



***UPL ADVISORY OPINION***

***UPL 07-02***

***June, 2007***

**Temporary Practice of Law**

This is an Advisory Opinion regarding Rule 31 of the Rules of the Supreme Court of Arizona regarding lawyers not admitted to practice in Arizona living in Arizona part-time and advising ongoing Arizona clients regarding matters of federal law.<sup>1</sup>

**Issues:**

1. May a lawyer who is not admitted to practice in Arizona, reside in Arizona four to five months each year and periodically advise several Arizona clients with whom he had a prior professional relationship on matters of federal law? Yes.

**Facts:**

A lawyer admitted to practice in another jurisdiction ("Lawyer X") has sought guidance from the Committee concerning his plans to reside four to five months a year in Arizona.

Lawyer X is admitted in four jurisdictions, but not Arizona. He maintains his only law office with ten attorneys in another state, one of whom is admitted to practice in Arizona. Lawyer X's practice focuses on complex business transactions and federal securities compliance. He has two clients in Arizona—a major national corporation and an individual who owns a variety of businesses throughout the United States. He provides federal securities compliance representation to the corporation, including advice regarding mergers and acquisitions and also serves on the corporation's board. He also represents the individual with respect to that individual's national business ventures and securities issues, some of which involve Arizona-based entities.

Lawyer X regularly associates with an Arizona law firm to provide legal services to both the corporation and the individual client regarding Arizona law issues. Additionally, the lawyer in the firm who is admitted in Arizona provides Arizona-related legal services to the corporation and individual as well as other legal services related to acquisitions of business interests in other states, federally regulated securities matters, and financing of transactions in other jurisdictions. Lawyer X discloses to clients that he is admitted only in the four jurisdictions, which also is conspicuously stated on his firm's website. His letterhead, business cards and website list only his state of residence, addresses and phone numbers.

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<sup>1</sup> Opinions of the Committee are advisory in nature only and are not binding in any disciplinary or other legal proceedings. © State Bar of Arizona 2006

Lawyer X's wife has purchased a home in Arizona and Lawyer X intends to spend 120 to 145 days a year in Arizona, with most of the time being in January, February and March of each year.

Lawyer X would like to maintain his professional relationships with his two Arizona clients while he is physically present in this state by meeting with them periodically during the time he is residing here. Lawyer X states he will not meet with clients at his Arizona residence and will not use any Arizona contact information with his clients. While in Arizona all communications will go through his firm's office and he will use his cell phone with a phone number from his state of residence. Lawyer X does not maintain an office at the corporation, and maintains no professional presence in Arizona.

Lawyer X has asked whether, under the foregoing circumstances, he may proceed without being admitted to practice law in Arizona.

**Relevant Authority:**

ER 5.5. Unauthorized Practice of Law, Arizona Rules of Professional Conduct

- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
  - (1) Except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  - (2) Hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
  - (1) Are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter.
  - (2) Are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
  - (3) Are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted

to practice and are not services for which the forum requires *pro hac vice* admission; or

- (4) Are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
- (d) 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; or
  - (2) Are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

\* \* \*

- (g) Any attorney who engages in the multijurisdictional practice of law in the State of Arizona, whether authorized in accordance with these Rules or not, shall be subject to the Rules of Professional Conduct and the Rules of the Supreme Court regarding attorney discipline in the State of Arizona.

**Discussion:**

1. **May a lawyer who is not admitted to practice in Arizona, reside in Arizona four to five months each year and periodically advise several Arizona clients with whom he had a prior professional relationship on matters of federal law?**

Yes. A lawyer admitted in another jurisdiction may engage in the temporary practice of law in Arizona where his practice is reasonably related to his existing practice in a jurisdiction where he is admitted to practice law and where his practice does not involve representation of clients on matters of Arizona law.

Background

Lawyer X asks that the Committee find that his proposed practice in Arizona is permissible under ER 5.5(c)(4)—his practice here is “temporary” and “reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.” Because Lawyer X’s practice in Arizona would be reasonably related to his practice in his home jurisdiction, and because Lawyer X does not advise clients with respect to Arizona law, and is not undertaking

the representation of new clients in Arizona, Lawyer X's practice would be considered "temporary" as contemplated by ER 5.5(c).

Lawyer X's inquiry concerns the subject of the multijurisdictional practice of law—a subject that has been examined recently not only by the State Bar of Arizona, and the Arizona Supreme Court, but also by the American Bar Association (the "ABA") which conducted a comprehensive study of the issue. To examine the issue of the multijurisdictional practice of law, the ABA established a Commission on Multijurisdictional Practice (the "ABA Commission"). The ABA Commission issued an interim report several years ago and in so doing, it solicited views from, among other places, the bar associations throughout the United States. The State Bar of Arizona in response to that request, established its own Task Force on Multijurisdictional Practice to examine the ABA commission's interim report and to make recommendations regarding the report. Those recommendations were submitted to the ABA on March 15, 2002 in a letter from then president of the State Bar of Arizona, Nicholas J. Wallwork.

The ABA Commission's final report, *Client Representation in the 21<sup>st</sup> Century*, was issued in 2002 and, based upon that report, the ABA House of Delegates adopted Model Rule of Professional Conduct ER 5.5 in August 2002. In December 2003, the State Bar of Arizona petitioned the Arizona Supreme Court to adopt ER 5.5, based upon the ABA model rule. The Arizona Supreme Court adopted ER 5.5 effective December 1, 2004.

#### Review of Applicable Rules and Principles

Because there is "no single test to determine whether a lawyer's services are provided on a 'temporary basis,'" Comment 6 to Model Rule ER 5.5, neither the ABA Model Rule nor Arizona Rule ER 5.5 define precisely the meaning of the term. The report of the ABA Commission, however, discusses what is meant by the temporary practice of law as it pertains to the relationship between the temporary practice of law in the state where the lawyer is not admitted, and the lawyer's practice in his or her home jurisdiction.

**Proposed Model Rule 5.5(c)(4)** would permit, on a temporary basis, transactional representation, counseling and other non-litigation work that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. . . .

This provision is intended, first, to cover services that are ancillary to a particular matter in the home state. For example, in order to conduct negotiations on behalf of a home state client or in connection with a home state matter, the lawyer may need to meet with the client and/or other parties to the transaction outside the lawyer's home state. A client should be able to have a single lawyer conduct all aspects of a transaction, even though doing so requires traveling to different states. It is reasonable that the lawyer be one who practices law in the client's state or in a state with a connection to the legal matter that is the subject of the representation. In such circumstances, it should be sufficient to rely on the lawyer's home state as the jurisdiction with the primary responsibility to ensure that the lawyer has the requisite character and fitness to practice law; the home state has a substantial interest in ensuring

that all aspects of the lawyer's provision of legal services, wherever they occur, are conducted competently and professionally.

Second, this provision would respect preexisting and ongoing client-lawyer relationships by permitting a client to retain a lawyer to work on multiple related matters, including some having no connection to the jurisdiction in which the lawyer is licensed. Clients who have multiple or recurring legal matters in multiple jurisdictions have an interest in retaining a single lawyer or law firm to provide legal representation in all the related matters. In general, clients are better served by having a sustained relationship with a lawyer or law firm in whom the client has confidence. Through past experience, the client can gain some assurance that the lawyer performs work competently and can work more efficiently by drawing on past experience regarding the client, its business, and its objectives. In order to retain the client's business, lawyers representing clients in multiple matters have a strong incentive to work competently, and to engage other counsel to provide legal services work that they are not qualified to render.

Third, this provision would authorize legal services to be provided on a temporary basis outside the lawyer's home state by a lawyer who, through the course of regular practice in the lawyer's home state, has developed a recognized expertise in a body of law that is applicable to the client's particular matter. This could include expertise regarding nationally applicable bodies of law, such as federal, international or foreign law. A client has an interest in retaining a specialist in federal tax, securities or antitrust law, or the law of a foreign jurisdiction, regardless of where the lawyer has been admitted to practice law. This could also include expertise regarding the law of the lawyer's home state if that law governs the matter, since a client has an interest in retaining a lawyer who is admitted in the jurisdiction whose law governs the particular matter and who has experience regarding that law. The provision would, thus, bring the law into line with prevalent law practices. For example, many lawyers who specialize in federal law currently practice nationally, without regard to jurisdictional restrictions, which are unenforced. The same is true of lawyers specializing in other law that applies across state lines.

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When a lawyer seeks to practice law regularly in a state, to open an office for the solicitation of clients, or otherwise to establish a practice in the state, however, the state has a more substantial interest in regulating the lawyer's law practice by requiring the lawyer to gain admission to the bar. Although the line between the "temporary" practice of law and the "regular" or "established" practice of law is not a bright one, the line can become clearer over time as Rule 5.5 is interpreted by courts, disciplinary authorities, committees of the bar, and other relevant authorities.

Additionally, for this provision to apply, the lawyer's work in the host state must arise out of or be reasonably related to the lawyer's practice in the home state, so that as a matter of efficiency or for other reasons, the client's interest in retaining the lawyer

should be respected. For example, if a corporate client is seeking legal advice about its environmental liability or about its employment relations in each of the twenty states in which it has plants, it is likely to be unnecessarily costly and inefficient for the client to retain twenty different lawyers. Likewise, if a corporate client is seeking to open a retail store in each of twenty states, the client may be best served by retaining a single lawyer to assist it in coordinating its efforts. On the other hand, work for an out-of-state client with whom the lawyer has no prior professional relationship and for whom the lawyer is performing no other work ordinarily will not have the requisite relationship to the lawyer's practice where the matter involves a body of law in which the lawyer does not have special expertise. In the context of determining whether work performed outside the lawyer's home state is reasonably related to the lawyer's practice in the home state, as is true in the many other legal contexts in which a "reasonableness" standard is employed, some judgment must be exercised.

Although the Commission's report is helpful in understanding what is meant by the intent of ER 5.5 (c)(4), it is not completely helpful in fully understanding the meaning of "temporary." Because the ABA commission relied heavily for its analysis on the Restatement (Third) of The Law Governing Lawyers (2000) (the "Restatement"), it is appropriate to look to the Restatement for guidance on the meaning of "temporary" as that concept is used in ER 5.5

The Restatement recognizes that lawyers properly admitted in one state, who are engaged in litigation, may need to conduct "proceedings and activities ancillary" to the litigation in another state, and that such activities incidental to permissible practice are appropriate and permissible." § 3 at 27. The Restatement recognizes that a transactional or corporate practice may raise similar issues although there is no procedure for temporary admission *pro hac vice* for such representation.

The Restatement also recognizes that transactional lawyers may often need to be physically present in a state, other than the state where they are admitted to practice. Determining whether a lawyer's practice in a state other than his home state is permissible depends on the circumstances. Given the nature of the practice of law, including the growth of telecommunications and electronic mail, clients have increasingly demanded the interstate practice of law. It is clear, however, that a lawyer's admission in one state "does not authorize the lawyer to practice generally in another state as if the lawyer were also fully admitted there." *Id.* at 26. Thus, a lawyer may not open an office to practice generally in another jurisdiction as if the lawyer were also fully admitted there nor "otherwise engage in the continuous, regular, or repeated representation of clients within the other state." *Id.*

Giving consideration to the foregoing "legislative history," it is the Committee's opinion that Lawyer X's intermittent representation of his existing clients while he is physically present in Arizona, on existing matters of federal law which relate to his practice in the jurisdiction where he is admitted to practice law, constitute the type of temporary practice permitted under ER 5.5(c)(4). Indeed, this type of temporary practice appears to have been contemplated by the State Bar of Arizona in urging adopting of ER 5.5 to the Arizona Supreme Court. When the State Bar of Arizona petitioned the Arizona Supreme Court to adopt ER 5.5, it described the particular purpose of ER 5.5(c)(4) this way:

The exception in 5.5(c)(4) for providing services that relate to the lawyer's practice in his home jurisdiction allows out-of-state lawyers with specialty practices in areas such as franchise law, securities regulation, and similar fields to advise clients with offices in several states. Very often, these lawyers provide such services electronically, without even leaving their home jurisdiction. The proposed rules allow such services if they are temporary and arise out of or are reasonably related to the lawyers' practice in his or her state of admission.

#### Conclusion

Giving consideration to the language of ER 5.5(c)(4), the ABA Commission report, the Restatement and the "legislative" history of ER 5.5(c)(4) as adopted by the Arizona Supreme Court, it is the view of the Committee that Lawyer X would be engaged in the permissible temporary practice of law in Arizona if he is living in Arizona for several months each year and providing legal services periodically to his existing clients on matters of federal law and not undertaking the representation of new clients in Arizona.