SUMMARY OF PROPOSED AMENDMENTS TO COMMENTS TO RULES 4.2, 4.4, AND 5.5 OF THE MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT

The Supreme Judicial Court Standing Advisory Committee on the Rules of Professional Conduct is publishing for public comment proposed amendments to comments to Rules 4.2, 4.4, and 5.5 of the Massachusetts Rules of Professional Conduct.

Proposed Amendments to Comments to Mass. R. Prof. C. 4.2 and 4.4

Rule 4.2. On September 28, 2022, the American Bar Association's Standing Committee on Ethics and Professional Responsibility (the ABA Committee) released its Formal Opinion 502 advising that under ABA Model Rule 4.2, which concerns communication with persons represented by counsel, a self-represented lawyer is prohibited by that Rule from contacting a represented person about the subject of the representation without the consent of the represented person's lawyer, unless the self-represented lawyer is authorized to do so by law or a court order. Mass. R. Prof. C. 4.2 (Rule 4.2) is identical to the ABA's Model Rule 4.2, and the Massachusetts Rules of Professional Conduct, when identical to the corresponding ABA Model Rules, are generally interpreted consistently with the Model Rules. Moreover, the interpretation in Formal Opinion 502 appears to be consistent with the limited case law on the subject in Massachusetts. See, e.g., Fishelson v. Skorupa, 13 Mass. L. Rptr. 458 (Mass. Super. 2001). The Standing Committee has also been advised that the Board of Bar Overseers has taken disciplinary action in the past for violations of Rule 4.2 by self-represented lawyers.

Two members of the ABA Committee dissented from Formal Opinion 502. While they agreed that the purpose of Model Rule 4.2 would be served by extending it to self-represented lawyers, they did not agree with the ABA Committee majority that the language of the Model Rule clearly established its application to self-represented lawyers. Moreover, the fourth sentence of Comment 4 to Model Rule 4.2 creates further ambiguity as to its application to self-represented lawyers in stating: "Parties to a matter may communicate directly with each other...." Furthermore, the ABA Committee recognized that some authorities, including the Restatement of the Law Governing Lawyers, have come to a different conclusion than the majority of the ABA Committee. *See* Formal Opinion 502, footnote 25.

Because of divergence of authority in other jurisdictions on the applicability of Rule 4.2 to lawyers representing themselves, and the limited published authority in Massachusetts, and to provide guidance for lawyers on the applicability of the rule, the Standing Committee recommends the adoption of a comment confirming the interpretation that the rule should apply to self-represented lawyers, as shown in **Exhibit A** enclosed. Comment 4A would be added to the comments, and an exception referencing Comment 4A would be added to the fourth sentence of Comment 4 for consistency. In light of the existing interpretation of Rule 4.2 by at least one Massachusetts court and in reported disciplinary matters, the Standing Committee did not see the need to amend the Rule itself, as was suggested by the dissenters on the ABA Committee and the authorities the dissenting members of the ABA Committee cite. Should the ABA Model Rule ever be amended as the dissenters have recommended, the Standing Committee would consider whether to recommend an amendment to the Massachusetts Rule for consistency with the ABA Model Rules.

The Standing Committee recognizes that the application of Rule 4.2 to lawyers representing themselves in such matters as divorce and custody disputes could lead to arguments over whether the two spouses should be allowed to discuss such matters as routine financial matters or arrangements relating to transportation of children without the participation of the lawyer for the represented spouse. The Standing Committee views such issues as easily resolved by an early discussion between the self-represented lawyer and the spouse's counsel setting ground rules over what issues can be discussed without the participation of the spouse's lawyer.

Rule 4.4(a). In its consideration of the applicability of Rule 4.2 to self-presented lawyers, the Standing Committee recognized that ABA Model Rule 4.4(a) and the corresponding Mass. R. Prof. C. 4.4(a) (Rule 4.4(a)), which concern respect for the rights of third persons, similarly apply to a lawyer "[i]n representing a client." Just as the purpose of Rule 4.2 is properly served by its application to self-represented lawyers, so also is the purpose of Rule 4.4(a) served by the application of that Rule to self-represented lawyers. Accordingly, to avoid any ambiguity on the applicability of Rule 4.4(a) to self-represented lawyers, and for consistency of interpretation, the Standing Committee also recommends the addition of Comment 1C to the comments to Rule 4.4(a), in the form shown in Exhibit B.

Proposed Amendment to Comment to Mass. R. Prof. C. 5.5

Paragraph (b) of Mass. R. Prof. C. 5.5 (Rule 5.5) prohibits a lawyer who is not admitted to practice in Massachusetts from establishing "an office or other systematic and continuous presence in this jurisdiction for the practice of law." Paragraph (c) of that Rule permits a lawyer not admitted to practice in Massachusetts to provide legal services on a temporary basis on the conditions set forth therein. Comment 6 to that Rule provides that services may be "temporary" even if the services are recurring or are provided for an extended period, such as during a single lengthy negotiation or litigation. Before the COVID-19 pandemic, it was generally understood that a lawyer who is not admitted to practice in Massachusetts could nevertheless continue to advise clients from a location in Massachusetts -- for example while traveling on business, on vacation, or on other more extended visits -- as long as the lawyer did not hold himself or herself out as having an office in Massachusetts or being admitted in Massachusetts.

When the pandemic began and offices were closed across the country, many lawyers regularly practiced from their homes, which became their only offices for the duration of the pandemic. Although the pandemic restrictions have been lifted, many lawyers have continued to practice from their home offices for some or all of the time. Some of these lawyers are working remotely from homes located in jurisdictions where they are not admitted to practice. Whether such remote practice constitutes the establishment of "an office or other systematic presence" in a jurisdiction is a matter for interpretation of Rule 5.5 in the applicable jurisdiction.

On December 16, 2020, the ABA Committee issued its Formal Opinion 495 addressing remote practice and interpreting the provisions of ABA Model Rule 5.5. That opinion advised that lawyers not admitted in a jurisdiction but working remotely in that jurisdiction do not violate the provisions of Model Rule 5.5(b) if they do not advertise or otherwise hold themselves out as having an office in the jurisdiction and do not provide or offer to provide legal services in that jurisdiction. The ABA Committee reasoned that the lawyer working remotely has not established an office or other systematic presence in the jurisdiction if the lawyer does not hold

out to the public an address in that jurisdiction as an office, and the lawyer's local address does not appear on letterhead, business cards, websites other indicia of the lawyer's presence.

In response to the increasing desire for work flexibility and Formal Opinion 495, many states have responded with regulatory frameworks for the remote practice of law. A few states have approved practice in their jurisdiction through separate rules or amendments to rules. Some states have responded through comments to their version of Rule 5.5, some have responded with advisory interpretation from bar counsel or other authority, and some have done both. A few states have guidelines on the remote practice of law that pre-date COVID-19 and Formal Opinion 495.

Pre-Pandemic Guidelines and Rules

Maine, Utah, and Virginia are examples of states that adopted pre-pandemic guidelines on remote work. Following a request from Bar Counsel, Maine's Professional Ethics Commission issued an opinion which relies on ABA Model Rule of Professional Conduct 5.5 to conclude that "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." Me. Prof'l Ethics Comm'n, Op. 189: Unauthorized Practice of Law in Maine by Admittees of Foreign Jurisdiction (2005). Specifically pointing to Model Rule 5.5 and the Restatement (Third) of the Law Governing Lawyers §3, that opinion provides the following specific factors for assessing whether a lawyer is practicing law in Maine in an unauthorized way:

- "1. Whether the attorney has established an office in the jurisdiction;
- 2. whether the attorney has established some other systematic and continuous presence in the jurisdiction;
- 3. whether the attorney holds out to the public or otherwise represents that the attorney is admitted to practice law in the jurisdiction;
- 4. whether the attorney is providing legal services in the jurisdiction on more than a temporary basis in connection with some matter or proceeding for which the attorney is properly admitted to practice either by another jurisdiction or a tribunal; and
- 5. whether the attorney is providing services that fall within some exception to the usual unauthorized practice of law rules, such as the 'federal practice' exception."

Prior to the pandemic, Utah also established a standard for remote work through an opinion by the Utah Ethics Advisory Committee. Utah Ethics Advisory Comm., Op. No. 19-09 (2019). However, unlike Maine's opinion with specific factors on how to assess whether conduct constitutes the unauthorized practice of law, Utah's opinion is shorter with fewer guiding principles. Specifically, the opinion concludes that Utah's Rules of Professional Conduct "do not prohibit an out-of-state attorney from representing clients from the state where the attorney is licensed even if the out-of-state attorney does so from his private location in Utah.

However, in order to avoid engaging in the unauthorized practice of law, the out-of-state attorney who lives in Utah must not establish a public office in Utah or solicit Utah business."

In a Legal Ethics Opinion approved by the Virginia Supreme Court in 2011, Virginia provided the following guidance, "[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."

Colorado and New York adopted pre-pandemic amendments to existing rules or the addition of new rules to address remote practice. In 2015, Colorado added Rule 205, which provides eligibility criteria, scope of practice clarity, and discipline jurisdiction for the temporary practice by an out of state attorney in Colorado. Colo. Rules Governing Admission to the Practice of Law in Colo. Rule 205 (2015). Additionally, New York added Rule 523 to the Rules of the Court of Appeals for the Temporary Practice of Law in New York, providing "general regulation[s] as to lawyers admitted in another jurisdiction." N.Y. Comp. Codes R. & Regs. tit. 22 § 523 (2015).

Separate New York Rule on Remote Practice

Following the ABA's Formal Opinion 495, New York added § 523.5, titled "Working from home," to permit remote practice. N.Y. Comp. Codes R. & Regs. tit. 22 § 523.5 (2021). This amendment more closely aligns with Maine's response and provides factors and guidelines for assessing when remote practice may fall outside the scope of the authorized practice of law. Specifically, it states that a lawyer can practice in New York to the same extent the lawyer is permitted to practice in the jurisdiction where the lawyer is admitted provided that:

- "(a) the lawyer does not practice the law of this State except to the extent permitted by this Part, by other laws of this State, and by the laws of jurisdictions in which the lawyer is authorized to practice;
- (b) the lawyer does not use advertising, oral representations, business letterhead, websites, signage, business cards, email signature blocks or other communications to hold themselves out, publicly or privately, as authorized to practice law in this State or as having an office for the practice of law in this State;
- (c) the lawyer does not solicit or accept residents or citizens of New York as clients on matters that the lawyer knows primarily require advice on the state or local law of New York, except as permitted by 22 NYCRR section 522.4 (the in-house registration rule) or by other New York or federal law;
- (d) the lawyer does not regularly conduct in-person meetings with clients or third persons in New York except as would otherwise be permitted under section 523.2 of this Part; and
- (e) when the lawyer knows or reasonably should know that a person with whom the lawyer is dealing mistakenly believes that the lawyer is authorized to practice in this State, the lawyer shall make diligent efforts to correct the misunderstanding."

States with Additional Comments to their Version of Rule 5.5

Vermont, Florida, Washington, and South Carolina are a few of the states that have provided guidelines for remote practice in the commentary to the state's version of Rule 5.5.

Vermont addresses remote work succinctly in Comment [22] by stating that, "Lawyers who are not admitted to the bar of the Vermont Supreme Court may remotely practice the law of the jurisdictions in which they are licensed while physically present in Vermont if they do not hold themselves out as being admitted to the bar of the Vermont Supreme Court or licensed to practice in Vermont, do not advertise or otherwise hold themselves out as having an office in Vermont, and do not provide, offer to provide, or hold themselves out as authorized to provide legal services in Vermont. ...Remote practice that satisfies these requirements does not constitute the unauthorized practice of law in Vermont." Vt. Rules of Prof'l Conduct Rule 5.5 cmt. 22 (2023).

Florida amended the comments to its Rule 4-5.5, confirming a previously issued advisory opinion. Fla. Bar Advisory Opinion - Out of State Att'y Working Remotely from Fla. Home, 318 So. 3d 538 (Fla. 2021); Fla. Rules Regulating the Fla. Bar 4-5.5 (2022). Similarly, Washington addresses the practice of remote work within comments [4] and [5] to its Rule 5.5, and also through a Washington State Bar Advisory Opinion. Wash. State Bar Ass'n, WSBA Advisory Op. 201601 (2022); Wash. Rule of Prof'l Conduct 5.5 cmt. 4 and 5 (2021).

Advisory Interpretation from Bar Counsel or Other Authority

Several states have responded to Formal Opinion 495 with advisory interpretations from bar counsel or other professional ethics committees. For example, New Jersey's Committee on the Unauthorized Practice of Law & Advisory Committee on Professional Ethics issued Joint Opinion 59/742 (2021), where the committee concluded that "non-New Jersey licensed lawyers... who simply work remotely from their New Jersey homes... are not considered to have a 'continuous and systematic presence' for the practice of law in New Jersey... [and are] not considered to be engaging in the unauthorized practice of New Jersey law." N.J. Advisory Comm. on Prof'l Conduct and Comm. on the Unauthorized Practice of Law, Joint Op. 59/742 (2021).

Additionally, the Pennsylvania and Philadelphia Bar Associations issued a Joint Formal Opinion in 2021 concluding that a lawyer admitted in one jurisdiction may practice the law of such licensing jurisdiction while working remotely from a Pennsylvania location. Pa. Bar Ass'n Comm' on Legal Ethics & Prof'l Responsibility and Phila. Bar Ass'n Prof'l Guidance Comm. Joint Formal Op. 2021-100. Ethical Considerations for Lawyers Practicing Law from Physical Locations Where They are Not Licensed (2021).

Proposed Amendment to Comments to Rule 5.5

The Standing Committee believes that an amendment to the comments to Rule 5.5 is sufficient to address the issue of remote practice in Massachusetts. The Standing Committee recommends the adoption of a comment similar to Comment 22 adopted in Vermont to confirm that lawyers admitted in another jurisdiction but not admitted to practice in Massachusetts do not violate Rule 5.5 if those lawyers are practicing from a location in Massachusetts but do not

advertise or otherwise hold themselves out as having an office in Massachusetts, and do not provide, or hold themselves out as authorized to provide legal services in Massachusetts. The proposed comment would be added as Comment 4A in the form shown in **Exhibit C** enclosed herewith.