

## Comments on: ABA Model Rule of Professional Conduct 5.5 and the Limits on Virtual Presence in a Jurisdiction

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Comments to the  
ABA Commission on Ethics  
20/20 Working Group on  
Uniformity, Choice of Law, and  
Conflicts of Interest

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Consumers for a Responsive Legal System (“Responsive Law”) thanks the American Bar Association for the opportunity to present its comments on the rule amendment regarding virtual presence in a jurisdiction proposed by the ABA Commission on Ethics 20/20 Working Group on Uniformity, Choice of Law, and Conflicts of Interest. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable. We believe that the Commission, at this point, should not make a proposal in the area of virtual presence in a jurisdiction, but instead should identify the relevant issues in an informational report that can then be filed with the ABA House of Delegates to help educate the profession regarding this type of practice.

When considering changes to the current rule regarding virtual presence, the Commission should identify the modifications which would be most beneficial to legal consumers, not just to lawyers. Virtual presence in jurisdictions is a new practice, but it is one that has great potential for increasing affordable consumer access to the legal system. Consumers should not be prevented from having greater access to affordable, competent legal work. The relevant consideration for consumers is the quality and competence of the legal work that the lawyer performs, not where that lawyer is physically located.

Critics claim that allowing lawyers to be virtually present will decrease the quality and accountability of legal services. They believe that lawyers without bricks-and-mortar offices will choose to converse with their clients entirely through technology which

will decrease the quality of human interaction in the lawyer-client relationship. Critics also claim that legal services will be less accountable if lawyers do not have physical offices in the jurisdictions where they practice. However, these criticisms ignore the significant benefit to consumers of lower prices and greater access that virtual practice can provide. Furthermore, concerns about communication and accountability are largely unfounded, and may rest upon a notion of qualification to practice law that does more to protect lawyers than clients.

*Virtual Practice Improves Access to Justice*

A quality virtual law office can operate successfully with lower overhead and operational costs, which can lower the price of a lawyer's services. Additionally, virtual presence gives consumers the ability to use a lawyer located far from them, vastly expanding the number of service providers available to them. Online commerce has expanded the availability of goods and services in nearly every industry, particularly for those located far from major cities. The legal profession, with its duty to protect access to justice, should support efforts to make the legal industry more widely available through virtual practice.

*Virtual Practice Can Foster Client-Lawyer Communication*

Virtual practices are more likely to improve communication between lawyers and clients than hinder it. Moreover, some clients, especially younger ones, may be more comfortable interacting with their lawyer online than through postal mail or in person. Additionally, email, unlike telephone or in-person communication, does not require simultaneous communication. As a result, virtual practices can expand the number of hours during which lawyers and clients can communicate.

*Virtual Practice Does Not Decrease Lawyers' Accountability to Clients*

Whether a lawyer has a physical office in a particular jurisdiction does not determine whether they can be held accountable in that jurisdiction. Lawyers practicing virtually in a state can be held accountable in the same way that lawyers practicing physically can. Regardless of their type of presence, if lawyers engage in bad practices they can be held accountable through civil liabilities, action by bar disciplinary committees or client compensation funds. Consumers of virtual legal presence can bring a civil claim against a lawyer in the same way in which they can bring civil claims against out-of-state companies engaged in commerce within their state. Consumers can also be protected by the bar disciplinary committee in the jurisdiction where the lawyer holds a license. If the violation is severe enough, the disciplinary committee can decide to revoke the license of the virtually present lawyer just as they can for the physically present lawyer. In the case of misappropriation of funds, consumers can be compensated directly by the bar association through client compensation funds regardless of the lawyer's location. Because lawyers can be held accountable regardless of the method they use to practice, consumers face no additional risks when dealing online with a properly licensed lawyer.

*The "Systematic and Continuous" Requirement Protects Some Lawyers from Competition, But Does Not Protect Consumers*

Whether a lawyer has a physical office in a state is not determinative of their competence to practice that state's law, nor should it be determinative of authorization to practice. In choosing a lawyer, a consumer should look at whether the lawyer is qualified to practice a state's law based on their bar admission. Additionally, they may want to weigh the value of a lawyer's experience with the practice of law in that state, or a lawyer's expertise with the type of matter for which they need legal help. Having a physical office in a state, particularly one that is not the

same as the client's state, is of little value to a consumer. It certainly does not present a risk against which the consumer needs to be protected by ethics rules.

For example, a lawyer admitted in Maryland can sit in an office in Tennessee and can give legal advice to a Tennessee resident on a Maryland legal matter without a license to practice law in Tennessee. A Maryland office would be of little value to this client. And if the same lawyer were located in Maryland, it can only benefit this Tennessee client to have him available virtually for a Maryland legal matter.

What does it mean to be practicing law in a specific state? Few states have tackled this issue and the handful of states that have been forward-thinking enough to take on these issues have not reached a consensus. For the purpose of consumer protection, we believe that the practice of law is best defined by what state law is being interpreted.

New York provides an example of the problems with not adopting this approach. New York requires that members of the New York bar maintain a physical office within New York in order to provide legal services in New York. However, this requirement does not further consumers' interest because a New York resident cannot hire a lawyer based in Florida who is barred in New York but who has no physical office in New York. Moreover, a consumer spending the winter in Florida with legal issues pertaining to his home in New York can only hire a lawyer with a physical office location in New York, which could pose a substantial burden on the ability of such residents to get any legal services.

As our society becomes more mobile, there will be a growing number of situations like this where restrictions on practice based on office location hinder the ability to receive legal services. At best, this restriction is misguided; at worst it is blatant protectionism for a certain group of lawyers. Regardless of the reason, the anticompetitive nature of such restrictions reduces

access to the law without providing any offsetting consumer protection.

This anti-competitive environment is one of the unintended effects that the additional sentences to Comment 4 to Rule 5.5 may have. We agree with the commenters who suggested that the sentences provide little additional guidance and might have the unintended effect of deterring lawyers from engaging in forms of virtual practice that should be permissible. Consumers should not only be protected from harmful legal practices but also should be provided the widest range of potential lawyers to choose from. The more lawyer choices that a consumer has, the more competition lawyers will have. This will in turn decrease legal costs and thus increase access to the legal system.

Along with modifying Comment 4 to Rule 5.5, Responsive Law also suggests to the Commission that research be done to determine what the phrase “systematic and continuous” means in the context of multijurisdictional practice. The little information that is available for this definition would make any enforcement of the rule excessively arbitrary because of its vagueness.

We also recommended that the Commission explore how current lawyers are engaging in virtual presence, and how this affects their clients. The Commission should make every effort to ensure that rules are designed to protect consumers of legal services and to expand their access to the legal system, rather than solely to safeguard lawyers. The Commission should seek feedback from consumers of virtual legal services to determine whether there are any unique issues applying to virtual practice that necessitate additional regulation or whether, as we believe, existing rules are sufficient to guide this practice.

Responsive Law thanks the Commission for fully exploring this issue, and believes that once the relevant issues regarding virtual presence in jurisdictions are identified, the ABA House of Delegates will be better equipped to educate the profession on this issue.