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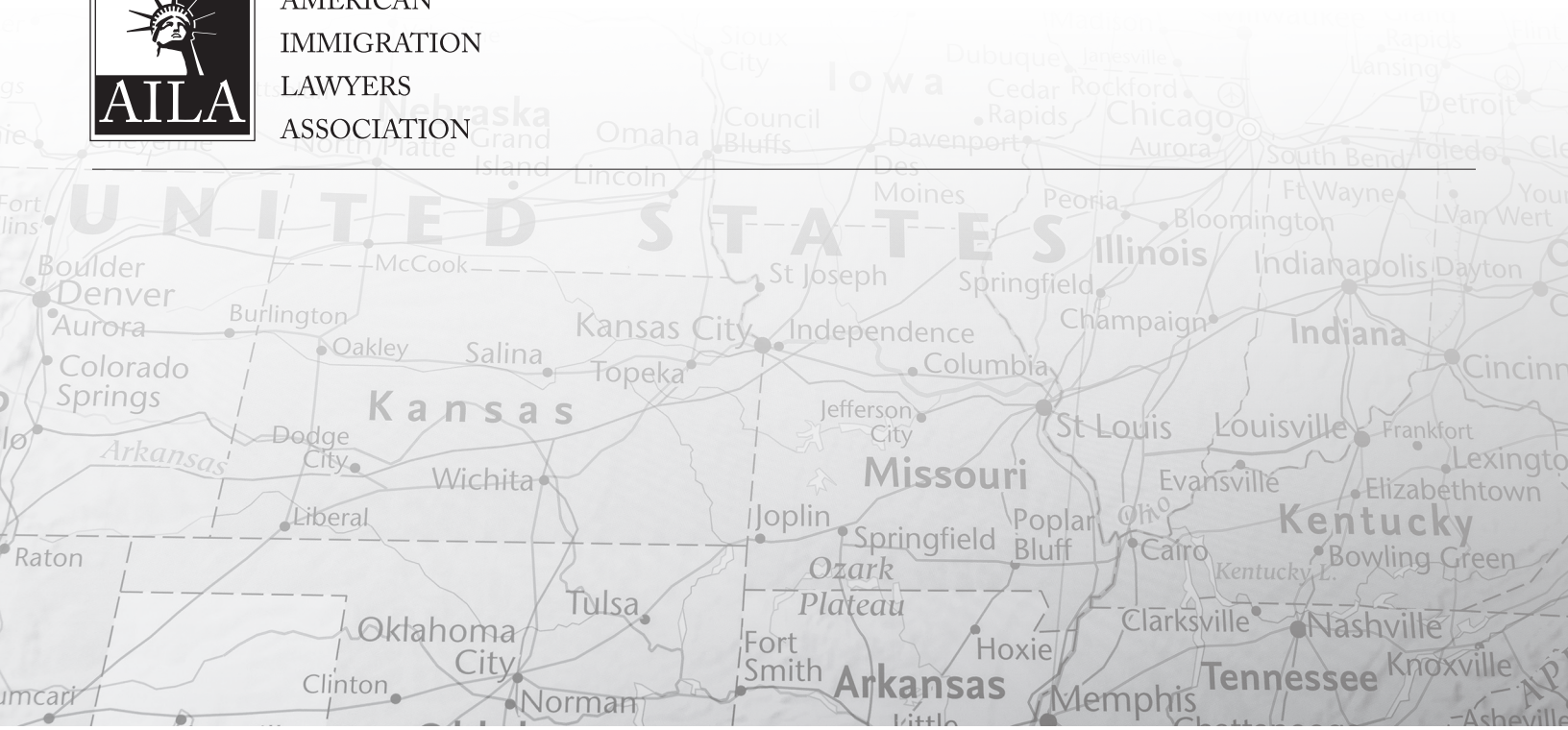

Crossing State Lines: A Practical Guide for Immigration Lawyers When Volunteering Their Services Out of State

By Melissa Chavin and K. Craig Dobson

A PUBLICATION OF THE AILA NATIONAL ETHICS COMMITTEE

U.S. immigration law can be practiced in any state by any lawyer licensed in good standing in any one of the 50 states under their federal authorization at 8 CFR §292.1. This ability of licensed attorneys to practice federally authorized law throughout the country has been discussed in the ruling of the U.S. Supreme Court case *Sperry v. Florida* (1963) and clarified in many states adopting ABA Model Rule 5.5(d)(2). However, the practice of immigration law frequently involves interpreting state law. How should that be handled?

In this set of hypotheticals, we encounter a fictional out-of-state licensed attorney who first considers a meeting with a client on immigration law matters. She next presents her first piece of correspondence to the out-of-state client, her engagement letter. As the case progresses, she is called upon to interpret the local laws of a third state, as well as those of the state where the immigration court sits. Finally, she needs to enter a petition in federal district court, where she may apply to appear *pro hac vice* for this particular case with the permission of the court.

Where the appearance is in an immigration court, the out-of-state attorney can interpret federal immigration law, as well as the relevant state laws from outside and within the state of the immigration court. Where she is asked to help with the active court proceedings of a criminal case outside of her licensed jurisdiction, however, she declines in order to avoid unauthorized practice of law. Likewise, where she appears in federal district court, another court outside the immigration court system, she must look at another option. She opts to appear *pro hac vice* upon written application and in the discretion of the court, as provided for in ABA Model Rule 5.5(c).

AILA Doc. No. 17092931. (Posted 9/29/17)

Q1. Sarah is an active member of the bar in New York. She takes on a pro bono case through a non-profit agency at Stewart Detention Center in Lumpkin, Georgia. She will visit the center to meet with this client. She wonders whether she will be breaking any professional conduct rules or engaging in the unauthorized practice of law by consulting with a client in Georgia[1]?

Sarah correctly remembers the black letter rule from her law school ethics class. Under ABA Model Rule 5.5(a), a lawyer may not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so. However, states which have adopted ABA Model Rule 5.5 in its entirety allow out-of-state lawyers to practice federal immigration law, and even to establish permanent offices.[2] Model Rule 5.5(d)(2) authorizes (1) out-of-state lawyers, (2) admitted and in good standing in their state, to practice in (3) a jurisdiction in which they are permitted to practice by law or rule. Federal regulation 8 CFR §292.1 authorizes any U.S.-licensed attorney[3] to practice immigration law. Model 5.5(d)(2) codifies an authorization found in the 1963 U.S. Supreme Court case, *Sperry v. Florida*. This ruling covers practice of permitted federal laws by people in the 50 states regardless of their state licensure. In states without a version of Model Rule 5.5(d)(2), out-of-state immigration lawyers should proceed with care, as state disciplinary authorities may protest that they are not protected by the ruling in *Sperry*.[4]

Out-of-state immigration lawyers who establish themselves in a foreign state must limit their practice to that which is federally authorized, and they must be careful not to hold themselves out as state law practitioners.

Q2. Sarah travels to Georgia to meet her new client. She offers the client an engagement letter on the form provided by the pro bono agency with which she is working. She includes her own address as an alternative address. The engagement letter provides a space to mention where she is licensed to practice law. What should Sarah do?

Model Rule 5.5(b)(2) prohibits holding oneself out as admitted to practice in a jurisdiction where one is not. If Sarah keeps silent, then she risks holding out to the public that she is admitted to practice in Georgia. She should set forth in the attorney-client agreement that she is licensed only in New York and can practice and is handling federal immigration matters only. It is especially important that she make sure the client is aware that she is not admitted in Georgia, since she is physically present there, and her work may well require interpreting local law.[5] In any writing, including in her engagement letter, Sarah should set forth where she is licensed and that in Georgia her practice is limited to federal immigration law. She can also include this language on any letters she writes on the case, any briefs or email signature blocks.

To the extent that Sarah has included her own New York address on the engagement letter, she can write just, "Admitted in NY," since she is appearing in Georgia. If she only set forth the Georgia address of the program, she may want to add these phrases to avoid misleading clients that she is licensed in Georgia: "Practice limited to U.S. immigration and nationality law," "Admitted in NY only," and some states might even require text along the lines of "Not Admitted in GA."

1 Georgia has not adopted ABA Model Rule 5.5 verbatim, but 5.5(d)(2) is included in their more expansive rule. We are using the model rules in this writing to be more representative of the majority of jurisdictions.

2 Lawyers are nonetheless authorized to practice federal immigration law in states that have not adopted Model Rule 5.5(d)(2) under pre-emption as set forth in *Sperry v. Florida*, 373 U.S. 379 (1963). But caution is advised as state prosecutors or disciplinary authorities may disagree.

3 *Attorney* means any person who is eligible to practice law in, and is a member in good standing of the bar of, the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia, and is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law." 8 CFR §1.2.

4 The ABA has posted a list of each state's multi-jurisdictional practice rules as of April 20, 2016: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf.

5 Discussion in Q3 and Q4; *see also* ABA Model Rule 5.5, Comment 20.

Q3. Sarah finds that it is important for the immigration case that she prove that her client is married under South Carolina law. The couple has a common-law marriage under South Carolina law. Can Sarah research this question and draft a brief on this issue for the immigration judge assigned to her client's case?

Yes, Sarah may research the marriage laws of South Carolina as part of her practice of federal immigration law in Georgia. Sarah may draft a brief on any subject related to the immigration case in which she is compentent for the immigration judge in Georgia who is assigned to her client's case. Her discussion of local South Carolina law before the judge in Georgia is part of her federal authorization under 8 CFR §292.1. This federal regulation grants the right to appear in immigration court to anyone who is a member in good standing of the bar or the highest court in one of the 50 states.[6] As Sarah's discussion of South Carolina family law in this case is part of her practice of immigration law, this is permitted multi-jurisdictional practice. This conclusion is supported by:

(1) the rule in *Sperry v Florida*, which found that a non-lawyer who was licensed as a patent attorney could practice before the patent court, because of a federal rule that permitted it;[7] and

(2) Model Rule 5.5(d)(2) where adopted.

Sarah should make sure that she is meeting her duty of competence under Model Rule 1.1. To do this, she can research to learn more about the marriage laws of South Carolina. If the issue is too detailed, or she doesn't have the time to do this, she should consider retaining a licensed attorney from South Carolina to assist her.

Q4. As part of her preparation of a cancellation of removal application, Sarah analyzes a Georgia shoplifting statute that her client was charged with violating and determines that the pre-trial intervention program her client completed does not qualify as a conviction for immigration purposes. Can she do this analysis?

Yes, this is similar to the common law marriage example in Q3 above. Sarah is federally authorized to represent her client in immigration court and analysis of the immigration consequences of a Georgia[8] conviction (or criminal charges anywhere else in the world) is within the scope of her authority.

If the criminal case was still pending, extra caution would be warranted. Sarah would need to make sure that the client understands that she does not represent him or her with respect to the criminal charges in state court. In other words, her advice on the criminal charges must be limited to the immigration consequences of a particular criminal charge or conviction. She should limit the scope of her representation in writing at the outset of the representation. Hopefully, this is done for her in the form engagement agreement of the program under whose auspices she is working. Sarah should also insist that her clients hire a criminal defense lawyer or request a public defender, if there is still a pending criminal case. If the client does not have separate criminal defense counsel with respect to a case currently pending in criminal court, then there is a serious risk that the clients might later claim that the immigration lawyer was providing representation of the client in the criminal case.

6 *See discussion* at Q1.
7 *Sperry vs. Florida*, 373 U.S. 379 (1963), at 402, and accompanying footnote 47.
8 *But see e.g.*, Tex. Disciplinary R.P.C. 5.05 and Tex. Comm. on Professional Ethics, Op. 516, V. 59 Tex. B.J. 647 (July 1996), https://www.legalethicstexas.com/Ethics-Resources/Opinions/Opinion-516 (it is not unauthorized practice of law for an out-of-state lawyer to practice exclusively immigration law, but "the risk of engaging in the unauthorized practice of law in Texas inevitably increases with the number of immigration and nationality cases handled by an out-of -state attorney.")

Q5. Which state's rules of professional conduct must Sarah follow in addition to the federal rules found at 8 CFR §1003.102 when representing clients in immigration court?

The Georgia Rules of Professional Conduct will apply to Sarah's representation in this case because that is where the immigration court is located. See ABA Model Rule 8.5(b)(1).[9]

Q6. Sarah determines that a prospective client needs a *habeas corpus* petition challenging the legality of the client's detention. She must file it immediately in federal district court in Georgia. She is not admitted to practice before the court. Can she accept the case?

Yes, pursuant to Rule 5.5(c)(2), provided that her activities "are in or reasonably related to a pending or potential proceeding before" the court and she "or a person [she] is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized." Of course, she must be granted permission by the federal district court to appear *pro hac vice* for a temporary admission in this particular case. In some federal courts, a lawyer might find that seeking full admission is a better option than a limited *pro hac vice* admission. This would allow the lawyer to handle the matter without affiliating with local counsel, and she would also be able to return to the court on future matters. However, the admission process to some federal courts can be lengthy, and some federal district courts limit admission to lawyers who are licensed in the state where the court sits (or in some cases, nearby jurisdictions as well). The same provision, Rule 5.5(c)(2), would also allow her to represent a special immigrant juvenile matter in Georgia state court, with a *pro hac vice* admission to state court. Sarah must make sure that she is competent to handle these matters pursuant to Model Rule 1.1.

Further Reading

The Ethics Committee of the American Immigration Lawyers Association (AILA), in conjunction with its Practice & Professionalism Center, has published a chapter on Unauthorized Practice of Law and Multi-Jurisdictional Practice embodied in ABA Model Rule 5.5–in the AILA Ethics Compendium, starting at page 21-1. The Compendium is available for free for AILA members.

9 For more details on how to determine which states have jurisdiction and which state's rules apply, see Kenneth Craig Dobson, *The Law of Outlaws: Rules and Jurisdiction When Establishing an Out-of-State Practice Under Rule 5.5(d)(2)* AILA Doc. No. 15051403 (May 2015). In every ethics matter, especially those involving Rule 5.5, it is important to analyze and compare each connected state's Rule 8.5 to determine which rules apply. In this case, Sarah should review Rule 8.5 for Georgia and New York to determine which state's rules of professional conduct apply.