

Rule 5.5: Unauthorized Practice of Law;

Multijurisdictional Practice of Law

1. Current Kentucky Rule with Official Comments:

SCR 3.130(5.5) Unauthorized practice of law

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.

Supreme Court Commentary

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(5.5) Unauthorized practice of law; multijurisdictional practice of law

(a) A lawyer shall not ~~{a}~~ practice law in a jurisdiction ~~where doing so violates in violation of~~ the regulation of the legal profession in that jurisdiction; ~~2~~ or ~~{b}~~ assist a ~~person who is not a member of the bar~~ another in the ~~performance of activity that constitutes the unauthorized practice of law~~ doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish or

maintain an office or other 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 if such services:

(1) comply with SCR 3.030(2), or do not require compliance with SCR 3.030(2), and are legal services undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; or

(2) are in, or reasonably related to, a pending or potential proceeding before a tribunal or alternative dispute resolution proceeding in another jurisdiction for a client, or prospective client pursuant to Rule 1.18, 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 pursuant to SCR 3.030(2); or

(3) are not within paragraph (c) (2) and arise out of, or are reasonably related to, the representation of the lawyer's client in the jurisdiction in which the lawyer is admitted.

(d) 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) comply with SCR 2.111 regarding a Limited Certificate of Admission to Practice Law in this jurisdiction; or

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

(e) A lawyer authorized to provide legal services under this Rule shall be subject to the Kentucky Rules of Professional Conduct and shall comply with SCR 3.030(2) or, if such legal services do not require compliance with that Rule, the lawyer must actively participate in, and assume responsibility for, the representation of the client.

Supreme Court Commentary Comment

A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. The practice of law in Kentucky is defined in SCR 3.020. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. ~~Paragraph (b)~~ This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[2] ~~Likewise, it does not prohibit~~ A lawyers from providing may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[3] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes or maintains an office in this jurisdiction for the practice of law. A lawyer may violate paragraph (b) by establishing or maintaining an office even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See Rules 7.15 and 7.50. For example, advertising in media specifically targeted to Kentucky residents or initiating contact with Kentucky residents for solicitation purposes could be viewed as conduct in Kentucky in violation of paragraph (b). See also Comment [20].

[4] There are occasions in which a lawyer admitted to practice in another United

States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies three such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish or maintain an office in this jurisdiction without being admitted to practice generally here.

[5] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who, while technically admitted, is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must comply with SCR 3.030(2) or, if such legal services do not require compliance with that Rule, the lawyer must actively participate in, and show responsibility for, the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a court or federal administrative agency to appear before the court or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to rules of the federal administrative agency. Under paragraph (c)(1) and (2), a lawyer does not violate this Rule when the lawyer appears before a court or agency pursuant to such authority. To the extent that a court rule or

other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a court or agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction. Paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[11] Paragraph (c)(2) also permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[12] Paragraph (c)(3) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted but are not within paragraph (c)(2). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[13] Paragraphs (c)(2) and (c)(3) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted.

A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[14] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish or maintain an office in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes or maintains an office in this jurisdiction must become admitted to practice law generally in this jurisdiction.

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

[16] If an employed lawyer under paragraph (d)(1) performs legal services in this

jurisdiction, the lawyer is subject to the rules, rights and privileges governing the practice of law under SCR 2.111.

[17] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal law or other law of this jurisdiction.

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

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

[20] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.01 to 7.50.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) MR 5.5 is a major expansion of the current KRPC 5.5 both in the Rule and Comments. While the Committee agreed with much of the MR, the Committee disagreed with the scope of the Rule in allowing out-of-state lawyers to practice in Kentucky. To reduce this scope the Committee substantially revised MR paragraph (c). MR paragraph (c) is as follows:

(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.

(2) The Committee deleted MR paragraph (c)(3), modified MR paragraph (c)(2) and (c)(4), and renumbered (c)(4) to (c)(3). The key modification in these two sections was to add the requirement that for the covered temporary legal services to be authorized the services must "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." This limitation is for protection of the public with regard to new client matters.

(3) The Committee made other changes in the MR for purposes of emphasis and clarity, but they are not intended to be substantive changes to the MR.

(4) The MR Comments were modified where appropriate to be consistent with changes made to the MR in proposed KRPC 5.5.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

The Committee concluded that while the MR contains in most ways an appropriate expansion of multijurisdictional practice, it went too far in allowing lawyers from other jurisdictions to temporarily provide legal services in new client matters unrelated to their practice in the jurisdiction they are authorized to practice. The changes the Committee

recommends are considered a reasonable balance between the need to recognize in the Rules the realities of multijurisdictional practice as it exists today and the need to protect the public by limiting circumstances in which lawyers unfamiliar with Kentucky law are permitted to provide legal services in Kentucky.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.