

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Appointed by the Supreme Court of New Jersey

OPINION 49

**Multijurisdictional or Crossborder Practice
Under *Rule of Professional Conduct 5.5(b)(3)***

The Committee on the Unauthorized Practice of Law received an inquiry asking whether an out-of-state lawyer, representing an out-of-state buyer, may prepare a contract for purchase of New Jersey commercial real estate. The Committee has also received numerous inquiries on the attorney ethics research assistance hotline regarding multijurisdictional or crossborder practice. Accordingly, the Committee decided to issue this Opinion to provide guidance on the scope of permitted New Jersey practice by out-of-state lawyers.

Rule of Professional Conduct 5.5(b)(3) permits an out-of-state lawyer to engage in the practice of New Jersey law in certain limited circumstances. The *Rule* provides:

- (b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

* * * *

- (3) under any of the following circumstances:

- (i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing

client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

- (ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program and 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 pro hac vice admission pursuant to R. 1:21-2 is required;
- (iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice;
- (iv) the out-of-state lawyer's practice in this jurisdiction is occasional and the lawyer associates in the matter with, and designates and discloses to all parties in interest, a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-state lawyer in the matter; or
- (v) the lawyer practices under circumstances other than (i) through (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

A lawyer who engages in the practice of New Jersey law as a multijurisdictional or crossborder practitioner under *Rule of Professional Conduct 5.5(b)(3)(i), (iv), or (v)*

must first “register” with the Clerk of the Supreme Court. This consists of submitting a form to the Clerk consenting to appointment of the Clerk as agent for service of process. These practitioners must also comply with *Rule* 1:20-1(b) (payment of the annual assessment for the discipline system), *Rule* 1:20-1(c) (submission of the annual registration statement), *Rule* 1:28-2 (payment of the annual assessment for the Lawyers’ Fund for Client Protection), and *Rule* 1:28B-1(e) (payment of the annual assessment for the Lawyers Assistance Program) “during the period of practice.”¹ *RPC* 5.5(c)(3) and (6).

Rule of Professional Conduct 5.5(b)(3) does not supplant fundamental principles regarding the practice of New Jersey law. Specifically, out-of-state lawyers may not maintain a continuous and systematic presence in New Jersey by practicing law from an office in New Jersey. *In re Jackman*, 165 *N.J.* 580, 588 (2000). *See also* Advisory Committee on Professional Ethics Opinion 550 (January 24, 1985) (“out-of-state lawyers who have not been admitted to the bar here in accordance with the rules of our Supreme Court are not authorized to conduct a practice in New Jersey, either on their own or through the subterfuge of New Jersey-licensed ‘associates’”); Committee on the Unauthorized Practice of Law Opinion 33 (July 13, 1998), *modified* (as to certain bond transactions) *In re Opinion 33*, 160 *N.J.* 63 (1999) (“Opening an office in New Jersey does not grant a license to practice law in this State to the entire legal staff of the out-of-state law firm – each attorney must be individually licensed to practice law in New Jersey”); *Rule* 1:21-1(a) (“no person shall practice law in this State unless that person is an attorney holding a plenary license to practice in this State”).

¹ When the “period of practice” has concluded, the practitioner should notify the Lawyers’ Fund for Client Protection to avoid being billed for the annual assessment the next calendar year or being placed on the list of lawyers who are ineligible to practice in New Jersey.

Multijurisdictional or crossborder practice in New Jersey under *Rule of Professional Conduct 5.5* is a relatively new development. In 2001, the *ad hoc* Committee on Bar Admissions, chaired by then-Judge Wallace (the “Wallace Committee”), reviewed the *Rules* on admission to practice in New Jersey, including multijurisdictional or crossborder practice. During the same time period, the Supreme Court Commission on the Rules of Professional Conduct, chaired by retired Justice Pollock (the “Pollock Commission”), also considered changes to the rules.

The Pollock Commission recommended modifications to *Rule of Professional Conduct 5.5* that substantially tracked the recently-enacted language in *Model Rule of Professional Conduct 5.5*, while the Wallace Committee recommended new language proposed by the New Jersey State Bar Association. Both Reports stressed that multijurisdictional or crossborder practice must be temporary or occasional. The Court issued its Administrative Determinations on September 10, 2003, opting for the approach set forth in the Wallace Committee report.² Hence, effective January 1, 2004, *Rule of Professional Conduct 5.5* was amended to include a new subparagraph (b) listing certain circumstances where an out-of-state lawyer may provide legal services in New Jersey.

In July 2004, the Court added language to *Rule of Professional Conduct 5.5(c)* requiring multijurisdictional practitioners to maintain a bona fide office and comply with annual assessment and registration rules “during the period of practice.” In July 2010, the Court further amended *Rule of Professional Conduct 5.5(b)(3)* to include a new subparagraph (iv). This new subparagraph permitted out-of-state lawyers to engage in practice of New Jersey law if:

² The Supreme Court September 10, 2003 Administrative Determination is available at www.judiciary.state.nj.us/notices/n030910a.htm.

- (iv) the lawyer associates in a matter with a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-state lawyer in the matter

Thereafter, in July 2012, the Court clarified this new subparagraph by stating that the out-of-state lawyer's practice in New Jersey must be "occasional" and the out-of-state lawyer must designate and disclose to all interested parties the New Jersey lawyer with whom the out-of-state lawyer associates in the matter. This amendment became effective September 4, 2012.

To ensure that out-of-state lawyers who are not admitted to practice in New Jersey do not establish a continuous or systematic presence in New Jersey, each of the "safe harbor" provisions of *Rule of Professional Conduct 5.5(b)(3)* describe restricted practice activities. Subparagraph (b)(3)(i) is limited by the narrow circumstances in which the practice is permitted: the out-of-state lawyer engages in negotiation of the terms of a transaction in furtherance of representation of an existing client in a jurisdiction in which the lawyer is admitted to practice *and* the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice. Subparagraph (b)(3)(ii) is similarly limited, in that the out-of-state lawyer may engage in representation of a party in complementary dispute resolution only when 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. Subparagraph (b)(3)(iii) is limited to certain litigation-related activities in New Jersey for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice. Subparagraph (iv) is limited by the word "occasional" – the out-of-state lawyer's practice in New Jersey must be only "occasional" and the lawyer must associate with a New Jersey lawyer in the matter.

Lastly, subparagraph (b)(3)(v) is limited both by the condition that the practice is “occasional” and that the practice activity arises directly out of the lawyer’s representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice.

The Professional Responsibility Rules Committee, in its 2006-2008 Rules Cycle Report dated January 15, 2008, discussed the term “occasional” as used in *Rule of Professional Conduct 5.5(b)(3)*.³

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.

The Committee on the Unauthorized Practice of Law agrees with this meaning of the word “occasional” as used in *Rule of Professional Conduct 5.5(b)(3)(iv)* and (v). If the out-of-state lawyer’s entry into New Jersey is recurring or frequent, then it does not qualify as “occasional” under *RPC 5.5(b)(3)(iv)* or (v).

Several out-of-state lawyers have called the attorney ethics research assistance hotline asking whether registration under *Rule of Professional Conduct 5.5(b)(3)* will permit them to appear in a New Jersey court. The answer is no. *Rule of Professional Conduct 5.5(b)(3)* permits an out-of-state lawyer to engage in certain transactions or other nonlitigation matters in New Jersey. *Pro hac vice* admission under *Rule 1:21-2* permits an out-of-state lawyer to appear, with local counsel, in a New Jersey court.

These two paths to permitted practice in New Jersey are mutually exclusive.

³ The Professional Responsibility Rules Committee was discussing the word “occasional” in what is now *Rule of Professional Conduct 5.5(b)(3)(v)*, but the discussion is equally applicable to the meaning of the word “occasional” in newly-amended *Rule of Professional Conduct 5.5(b)(3)(iv)*. The Report can be found at www.judiciary.state.nj.us/reports2008/prrc.pdf.

Lawyers with offices and practices in a neighboring state have asked whether they may engage in an ongoing practice of New Jersey law by bringing a New Jersey lawyer into the firm, thereby “associating” with New Jersey counsel. Again, the answer is no. *Rule of Professional Conduct 5.5(b)(3)(iv)* does not permit recurring practice in New Jersey by an out-of-state lawyer who has associated with a New Jersey lawyer. The practice must be “occasional.”

The Committee now turns to the specific inquiry about an out-of-state lawyer representing an out-of-state client in a commercial real estate transaction, negotiating the terms of the transaction, and preparing the contract and other related documents. Preparing real estate sale and lease contracts for a third person is the practice of law. *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 139 N.J. 323, 336 (1995). *See also New Jersey State Bar Assn. v. New Jersey Assn. of Realtor Bd.s*, 93 N.J. 470, 472 (1983) (acknowledging that it is the practice of law but permitting real estate agents to prepare certain types of contracts if the agreements contain specific provisions); *Cape May County Bar Ass’n v. Ludlam*, 45 N.J. 121, 124-25 (1965) (“[t]he practice of law embraces the art of conveyancing”); *New Jersey State Bar Assn. v. Northern New Jersey Mortgage Associates*, 32 N.J. 430, 444 (1960) (preparing deeds, notes, mortgages, releases, affidavits, and other legal documents affecting the title to real estate is the practice of law); Committee on the Unauthorized Practice of Law Opinion 1 (October 10, 1968) (an out-of-state lawyer may not represent a New Jersey resident in the purchase of real estate in New Jersey); Committee on the Unauthorized Practice of Law Opinion 17 (June 26, 1975) (an out-of-state lawyer may not prepare a deed to convey New Jersey real estate).

Further, negotiating the terms of a legal document such as a contract for the purchase or sale of real estate as an advocate for another person is the practice of law. Committee on the Unauthorized Practice of Law Joint Opinion 45 (July 6, 2009) (negotiating mortgage modification for another person is the practice of law).

As the activities comprise the practice of New Jersey law, the out-of-state lawyer must meet the criteria of one of the “safe harbor” subparagraphs of *Rule of Professional Conduct 5.5(b)(3)*. *Rule of Professional Conduct 5.5(b)(3)(ii)* and *(iii)* are not applicable to this fact pattern. As the out-of-state lawyer has chosen not to associate with New Jersey counsel in the real estate transaction, *Rule of Professional Conduct 5.5(b)(3)(iv)* is not applicable.

Rule of Professional Conduct 5.5(b)(3)(i) permits an out-of-state lawyer to “negotiat[e] the terms of a transaction” when the lawyer represents “an existing client in a jurisdiction where the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice.” Inquirer stated that the out-of-state purchaser of the New Jersey real estate is a developer. Presumably, the transaction relates to the developer’s out-of-state business; the out-of-state lawyer is licensed in the jurisdiction where the developer and its business are located; and the developer is an “existing client” of the out-of-state lawyer. Therefore, the out-of-state lawyer may represent this developer in a limited role, to negotiate the terms of the New Jersey real estate transaction. Notably, however, *Rule of Professional Conduct 5.5(b)(3)(i)* does not further authorize the out-of-state lawyer to prepare the contract of sale or other pertinent legal documents.

Rule of Professional Conduct 5.5(b)(3)(v) permits the out-of-state lawyer to practice “with respect to a matter where the practice activity arises directly out of the lawyer’s representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer’s disengagement would result in substantial inefficiency, impracticality or detriment to the client.” Here, the out-of-state client is a developer seeking to purchase New Jersey commercial real estate in the course of its business. The transaction relates to the developer’s out-of-state business; the out-of-state lawyer is licensed in the jurisdiction where the developer and its business are located; and the developer has a preexisting relationship with its lawyer. The lawyer’s disengagement may result in “substantial inefficiency, impracticality or detriment” to a sophisticated client in these circumstances. If the practice in New Jersey is also “occasional,” these circumstances could satisfy the criteria of *Rule of Professional Conduct 5.5(b)(3)(v)*. The out-of-state lawyer, however, must “register” with the Clerk of the Court and pay the annual assessment pursuant to *Rule of Professional Conduct 5.5(c)*.

In sum, *Rule of Professional Conduct 5.5(b)(3)* permits out-of-state lawyers to engage in limited practice of New Jersey law provided all criteria in the pertinent “safe harbor” subparagraph are met. Lawyers who engage in the practice of New Jersey law as multijurisdictional or crossborder practitioners under *Rule of Professional Conduct 5.5(b)(3)(i), (iv), or (v)* must first “register” with the Clerk of the Supreme Court and pay the annual assessment. *RPC 5.5(c)(3) and (6)*.