Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law
(Proposed Rule Adopted by the Board on November 17, 2016)

(a) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

(2) knowingly* assist a person* or entity in the unauthorized practice of law.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

Paragraph (b)(1) prohibits lawyers from practicing law in California unless otherwise entitled to practice law in this state by court rule or other law. See, e.g., California Business and Professions Code, §§ 6125 et seq. See also California Rules of Court, rules 9.40 (counsel pro hac vice), 9.41 (appearances by military counsel), 9.42 (certified law students), 9.43 (out-of-state attorney arbitration counsel program), 9.44 (registered foreign legal consultant); 9.45 (registered legal services attorneys), 9.46 (registered in-house counsel), 9.47 (attorneys practicing temporarily in California as part of litigation), and 9.48 (non-litigating attorneys temporarily in California to provide legal services).

PROPOSED RULE OF PROFESSIONAL CONDUCT 5.5
(Current Rule 1-300)
Unauthorized Practice of Law; Multijurisdictional Practice of Law

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct ("Commission") evaluated current rule 1-300 (Unauthorized Practice of Law) in accordance with the Commission Charter. In addition, the Commission considered the national standard of ABA Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law). The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rules. The result of the Commission's evaluation is proposed rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law).

Rule As Issued For 90-day Public Comment

Proposed rule 5.5 amends current rule 1-300. In substance, it continues the prohibitions in rule 1-300 against aiding any person or entity in the unauthorized practice of law and against a member of the California bar practicing law in another jurisdiction in violation of the regulations of that other jurisdiction. However, the Commission is recommending that the rule also include the Model Rule 5.5 prohibitions against a lawyer who is not admitted to practice in California from maintaining an office or systematic presence in California and falsely holding out that he or she is admitted to practice law in California.

The main issue considered by the Commission in studying this rule was whether to propose paragraph (b) that implements the Model Rule prohibitions against a lawyer who is not admitted to practice in California from: (i) maintaining an office or systematic presence in California; and (ii) from holding out that he or she is admitted to practice law in California. Although the Commission recognized that such conduct presently is governed by well-established State Bar Act prohibitions against the unlawful practice of law (see Business and Professions Code §6125 et seq.), the Commission nevertheless recommends this amendment to the current rule. Three of the Commission's reasons for this change are set forth below.

First, proposed rule 5.5 would serve as an entry point for out-of-state lawyers considering whether to practice in California and proposed paragraph (b) alerts such lawyers to limitations on their potential authorization to practice in California even if they believe that they would qualify to do so under one of the multijurisdictional practice of law ("MJP") provisions in the California Rules of Court (i.e., MJP Rule of Court 9.46 authorizing a registered in-house counsel to engage in a limited practice exclusively for that lawyer's employer).

Second, proposed paragraph (b) would prohibit all non-admitted lawyers, including those persons authorized to practice in California under the Rules of Court (i.e., under the MJP rules, the pro hac vice rule, and other rules) from holding himself or herself out to the public or otherwise representing that he or she is admitted to practice law in California as a member of the State Bar. For example, a non-admitted lawyer who is given narrow permission by a trial judge to appear as counsel pro hac vice in a single case should not thereafter hold himself or herself out as being admitted in California as that would be a misleading representation that the lawyer enjoys the same unlimited privilege of practicing law as an active member.

Third, proposed paragraph (b) would be a necessary predicate in the black letter of the rule for the important information provided in the proposed Comment to the rule concerning California's

regulatory structure for MJP which differs substantially from that in other jurisdictions where regulation of MJP is found in the Rules of Professional Conduct. In California, MJP is "codified" in the Rules of Court. The Comment identifies the categories of authorized practice of law available to qualified lawyers who are not admitted in California and includes citations to the applicable Rules of Court.

Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

COMMISSION REPORT AND RECOMMENDATION: RULE 5.5 [1-300]

Commission Drafting Team Information

Lead Drafter: Mark Tuft
Co-Drafters: Jeffrey Bleich, Hon. Karen Clopton

I. CURRENT CALIFORNIA RULE

Rule 1-300 Unauthorized Practice of Law

(A) A member shall not aid any person or entity in the unauthorized practice of law.

(B) A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016
Action: Recommend Board Adoption of Proposed rule 5.5 [1-300]
Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016
Action: Board Adoption of Proposed rule 5.5 [1-300]
Vote: 11 (yes) – 0 (no) – 1 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 5.5 [1-300] Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer admitted to practice law in California shall not:

(1) practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

(2) knowingly* assist a person* or entity in the unauthorized practice of law.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

Paragraph (b)(1) prohibits lawyers from practicing law in California unless otherwise entitled to practice law in this state by court rule or other law. See, e.g., California Business and Professions Code, §§ 6125 et seq. See also California Rules of Court, rules 9.40 (counsel pro hac vice), 9.41 (appearances by military counsel), 9.42 (certified law students), 9.43 (out-of-state attorney arbitration counsel program), 9.44 (registered foreign legal consultant); 9.45 (registered legal services attorneys), 9.46 (registered in-house counsel), 9.47 (attorneys practicing temporarily in California as part of litigation), and 9.48 (non-litigating attorneys temporarily in California to provide legal services).

IV. COMMISSION'S PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE 1-300)

Rule 5.5 [1-300] Unauthorized Practice of Law; Multijurisdictional Practice of Law

~~(A) A member shall not aid any person or entity in the unauthorized practice of law.~~

(a) A lawyer admitted to practice law in California shall not:

(1) ~~(B) A member shall not~~ practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

(2) knowingly* assist a person* or entity in the unauthorized practice of law.

(b) A lawyer who is not admitted to practice law in California shall not:

(1) except as authorized by these rules or other law, establish or maintain a resident office or other systematic or continuous presence in California for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in California.

Comment

Paragraph (b)(1) prohibits lawyers from practicing law in California unless otherwise entitled to practice law in this state by court rule or other law. See, e.g., California Business and Professions Code, §§ 6125 et seq. See also California Rules of Court, rules 9.40 (counsel pro hac vice), 9.41 (appearances by military counsel), 9.42 (certified law students), 9.43 (out-of-state attorney arbitration counsel program), 9.44 (registered foreign legal consultant); 9.45 (registered legal services attorneys), 9.46 (registered in-house counsel), 9.47 (attorneys practicing temporarily in California as part of litigation), and 9.48 (non-litigating attorneys temporarily in California to provide legal services).

V. RULE HISTORY

The current rule 1-300 originated in 1928 as a part of former rule 3. Pursuant to then section 29 of the State Bar Act, the rule became operative on July 24, 1928. (See The State Bar Journal (July 1928) Vol. III, No. 1, p. 17.) The pertinent part of rule 3 originally read: "A member of the State Bar shall not . . . directly or indirectly aid or abet an unlicensed person to practice law or to receive compensation therefrom."

For the purposes of clarification, the State Bar of California amended rule 3 in September, 1942. The Supreme Court approved the amendments which became operative on December 1, 1944. The amendments included dividing rule 3 into two sentences and revising the pertinent part of the rule to read: "A member of the State Bar shall not . . . directly or indirectly aid or abet any person not so licensed, or any association or corporation, to practice law or to receive compensation therefrom." (See The State Bar Journal (November-December 1944) Vol. XIX, No. 6, p. 416 & 418.)

In 1972, the State Bar of California's Special Committee to Study the ABA Code of Professional Responsibility recommended implementing the numbering system and format of the ABA Code of Professional Responsibility as adopted by the American Bar Association on February 24, 1970. This recommendation included renumbering rule 3 as rule 3-101, and entitling it "Aiding Unauthorized Practice of Law." Proposed rule 3-101 contained two subparts. Subpart (A) provided: "A member of the State Bar shall not aid any person, association, or corporation in the unauthorized practice of law." Subpart (B) provided: "A member of the State Bar shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." Proposed Rule 3-101 became operative on January 1, 1975.

In 1989, rule 3-101 was amended and renumbered as rule 1-300 as part of a comprehensive revision and renumbering of the entire California Rules of Professional Conduct. Rule 1-300 was titled "Unauthorized Practice of Law." Under subpart (A), the words "association, or corporation" were replaced with "or entity." The rule was further amended by deleting the phrase "of the State Bar" from both subpart (A) and (B). The amended rule became operative May 27, 1989. Rule 1-300 has not since been amended.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016 (In response to 90-day public comment circulation):**

    1. OCTC is concerned that subparagraph (a)(2) of this proposed rule requires "knowingly" for the same reasons expressed regarding that term in proposed Rule 1.9, proposed Rule 3.3, 4.1, and the General Comments section of this letter. Requiring "knowingly" permits an attorney not to research whether the person they are aiding is an attorney in California, or currently permitted to practice law in California. (See *Butler v. State Bar* (1986) 42 Cal.3d 323, 328-329 [circumstances known to the attorney may require an investigation]; *Vaughn*

v. State Bar (1972) 6 Cal.3d 847, 850 and 855-858; *Sanchez v. Bar* (1976) 18 Cal.3d 280, 283–285 [gross negligence amounting to moral turpitude where attorney who knew client's case was in danger of dismissal inaccurately reported case status to client without first checking client's file]; *In the Matter of Yee* (Review Dept. 2014) 5 Cal. State Bar Ct. Rptr. 330; *In the Matter of Parish* (2015) 5 Cal. State Bar Ct. Rptr. 370; *In the Matter of Harney* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 266, 281; *In the Matter of Downey* (Review Dept. 2009) 5 Cal. State Bar Ct. Rptr. 151, 155 [gross negligence amounting to moral turpitude where attorney filed verification that his clients were out of county, without first confirming that fact]; *In the Matter of Carver* (Review Dept. 2016) 5 Cal. State Bar Ct. Rptr. 427, 432-433.)

Commission Response: The Commission has not made a change to the Rule. As it has noted with respect to other rules, the definition of "knowingly" in Rule 1.0.1(f) makes clear that knowledge can be inferred from the circumstances. A lawyer may not engage in willful blindness to avoid knowledge the lawyer being assisted was not permitted to practice law in California. With this definition, the Commission believes that the "knowingly" standard is appropriately used in this Rule.

2. OCTC supports the Comment.

   Commission Response: No response required.

- **State Bar Court:** No comments were received from State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, four public comments were received. One comment agreed with the proposed rule and three comments agreed only if modified. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

One speaker appeared at the public hearing whose testimony was in support of the proposed rule if modified. That testimony and the Commission's response is also in the public comment synopsis table.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

1. Aiding in the unauthorized practice of law. Other California laws prohibit the unauthorized practice of law in California. Among these other laws are Business and Professions Code §§ 6125 et seq. stating that perpetrators are guilty of a misdemeanor punishable by a fine, imprisonment, or both. Unauthorized practice of law may also be enforced under laws prohibiting unfair competition. (See,

People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599, applying the Unfair Competition Act, Business and Professions Code §§ 17200 – 17208. See also, Opinion of the California Attorney General No. 93-303 (August 30, 1993).) Similar to the approach taken in rule 1-300(A), rule 1-311 regulates an attorney's employment or professional association with a disbarred, suspended, resigned, or involuntarily inactive member. Underlying both rules is the policy of protecting the public from lawyers or nonlawyers deemed unqualified to provide legal services.

2. Corporations practicing law. Rule 1-300(A) includes a prohibition against aiding an *entity* in the unauthorized practice of law. Certain entities are authorized to practice law in California. The State Bar registers Professional Law Corporations and Limited Liability Partnerships pursuant to code sections and State Bar rules. (See Business and Professions Code §§ 6160 et. seq. (re law corporations) and §§ 6174 and 6174.5 (re limited liability partnerships).) Some nonprofit entities may also be authorized to practice law. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23 [40 Cal.Rptr.3d 221]*.)*

3. Practicing law in violation of another jurisdiction's regulation of the profession in that jurisdiction. Other laws regulate a California lawyer's professional conduct in another jurisdiction. The statutory duties of an attorney include a duty to report to the State Bar the "imposition of discipline against the attorney by a professional... disciplinary agency, whether in California or elsewhere." (Business and Professions Code § 6068(o)(6).) A California lawyer may be subject to expedited disciplinary proceedings in California if it is determined that the California lawyer committed professional misconduct in another jurisdiction. A certified copy of a final order from that jurisdiction is conclusive evidence of the lawyer's culpability. (Business and Professions Code § 6049.1.)

B. ABA Model Rule Adoptions

Adoptions of Model Rule 5.5. As discussed below in the section on state adoptions of Model Rule 5.5, most jurisdictions have adopted some version of current Model Rule 5.5 that includes the model rule's multijurisdictional practice provisions.

- Illinois Rule 5.5 is representative of how Model Rule 5.5 has been adopted or revised in the various jurisdictions:

  Illinois Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

  (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if 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 the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

Jurisdictions that have not adopted Model Rule 5.5's MJP Provisions. As noted below under state adoptions of Model Rule 5.5, there are four jurisdictions that have rules substantially similar to California Rule 1-300. They are:

- **Hawaii Rule 5.5**

  A lawyer shall not:

  (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

  (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law; or

  (c) allow any person who has been suspended or disbarred and who maintains a presence in an office where the practice of law is conducted by the lawyer to have any contact with the clients of the lawyer either in person, by telephone, or in writing or to have any contact with persons who have legal dealings with the office either in person, by telephone, or in writing.

- **Mississippi Rule 5.5**

  A lawyer shall not:

  (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

  (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

- **Montana Rule 5.5**

  A lawyer shall not:

  (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

  (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

- **Texas Rule 5.05**

  A lawyer shall not:

  (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

The ABA State Adoption Chart for Model Rule 5.5, which is analogous to rule 1-300, was last revised on October 18, 2016, and is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_5.authcheckdam.pdf (Last accessed on 2/7/17)

In addition, the ABA has issued an Adoption Chart regarding the various jurisdictions' adoption of the multijurisdictional practice (MJP) principles contained in Model Rule 5.5, last revised on April 28, 2014. It is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/quick_guide_5_5.authcheckdam.pdf (Last accessed on 2/7/17)

- Fourteen jurisdictions have adopted a rule of professional conduct identical to Model Rule 5.5.[1]

- Thirty jurisdictions have adopted a rule of professional conduct substantially similar to Model Rule 5.5.[2]

- Two jurisdictions (California, District of Columbia[3]) have rules of court that address substantially the same issues as are addressed in Model Rule 5.5.

- Four jurisdictions have adopted a rule of professional conduct substantially different from Model Rule 5.5;[4] these jurisdictions have retained their version of Model Rule 5.5 that pre-dates the 2002 Ethics 2000 revisions to Model Rule 5.5, as well as the 2003 ABA MJP Commission revisions to Model Rule 5.5, and are similar to current California Rule 1-300.

- One jurisdiction has a recommendation before its highest court to adopt a rule substantially similar to Model Rule 5.5 (New York).

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[1] The fourteen jurisdictions are: Alaska, Arkansas, Illinois, Indiana, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, Rhode Island, Utah, Vermont, Washington, and West Virginia.

[2] The thirty jurisdictions are: Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Caroline, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, Wisconsin, and Wyoming.

[3] See D.C. App. Rule 49, available at: http://www.dccourts.gov/internet/documents/rule49.pdf [Last visited 5/10/15]

[4] The four jurisdictions are: Hawaii, Mississippi, Montana, and Texas.

IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Changing the title of the current rule by adding "Multijurisdictional Practice of Law."

   - Pros: Referring to multijurisdictional practice ("MJP") more accurately describes the content of the proposed rule with the addition of paragraph (b). More important, because California addresses MJP in Rules of Court, (e.g., Rules 9.40 – 9.48) but the ABA Model Rules and most jurisdictions address MJP in their Rules of Professional Conduct, proposed Rule 1-300, which would apply to out-of-state lawyers authorized to practice in California. The change would provide such lawyers (who would naturally expect to find the MJP rules in the CRPC's) with an important point of reference for locating the relevant California regulations concerning MJP.

   - Cons: None identified so long as paragraph (b) is included in the rule.

2. Substitute the term "lawyer" for the term "member."

   - Pros: The rule's use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term "lawyer." More important, using "lawyer" is particularly apt in proposed Rule 1-300, which addresses in paragraph (b) the concept of MJP, i.e., the practice of law in California by lawyers who by definition are *not admitted* in California. It is more accurate to draw a distinction between a "lawyer admitted to practice law in California" (paragraph (a)) and a "lawyer who is not admitted to practice law in California" (paragraph (b)) than to have the distinction rest on a term, "member," that is familiar only in California.

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

3. Add the phrase "admitted to practice law in California."

   - Pros: See Pros for substituting "lawyer" for "member," above. Implied in the decision to substitute "lawyer" for member is the need to add the phrase "admitted to practice law in California" to demarcate that paragraph (a) applies to lawyers who are "admitted" to practice law in California, (i.e., members of the California bar.)

   - Cons: None identified if "lawyer" is substituted for "member."

4. Reverse the order of current rule 1-300(A) and (B) in the proposed rule as proposed paragraphs (a)(2) and (a)(1), respectively.

    - Pros: First, addressing the lawyer's own unauthorized practice logically should be addressed in the rule before the lawyer's assisting another person's unauthorized practice. Second, this logic was apparently recognized by the ABA in 1983 when the Kutak Commission similarly reversed the order of the concepts when it revised ABA Code of Professional Responsibility ("ABA Code"), DR 3-101, from which Rule 1-300 is derived, and renumbered it Model Rule 5.5. Third, the switch removes an unnecessary difference between California and the trend in nearly every other jurisdiction to first address the lawyer's own violation and then address the lawyer assisting in a violation. Fourth, a non-substantive change is to place current (A) and (B) as subparagraphs (2) and (1) of proposed paragraph (a), respectively. This latter change tracks the organization of Model Rule 5.5, with proposed paragraph (a) applying to lawyers "admitted" in California and proposed paragraph (b) applying to lawyers "not admitted" in California and would provide less confusion if the concept of MJP is included in the rule. Finally, setting out the provisions in proposed Rule 5.5(a) as subparagraphs provides for better clarity.

    - Cons: None identified if "lawyer" is substituted for "member."

5. In proposed Rule 5.5(a)(2) [current 1-300(B)], include the word "knowingly" to modify "assist."

    - Pros: Including "knowingly" in the rule would apply a *mens rea* requirement for assisting a person in the unauthorized practice of law. The first Commission included "knowingly" is its version of the rule, which OCTC approved and the Board adopted. If the Model Rule definition of "know" or "knowing" were to be adopted, actual knowledge could be inferred from the surrounding circumstances. (Model Rule 1.0(f) provides: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.")

    - Cons: Including the word "knowingly," which would require actual knowledge, would narrow the rule's application and make it less enforceable. Current rule 1-300(A) does not include such a limitation on liability. There is no evidence that the lack of such a limitation has unfairly led to lawyers being charged or disciplined under the rule. Also, the term "knowingly" is not used in the rule adopted by any other jurisdiction.

6. In proposed paragraph (a)(2) [current 1-300(A)], substitute the word "assist" for "aid" in current rule 1-300(A).

    - Pros: No substantive change in meaning is intended or likely to result from changing "aid" to "assist." Current rule 1-300's wording is derived from the

ABA Code, DR 3-101(A), which used the word "aid." The ABA substituted "assist" for "aid" in 1983 with no known adverse consequences. Moreover, a substantial majority of jurisdictions have followed suit and adopted the 1983 Model Rule word change. Further, conforming the language of proposed paragraph (a)(2) to that of the Model Rule and the substantial majority of jurisdictions is warranted for the same reasons outlined above, i.e., proposed Rule 5.5 (together with a rule similar to Model Rule 8.5 [current rule 1-100(D)] functions as an the entry point to the California Rule for out-of-state lawyers.

- Cons: There is a possibility that changing "aid" to "assist" would generate litigation over whether the change is substantive. This possibility might be remote given that "aid" and "assist" are considered as synonyms (see http://www.thesaurus.com/browse/assist and http://www.thesaurus.com/browse/aid?s=t.)

7. In proposed paragraph (a)(2) [current 1-300(A)], substitute the word "a" for "any."

   - Pros: No change in meaning is intended or likely. Substituting the article "a" for the adjective "any" is simply a modern, preferred convention for writing rules.

   - Cons: None identified.

8. Add proposed paragraph (b) [based on Model Rule 5.5(b)], which applies concepts regarding UPL/MJP to out-of-state lawyers and parallels the prohibitions stated in Bus. & Prof. Code § 6126.

   - Pros: First, as noted, proposed Rule 5.5, together with a rule similar Model Rule 8.5, functions as an entry point for out-of-state lawyers. The rule should alert such lawyers to limitations on their ability to practice even if they are authorized under one of the MJP rules of court. Derived from Model Rule 5.5(b), proposed paragraph (b) contains two prohibitions on lawyers not admitted in California who seek to practice in California: (1) it prohibits such lawyers from establishing or maintaining a resident office – or any other systematic or continuous presence in California unless the lawyer is authorized to do so, e.g., if the lawyer is a registered legal services lawyer (Rule of Court 9.45); registered in-house counsel (Rule of Court 9.46); or registered foreign legal consultant (Rule of Court 9.44); and (2) prohibits all non-admitted lawyers, including those authorized to practice in California under Rules of Court 9.40 – 9.48, from holding himself or herself out to the public or otherwise representing that he or she is admitted to practice law in California.

     Second, proposed Rule 5.5(b)(2) responds to OCTC's request that: "Rule 1-300(B) should be amended to prohibit not only the practice of law in a jurisdiction where to do so would be in violation in that jurisdiction, but also holding oneself out as entitle to practice law in a jurisdiction where one is not entitled to do so. This would clarify rule 1-300(B) and conform it to Business

and Professions Code, §§ 6125 and 6126." (See 4/20/15 OCTC Memo [Kim] to Chair & Commission.) To the extent OCTC appears to have requested that the prohibition be applied to State Bar members (current paragraph (B) applies to "members" engaging in extra-jurisdictional practice), the request was confusing for two reasons: First, although OCTC stated such a provision would conform current 1-300(B) to §§ 6125 and 6126, § 6125 in fact only states that a "person shall not practice law in California unless the person is an active member of the State Bar." By definition, a "member" to whom current 1-300(B) applies is not covered by § 6125. Further § 6126 prohibits lawyers not admitted or authorized to practice law in California from holding themselves out as "practicing or being entitled to practice" unless they are "an active member of the State Bar." Again, by definition, a "member" to whom current 1-300(B) applies is not covered by § 6125. OCTC's proposed amendment would not conform the rule to the statute sections. Second, the Commission is not aware of any jurisdiction that has such a prohibition, i.e., prohibits lawyers admitted in the regulatory authority's jurisdiction from holding themselves out as being admitted in another jurisdiction. To the extent there is a prohibition on "holding out," it is the host jurisdiction that would prohibit the conduct of "out-of-state" lawyers holding themselves out to be admitted in the host jurisdiction. Such a prohibition is the intent of proposed paragraph (b)(1). It is more aligned with the host jurisdictions interest in protecting its residents, i.e., the "public," than is the proposed OCTC request.

Third, the construction of proposed paragraph (b) affords desired public protection. Proposed paragraph (b)(1) recognizes that in certain situations, (e.g., pursuant to Cal. Rules of Court, rules 9.44, 9.45, and 9.46) lawyers not admitted to practice in California nevertheless can establish or maintain an office, but prohibits lawyers not so authorized from doing so. Further, proposed paragraph (b)(2), by not containing a savings clause similar to the one in (b)(1) ("except as authorized"), prohibits even lawyers otherwise authorized to practice in California from holding themselves out as being "admitted to practice" in California.

Fourth, proposed paragraph (b) serves as a necessary predicate in the black letter of the rule for the proposed Comment, which provides important information about California's regulatory structure for MJP which, as noted, differs substantially from that in other jurisdictions which regulate MJP through their Rules of Professional Conduct.

Fifth, proposed paragraph (b) tracks Model Rule 5.5(b), which a substantial majority of the states have adopted.

- Cons: First, regarding paragraph (b)(2), the difference between "admitted to practice law in California" and "entitled to practice law in this state by court rule" might not be readily understood and could cause confusion. For example, the rules of the State Bar governing a Registered In-House Counsel

state that a registrant "must" use the title "Registered In-House Counsel" in connection with activities performed as Registered In-House Counsel (See rule 3.372(C) of the Rules of the State Bar). Paragraph (b)(2) might be misinterpreted as being in conflict with this requirement.

Second, regarding the OCTC comment concerning State Bar members who improperly "hold out" their ability to practice law in another jurisdiction, existing discipline case law demonstrates that this is not an uncommon problem in the discipline system and declining to implement OCTC's change could be a lost opportunity to facilitate greater compliance by members. (See *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 903; *In the Matter of Lenard* (Review Dept. 2013 2013 WL 5676040; and *In the Matter of Ferko* (Review Dept. 2014) 2014 WL 3889184.

9. In proposed paragraph (b)(1), add the word "resident" as a modifier of "office," add the phrase "or maintain," and insert the conjunction "or" between the terms "systematic" and "continuous presence."

    - Pros: Although Model Rule 5.5(b) does not contain any of the modifications listed, the Commission made those revisions to Model Rule 5.5(b)(1) to conform proposed paragraph (b)(1) to the language used in Rules of Court 9.47 [Attorneys practicing law in California as part of litigation] and 9.48 [Non-litigating attorneys temporarily in California to provide legal services]. Although the Commission determined that the use of "or" is not only inconsistent with the Model Rule and rules in most jurisdictions and can cause mischief for out-of-state lawyers, the Commission concluded that the rule's language should be conformed to the language of the Rules of Court.

    - Cons: The aforementioned inconsistency of language between California and a substantial majority of other jurisdictions might operate to undermine the attainment of a national standard in this area and could be a source of confusion.

10. Change the name of the "Discussion" section to "Comment."

    - Pros: The Code of Judicial Ethics refers to its explanatory sections as "*Commentary* of the Advisory Committee." (Emphasis added). The ABA Model Rules and every other jurisdiction that has adopted the Model Rule approach of including comments to their rules, refers to the explanatory comment sections of each rule as "Comment."

    - Cons: None identified.

11. Add a Comment concerning MJP to the proposed rule.

    - Pros: As noted, proposed paragraph (b) applies to out-of-state lawyers who are authorized to practice in California, and the proposed Comment is intended to provide a useful entry point for out-of-state lawyers unfamiliar with

California law to the regulatory framework of MJP in California. Although the savings clause in subparagraph (b)(1) ("except as authorized") of the black letter informs such lawyers that an MJP framework exists in California, there is no explanation of what that framework is or where it might be located. The proposed Comment provides that information by referring readers to specific Rules of Court that establish the framework. Alerting out-of-state lawyers to the California Rules of Court requirements enhances public protection. Further, by listing the relevant Rules of Court with their subject matter, the Comment clarifies what is meant by the phrase, "authorized by these Rules or other law."

- Cons: Proposed paragraph (b)(1), if adopted, would merely inform a lawyer of the existence of an MJP regulatory framework in California. A set of minimum standard disciplinary rules arguably is not the place to provide guidance on where to find the relevant law that establishes that framework.

B. Concepts Rejected (Pros and Cons):

1. In proposed Rule 5.5(a)(2) [current 1-300(B)], substitute the clause, "in the performance of activity that constitutes the unauthorized practice of law" for the phrase "the unauthorized practice of law."

   - Pros: The extra verbiage adds nothing to the rule's scope or application. The substantial majority of jurisdictions do not use it.

   - Cons: This clause, which has been adopted by several jurisdictions,[5] is a more precise description of the conduct that is prohibited under the rule.

2. Add new paragraph (a)(3) which would have provided that a lawyer *admitted in California* shall not "hold out to the public or otherwise represent that the lawyer is admitted or authorized to practice in another jurisdiction unless the lawyer is entitled to do so." (See explanation for rejection in Section A.8, above.)

3. Add a Comment to the proposed rule intended to clarify the application of paragraph (a).[6]

   - Pros: The proposed Comment that was rejected did not clarify the rule so much as it restated the rule and thus was not appropriate for inclusion.

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[5] There are six jurisdictions that have adopted this language: Alabama, Colorado, Hawaii, Mississippi, New Jersey and Texas.

[6] The proposed Comment would have provided:

"A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. Paragraph (a) prohibits the unauthorized practice of law by a lawyer admitted to practice law in California, whether through the lawyer's own conduct or by the lawyer assisting another person in the performance of activities that constitute the unauthorized practice of law."

- Cons: The proposed Comment was based on a Comment to the first Commission's proposed Rule 5.5. Although current rule 1-300 does not have any Comments, this Comment would have provided helpful orientation regarding the application of proposed paragraph (a) to lawyers who are *admitted* to practice in California. In tandem with the Comment that has been added to the rule, which expressly states it applies to lawyers who are *not admitted* in California, the two Comments would have helped clarify the regulatory scope of each proposed paragraph.

4. Add to the proposed Comment a reference to Business & Professions Code §§ 6450 – 6456 (regulation of paralegals). This issue was addressed in consideration of a public comment received as part of the Commission's outreach with a 45-day public comment period ending on June 16, 2015. Without determining the pros or cons of including such a reference, the Commission concluded that including such a reference in a set of *lawyer* disciplinary rules was beyond the scope of the Commission's charge.

5. Add a Comment, similar to Discussion ¶. 1 in current rule 1-311, that would provide guidance on what constitutes the practice of law.

   - Pros: Defining the practice of law has proven to be an elusive endeavor, the ABA having abandoned a project to do so over a dozen years ago. See http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law.html

     Moreover, the California Supreme Court in *Birbrower Montalbano, Condon & Frank, P.C. v. Superior Court* (1998) 17 Cal.4th 119, 129, held that the determination of what constitutes the practice of law "in" California must be decided on the facts of each case.

   - Cons: Such information provide guidance to lawyers on conduct that is viewed as the unauthorized practice of law.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rule:

1. Adding proposed paragraph (b) and its subparts is a substantive change to the extent that neither current rule 1-300 nor any other California rule of professional conduct addresses the conduct described in the paragraph. However, paragraph (b)(1) reflects the current state of the law regarding multijurisdictional practice as regulated by Rules of Court 9.40 – 9.41 and 9.43 – 9.48. In addition, paragraph (b)(2) conforms the rules of professional conduct to Business and Professions Code § 6126 and the rule in a substantial majority of the other states. Therefore,

it is arguable that there has been no change in lawyer duties by the inclusion of paragraph (b) in the rule.

2. Adding the word "knowingly" to modify the word "assist" in proposed paragraph (a)(2) is a substantive change to current rule 1-300(A) because it adds a *mens rea* requirement where none currently exists. (See Section IX.A.5, above.)

D. Non-Substantive Changes to the Current Rule:

1. Substituting the term "lawyer" for "member".

   - Pros: The current Rules' use of "member" departs from the approach taken in the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

   - Cons: Retaining "member" would carry forward a term that has been in use in the California Rules for decades.

2. Changing the rule number to correspond to the ABA Model Rules numbering and formatting (e.g., lower case letters)

   - Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized to practice in California under *pro hac vice* admission (see current rule 1-100(D)(1)) to find the California rule corresponding to their jurisdiction's rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the "Con" that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.

   - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

3. In proposed paragraph (a)(2), substituting "assist" for "aid," and "a" for "any" are also intended as non-substantive. See Concepts Adopted, above.

4. Changing the name of the "Discussion" section to "Comment" is a non-substantive change, recommended to remove unnecessary differences between

the California rules and the rules in other jurisdictions, as well as the Code of Judicial Conduct.

5. Adding the proposed Comment is not intended as a substantive change except to the extent that a Comment has been added to a rule that previously had no Comments. The Comment is explanatory and clarifies the rule's scope. (See Section IX.A.11, above.) It does not extend the scope of the rule or provide for an exception to the rule that is not in the black letter rule itself.

E. Alternatives Considered:

None.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 5.5 [1-300] in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 5.5 [1-300] in the form attached to this Report and Recommendation.