

## ETHICS ADVISORY OPINION

23-02

UPON THE REQUEST OF A MEMBER OF THE SOUTH CAROLINA BAR, THE ETHICS ADVISORY COMMITTEE HAS RENDERED THIS OPINION ON THE ETHICAL PROPRIETY OF THE INQUIRER'S CONTEMPLATED CONDUCT. THIS COMMITTEE HAS NO DISCIPLINARY AUTHORITY. LAWYER DISCIPLINE IS ADMINISTERED SOLELY BY THE SOUTH CAROLINA SUPREME COURT THROUGH ITS COMMISSION ON LAWYER CONDUCT.

### **SC Rules of Professional Conduct: 5.1 and 5.5(b), (c)(1) & (c)(2)**

#### **Facts:**

Lawyer is licensed in South Carolina and North Carolina, and her law firm is located in North Carolina. Lawyer routinely represents clients in both states and is actively involved in all cases handled by her firm. Lawyer has hired Associate, who is licensed only in North Carolina. The language of Rule 5.5(c)(1), RPC, SCACR 407, in conjunction with comments 6 and 8, seems to allow Associate to work on South Carolina cases as an attorney and even appear in court, so long as Lawyer is actively involved in the case and shares responsibility for the representation of the client. Lawyer would like clarity on whether this interpretation is correct and further guidance on the meaning of "temporary basis" and "actively participate."

#### **Questions Presented:**

1. If Lawyer allows Associate to work on South Carolina cases as an attorney and even appear in court, would Lawyer be assisting in the unauthorized practice of law?
2. If Associate works on South Carolina cases as an attorney and appears in court, and Lawyer is actively involved in the case and shares responsibility for the representation of the client, is Lawyer fulfilling her supervisory obligations under Rule 5.1?
3. Does "actively participate" mean that Lawyer must be physically present with Associate if Associate undertakes any legal services on South Carolina cases, or does it simply require that Lawyer actively participate in the representation as a whole?

#### **Summary:**

In order to avoid assisting in the unauthorized practice of law, a South Carolina lawyer working in association with an out-of-state lawyer in South Carolina must actively participate in the matter. Active participation requires taking responsibility for the matter and providing the same level of supervision that would be required of the lawyer over a non-lawyer assistant. Once the out-of-state lawyer is granted *pro hac vice* status, however, the South Carolina lawyer's responsibilities are

reduced to those specifically required by *pro hac vice* rules. Some of the issues raised in this inquiry cannot be addressed by the Committee because they involve unanswered questions of law regarding cross-border practice, specifically when supervision requires the lawyer's physical presence with the supervised person, and whether a lawyer may be practicing law in South Carolina without being physically present in this state.

### **Opinion:**

Allowing Associate to work on South Carolina cases outside of court appearances is not assisting in the unauthorized practice of law as long as Lawyer actively participates in the matter. Allowing associate to appear in court in South Carolina is not assisting in the unauthorized practice of law as long as Associate is admitted *pro hac vice* (or otherwise authorized by the forum to appear) and both Lawyer and Associate comply with the rules governing such admission.

#### 1. In-state work on South Carolina matters

If Associate's work "on a South Carolina case" involves travel into South Carolina, the Committee believes Associate would be practicing law in this jurisdiction for purposes of Rule 5.5. In that case, South Carolina's Rules would apply to Associate's conduct and, for unauthorized-practice-of-law purposes, Lawyer's conduct as well. Any work Associate performs may only be "on a temporary basis." See Rule 5.5(c). The Committee believes the phrase "temporary basis" in subsection (c) and the phrase "systematic and continuous" in subsection (b) are mutually exclusive and bounded by each other. Regular travel into South Carolina over a long period of time may be regarded as *continual*, but it is not *continuous* if Associate returns to North Carolina after each visit, and the Committee believes that distinction is relevant. See Rule 5.5 cmt. 6 ("Services may be 'temporary' even though the lawyer provides services in this jurisdiction on a recurring basis...."). The committee notes, however, that having an office located within this state would constitute a systematic and continuous presence that would prevent Associate's work in South Carolina from being regarded as "temporary."

The inquiry suggests Associate's work is in litigation and potential litigation matters, and this opinion is therefore limited to that context. The inquiry asks, essentially, what the extent of Lawyer's involvement must be in Associate's work in order to avoid assisting Associate in the unauthorized practice of law. The answers to those questions differ between those portions of Associate's work that occur outside court and those that involve appearing in court.

##### a. Court appearances

Associate's court appearances in South Carolina are governed by Rule 5.5(c)(2). Allowing Associate to appear in state court here will comply with Rule 5.5(c)(2) (and therefore Lawyer will not be assisting in the unauthorized practice of law) as long as Associate is granted *pro hac vice* admission pursuant to Rule 404, SCACR, and both lawyers are complying with that rule. Rule 5.5(c)(2) does not impose the same "active participation" requirement as (c)(1) (below), so Lawyer's obligations as the South Carolina "attorney of record" extend no further than those imposed by Rule 404, which are "at all times be prepared to go forward with the case, sign all papers subsequently filed, and attend all subsequent proceedings in the matter."

Rule 404(f) limits the number of *pro hac vice* applications an out-of-state lawyer may file in any calendar year to six and prohibits *pro hac vice* admission to any lawyer who “is regularly engaged in the practice of law or in substantial business or professional activities in South Carolina.” This language appears more restrictive than the Rule 5.5(b) prohibition on a “systematic and continuous presence.” Therefore, if Associate “regularly” enters South Carolina to work on in-state cases, Rule 404 would prohibit *pro hac vice* admission, even though that same regular, continual entry would not preclude Rule 5.5(c)(1) authorization to perform legal services in South Carolina that do not involve *pro hac vice* appearances.

Allowing Associate to appear in federal court in South Carolina is not assisting in the unauthorized practice of law as long the federal forum has authorized Associate to appear, and Associate is complying with the terms of that authorization. Federal preemption prohibits states from imposing any further restrictions on a lawyer’s practice in a federal forum.

#### b. Out-of-court in-state work

Associate’s work in South Carolina requires more than a mere “association” with Lawyer to avoid the unauthorized practice of law. Rule 5.5(c)(1) allows Associate to practice law in South Carolina if Associate works “in association” with Lawyer and Lawyer “actively participates in the matter.” Comment 8 to Rule 5.5 notes that, in so doing, Lawyer takes responsibility for the matter. Because subsection (c)(2), relating to *pro hac vice* admission, does not contain this requirement of active participation and responsibility, the Committee believes that active participation and taking responsibility mean something more than the mere Rule 404(i) requirement of being “prepared to go forward at any time” that applies to local counsel for an out-of-state lawyer admitted *pro hac vice*.

The Committee believes the level of supervisory responsibility under Rule 5.5(c)(1) is similar to a lawyer’s supervisory responsibility for the work of a non-lawyer assistant under Rule 5.1. Neither Rule 5.1 nor Rule 5.5(c)(1) delineates specific supervisory duties, but South Carolina case law indicates that supervision over a non-lawyer requires a lawyer to do three things: 1) give instruction to the non-lawyer (here, Associate); 2) review the non-lawyer’s work, and 3) where necessary, correct the work. If Lawyer is involved in Associate’s cases to this extent, the Committee believes Lawyer would not be assisting in the unauthorized practice of law by Associate under a Rule 5.5(c)(1) analysis.

This level of supervision does not require Lawyer’s physical presence with Associate at all times when Associate undertakes legal services in South Carolina, such as drafting documents. It does, however, require that Lawyer at least have supervisory authority to direct Associate’s work in South Carolina and remain responsible for it. The South Carolina Supreme Court has required a lawyer’s physical presence during certain non-lawyer interactions with clients when those interactions inherently involve legal advice, as in a residential real estate closing, *see In re Lester*, 253 S.C. 246, 247, 578 S.E.2d 7, 7 (2003) (“licensed attorney should have been physically present”), or when a paralegal offers to answer a client’s legal questions, *see Doe v. Condon*, 341 S.C. 22, 28, 532 S.E.2d 879, 883 (2000) (“The proposed after the fact attorney review comes too late.”).

The present inquiry involves representing clients in South Carolina cases, which would seem to include meeting with clients and rendering advice similar to the paralegal's client meetings in *Condon* but performed by an out-of-state lawyer. Whether, or in what specifics, the physical presence requirement regarding non-lawyer employees applies to a South Carolina lawyer's supervision of an out-of-state lawyer practicing in South Carolina pursuant to Rule 5.5(c)(1) is a question best left to the South Carolina Supreme Court.<sup>1</sup>

## 2. Out-of-state work on in-state matters

This Committee cannot answer the question whether Associate is engaged in the practice of law in South Carolina (and thus whether Lawyer must actively participate as noted in 1.b above in order to avoid assisting in the unauthorized practice of law) because that question depends on whether Associate's reach into South Carolina matters from across the border via telephone, email, and other communication amounts to a "virtual presence" in South Carolina for the practice of law. The precise contours of providing legal services "in" a particular jurisdiction have not been defined in South Carolina and are the subject of much debate nationally, but it is not defined simply by the physical location of the lawyer. South Carolina has recently amended the Comments to Rule 5.5 to note that an out-of-state lawyer's physical presence in South Carolina is not the practice of law in this jurisdiction for Rule 5.5 purposes where the lawyer merely lives or visits here physically and works remotely through a practice in the state where the lawyer is licensed. *See* Rule 5.5 cmt. 4. Consistent with several other jurisdictions' and the ABA's views on this question, these amendments essentially acknowledge that a lawyer's "presence" for Rule 5.5(b) purposes is where the predominant effect of the work occurs and where the clients or forum are located. Similar reasoning could support the conclusion that the reverse is also true when the lawyer trades sides of the state line with the client and the forum. However, that is a question that only the South Carolina Supreme Court can answer. *See* footnote 1 above.

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<sup>1</sup> In *In re Unauthorized Practice of Law Rules*, the Supreme Court recognized that "situations will arise which will require this Court to determine whether the conduct at issue involves the unauthorized practice of law. We urge any interested individual who becomes aware of such conduct to bring a declaratory judgment action in this Court's original jurisdiction to determine the validity of the conduct." 309 S.C. 304, 307, 422 S.E.2d 123, 125 (1992). The Committee notes that lawyers have been permitted to anonymously petition the court for such guidance when their own conduct is the subject of the action. *See, e.g., Doe Law Firm v. Richardson*, 371 S.C. 14, 636 S.E.2d 866 (2006).