ETHICS WATCH

Limited Admission to Practice in and Outside of South Carolina

By Nathan M. Crystal

At a recent conference, during discussion of the future of the legal profession, several participants raised questions about the propriety of practice in South Carolina by lawyers from other states and even other countries and, correspondingly, the extent to which South Carolina lawyers could practice elsewhere. The terms "limited admission" or "temporary practice" are usually used to refer to such situations.

Limited admission is a hot topic these days, particularly with regard to limited admission of foreign lawyers. The S.C. Supreme Court has before it a proposal from the International Law Committee approved by the House of Delegates dealing with limited admission of foreign lawyers in South Carolina.

It is my experience that the limited practice rules are poorly understood. The basic rule is SCRPC 5.5, but Appellate Court rules 404 (*pro hac vice*) and 405 (limited certificates of admission) also are involved.

In general a lawyer from another jurisdiction who is not admitted to practice in South Carolina cannot have an office or other systematic and continuous presence in South Carolina for the practice of law, or hold himself out as admitted to practice in South Carolina. SCRPC 5.5(c). However, the Rule provides for a number of exceptions.

Lawyers who move to South Carolina. A common problem area with Rule 5.5 involves a lawyer who moves to South Carolina to practice law, typically with a firm. Because South Carolina does not recognize reciprocal admission, there will usually be a period of time between a lawyer's movement to this state, passage of the bar exam, and admission to practice law, perhaps as much as a year. During this time the lawyer and the firm cannot hold the lawyer out as admitted to practice law. This means no business cards, notices to other firms, website announcements, press releases or advertisements showing the lawyer as admitted in South Carolina.

Can the lawyer practice law at all? The lawyer could not appear in court or take depositions unless the lawyer is admitted *pro hac vice (phv)* under SCACR 404, which prohibits a lawyer from seeking such admission "if the attorney is regularly employed in South Carolina, or is regularly engaged in the practice of law or in substantial business or professional activities in South Carolina, unless the attorney has filed an application for admission under Rule 402." SCACR 404(f) (emphasis added). The *phv* Rule requires that "a regular member of the South Carolina Bar in good standing is associated as attorney of record with that person." SCACR 404(a). In transactional matters, the lawyer must function like a highly experienced paralegal, operating under the supervision of an admitted South Carolina lawyer. The attorney may meet with clients and draft documents under the supervision of a South Carolina lawyer.

For a lawyer who is opening up his own practice in South Carolina, the supervision requirement may be difficult to meet. Perhaps the lawyer could establish a formal relationship with an admitted South Carolina lawyer that would meet the supervision requirement. The safest course for a solo practitioner is to seek admission well in advance of the lawyer's move. For a lawyer practicing in a firm, it will be easier to meet the supervision requirement, although with a highly experienced lawyer it may be awkward to do so. While an experienced lawyer, like a well-seasoned paralegal, can be given a good deal of leeway, the supervision requirement should not be ignored. A simple formula for avoiding unauthorized practice by an experienced lawyer joining the firm is

> no litigation without *phv* admission + no holding out + proper disclosure of status + proper supervision by an admitted lawyer = likely avoidance of the unauthorized practice of law

Some jurisdictions allow a lawyer to practice pending admission. See D.C. Appellate Court Rule 49(c)(8). While South Carolina does not have such a rule, in fact a lawyer working with a firm in South Carolina can to a large extent do what is permitted by the D.C. rule. For litigation matters, the lawyer can appear *phv* if the lawyer has filed an application for admission. In nonlitigation matters the lawyer can do a great deal of legal work so long as the lawyer is under the supervision of a South Carolina lawyer.

Temporary practice in litigation and ADR matters. Rule 5.5(c) pro-

vides for temporary practice in South Carolina in four situations for a lawyer who is admitted to practice in another U.S. jurisdiction and who is not disbarred or suspended from practice in any jurisdiction. It is helpful to organize the discussion of the Rule's four subsections in terms of litigation/ADR and transactional matters. Rules 5.5(c)(2) and (c)(3) deal with temporary practice by out-of-state lawyers (OSL) in litigation/ADR matters. Rule 5.5 (c)(2) deals with pending or potential proceedings either in South Carolina or another jurisdiction. The rule allows an OSL to provide services in South Carolina that are reasonably related to a proceeding if the lawyer is authorized by law to appear in such a proceeding or reasonably expects to be so authorized. Thus, an OSL could come to South Carolina and interview potential clients for litigation expected to be filed either in South Carolina or another jurisdiction if the lawyer is either admitted in the jurisdiction where the matter is to be filed or reasonably expects to be admitted. If a case has been filed in another jurisdiction, an OSL could come to South Carolina to take a deposition of a witness in the matter. Participation by local counsel in such activities, which do not require court appearances, is not required under the rules. Please note that the participation of a local counsel might be advisable to comply with the lawyer's duty of competence, Rule 1.1 (and to avoid malpractice risks) if the OSL is not aware of particular aspects of South Carolina law that can impact the litigation.

If the lawyer appears in a proceeding before a tribunal in South Carolina, that lawyer must be admitted *phv* under SCACR 404. Two aspects of the rule are of particular significance for OSL: First, *phv* admission requires association of local counsel who actively participates in the matter. Second, if a lawyer appears *phv* more than six times in a calendar year in South Carolina, the lawyer is presumed to be engaged in the practice of law in South Carolina.

Rule 5.5(c)(3) is similar to (c)(2) but deals with ADR proceedings rather than litigation. Rule (c)(3) contains an important restriction not found in (c)(2). Under (c)(3) the OSL's ADR services must "arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice." For example, if a New York company has an arbitration proceeding with a South Carolina company in South Carolina, the New York attorney's regular counsel could handle the matter in South Carolina. In an ADR proceeding an OSL is not required to associate South Carolina counsel. See SCACR 404(a) (definition of "tribunal" for purpose of *phv* rule). However, if the proceeding involves South Carolina law, the OSL's duty of competency might require such association. The *phv* Rule prohibits OSL from

appearing in more than three ADR matters in a calendar year.

If a South Carolina lawyer handling an ADR matter in South Carolina wishes to associate as co-counsel an OSL in a matter, Rule 5.5(c)(3) would technically not apply because the OSL does not have an "existing client" under Rule 5.5(c)(3). However, the OSL could still participate in the matter under the Rule 5.5 (c)(1) exception.

Temporary practice in transactional matters. In these matters the relevant rules are 5.5(c)(1) and (c)(4). If the OSL associates or is associated by local counsel who actively participates in the matter, the OSL may properly perform any services related to transactional matters, subject of course to the lawyer's obligation of competency under Rule 1.1. Rule 5.5(c)(1). For example, a South Carolina lawyer could associate a tax expert from Illinois to participate in a matter being handled by the South Carolina lawyer.

If an OSL has an existing client in a jurisdiction in which the OSL is admitted, the OSL could handle a transactional matter in South Carolina without any involvement of local counsel, although again the OSL's duty of competency might caution the lawyer to associate local counsel. For example, a Virginia lawyer with a client who is buying a condo in South Carolina could handle the matter under Rule 5.5(c)(4). See South Carolina Ethics Advisory Committee FAQ #7 (available on the Internet). Note the S.C. rule differs from ABA Model Rule 5.5(c)(4) because it requires the lawyer to have an "existing client," while the Model Rule only requires the representation to be "reasonably related" to the lawyer's practice.

What is temporary? Rule 5.5(c) only applies if the lawyer's practice in South Carolina is temporary. However, the comments indicate that temporary practice need not be limited in time. For example, an OSL might be involved in a transactional matter in South Carolina such as a merger or acquisition that could go on for several years. See SCRPC 5.5, comment 6. However, even if "temporary" should not be interpreted as "short," it does not allow an OSL to open an office in this state for the practice of law.

OSL opening an office in South Carolina. Rule 5.5 generally does not allow an OSL to open an office in South Carolina, to have a systematic or continuous presence in this state, or to hold himself out as admitted to practice in this state, but the rules provide two exceptions: First, the in-house lawyer exception: a lawyer in good standing in another jurisdiction may provide legal services to the lawyer's employer or its organizational affiliates so long as the services are not ones for which *phv* admission is required. SCRPC 5.5(d)(1). This rule allows a corporation or other entity, including a governmental body, to employ an in-house lawyer who provides legal services to the employer without the lawyer having to take the South Carolina bar exam. However, to gain the benefit of Rule 5.5(d)(1), in-house counsel must obtain a limited certificate of admission under SCACR 405. That rule gives the attorney the right to appear before certain tribunals. (Supreme Court Rule 424 also provides for limited certificates of admission for foreign legal consultants.)

Second, the federal law exception: Rule 5.5(d)(2) permits a lawyer not admitted to practice in a jurisdiction to provide legal services in the jurisdiction when authorized by federal law or by other law of the jurisdiction. See Rule 5.5, comment 18. See S.C. Bar Ethics Adv. Op. #06-07 (associate whose practice is limited exclusively to cases before the Social Security Administration may practice in South Carolina even though the associate is not admitted to practice in this state). The scope of the "federal law" exemption, however, is unclear. The rule speaks in terms of services that the lawyer is "authorized by federal law … to

provide in this jurisdiction." When does federal law authorize a lawyer to provide services in a jurisdiction? The clearest case is when the lawyer is authorized to practice before a federal agency, such as U.S. Immigrations and Customs Enforcement. Services rendered to clients in South Carolina in connection with matters before a federal agency are authorized by federal law. Otherwise, lawyers handling such matters could only do so in D.C. See *Sperry v. Florida*, 373 U.S. 379 (1963). On the other hand, merely because federal law is involved in the matter is insufficient to establish "authorization." In addition, many areas of law have both federal and state aspects, and it may be difficult to separate the two. Lawyers who rely on the federal law exemption should be careful to limit their practice to federal aspects and seek association of South Carolina counsel when the matter involves state law issues. For the application of other rules to lawyers who are practicing pursuant to Rules 5.5(c) or (d) see cmts. 19-21.

South Carolina lawyers practicing in other states. If a South Carolina lawyer is considering practice in another jurisdiction, the first question that must be addressed is what ethics rules govern the lawyer's conduct. He should not simply assume South Carolina Rules apply. If the matter is pending before a tribunal in another jurisdiction, most jurisdictions have a choice of law rule similar to ABA Model Rule 8.5(b)(1), which provides that the ethics rules of the jurisdiction in which the tribunal sits apply unless the rules of the tribunal provide otherwise. If the lawyer is going to appear before a tribunal in another jurisdiction, most jurisdictions require the lawyer to seek *phv* admission. In addition, in many jurisdictions, like in South Carolina, the *phv* rules limit the number of such admissions in a calendar year.

If the lawyer is not appearing before a tribunal – for example, interviewing witnesses, taking a deposition, or engaging in contract negotiations – the lawyer must look to that state's version of ABA Model Rule 5.5 to determine if the lawyer's conduct in that jurisdiction is proper. Virtually every jurisdiction, with the exception of New York, has adopted limited practice rules based on ABA Model Rule 5.5. New York currently does not allow limited practice by OSL, but the New York Court of Appeals has recently proposed adoption of a rule that would largely follow Model Rule 5.5. See NY Ct. App. Proposed Rule 523 Regarding Temporary Practice. For a review of the status of Model Rule 5.5 in the states, see State Implementation of ABA MJP Policies, on the ABA website.

However, state versions of Rule 5.5 differ in important details. The major differences among the states involve the scope of Rule 5.5(c)(4). For example, Florida has a quite liberal version of this rule: a lawyer not admitted to practice in Florida "may provide legal services on a temporary basis" in Florida if the client is a resident or has an office in the jurisdiction in which the lawyer is admitted or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Compare that to the South Carolina rule, which allows practice in South Carolina by an OSL that does not fall under 5.5(c)(1)-(3) only if the representation is of an "existing client" in the jurisdiction in which the lawyer is admitted to practice. Lastly, if a South Carolina lawyer is contemplating a permanent presence in another jurisdiction, the lawyer would need to consider that state's version of Rule 5.5(d). He should be aware that generally it is not possible to open up an office outside of the two mentioned exceptions (in-house counsel and federal law exception). However, some states may be more generous; for example, North Carolina allows opening an office if the OSL does not practice North Carolina law. ⚖