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272. See *supra* note 271.

273. MJP COMMISSION REPORT, *supra* note 3, at 4.

274. ETHICS ADVISORY COMM., S.C. BAR, ETHICS ADVISORY OP. 89-10 (1989).

275. See Rule 5.4(a), RPC, Rule 407, SCACR.

276. Rule 5.5, RPC, Rule 407, SCACR.

277. Rule 404, SCACR.

278. See Rule 5.5, RPC, Rule 407, SCACR; Rule 404, SCACR.

279. Rule 5.5(c)(4), RPC, Rule 407, SCACR.

280. Rule 5.5(c)(1), RPC, Rule 407, SCACR.

281. *Id.*

282. See, e.g., *Doe v. McMaster*, 355 S.C. 306, 314, 585 S.E.2d 773, 777 (2003); *In re Lester*, 353 S.C. 246, 248, 578 S.E.2d 7, 8 (2003); *State v. Buyers Serv. Co., Inc.*, 292 S.C. 426, 432, 357 S.E.2d 15, 18 (1987).

state lawyer would have to prepare the title abstract. If a South Carolina lawyer participated, the South Carolina lawyer should review the title abstract.<sup>283</sup>

Additionally, an attorney must be present at the closing.<sup>284</sup> To comply with this requirement, the out-of-state lawyer must attend the closing; however, it is unclear if the associated South Carolina lawyer must also attend the closing. South Carolina law prohibits non-lawyers, such as paralegals and title insurance companies, from participating in closings without a lawyer present.<sup>285</sup> However, no case law in South Carolina currently prohibits an out-of-state lawyer from participating in real estate closings. If a South Carolina lawyer agrees to assist an out-of-state lawyer in the South Carolina real estate matter, then pursuant to Rule 5.5(c)(1), a prudent South Carolina lawyer would “actively participate” by attending the closing.<sup>286</sup> Although nothing in the rule requires the South Carolina lawyer to attend the closing, it would be prudent to do so.

#### *D. Sanctions and Fee Disputes*

##### *1. Hypothetical 10—Disciplining an Out-of-State Lawyer and a South Carolina Lawyer*

When a court finds a lawyer in violation of Rule 5.5, there are at least three possible remedies. The court could discipline the out-of-state lawyer, discipline the South Carolina lawyer, or disgorge both attorneys’ fees. Rule 8.5 deals with the scope of the South Carolina Supreme Court’s authority to discipline lawyers admitted in other jurisdictions or South Carolina.<sup>287</sup> The rule states, “[A] lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.”<sup>288</sup> The rule further states that both South Carolina and another jurisdiction may discipline the lawyer for the same conduct.<sup>289</sup>

Rule 8.5 seems to exceed the actual disciplinary authority of the Commission on Lawyer Conduct.<sup>290</sup> The Rule for Lawyer Disciplinary Enforcement defines a lawyer as

anyone admitted to practice law in this state, including any formerly admitted lawyer with respect to acts committed prior to resignation or disbarment; any lawyer specially admitted by a court of this state for a particular proceeding; or anyone whose

283. Rule 5.5(c)(1), RPC, Rule 407, SCACR.

284. *In re Lester*, 353 S.C. at 247, 578 S.E.2d at 8.

285. *Id.*

286. Rule 5.5(c)(1), RPC, Rule 407, SCACR.

287. Rule 8.5, RPC, Rule 407, SCACR; ROBERT M. WILCOX & NATHAN M. CRYSTAL, ANNOTATED SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT 347 (2005).

288. Rule 8.5(a), RPC, Rule 407, SCACR.

289. *Id.*

290. Rule 2, RLDE, Rule 413, SCACR; WILCOX & CRYSTAL, *supra* note 287, at 347.

advertisements or solicitations are subject to regulation by Rule 418, SCACR.<sup>291</sup>

Rule 418 provides that any lawyer admitted to practice in another United States jurisdiction, other than South Carolina, who advertises in South Carolina must follow the applicable Rules of Professional Conduct.<sup>292</sup> Rule 8.5 is broader and states that any out-of-state lawyer who provides or offers to provide services in South Carolina may become subject to discipline in South Carolina.<sup>293</sup> How the South Carolina Supreme Court intends to reconcile these two rules is unclear. However, given the court's previous limitations on lawyers from other jurisdictions practicing in South Carolina, the court likely will broaden the disciplinary authority rule to mirror Rule 8.5. The court should amend the disciplinary authority rule so attorneys have a clearer guide.

Practicing law in multiple jurisdictions creates conflict of law issues.<sup>294</sup> Rule 8.5(b) lays out principles for resolving conflicts of law.<sup>295</sup> The drafters based the rules on three principles: 1) a lawyer's conduct should only be subject to one set of rules, 2) conflict rules should be clear, and 3) the court should not discipline lawyers who act reasonably in determining which jurisdiction's rules apply.<sup>296</sup> For conduct connected with a matter before a tribunal, "the rules of the jurisdiction in which the tribunal sits" govern "unless [those] rules . . . provide otherwise."<sup>297</sup> For other conduct, the rules of the jurisdiction where the conduct happened apply unless another jurisdiction feels "the predominant effect of the conduct."<sup>298</sup> When a lawyer practices in more than one jurisdiction and it is unclear where the predominant effect . . . will occur, a jurisdiction shall not discipline the lawyer if "the lawyer's conduct conforms to the rules of [the] jurisdiction in which the lawyer reasonably believes the predominant effect will occur."<sup>299</sup> If more than one jurisdiction implements disciplinary proceedings against a lawyer, the jurisdictions "should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules."<sup>300</sup> Logically, out-of-state lawyers entering into South Carolina should realize their conduct occurs in South Carolina, and out-of-state lawyers who work in their home offices should realize whether the predominant effect of their work will be in South Carolina. Thus, an out-of-state lawyer practicing temporarily

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291. Rule 2(q), RLDE, Rule 413, SCACR.

292. Rule 418, SCACR; *See* Rules 7.1–7.5, RPC, Rule 407, SCACR (outlining the requirements for lawyer advertising in South Carolina).

293. Rule 8.5 cmt. 1, RPC, Rule 407, SCACR; WILCOX & CRYSTAL, *supra* note 287, at 347.

294. WILCOX & CRYSTAL, *supra* note 287, at 348.

295. Rule 8.5(b), RPC, Rule 407, SCACR; WILCOX & CRYSTAL, *supra* note 287, at 348.

296. Rule 8.5 cmt. 3, RPC, Rule 407, SCACR.

297. Rule 8.5(b)(1), RPC, Rule 407, SCACR.

298. Rule 8.5(b)(2), RPC, Rule 407, SCACR.

299. Rule 8.5 cmt. 5, RPC, Rule 407, SCACR.

300. Rule 8.5 cmt. 6, RPC, Rule 407, SCACR.

in South Carolina who violates the Rules of Professional Conduct will be subject to discipline in South Carolina.<sup>301</sup>

If a South Carolina lawyer violates any of the Rules of Professional Conduct, the South Carolina Supreme Court has the authority to sanction them regardless of where the misconduct occurs.<sup>302</sup>

## 2. Hypothetical 11—Fee Disgorgement for the Unauthorized Practice of Law

An out-of-state lawyer working in South Carolina pursuant to Rule 5.5(c)(2) seeks *pro hac vice* admission. If the court denies *pro hac vice* admission to the out-of-state lawyer, is the out-of-state lawyer allowed to collect fees for the work the lawyer performed before the court denied *pro hac vice* admission? Rule 5.5 as a disciplinary rule is silent regarding fees.<sup>303</sup> Nonetheless, some courts have held that when an attorney violates a disciplinary rule, fee disgorgement may be a proper remedy.<sup>304</sup>

In general, if the lawyer continues to work on the case after the court denies *pro hac vice* admission, the out-of-state lawyer is engaged in the unauthorized practice of law and fee disgorgement is a proper remedy.<sup>305</sup> However, suppose the out-of-state lawyer genuinely expects the court to grant *pro hac vice* admission and meets the denial of the request with surprise. The comments to Rule 5.5 do not guide courts or attorneys in dealing with fee disputes that arise when lawyers seek *pro hac vice* admission. Additionally, the rule does not define the phrase “reasonably expects” in the part of the rule that protects attorneys who reasonably expect to be authorized to practice in a South Carolina tribunal.<sup>306</sup>

In the context of fee disputes, one must define “reasonably” in the phrase “reasonably expects to be so authorized” because neither the rule nor the comments define it.<sup>307</sup> The reasonable standard should be an objective standard because a subjective standard would allow out-of-state lawyers to concoct attenuated justifications for their expectations.

The proper standard should be whether a reasonable lawyer in the same situation would expect to be admitted *pro hac vice*. The court should look at three

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301. Rule 8.5, RPC, Rule 407, SCACR.

302. S.C. CONST. art. V, § 4; Rule 5.5(a), RPC, Rule 407, SCACR; Rule 8.5, SCACR; WILCOX & CRYSTAL, *supra* note 287, at 347.

303. Rule 5.5, RPC, Rule 407, SCACR.

304. See *Perlah v. S.E.I. Corp.*, 612 A.2d 806, 808–09 (Conn. App. Ct. 1992); *Estate of Vafiades v. Sheppard Bus Serv., Inc.*, 469 A.2d 971, 973, 978 (N.J. Super. Ct. Law Div. 1983).

305. *Estate of Vafiades*, 469 A.2d at 976, 978.

306. Rule 5.5(c)(2), RPC, Rule 407, SCACR (“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: . . . (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[.]”).

307. *Id.*



factors in order to determine whether the belief is objectively reasonable. The court should consider 1) whether the attorney followed ethical rules in obtaining the client; 2) whether the lawyer had a preexisting relationship with the client;<sup>308</sup> and 3) whether the lawyer sought and was denied *pro hac vice* admission in South Carolina or any other jurisdiction. If the reviewing court determines a reasonable lawyer would have expected the court to grant *pro hac vice* admission, the court should allow the attorney to recover fees for work performed before the court granted or denied *pro hac vice* admission.

The proposed three-part test would guide out-of-state lawyers in determining whether to represent a preexisting client in South Carolina and would guide South Carolina lawyers in deciding whether to participate in a matter with an out-of-state lawyer. The proposed test would also promote client choice of counsel while protecting the attorney's expectation of collecting a fee, so long as that expectation is objectively reasonable.

Fee disputes may also arise for work performed by a lawyer awaiting bar admission. Pursuant to Rule 5.5, an out-of-state lawyer may practice law temporarily while waiting for admission to the South Carolina bar.<sup>309</sup> Yet, what happens if a client has a fee dispute with the out-of-state lawyer before South Carolina admits her to practice? In *Perlah v. S.E.I. Corp.*,<sup>310</sup> an attorney prepared acquisition documents for a corporation one month before Connecticut admitted the attorney to its state bar.<sup>311</sup> The Connecticut Supreme Court held the client did not have to pay for services rendered before the state admitted the attorney to practice.<sup>312</sup> In reaching its conclusion, the court adopted the reasoning of a Connecticut trial court which held no lawyer may recover compensation for legal services unless the state in which the lawyer is rendering the services has admitted the lawyer to practice law.<sup>313</sup> Although this reasoning may seem persuasive, the Connecticut Supreme Court decided this case before the drafting of revised Rule 5.5.<sup>314</sup> The court took a *per se* approach that if one works before being admitted to the bar, then that person may not recover fees.<sup>315</sup> If this situation arose today, the South Carolina Supreme Court should handle it differently.

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308. It should be noted that Rule 5.5(c)(2) does not mention the "preexisting client" standard that is required in Rule 5.5(c)(3) and (4). Therefore, this factor should not be the single controlling factor as it would be in a dispute involving services listed in either 5.5(c)(3) or (c)(4). Rule 5.5(c)(2), RPC, Rule 407, SCACR. However, including this factor as part of the proposed three-part test is important in light of the change in the South Carolina rule as compared to the ABA Model Rule. This change requires the out-of-state attorney to represent a client with whom the lawyer had a pre-existing relationship. See Rule 5.5(c)(3)–(4), RPC, Rule 407, SCACR.

309. Rule 5.5(c)(2)–(3), RPC, Rule 407, SCACR.

310. 612 A.2d 806 (Conn. App. Ct. 1992).

311. *Perlah*, 612 A.2d at 807.

312. *Id.* at 809.

313. *Id.* at 808–09 (citing *Taft v. Amsel*, 180 A.2d 756, 757 (Conn. Super. Ct. 1962)).

314. *Id.* at 806; see MJP COMMISSION REPORT, *supra* note 3, at 6 (indicating that Model Rule 5.5 was adopted in 2002).

315. *Perlah*, 612 A.2d at 808–09.

Recall that Rule 5.5(c)(1) allows an out-of-state lawyer to practice in South Carolina if a South Carolina lawyer “actively participates” in the matter.<sup>316</sup> In such a situation, the client should pay the fees if reasonable and neither the South Carolina lawyer nor the out-of-state lawyer violated any ethical rules. Specifically, if Rule 5.5(c)(1) applies, the court should ensure the South Carolina lawyer actively participated in the matter.<sup>317</sup> The court should not allow a client to avoid paying just because an out-of-state lawyer or person waiting for bar admission provided the legal services. While the court should consider whether the out-of-state lawyer or South Carolina lawyer violated any ethical rules, it should not create a per se rule against fee recovery for legal services rendered in anticipation of bar admission.

## VII. CONCLUSION

After *Birbrower*,<sup>318</sup> the ABA modified and updated Model Rule of Professional Conduct 5.5.<sup>319</sup> The South Carolina Supreme Court modified and adopted revised Rule 5.5, which is substantially similar to the Model Rule.<sup>320</sup> With the adoption of the revised rule, the South Carolina Supreme Court has increased opportunities for attorneys from other states to practice law temporarily in South Carolina. Although the effects of the new rule will only emerge with time, the rule promotes client choice while easing the limitations South Carolina courts have placed on out-of-state attorneys.

Revised Rule 5.5 promotes client choice in both litigation and transactional work. The rule guides attorneys who wish to participate in litigation, alternative dispute resolutions, and contract negotiation. However, the revised rule does not resolve all problems. For example, the rule is silent regarding fees and is not entirely consistent with some other South Carolina court rules. Until the court decides how to handle these issues, both out-of-state and South Carolina attorneys must use their best judgment.

Although revised Rule 5.5 does not answer all the questions regarding the multijurisdictional practice of law, the revised rule broadens the opportunities for out-of-state lawyers to practice in South Carolina and offers better guidance for all attorneys than the previous Rule 5.5.

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316. Rule 5.5(a), RPC, Rule 407, SCACR.

317. Rule 5.5(c)(1), RPC, Rule 407, SCACR.

318. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998).

319. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2004).

320. Rule 5.5, RPC, Rule 407, SCACR.

