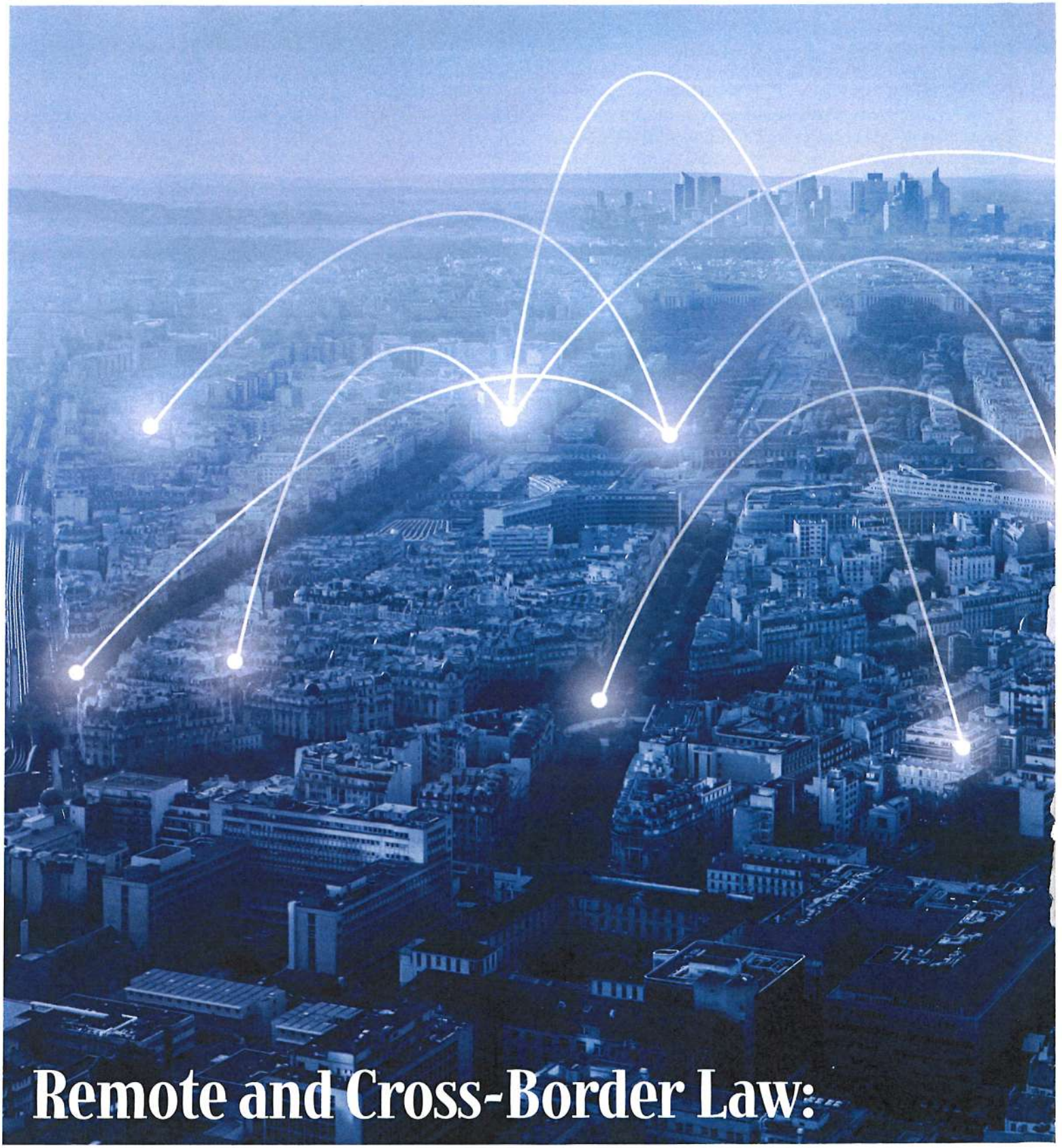

Remote and Cross-Border Law: Practice in Connecticut

BY MARCY TENCH STOVALL AND DAVID P. ATKINS

and Beyond

The pandemic that began in 2020 has caused innumerable problems for almost every profession. For lawyers, the varying restrictions on the unauthorized practice of law (UPL) have presented one such challenge. Because the pandemic triggered a mass shift to remote work, the profession has been confronted by the implications of UPL statutes and rules for remote practice—that is, where a lawyer licensed in one jurisdiction provides legal services to clients as permitted in the licensing jurisdiction while the lawyer is physically located in *another* jurisdiction, one where she is not licensed to practice law. To the extent such practice could be deemed practice of law in the jurisdiction in which the lawyer is physically located but not licensed, the lawyer is at risk of engaging in unauthorized practice of law.

Connecticut has now eliminated that potential risk. On June 10, 2022, at their annual meeting, the judges of the Connecticut courts voted to adopt an amendment of Rule 5.5 of the Connecticut Rules of Professional Conduct, and a corresponding addition to Practice Book § 2-44A, that directly address such remote practice. As of January 1, 2023, new Rule 5.5(f) and Practice Book § 2-44A(c) will each provide as follows:

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> To the extent that a lawyer is physically present in this jurisdiction and remotely engages in the practice of law as authorized under the laws of another United States jurisdiction in which that lawyer is admitted, such conduct does not constitute the practice of law in this jurisdiction.

An addition to the Commentary to Rule 5.5 explains the rationale for the provision:

> Subsection (f) reflects the reality that with the advancement of technology, many lawyers work remotely from locations outside the jurisdiction(s) in which they are admitted to practice law. Subsection (f) allows those lawyers to practice law as authorized in the jurisdiction(s) in which they are admitted while physically present in Connecticut.

The new provision does not permit the remotely practicing lawyer to hold herself out as authorized to practice in Connecticut or to provide legal services for Connecticut clients. Similarly, the Rule's Commentary expressly provides that it does not "authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions."

In adopting this provision, Connecticut's rule makers have found a way to fit remote practice into a structure of rules that was created long before the pandemic and well before the advent of the global economy and widespread cross-border law practice. The new provision also answers the question lurking in the unauthorized practice restrictions of most states. This question, sometimes called the "butt-in-seat" question, is as follows: *where* is a lawyer practicing law when she works on client matters arising out of her practice in the state where she is licensed, but she happens to be physically sitting in a state where she is not licensed? As of January 1, 2023, if the lawyer is sitting in Connecticut, Connecticut's answer is that she is not practicing *in Connecticut*. Put another way: so long as the lawyer's practice is essentially invisible in Connecticut, her physical location will not determine where she is deemed to be practicing.

Once the new provision is in effect, remote practice from Connecticut by an attorney not licensed in Connecticut will not implicate concerns about *unauthorized* practice in Connecticut for one straightforward reason: it will not be considered law practice *in* Connecticut.

Why the New Rule Is Necessary

Generally speaking, the current provisions for multi-jurisdictional practice have not kept pace with the development of modern law practice and service to clients in an increasingly globalized economy. As the authors of the *Restatement (Third) of the Law Governing Lawyers* have noted:

> The rules governing interstate practice by nonlocal lawyers were formed at a time when lawyers conducted very little practice of that nature. Thus, the limitation on legal services threatened by such rules imposed little actual inconvenience. ... Applied literally, the old restrictions on practice of law in a state by a lawyer admitted elsewhere could seriously inconvenience clients who have need of such services within the state.

Restatement (Third) of the Law Governing Lawyers, § 3 (2000). And as the ABA has noted, the protective intent underlying such restrictions on cross-border practice has little bearing on the conduct of attorneys practicing remotely:

> The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed.

ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 495, *Lawyers Working Remotely* (December 16, 2020).

In Formal Opinion 495, the ABA opined that remote practice "does not 'establish' a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so." While the authors of Formal Opinion 495 recognized that the Model Rules do not prohibit remote practice, the opinion's authors did not provide a blanket safe harbor for remote practice. To the contrary, the ABA's ultimate conclusion was that a lawyer may practice remotely *only* "in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law."[1]

While the pandemic may have triggered a widespread move to remote work out of necessity, there is little doubt that remote work will continue to be a prominent feature of law practice even after the pandemic recedes. Connecticut's adoption of a remote practice provision is a small but necessary step in aligning the rules of practice with how lawyers actually practice, particularly as lawyers increasingly use technology to serve their clients when, either by necessity or choice, circumstances dictate that they work from locations outside the jurisdictions in which they are admitted. The new provision reflects the recognition that remote law practice conducted through computers and other resources that are fully integrated with an office in the lawyer's home jurisdiction is functionally equivalent to law practice conducted while physically present in an office in the home jurisdiction.

How Other States Address Remote Practice

Thus far, Connecticut appears to be one of only two states to ex-

pressly address remote practice in the body of Rule 5.5, and in a way that acknowledges that a lawyer who is physically located outside her home jurisdiction is nonetheless functionally practicing there, not in the jurisdiction where she is physically present.

Other states have addressed the issue of such remote practice in various ways. In 2021, Ohio's rule makers retitled that state's version of Rule 5.5 as "Unauthorized Practice of Law; Multijurisdictional Practice of Law; *Remote Practice of Law*" (emphasis added); added a provision to the unauthorized practice exceptions of Rule 5.5(d) to permit practice in the state by an attorney licensed in another state where "the lawyer is providing services that are authorized by the lawyer's licensing jurisdiction"; and added commentary concerning remote practice.

A few states have adopted a variation of Model Rule 5.5(d) that, while not expressly employing the term "remote practice" implicitly permits remote practice from the state where the lawyer's legal services "exclusively involve ... the law of another jurisdiction" (Arizona); "exclusively involve ... the law of another jurisdiction in which the lawyer is licensed to practice law" (Minnesota); "are limited to ... the law of the jurisdiction in which the lawyer is admitted to practice" (North Carolina); or "relate solely to the law of a jurisdiction in which the lawyer is admitted" (New Hampshire).[2]

At least two states addressed remote practice by lawyers not licensed in the state via opinions issued well before the pandemic. In 2005, the Maine Board of Overseers of the Bar summarized its view this way:

> [T]the mere fact that an attorney, not admitted in Maine, is working in Maine does not automatically mean that the attorney is engaged in the unauthorized practice of law. For example, an out-of-state lawyer who has a vacation home in Maine might bring work to Maine to complete while on vacation. Where the lawyer's practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and clients located in some other jurisdiction. In neither case has the lawyer established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine where the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine.

Maine Board of Overseers of the Bar, Opinion No. 189, *Unauthorized Practice of Law in Maine by Admittees of Foreign Jurisdiction* (November 15, 2005). *See also*, Utah Ethics Advisory Opinion Committee, Opinion 19-03 (May 14, 2019) ("[W]hat interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? ... —none.").

Well into the pandemic, a handful of states—Michigan, New Jersey, Virginia, and Wisconsin—issued opinions addressing the pandemic-imposed situation in which attorneys have found themselves practicing remotely from locations in which they were not licensed to practice. Generally, the authors of these opinions frame the analysis as did New Jersey: "[N]on-New Jersey licensed lawyers who are associated with an out-of-state law firm, or are in-house counsel for an out-of-state company, and who simply work remotely from their New Jersey homes but do not exhibit such outward physical manifestations of presence, ... are not considered to be engaging in the unauthorized practice of New Jersey law." Joint Opinion of the New Jersey Committee on the Unauthorized Practice of Law (Opinion 59) and the Advisory Committee on Professional Conduct (Opinion 742), *Non-New Jersey Licensed Lawyers Associated with Out-of-State Law Firms or Serving as In-House Counsel to Out-of-State Companies Remotely Working from New Jersey Home* (October 6, 2021).[3]

Even Florida—a state generally considered hostile to out-of-state lawyers practicing within its borders—has blessed remote practice from that state. This occurred initially via opinion (Florida Supreme Court, *Florida Bar re Advisory Opinion—Out-of-State Attorney Working Remotely from Florida Home* (May 20, 2021)), and then via amendment of the Commentary to Rule 5.5 that tracks the conclusion of the Opinion:

> For purposes of this rule, a lawyer licensed in another United States jurisdiction does not have a regular presence in Florida for the practice of law when the lawyer works remotely while physically located in Florida for an extended period of time if the lawyer works exclusively on non-Florida matters, and neither the lawyer nor any firm employing the lawyer holds out to the public as having a Florida presence.

What Does the Future Hold for Regulation of Multi-Jurisdictional Practice?

The Connecticut bar has been leery of loosening the restrictions on practice in Connecticut by lawyers who are not licensed in Connecticut. As a result, Connecticut's version of Rule 5.5 is more restrictive than that of most states. The authorization for out-of-state lawyers to provide legal services in Connecticut on a temporary basis is available only if the lawyer's licensing jurisdiction accords similar privileges to Connecticut attorneys. This means that lawyers licensed in one of the five states the Statewide Grievance Committee currently deems non-reciprocal—Hawaii, Kansas, Mississippi, Montana, and Texas—may not lawfully perform legal services within the state, even temporarily.

Moreover, under Connecticut's version of Rule 5.5, an out-of-state attorney may not provide legal services to a Connecticut resident

in the state unless she is working on the matter with a Connecticut admitted attorney or has been authorized to do so by court order or reasonably expects to be so authorized. Otherwise, out-of-state lawyers who wish to provide services in Connecticut that are either: (1) "related to a pending or potential mediation or other alternative dispute resolution"; or (2) "related to the legal services provided to an existing client of the lawyer's practice" where the lawyer is licensed, must comply with the notification and payment requirements of Rule 5.5(g) for each legal matter in which the attorney provides legal services in Connecticut. The fee is currently $100 per notification, and the current practice of the Statewide Grievance Committee is to limit the number of client matters for which an out-of-state attorney will be permitted to provide services in Connecticut in a given year. Both the reciprocity requirement and the fee and notification requirements are unique to Connecticut.

But the national trend is toward more, not less, cross-border practice, and it seems increasingly likely that ABA Model Rule 5.5 and corresponding state rules will be modified to address that reality. One intriguing proposal comes from the Association of Professional Responsibility Lawyers (APRL), a national association of over 400 lawyers and law professors who advise and represent lawyers on ethics and professional conduct issues.[4] APRL is often involved in promoting changes to the Model Rules. For example, many of the 2018 changes to the Model Rules concerning advertising (largely adopted in Connecticut) originated with a proposal from APRL.

APRL has recently submitted to the ABA a proposal to dramatically revise Model Rule 5.5 to address the ongoing expansion of multi-jurisdictional practice. APRL's proposal is that Model Rule 5.5 be amended to provide as follows:

> A lawyer admitted and authorized to practice law in any United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction.

The proposed version of Rule 5.5 contemplates widespread multi-jurisdictional practice that would permit a lawyer admitted in one jurisdiction to practice the law of any jurisdiction, for clients in any jurisdiction, while physically located in any jurisdiction, so long as she was competent to do so and was not suspended or disbarred in any jurisdiction. Attorneys would not, however, be permitted to hold themselves out as admitted in jurisdictions where they are not admitted, and would be required to disclose the jurisdictions where they are admitted. A lawyer practicing in a state where she was not admitted also would have to comply with that jurisdiction's Rules of Professional Conduct, and all of its requirements for practice before the jurisdiction's courts. The proposed Rule 5.5 expressly provides that a lawyer practicing in a jurisdiction in which she is not admitted has a particular duty to comply with Rule 1.1 (Competence).[5]

The APRL proposal does not do away with state regulation of lawyer conduct. In APRL's view, the proposed revision of Rule 5.5 meets the goals of lawyer regulation and client protection because it "recognizes that ethics rules will continue to govern the conduct of lawyers and require competence in the delivery of legal services provided; acknowledges that courts and other tribunals have the inherent power to control who appears before them; and embraces the fact that technology has fundamentally changed the ease with which clients and lawyers work together over vast distances." Report of the Future of Lawyering Subcommittee of the Association of Professional Responsibility Lawyers Regarding Proposed Revised Model Rule 5.5 (Report), at 1.

One premise of the APRL proposal is that in this day and age, geographic boundaries are an artificial tool for regulating lawyers. Many matters involve multiple jurisdictions, and there is no reason that a client should be required to retain separate counsel in each jurisdiction. As the authors of the APRL proposal note, what they propose is similar, but not identical, to the regulatory scheme for drivers' licenses: "Although each jurisdiction implements its own scheme for granting drivers' licenses, those licenses are, of necessity, recognized in every U.S. jurisdiction. Drivers are expected to inform themselves of the laws in jurisdictions to which they travel." Report at 1.

Conclusion

In adding a remote practice provision to Rule 5.5 and Practice Book § 2-44A, Connecticut's rule makers have demonstrated a sensible flexibility in acknowledging the reality that the profession's workforce increasingly will be practicing law remotely. But on the broader question of practice in the state by lawyers licensed in another jurisdiction, Connecticut's Rule 5.5 still runs contrary to the national trend of easing of restrictions on such practice by permitting greater latitude for cross-border practice.

Reasonable minds may differ over whether Rule 5.5 should be revised wholesale along the lines APRL has proposed. But in an age when the practice of law is no longer confined within geographic boundaries, it is past time for members of the bar and Connecticut's rule makers to reconsider the outmoded notion of using state borders to determine where a lawyer may ethically and competently practice law. ■

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NOTES

1. Bar associations in Delaware and Pennsylvania have taken a similar position. See, Delaware State Bar Association Committee on Professional Ethics, Formal Opinion 2021-1 (July 9, 2021) (advisory opinion that a Delaware lawyer could work remotely from another jurisdiction so long as such practice did not run afoul of the unauthorized practice provisions of the other jurisdiction; but opinion does not address whether a lawyer who is not licensed in Delaware may practice remotely while physically located in Delaware); Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility and Philadelphia Bar Association Professional Guidance Committee, Joint Formal Opinion 2021-100, *Ethical Considerations for Lawyers Practicing from Physical Locations Where They Are Not Licensed* (March 2, 2021) (same).
2. The Ethics Committee Commentary to New Hampshire Rule 5.5 provides that "New Hampshire's … adoption of new Rule 5.5(d)(3) clarif[ies] that a lawyer who is licensed in another jurisdiction but does not practice New Hampshire law need not obtain a New Hampshire license to practice law solely because the lawyer is present in New Hampshire."
3. *See also* State Bar of Michigan, RI-382 (December 8. 2021) ("An out-of-state attorney does not violate Rule 5.5(b) by working remotely from a physical location in Michigan, if the out-of-state attorney practices only the law of a jurisdiction in which the out-of-state attorney is licensed."); Virginia State Bar Standing Committee on Legal Ethics, Opinion 1896, *Out-of-State Lawyers Working Remotely in Virginia* (adopted by the Supreme Court of Virginia January 11, 2022) ("[A] lawyer who is not licensed in Virginia may work from a location in Virginia on a continuous and systematic basis, as long as that practice is limited to exclusively federal law and/or the law of the lawyer's licensing jurisdiction, regardless of the reason for being in Virginia."); Wisconsin Formal Ethics Opinion EF-21-02, *Working Remotely* (January 29, 2021) (Wisconsin's Rule 5.5 "does not prohibit an out-of-state lawyer from representing clients from the state where the attorney is licensed even if the out-of-state lawyer does so from the lawyer's private location in Wisconsin."); Bar Association of San Francisco, Opinion 2021-1 ("A lawyer who is not licensed in California, and who does not advertise or otherwise hold himself or herself out as a licensed California lawyer, does not establish an office or other systematic or continuous presence for the practice of law in California, and does not represent a California person or entity, but is merely physically present in California while using modern technology to remotely practice law in compliance with the rules of the jurisdiction where the lawyer is licensed, should not be held in violation of California's Unauthorized Practice of Law ("UPL") rule and laws....").
4. The authors are long time members of APRL.
5. The ABA's Centers for Professional Responsibility Committee has formed a 5.5 Working Group to consider proposals to revise Model Rule 5.5 and is expected to gather comments from a variety of sources, including state and local bar associations, the National Organization of Bar Counsel, APRL, and the Conference of Chief Justices.