

# Three Ethics Rules that Threaten the Future of Legal Practice

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## I. Rule 5.4: Professional Independence or Obsolence

- A. Rule 5.4, in its various parts sets a bright line between lawyers and nonlawyers to protect a lawyer's judgment. The central premise of the rule is that if nonlawyers had a financial interest of any type in the lawyer's work, the lawyer would be subject to influence by those nonlawyers that would override the lawyer's judgment.
1. Several of the provisions overlap with themselves or other rules.
    - a) Part (a)(2) recognizes an exception found in Rule 1.17 regarding the sale of a law practice.
    - b) Part (a)(4) allows the sharing of legal fees with a nonprofit, similar to the provision in Rule 7.2(b)(2) that allows lawyers to pay referral fees to approved bar association referral programs.
    - c) Parts (b) and (d) both state prohibitions on forming partnerships with nonlawyers in whole or in part to practice law.
    - d) Part (c) states the same rule that is found at 1.8(f) regarding the influence of non-clients who may pay the lawyer's fee in a matter.
  2. "The prohibitions in Rule 5.4 are directed mainly against entrepreneurial relationships with nonlawyers and primarily are for the purpose of protecting a lawyer's independence in exercising professional judgment on the client's behalf free from control by nonlawyers." ABA Formal Op. 01-423, "Forming Partnerships with Foreign Lawyers" (Sept. 2001). It is precisely the stifling of lawyers' entrepreneurial relationships with nonlawyers that is the problem with Rule 5.4.
  3. As a practical matter, Rule 5.4 prohibits:
    - a) Nonlawyer investments in law firms.
    - b) Paying nonlawyer staff or contractors on a per-case commission basis, even if it is only \$5 per case. *See In re Holmes*, 304 B.R. 292 (Bankr. N.D. Miss. 2004).
    - c) Paying nonlawyer staff incentives or bonuses based on the number of cases they bring to the firm. *See In re Bass*, 227 B.R. 103 (Bankr. E.D. Mich. 1998).

- d) Sharing fees with nonlawyer marketing companies based on actual cases generated (as distinguished from paying set fees for advertising unrelated to cases generated).

B. Permitted.

1. Refunding fees to clients or voluntarily reducing a fee is not considered sharing fees with a nonlawyer. *See* Me. Ethics Op. 198 (2009); N.Y. State Ethics Op. 819 (2007); Va. Ethics Op. 1783 (2003).
2. Sharing fees with bar association referral plans. *See Richards v. SSM Health Care, Inc.*, 724 N.E.2d 975 (Ill. App. Ct. 2000).
3. Including nonlawyer employees in firm-wide profit-sharing and retirement plans, as long as they are not tied to particular matters.

C. The District of Columbia has since 1990 had a unique (for U.S. jurisdictions) version of Rule 5.4(b) that specifically permits lawyers to enter partnerships with nonlawyers if:

1. the sole purpose of the partnership is to provide legal services,
2. the nonlawyer partners agree to conform to the requirements of the lawyer ethics rules, and
3. lawyers with a financial stake or managerial authority in the partnership undertake responsibility for the nonlawyer partners to the same extent they are responsible for other firm lawyers under Rule 5.1.

Lawyers in other U.S. jurisdictions who co-counsel with D.C. lawyers may still share fees with a D.C. law firm that has nonlawyer partners. ABA Formal Op. 13-464 (2013).

D. The United Kingdom has been issuing licenses for Alternative Business Structures, which allow nonlawyers to both own law firms and combine law firms with other non-law businesses, since 2011.

1. Australia permits nonlawyers to purchase stock in law firms, which may conduct public offerings.
2. LegalZoom announced in December 2015 that it was acquiring a UK law firm, Beaumont Legal.  
<http://www.businesswire.com/news/home/20151207005117/en/LegalZoom-UK-Acquire-Law-Firm> (last visited Feb. 10, 2016).

E. Advertising vs. Sharing Fees. Technological and web-based innovations have generated debate over the application of Rule 5.4.

1. “Daily Deal” discounts and coupons, such as those promoted by Groupon, do not run afoul of Rule 5.4, despite the fact that the

prospective client pays the entire fee of the coupon to the nonlawyer coupon company, which in turn forwards the fee, less a service charge to the lawyer. C. Klausning, “Check Out North Carolina if ‘Daily Deal’ in Your Future” Minnesota Lawyer (Nov. 7, 2011); ABA Formal Op. 13-465, “Lawyers’ Use of Deal-of-the-Day Marketing Programs” (Oct. 21, 2013). The fee was deemed to be akin to “the cost of advertising on the website” rather than the sharing of a legal fee.

2. AVVO is offering a legal services plan that it declares will not violate Rule 5.4 because the “entire” legal fee is paid to the lawyer, who then pays AVVO a marketing fee.  
<http://lawyernomics.avvo.com/ethics/avvo-legal-services-and-the-rules-of-professional-conduct.html> (last visited Feb. 10, 2016).

F. Policy and Practice

1. Are lawyers really so malleable that they can be influenced by payments to or partnerships with nonlawyers?
2. Nonlawyer businesses, such as LegalZoom, Avvo, and Binder & Binder, have no restrictions and are competing for lawyers’ businesses, much as large accounting firms have undercut lawyers’ business in advising corporation on tax and business issues.
3. Rule 5.4 is only enforced in the breach.
  - a) Insurance companies have “captive law firms.”
  - b) Accounting firms employ numerous lawyers in “nonlawyer” roles.
  - c) Employee benefits companies provide “non-legal” advice to human resources departments.
  - d) Binder & Binder provides nonlawyer advocates to social security claimants.
  - e) Health care companies have in-house lawyers who are representing social security claimants to relieve them of long-term disability and health care payments to individuals.
4. Lawyers’ professional judgment is more often swayed by their own financial concerns than it would necessarily be by nonlawyers.

**II. Rule 5.5: The Maze of Multi-Jurisdictional Practice**

A. Definitions.

1. MJP = Multi-jurisdictional Practice, the act of practicing law in other jurisdictions, where a lawyer may not be licensed.

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2. UPL = Unauthorized Practice of Law, whether by a non-attorney, a suspended or disbarred attorney, or an attorney licensed somewhere other than the jurisdiction in which the attorney is practicing law.
  3. HomeState = for purposes of these materials, any jurisdiction in which a lawyer is licensed and in good standing to practice law.
  4. AwayState = for purposes of these materials, any jurisdiction in which a lawyer is not licensed to practice law.
- B. Rule 5.5: Unauthorized Practice of Law (UPL); Multijurisdictional Practice (MJP). Since its passage as part of Ethics 2000, 43 states have adopted an identical or similar version of ABA Model Rule 5.5 (as of Sept. 27, 2011). The main premise of the rule may not be as critically important as its exceptions.
1. The rule states broadly that “(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.”
  2. This simple rule has two critical parts: what it means to “practice law” and what it means to be “in” a jurisdiction. Definitions of the practice of law are explored *infra* at section I(D).
  3. Generally, a lawyer is “in” a jurisdiction when the lawyer is either:
    - a) physically present in that jurisdiction;
    - b) the lawyer makes an appearance by filing a pleading or other documents with the court, which do not require the lawyer’s physical presence in the state; or
    - c) the lawyer, through advertising or other means, holds him or herself out as licensed to practice in another jurisdiction, even though the lawyer is not physically present in that jurisdiction.
- C. Purpose of MJP prohibitions.
1. Protect the public from abuse by unqualified lawyers. Mode. R. Prof. Conduct, Rule 5.5, cmt. 2. *See Renaissance Enters. Inc. v. Summit Teleservices, Inc.*, 515 S.E.2d 257 (S.C. 1999).
  2. Retain ability to discipline lawyers who violate local standards.
  3. Protect financial interests of the local bar.
- D. What is the “practice of law?”
1. “The definition of the practice of law is established by law and varies from one jurisdiction to another.” Rule 5.5, cmt. 2.

2. Many authorities find the term difficult to define. “There is no wholly satisfactory definition as to what constitutes the practice of law; it is not easy to give an all-inclusive definition. We believe that generally one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in connection with these rights and duties is engaged in the practice of law. *Denver Bar Association v. Public Utilities Commission*, 391 P.2d 467 (Colo. 1964).
3. Many state supreme courts, despite the existence of unauthorized practice of law statutes, take the position that the courts retain exclusive jurisdiction to determine what constitutes the practice of law. *See Nicollet Restoration, Inc. v. Turbam*, 486 N.W.2d 753, 755-56 (Minn. 1992); *In re Flack*, 33 P.3d 1281 (Kan. 2001) (state supreme court has inherent power to define and regulate practice of law); *In re Mid-Am. Living Trusts Assocs., Inc.*, 927 S.W.2d 855 (Mo. 1996) (it is judiciary’s responsibility to determine what constitutes practice of law).
4. Some definitions may, nevertheless, be found in statutes. Minn. Stat. § 481.02, subd. 1, identifies several activities that may constitute the practice of law:
  - a) Appearing in an action or proceeding in court;
  - b) Holding oneself out as qualified to give legal advice or prepare legal documents; or
  - c) Giving legal advice or preparing legal documents.
5. Other states have even more detailed rules. For example, Colorado has a more detailed, multi-part definition in its bar admission rules:
  - a) The private practice of law as a sole practitioner or as a lawyer employee of or partner or shareholder in a law firm, professional corporation, legal clinic, legal services office, or similar entity; or
  - b) Employment as a lawyer for a corporation, partnership, trust, individual, or other entity with the primary duties of:
    - (i) Furnishing legal counsel, drafting documents and pleadings, and interpreting and giving advice with respect to the law, or
    - (ii) Preparing, trying or presenting cases before courts, executive departments, administrative bureaus or agencies;or

- c) Employment as a government lawyer, with the primary duties of
    - (i) Furnishing legal counsel, drafting documents and pleadings, and interpreting and giving advice with respect to the law, and/or
    - (ii) Preparing, trying or presenting cases before courts, executive departments, administrative bureaus or agencies; or
  - d) Employment as a judge or other neutral; provided such employment is available only to a lawyer; or
  - e) Employment as a teacher of law at an ABA accredited law school; or
  - f) Any combination of subparagraphs (a)-(e) above. C.R.C.P., Rule 201.3, *cited by In re Bolte*, 699 N.W.2d 914, 919 (Wis. 2005).
6. According to the Minnesota rules governing admission to the bar without examination, the practice of law includes engaging in a private law practice, serving as in-house counsel for a corporate entity or government agency, serving as a judge, or teaching as a professor in an approved law school. Minn. R. Admission to the Bar, Rule 7A.
7. “[When] a person becomes a lawyer he takes on a mantle that he cannot thereafter take on or off as he pleases. Conduct in which he engages which involves the practice of law when engaged in by lawyers must be in accordance with the ethical standards of the profession if he is to retain his professional status. Even though a particular activity may be open to a layman, if such activity is the practice of law when engaged in by a lawyer, one who is a lawyer cannot free himself of the ethical restraints of the profession in carrying on such activity merely by announcing he is to be regarded as a layman for this particular purpose.” ABA Formal Op. 297 (Feb. 24, 1961).

E. Examples.

- 1. Preparation, filing, and prosecution of motion. *In re Henderson*, 426 B.R. 526 (Bankr. W.D. Pa. 2010).
- 2. Representing parties in state administrative hearings, even though laypeople permitted to do so. *Benninghoff v. Superior Court*, 38 Cal. Rptr. 3d 759 (Ct. App. 2006), *But see, In re Chimko*, 831 N.E.2d 316 (Mass. 2005) (Michigan lawyer’s preparation of reaffirmation agreement in Massachusetts bankruptcy court “akin to the nonattorney’s preparation



of preprinted income tax returns,” and did not constitute unauthorized practice of law).

3. Could be as little as writing a letter stating that signer “represents” the party and signing the letter “attorney for X.” *State v. Gilbert*, 708 P.2d 138 (Ha. 1985)(dismissing on other grounds charges against California lawyer (license inactive) who moved to Hawaii and wrote a letter on behalf of his California client).
4. Reviewing a mineral-rights lease and expressing an opinion about how it should be interpreted; providing legal theories about alternatives for recovering damages. *In re Bolte*, 699 N.W.2d 914 (Wis. 2005).

F. Clearly permitted.

1. Representing HomeState clients in HomeState.
  - a) Including advising HomeState clients of what the law is in other jurisdictions.
  - b) Including taking depositions in other states, examining documents, conducting negotiations in other states, etc., all incidental to the representation of the HomeState client. *See* Rule 5.5(c)(4). *See also* Restatement Third, The Law Governing Lawyers § 3, cmt. e.
  - c) *Accord*, Ohio Bd. Commissioners on Grievances and Discipline, Op. 2002-4 (Jun. 14, 2002).
2. Representing clients from other jurisdictions in litigation venued in HomeState, including advising clients on the law in other jurisdictions.
  - a) Lawyers advising clients regarding the law of other jurisdictions may have a malpractice risk in being unaware of local rules or custom, filing procedures, etc. The risk of malpractice may discourage lawyers from advising clients about the law in other jurisdictions but it is not generally considered malpractice to research and advise clients regarding the law in other jurisdictions.
3. Conducting activities in other states (but from the lawyer’s HomeState office) for corporate HomeState clients with activities in other states, such as providing advice, obtaining permits, and dealing with government regulatory officials, including conducting the work in other states. *See* Restatement Third, the Law Governing Lawyers, § 3, cmt. e, illus. 2 – 4. The work in the AwayState must be done on a “temporary basis” and must be reasonably related to the lawyer’s practice in

HomeState. *See In re Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016).

a) *See e.g. In re Cooper*, 746 N.W.2d 653 (Neb. 2008) (finding no UPL by Tennessee lawyer who, on behalf of corporate client, filed a Statement of Claim and a Demand for Notice in probate court in Nebraska). The court stated that the filing of documents did not “commence an action” or constitute an appearance in court. *Id.* at 559.

b) *But see In re Loveless Babies, Jr.*, 315 B.R. 785 (Bankr. N.D.Ga. 2004) (finding that Chicago lawyers, who operated a bankruptcy referral and petition preparation service from their Chicago office, engaged in the practice of law in Georgia despite associating with local counsel in Georgia who signed the debtors’ petition and represented the debtors in bankruptcy court in Georgia).

4. *Associating* with a lawyer who is admitted to practice in AwayState and who actively participates in the matter. Rule 5.5(c)(1).
5. *Being Admitted Pro Hac Vice* in AwayState or reasonably expecting to be so admitted. *See* Rule 5.5(a), 5.5(c)(2).
6. *Not permitted.* Appearing in court proceeding in AwayState where you are not licensed, unless admitted *pro hac vice* or employing local counsel. *See* Rule 5.5(a), 5.5(c)(2).
7. *Alternative dispute resolution.* Lawyers from other jurisdictions may provide legal services on a *temporary* basis in HomeState that are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding, if the services arise out of or are reasonably related to the lawyer’s practice in the jurisdiction in which the lawyer is licensed (and the forum does not require *pro hac vice* admission). Rule 5.5(c)(3). *See also* Restatement Third, The Law Governing Lawyers § 3(2).

a) This is the anti-*Birbrower* rule. In that California case, a New York law firm’s fee agreement with California client was found void because none of firm’s lawyers were licensed to practice law in California. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 70 Cal.Rptr.2d 304 (Cal. 1998).

- (1) Matter was limited to resolving contract dispute between two California entities (the other party was organized in Delaware but operated in California).

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- (2) Dispute was to be resolved through arbitration but case settled before arbitration took place.
  - (3) Court held that lawyers could recover *quantum meruit* fees for any work done in New York for the California client.
- b) This rule in favor of arbitrations is gaining favor in other states. A Massachusetts court recently let an arbitration decision stand where the arbitration was conducted in Massachusetts by a New York lawyer for one of the parties. *Superaudio LP v. Winstar Radio Productions LLC*, 844 N.E.2d 246 (Mass. 2006).
- (1) Court cited to ABA Model Rule 5.5(c)(3), which expressly permits multi-jurisdictional practice in arbitration proceedings.
  - (2) Even if the representation constituted unauthorized practice, that would not meet the legal standard of “undue means” necessary to vacate the arbitration.
- c) *See also Nolan v. Kenner*, 250 P.3d 236 (Az. 2011) (refusing to vacate arbitration award based on California lawyer’s representation of prevailing party in arbitration venued in Arizona).
8. *Federal practice.* The Model Rule allows lawyers licensed in AwayState to engage in Federal practice in HomeState. Rule 5.5(d).
- a) *See, e.g. Brown v. Smith (In re Poole)*, 222 F.3d 618 (9<sup>th</sup> Cir. 2000) (upholding Bankruptcy Court decision to allow a lawyer to collect attorney fees for an Arizona bankruptcy case, even though the lawyer was only licensed to practice in Illinois).
    - (1) *Accord, In re Desilets*, 291 F.3d 925 (6<sup>th</sup> Cir. 2002) (lawyer licensed in Texas, living in Wisconsin, and practicing in Michigan bankruptcy and federal courts).
    - (2) *But see Atty Grievance Comm. of Md. v. Harris-Smith*, 737 A.2d 567 (Md. 1999) (imposing 30-day suspension on attorney licensed in Pennsylvania, Virginia, and D.C. who maintained Maryland office for bankruptcy matters. Court found that in determining whether a prospective client was eligible for bankruptcy, the attorney would have to review the client’s facts and determine whether there were any [state] contract defenses to creditors’ claims).

- b) The Model Rule appears to allow lawyers from other jurisdictions to open an office or advertise in HomeState solely to conduct a Federal practice. *See* Rule 5.5(d), cmt. 15, 16. A few jurisdictions have issued opinions specifically allowing such conduct:
- (1) In D.C., lawyers licensed elsewhere may conduct a federal courts practice from an office in D.C, as long as they clearly state that they are not licensed in D.C. and that their practice is limited to federal matters. Dist. of Columbia Comm. on Unauthorized Practice of Law, Op. 17-06 (July 21, 2006).
    - (a) Disclaimer must appear on all letterhead and business documents.
  - (2) In Virginia, a registered patent lawyer may give legal advice and opinions on patent law from on office in Virginia, even if the lawyer is not licensed in Virginia. Virginia State Bar Standing Comm. on Unauthorized Practice, Op. 210 (Aug. 8, 2006). Must include a disclaimer that the lawyer is not licensed in Virginia, and the lawyer cannot attempt to practice Virginia law.
  - (3) *Accord*, Wash. Practice of Law Bd., Advisory Op. No. 02-01 (Nov. 2003) (permitting lawyers authorized by PTO but not Washington state to offer copyright services).
  - (4) Social security practice likely qualifies for the federal exemption. *See* Vermont Advisory Op. 2013-2.
- c) *Immigration Practice*. N.J. Committee on the Unauthorized Practice of Law, Op. 44 (Oct. 27, 2008) (permitting multi-state law firm to open New Jersey office, staffed only by an attorney not licensed in New Jersey, to practice solely immigration law).

G. Clearly Not Permitted.

1. Appearing in court proceeding in another jurisdiction where you are not licensed, unless admitted *pro hac vice* or employing local counsel. Rule 5.5(a), 5.5(c)(2).
2. Setting up an office or “other systematic or continuous presence” in another jurisdiction where the lawyer is not admitted to practice. *See* Rule 5.5(b)(1).

- a) Where multi-jurisdictional practice is permitted, a key element is the temporary nature of the lawyer's practice in another jurisdiction. Opening an office in another jurisdiction or advertising crosses the line into impermissible conduct.
- b) Except in Arizona as of 2015 and New Hampshire as of 2016. *See* New Hampshire Rules of Professional Conduct, Rules 5.5(b) and d(3); Arizona Rules of Professional Conduct, Rules 5.5(b) and (d).
- c) Otherwise, it is impermissible to set up an office or work continuously out of one's home in a jurisdiction in which the lawyer is not licensed. For example, in Florida, a lawyer licensed only in New York may not have a Florida office and advertise for "New York legal matters only." *Gould v. Harkness*, 470 F.Supp. 1357 (S.D.Fla. 2006), *affirmed Gould v. Florida Bar*, 2007 U.S. App. Lexis 28968 (11<sup>th</sup> Cir. 2007) (unpublished opinion).
- d) *See In re Nadel*, 82 A.3d 716 (Del. 2013) (suspending lawyer for representing at least 75 Delaware residents in personal injury matters over three-year period; lawyer admitted conduct "could have unintentionally created the impression that he was licensed to practice law in Delaware).
  - (1) Lawyer "never filed a lawsuit in Delaware or made any representations to a Delaware court," "never advertised or actively solicited clients" in Delaware, nor did he "represent to a Delaware citizen that he was a member of the Delaware bar."
  - (2) Court notes no actual harm from lawyer's representation of clients in pre-litigation negotiations with insurers.
  - (3) The Delaware clients constituted 10-15% of his practice.
- e) *See also In re Van Doo*, 152 P.3d 1183 (Az. 2007) (imposing informal reprimand on attorney licensed in Virginia and Florida who, while living in Arizona, represented party at a mediation. Even though the mediator was aware of the lawyer's unlicensed status, and even though non-lawyers may represent parties in mediations in Arizona, the opposing party filed an ethics complaint after the mediation ended without an agreement).
- f) *But see* Virginia Legal Ethics Op. 1856 (2011), suggesting that a lawyer licensed only in another jurisdiction (a "foreign" lawyer)

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might be able to “maintain an office or practice systematically and continuously in Virginia . . . if their practice is limited to matters involving the law of the state or country in which they are admitted to practice . . .”

3. A lawyer who wants to operate a HomeState practice from outside HomeState must be careful that he or she is not perceived as having an office or “other systematic or continuous presence” in a jurisdiction in which the lawyer is not licensed. On the other hand, lawyers on business trips or shorter vacations commonly work on multiple client cases while they are traveling. At a minimum, lawyers on extended leave should avoid:
  - a) Letterhead, business cards, web sites, etc. identifying an office address in a jurisdiction in which the lawyer is not licensed;
  - b) No advertising in other jurisdiction;
  - c) No solicitation of new business from other HomeState-ians vacationing in other jurisdiction, *but see* Restatement Third, The Law Governing Lawyers § 3, cmt. e, illus. 5 (suggesting lawyer in State A could draft estate planning documents for State A client while client is in another state, such as Florida, and also respond to request of client’s friend, in Florida, that lawyer draft similar estate plan, with lawyer doing most of work in State A);
  - d) No staff or assistants in other jurisdiction (unless affiliated with a lawyer licensed in that jurisdiction, as discussed below).
4. *See e.g. In re Bolte*, 699 N.W.2d 914 (Wis. 2005) (publicly reprimanding “inactive” Wisconsin attorney who moved to Colorado and engaged in the unauthorized practice of law there).
5. *See In re Lenard*, No. 09-O-11175 (State Bar Ct. Cal. Apr. 15, 2013) (finding lawyer handling debt settlement cases held himself out as licensed to practice in other jurisdictions despite doing all work from California office).

H. Not So Clear – The Extent of Temporary Physical Presence in Other Jurisdictions.

1. Pursuant to Rule 5.5(c)(4), a lawyer may provide legal services on a temporary basis in AwayState if those 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 extent to which legal services “arise out of” a lawyer’s practice in HomeState and the length or

frequency of the “temporary” presence in AwayState is subject to some debate.

- a) Business trips and vacations are likely “temporary” presences in other jurisdictions, although there are no clear guidelines on how long a trip or vacation may be and still be “temporary.”
- b) *See State of Indiana v. Farmer*, 978 N.E.2d 409 (In. 2012). Ohio attorney made about ten visits to Indiana over three-year period to meet with client, copy court records, meet with client’s prior attorney, and interview witnesses. Indiana disciplinary commission charged a violation of Rule 5.5(c) on the theory that because the visits to Indiana extended over a three-year period, they did not fit within the definition of “temporary.” The Indiana Supreme Court dismissed the matter, finding that the disciplinary commission failed to prove that “occasional visits to Indiana for a single client in a single legal matter, not multiple matters or clients or any systematic or continuous presence in Indiana” were more than temporary.
- c) *But see* Board of Prof. Responsibility of the Supreme Ct. of Tenn., Formal Ethics Op. 2012-F-91(c) (stating that applicants to Tennessee bar may not temporarily practice in Tennessee while awaiting admission “for a period of months” unless they fit exception for recent law graduates).

2. The Restatement (Third) of the Law Governing Lawyers provides two illustrations of permissible temporary practice “arising out of” a lawyer’s HomeState practice.

- a) *Illustration, part I.* Molly Marx is a licensed HomeState lawyer who practices estate planning from her only office in HomeState. She has represented and prepared estate plans for Richie Rich for many years. Rich moved to AwayState last year and recently called Marx from AwayState to ask her to prepare a codicil to his will, taking away the good silver from the daughter who never visits him. Marx prepares the codicil and takes it to AwayState to have Rich sign it. [modified from the Restatement of the Law (Third), the Law Governing Lawyers, § 3, cmt. e, illus. 5.]
- b) *Illustration, part II.* Assume Marx’ conduct above was permissible. While in AwayState having Rich sign his codicil, Rich introduces Marx to his friend Sam Sunnie, who has heard

about Rich's estate plan and wants Marx to draft a similar estate plan for Sunnie. Marx agrees to the representation, returns to HomeState, conducts some legal research about AwayState law, prepares the documents, confers with Sunnie by phone and letter, and then flies back down to AwayState to have Sunnie execute the documents. [Also adopted from the Restatement].

- c) The Restatement states that both illustrations constitute permissible practice, most likely because Marx did not have an office in AwayState, did not hold herself out to anyone as licensed to practice law in AwayState, and the work was both temporary and arose out of her HomeState practice.
  - (1) *See Estate of Condon*, 76 Cal.Rptr.2d 922 (Cal.Ct.App. 1998) (Colorado lawyer did not commit UPL and allowed to collect fees when, from office in Colorado, lawyer advised client –co-executor of an estate being probated in California, where the other executor lived– on California law, sent letters and directed telephone calls to opposing counsel and co-counsel in California, and visited California to confer with client and co-counsel and negotiate with other side; distinguishes from *Birbrower* because client was from Colorado).
- d) *But see* Ohio Bd. of Commissioners on Grievances & Discipline, Op. 2011-2: “[W]ork 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” *citing* ABA, Report of the Commission on Multijurisdictional Practice, at 7 (Aug. 2002).
- e) *But see In re Bolte*, 699 N.W.2d 914 (Wis. 2005) (publicly reprimanding “inactive” Wisconsin attorney who moved to Colorado and engaged in the unauthorized practice of law there).
  - (1) In underlying case, client avoids paying lawyer by relying on state unauthorized practice of law statute.
  - (2) Like Restatement example, lawyer originally approached by prospective client, who knows he is not licensed in jurisdiction and wants to hire him anyway.



- (3) Probably relevant that Bolte was living in Colorado; difficult to argue that to the extent he was working, his office was in Wisconsin.
  - (4) Case meets goals of state-by-state regulation, because no other jurisdiction besides Colorado is likely to oversee Bolte's conduct.
  - f) *But see also, Ranta v. McCarney*, 391 N.W.2d 161 (N.D. 1986) (Minn. lawyer engaged in UPL by traveling into ND to provide legal services to ND client relating to sale of the client's business; lawyer also had branch office in Bismarck).
  - g) *But see also, Chandris v. Yanakakis*, 668 So.2d 180 (Fla. 1995) (finding UPL by Mass. lawyer living in Florida and entering into representation agreement in Florida with non-Florida resident, even though case was based on Florida maritime law).
3. Representation of Family Member in Away State is Not "Reasonably Related" to a Lawyer's Private Practice of Law Unless the Matter is in the Lawyer's Area of Expertise.

- a) In *In re Panel File 39302*, 884 N.W.2d 661 (Minn. 2016), a Colorado lawyer was contacted by his mother and father-in-law, Minnesota residents, who had a post-judgment dispute with their condominium association and wanted help dealing with the association's attorney. The Colorado attorney engaged in negotiations with the Minnesota attorney by e-mail; about two dozen e-mails were exchanged over a four-month period. The Minnesota attorney became frustrated and filed an ethics complaint against the Colorado attorney with the Minnesota Office of Lawyers Professional Responsibility (OLPR). The Director's Office issued a private admonition for a violation of Rule 5.5. On appeal, a three-person panel of the Lawyers Professional Responsibility Board (LPRB) affirmed the admonition.

On appeal, the Minnesota Supreme Court held, 4-3, that the lawyer's conduct of sending e-mails to Minnesota constituted practice "in" Minnesota and that the "reasonably related" exception in Rule 5.5(c)(4) did not apply because the in-laws had a collections matter and the Colorado lawyer's practice was primarily environmental and personal injury law, with collections work related to that practice. The collections work

was inadequate to satisfy the exception because it did not fit the example in the comments of work that arose out of a “particular body of federal, nationally-uniform, foreign, or international law.” *Id.* at 668.

The dissent stated

Today's decision represents a step backwards. By the court's reasoning, when family members or friends--an abundant source of clients--email or call a practitioner admitted in another state, seeking assistance in areas in which the practitioner is experienced and competent, relying on a relationship of trust and confidence, they must be turned away. Those potential clients must then expend unnecessary time and resources to research and hire local counsel--even for minor, temporary services in which the out-of-state lawyer could have provided efficient, inexpensive, and competent service. Simply put, the court's decision is contrary to the principles and policy goals intended by Rule 5.5(c).

*Id.* at 673.

4. Real Property Transactions. Two jurisdictions have recently opined that real estate transactions, even if conducted and documented from lawyer's HomeState office, may violate MJP rules.

- a) *New Jersey.* In a 2012 opinion, the New Jersey Supreme Court Commission on the Unauthorized Practice of Law issued a lengthy opinion interpreting New Jersey Rules of Professional Conduct 5.5, which deviates in some ways from the Model Rule. The opinion adopts a previous interpretation of the use of the word “occasional” in relating to an AwayState lawyer's practice in NJ:

The Committee understands “occasional” to mean occurring infrequently or from time to time; thus, “recurring” practice is not “occasional.” The Committee views the term “occasional” as better suited to preventing attorneys from establishing a systematic, continuous presence in New Jersey unless they are admitted to practice here.

N. J. Sup. Ct. Comm, on the Unauthorized Practice of Law, Op. 49, at 6 (Oct. 3, 2012). In discussing a hypothetical real estate transaction, the discussion shifts subtly from the practice of law in **New Jersey** to the practice of **New Jersey law**. The remainder of the opinion then discusses the application of Rule 5.5 without specifying whether the conduct (the preparing of real estate transaction documents) is purportedly occurring in New Jersey or AwayState.

- b) *See also* Tex. Gov't Code Ann. § 83.001 (allowing only attorneys licensed in Texas to prepare real property legal instruments).

#### I. Discipline

1. Through Rule 8.5, adopted by Minnesota and most jurisdictions that have adopted the new model rules, a lawyer is subject to discipline in his or her home jurisdiction as well as in any jurisdiction in which the lawyer “provides or offers to provide legal services.” MRPC, Rule 8.5.
2. The “choice of law” provision states that the law of the jurisdiction in which the conduct occurs will apply. Rule 8.5 (b). For lawyers who are practicing simultaneously in multiple jurisdictions, a safe harbor provision protects lawyers who act upon a reasonable belief that the conduct would not violate the rules of the relevant jurisdiction in which the conduct occurred. *See* Rule 8.5, cmt. 5.

### III. **Rule 5.6: The Unintended Consequences of the Prohibition of Non-Compete Agreements**

- A. Prior to ABA Formal Opinion 300, issued in 1961, noncompete agreements were permitted for lawyers. S. Stroud, “Non-Compete Agreements: Weighing the Interests of Professional and Firm” 53 Ala. Law Review 1023, 1024 (2002). In 1969, the ABA codified it in the Model Code of Professional Conduct, as Disciplinary Rule 2-108(A).
- B. Rule 5.6(a) prohibits lawyers from “offering or making”  
a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement
  1. The exception for retirement agreements, one of two exceptions to the prohibition on noncompete agreements, is addressed below.
  2. Adoption nearly uniform across U.S. jurisdictions (except California). <http://ambar.org/MRPCStateCharts> (last visited Feb. 10, 2016).

3. General ban on noncompetes is premised on “the freedom of clients to choose a lawyer.”
4. All types of clever restrictions prohibited.
  - a) Financial disincentives that require departing lawyers to pay varying percentages of hourly fees earned from clients after departure are routinely struck down. *See Law Offices of Ronald J. Palagi, P.C., L.L.O. v. Howard*, 747 N.W.2d 1 (Neb. 2008) (all fees received from former firm clients); *Cincinnati Bar Ass’n v. Hackett*, 950 N.E.2d 969 (Ohio 2011) (publicly reprimanding lawyer for attempting to require departing associates to pay 95% of all fees received from clients); *Eisenstein v. David G. Conlin, P.C.*, 827 N.E.2d 686 (Mass. 2005) (15% of fees for four years); Ariz. Ethics Op. 09-01 (2009) (prohibiting payment of “marketing fee” of \$3,500 per client who continues to be represented by departing lawyer).
  - b) Cannot restrict communications with lawyers former clients. Ill. Ethics Op. 91-12 (1991) (rejecting ban on communicating with or representing former firm’s clients for three years after attorney departure).
  - c) Cannot make client files exclusive property of law firm. Mich. Informal Ethics Op. RI-86 (1991).
  - d) Cannot reduce a partner’s or shareholder’s reimbursement for their ownership interest in firm based on whether they compete with former firm. *See e.g. Gray v. Martin*, 663 P.2d 1285 (Or. Ct. App. 1983); *Denburg v. Parker Chapin Flattau & Klimpl*, 624 N.E.2d 995 (N.Y. 1993).
    - (1) *But see Fearnow v. Ridenour, Swenson, Cleere & Evans*, 138 P.3d 723, 729 (Ariz. 2006) (suggesting that stock forfeiture by departing attorney who competes within firm’s geographic area might be reasonable and remanding for further consideration).
  - e) Agreements regarding the division of contingent fee cases in progress at the time the lawyer departs the firm may not, by themselves, be financial disincentives that penalize a departing attorney for continuing to represent clients and do not violate Rule 5.6(a). *See Barna, Guzy, & Steffen, Ltd. v. Beens*, 541 N.W.2d 354, 357 (Minn.Ct.App. 1996) (upholding provision requiring

departing lawyer to pay 50% of all contingent fees received from cases that originated at former firm).

(1) *But see Arena v. Schulman, LeRoy & Bennett*, 233 S.W.3d 809 (Tenn. Ct. App. 2006) (striking down similar 50% contingent fee provision, tied to lawyer's practice in same or contiguous county, as improper restraint of lawyer's practice); *Accord Minge v. Weeks*, 629 So. 2d 545 (La. Ct. App. 1993) (striking down provision that would require departing lawyer to pay firm 80 percent of all fees derived from former firm clients who stay with attorney).

5. Can work to the advantage of in-house counsel, who cannot be prohibited from moving to an in-house position at a competitor. N.J. Ethics Op. 708 (2006).”

C. Exception 1: Law Firm Retirement Agreements. Rule 5.6(a) allows restrictions on a lawyer's ability to practice law (i.e. noncompete agreements) if they are tied to the lawyer's retirement from a law firm.

1. ABA Formal Opinion 06-444 sets forth some criteria for determining whether a restrictive covenant in an employment agreement is permissible under the retirement exception to the rule:

a) The covenant must affect benefits that are available only to a lawyer who is in fact retiring from the practice of law.

(1) Firms likely cannot label partner capital accounts as “retirement benefits” to get around Rule 5.6(a). *See* ABA Op. 06-444, n. 4 (citing cases that have held “retirement” provisions to violate Rule 5.6(a) because they were really anti-competitive restrictions on non-retiring, departing lawyers).

(2) Criteria that suggest a benefit is part of a *bona fide* retirement plan include benefit calculation formulas, benefits based on years of service to the firm, benefits payable over the lifetime of the retired partner, and benefits that are interrelated with the receipt of other retirement funds, such as social security benefits.

(3) *See Holmes v. Kennedy & Graven*, No. 4-96-361, Memorandum Opinion and Order at 9 (D. Minn. Nov. 17, 1997) (denying payment of retirement benefits to

departing partner who formed another law firm and did not retire).

- b) The covenant cannot force a lawyer to forfeit income that the lawyer has already earned.
  - c) Firms may require either a complete cessation from practice, only geographic restrictions on practice, or restrictions from engaging in private practice (in favor of teaching, public service, etc.).
2. *See Schoonmaker v. Cummings & Lockwood of Connecticut, P.C.*, 747 A.2d 1017 (Conn. 2000). The retirement agreement upheld in *Schoonmaker* provided that the retirement benefits were only payable after a retiring lawyer reached 60 or became physically or mentally incapable of practicing law, and calculated the retirement benefit based on the number of years the lawyer had worked at the firm and the lawyer's average annual income over a five-year period.

D. Exception 2: Selling a Law Practice.

1. Rule 1.17 (adopted Dec. 11, 1995) allows a lawyer to sell a law practice, as long as the practice is sold in its entirety, the seller notifies active clients as described in Rule 1.17, and the buyer agrees to a one-year freeze on legal fees.
2. Rule 1.17(f) provides that  
The transaction may include a promise by the selling lawyer that the selling lawyer will not engage in the practice of law for a reasonable period of time within a reasonable geographic area and will not advertise for or solicit clients within that area for that time.  
This provision would otherwise be prohibited by Rule 5.6(a).
3. ABA Model Rule 1.17(a) (initially adopted in 1990) goes even further and *requires* that the seller agree to cease practicing law entirely or in the area of practice that has been sold, modified by jurisdiction regarding whether cessation of practice in a particular geographic area is sufficient.
  - a) Comment 5 to the model rule discusses the requirement that a lawyer who sells only an area of practice must cease practicing in that area of law or in the geographic area but does not address in any way why clients can be deprived of their right to counsel in this situation but not in others.

4. The provision was intended to place retiring sole practitioners on an equal footing with lawyers who worked for law firms and could trade their book of business for a retirement benefit. *See* ABA Annotated Rules of Professional Conduct 571-72 (8<sup>th</sup> Ed. 2015) (“Annotated Rules”).
5. There are no reported cases in the Annotated Rules regarding compliance with Rule 1.17.
6. 47 U.S. jurisdictions have adopted Model Rule 1.17 or a version of it. Of those states, the majority have left intact the provisions requiring or allowing restrictions on a lawyer’s ability to practice in the jurisdiction or subject area. [http://www.abanet.org/cpr/pic/rule\\_charts.html](http://www.abanet.org/cpr/pic/rule_charts.html) (last visited Feb. 10, 2016).
7. The world has not ended.

E. Policy Rationale and Effects

1. “We are unable to conclude that the interests of a lawyer’s clients are so superior to those of a doctor’s patients (whose choice of a physician may literally be a life-or-death decision) as to require a unique rule applicable only to attorneys.” *Fearnow v. Ridenour, Swenson, Cleere & Evans*, 138 P.3d 723 (Ariz. 2006) (noting that noncompete agreements for doctors are not invalid on their face and subject to a reasonableness provision).
  - a) Minnesota doctors may be subject to noncompete agreements. *Freeman v. Duluth Clinic*, 334 N.W.2d 626 (Minn. 1983). Accountants, dentists, and veterinarians also may be subjected to noncompete covenants.
2. “We value counsel of choice. But clients cannot always get the lawyer they want. The lawyer may be too expensive. She may not be taking new clients because she is planning a long vacation or reducing her practice. The client's problem may not interest her, or she may dislike the client. It's a free country for lawyers, too. But not entirely free.” S. Gillers and R. Painter, “Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements” 18 *Geo. J. Legal Ethics* 291 (2005).
  - a) “Counsel of choice” is a mythical policy goal. No clients actually complain about being unable to hire particular lawyers and few lawyers are that special.
3. The ban on non-compete clauses is perceived as benefiting some lawyer because it increases their ability to demand high compensation

for their books of business and allows them to take their business with them.

- a) As a result, compensation at large law firms has become more formula-based.
- b) As it has become easier, primarily through technology, to move practices, the ability of law firms to leverage associates and junior partners has decreased.
- c) An unintended consequence of increased mobility is that law firms of all sizes have become more hesitant to hire and train new lawyers for fear of being unable to recoup their investments.
- d) As a result, more lawyers attempt to practice on their own and lack mentorship and training. Arguably, this puts the public at more risk than if clients are “deprived” of their right to counsel of their choice.

4. Permitting reasonable restrictive covenants would reverse some of these unintended affects.

- a) Lawyers with significant books of business would likely simply refuse to agree to restrictive covenants.



## **RULE 5.4: PROFESSIONAL INDEPENDENCE OF A LAWYER**

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
  - (2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
  - (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
  - (4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if
- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
  - (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
  - (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

### **Comment**

[1] The provisions of this rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This rule also expresses traditional limitations on permitting a third party to direct or regulate

the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8 (f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

**RULE 5.5: UNAUTHORIZED PRACTICE OF LAW;  
MULTIJURISDICTIONAL PRACTICE OF LAW**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction; or assist another in doing so.

(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 the 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) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may

provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

- (1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
- (2) are services that the lawyer is authorized by federal law or other law or rule to provide in this jurisdiction.

#### **RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE**

A lawyer shall not participate in offering or making:

- (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; . . .