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 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 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.[1]

1) What is temporary practice?

ABA Model Rule 5.5(c) states that a "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.

[1] ABA Model Rule 5.5 was revised in 2011 to include revisions to subsections (c). The ABA has tracked the implementation of the revisions to Rule 5.5 on a state by state basis on this website: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf.

Temporary has no definition in Model Rule 1.0.[2] The ABA has acknowledged that "there is no single test to determine whether the lawyer's services are provided on a temporary basis."[3]

The New York State Bar is the most recent bar to address or define what is temporary. Under the newly adopted 22 N.Y.C.R.R. §523.1(a) provides that "lawyers not admitted in New York who provide temporary legal services cannot establish an office or other systematic and continuous presence in this state for the practice of law unless authorized to do so."[4] The New York State Bar acknowledges that Section 523.1(a) presupposed that a lawyer's presence in a state can be continuous if they do not have a brick and mortar outpost in the state. Having "an online presence that implies that she can represent clients regularly in New York, or a pervasive advertising campaign . . . will likely run afoul of Part 523, but [it] will often be difficult to delineate the border between the permissible rendering of 'temporary' services and a prohibited 'systematic and continuous presence'." [5]

2) **What is practice before a tribunal?**

ABA Model Rule 5.5(c)(2) states that 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.

ABA Model Rule 1.1(m) defines "tribunal" as denoting a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or **other body acting in an adjudicative capacity.** A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

According to Mark DeBofsky, a Partner with Daley, DeBofsky & Bryant, lower courts have interpreted the *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) decision to impose a "quasi-administrative summary adjudicative process to ERISA civil actions."[6]

3) **What is authorization by law to practice?**

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[2] ABA Commission on Multijurisdictional Practice, Report to the House of Delegates, Report 201B ("Report) https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/201b.authcheckdam.pdf.

[3] Patrick M. Connors, *No License Required: Temporary Practice in New York State*, New York Law Journal, http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=64022.

[4] *Id.*

[5] *Id.*

[6] Mark D. DeBofsky, *What Process is Due in the Adjudication of ERISA Claims?*, 40 J. Marsh. L. Rev. 811, 812 (2007), https://www.debofsky.com/Articles/What-Process-is-Due-in-the-Adjudication-of-ERISA-Claims.pdf.

ABA Model Rule 5.5(c)(2) states that 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.

> The ABA Report states that Proposed Model Rule 5.5(c)(2) would also make clear that jurisdictional restrictions do not apply when out-of-state lawyers are authorized by law or court order to appear before a tribunal or administrative agency in the jurisdiction. As the Ethics 2000 Commission provided in Comment [3] to its proposed provision on this subject, Lawyers not admitted to practice generally in the jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. Such authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency.[7]
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> The Florida Bar, which has systematically explored the unauthorized practice of law in over 230 cases, has articulated that a federal law such as 37 C.F.R. §§10.1(1), 10.6, and 10.36, which allows an attorney admitted in another state or a registered patent agent to prepare and file patent applications for the U.S. Patent and Trademark Office, and 31 C.F.R. § 10 allows attorneys in any state and non-lawyers to represent individuals in front of the IRS and the Tax Court authorize attorneys to practice.[8]
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> Other jurisdictions also recognize these carve-outs. Specifically, the New York Bar Association recognizes that immigration lawyers who are admitted in one state are "authorized by law" to practice before a federal Immigration Court in all states and can operate an office to do so.[9]
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> Although ERISA does not specifically provide such carveouts, for purposes of the U.S. Administration on Aging's Pension Counseling and Information Program, which is authorized by the Older Americans Act, provides that entities shall "provide outreach, information, counseling, referral, and other assistance regarding pension and other retirement benefits, and rights related to such benefits, to individuals in the United States."[10] It also defines pension and other retirement benefits as "private, civil, service, and other public pensions and retirement benefits, including benefits provided under . . . (A) the Social Security Program under title II of the Social Security Act [ ]; (B) the railroad retirement program under the Railroad Retirement Act of 1974 [ ]; (C) the government retirement benefits programs under the Civil Service Retirement System (CSRS) . . ., the Federal Employees Retirement System (FERS) . . . , or other Federal retirement system or (D) employee pension benefit plans as defined in section 3(2) of the Employee Retirement Income Security Act. Thus the Older American's Act specifically authorizes counseling and other assistance regarding pension and other retirement

[7] ABA Report at 6.
[8] Summary of Unlicensed Practice of Law Cases, https://www.flcourts.org/core/fileparse.php/304/urlt/Summary-UPL-Cases.pdf.
[9] Patrick M. Connors, *No License Required: Temporary Practice in New York State*, New York Law Journal, http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=64022 (citing 8 C.F.R. §§ 1001.1(f), 1291.1(a)(1)).
[10] Older Americans Act Reauthorization, P.L. 114-144 § 215(b) (April 19, 2016).

benefits for Social Security, CSRS, FERS, ERISA covered plans in §3(2), and other federal retirement systems.

§3(2) of ERISA states that "the terms 'employee pension benefit plan' and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—(i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

Employer is defined in ERISA §3(5) as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." And employee organization is defined in ERISA §3(4) as "any labor union or any organization of any kind, or any agency or employee representation committee, association, group, or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships; or any employees' beneficiary association organized for the purpose in whole or in part, of establishing such a plan."

Government plans, including retirement plans established by a state, are defined in ERISA §3(32) and (10). Thus, the Older Americans Act does not authorize outreach, information, counseling, referral, and other assistance regarding pension and other retirement benefits, and rights related to such benefits to state and local government plans.[11]

4) What is authorization by law to practice?

ABA Model Rule 5.5(c)(4) states that services that "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**."

[11] *See* BNA Portfolio 372-4th: Church and Governmental Plans, Detailed Analysis, "The operation of governmental plans is significantly controlled by state and local constitutional and contractual law. Benefit formulas, forms of benefits, age, service, vesting, and contribution requirements are often set out by statute, elaborated upon in promulgated rules, regulations, policies and procedures and greatly vary from jurisdiction to jurisdiction. For that reason, state regulation generally is beyond the scope of this portfolio, but it is important for those who deal with plans of state and local governments to recognize and understand the local laws that surround them."

The ABA has characterized this section as a catch all provision that is meant to permit temporary practice in situations not covered by other sections of rule 5.5, but still clearly warranting a lawyer engaging in multijurisdictional practice from a common sense point of view.[12] According to the ABA, this provision is intended to facilitate the acquisition of legal services by a lawyer who has developed a recognized expertise in a body of law that is applicable to the client's particular matter.[13] Although there does not appear to be any authority governing the amount of experience and knowledge necessary for an attorney to be an expert or federal law specialist under Rule 5.5(c)(4), however, deference will be given to attorneys so long as the representation is related to work the attorney performs in his or her jurisdiction of admission.[14]

[12] Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 - an Interim Assessment*, 43 Akron L. Rev. 729, 748 (2010)
[13] Report, *supra* note 1, at 8.
[14] Philip L. Pomerance, *Multijurisdictional Practice and the Health Lawyer: Will Your Practice Benefit from the New ABA Model Rules of Professional Conduct?*, 37 J. Health L. 113, 126 (2004).