

NEW JERSEY STATE BAR ASSOCIATION



Report and Recommendations on Multijurisdictional Practice

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BACKGROUND

The New Jersey State Bar Association has participated with interest in the national debate over multijurisdictional law practice (MJP). In July 2000 then NJSBA President Barry D. Epstein appointed an ad hoc Committee on Multijurisdictional Practice, following the appointment of a Commission on Multijurisdictional Practice by the American Bar Association. The committee was asked to examine the major issues generated by multijurisdictional, or cross-border law practice, and suggest an appropriate course of action to the NJSBA Board of Trustees. The committee was also asked to monitor developments within the ABA and other states, and to suggest ways to educate the bar and the courts about MJP and its impact. The work of the committee, with assistance from the Professional Responsibility Committee formed the basis for the recommendations contained in this report.

To a large extent the work of the NJSBA has been in response to the activity of the ABA's Commission. The Commission has asked that final comments and suggestions from bar associations be submitted by March 15, 2002 regarding a possible model rule that would define the limits of MJP. The Commission's interim report also contains a number of other recommendations related to MJP. The NJSBA submitted preliminary recommendations to the Commission in June 2001, and the Chair of our ad hoc MJP Committee testified before the Commission at a hearing held in Philadelphia on February 1, 2002.

The New Jersey Supreme Court has appointed an ad hoc Committee on Bar Admissions that will address several issues including multijurisdictional practice, including admission to the bar on motion, a topic addressed in the Commission's report. The Court will ultimately determine whether or not rule changes are needed to recognize and define multijurisdictional practice as it affects the practice of law and the administration of justice in New Jersey.

The NJSBA proposes amendments to Rule 5.5 of the Model Rules of Professional Conduct (see Attachment A) that are intended to expand the current rule to include "safe harbors" under which a lawyer may engage in certain specified activities that will not be deemed the unauthorized practice of law. The committee has attempted to tailor its amendments to achieve a difficult goal ---- allowing appropriate activity by lawyers engaged in cross-border practice in jurisdictions where they are not licensed to practice while at the same time maintaining traditional bar admission and regulatory standards. A more detailed discussion of the amendments is set forth below.

It is important to emphasize that this is a model rule proposed for adoption in all jurisdictions. The NJSBA recommends that no MJP related rule or policy be implemented unless a super-majority of states agree to the proposal. It is essential that a

true uniform rule is adopted so that all lawyers are subject to the same protections and prohibitions.

WHAT IS MJP AND WHY IS IT IMPORTANT?

Multijurisdictional practice is, quite simply, the delivery of legal services in jurisdictions other than where a lawyer is formally admitted to practice. The topic is particularly important in New Jersey because of our location. New Jersey sits between two major population centers – New York and Philadelphia and is in the center of the middle Atlantic region that has developed into a vibrant and growing commercial center. As a result lawyers from neighboring states frequently appear here, or handle matters related to New Jersey law, and many New Jersey lawyers do likewise in neighboring states.

The growing ease of interstate travel and communication, coupled with the fact that many law firms and corporations conduct business on a regional or national scale makes it essential that the organized bar and the judiciary consider rules that better define and regulate cross-border practice. Currently, there is no uniformity in the way states address the activities of out-of-state lawyers. Regulation has developed by court rule, court opinions, statute, and ethics opinions. Lawyers have relied, for the most part, on custom to continue to engage in forms of MJP.

However, concern has developed because some states have erected barriers to out-of-state lawyers and have on occasion resorted to unauthorized practice prosecution. While lawyers usually think of MJP in terms of problems that may be caused by lawyers coming into their jurisdiction, the issue works both ways. For instance, in 1998 a Burlington County lawyer was indicted and convicted in South Carolina for unauthorized practice after traveling there to counsel relatives of New Jersey clients regarding personal injury claims. He was later publicly reprimanded by the New Jersey Supreme Court. See *In re Benedetto*, 167 N.J. 280 (2001).

The national debate on MJP was touched off a few years ago by a decision of the California Supreme Court. A New York firm entered into a written fee agreement to represent a California corporation in an arbitration in that state. The corporation was a subsidiary of a New York client of the firm. Firm lawyers made three trips to California to advise the client, negotiate with the other party, and interview potential arbitrators. The matter settled, but the firm and the corporation had a falling out. The corporation sued for malpractice and the firm counter-claimed for its fee. The California Supreme Court denied the fee, finding that the firm had engaged in the unauthorized practice of law. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P2d 1 (1998). The opinion set off alarm bells in law firms across the nation and became the focus of much attention within the organized bar.

MJP has turned out to be a topic of intricate complexity. In particular, the NJSBA has found that the most vexing issues to deal with are those related to the activity of transactional lawyers. Transactional lawyers often face difficult choices because they have no mechanism to obtain permission to practice temporarily in other states, such as *pro hac vice* admission. Nevertheless, transactional lawyers frequently represent clients in ways that involve contacts in other states. For many New Jersey lawyers, particularly those with commercial or litigation practices, MJP is a fact of life, just as it is for many out-of-state lawyers who travel into the state.

Lawyers employed by corporations and government also face problems. They may be relocated to offices in states in which they are not admitted and their work will undoubtedly involve activity that falls within the definition of the practice of law. Are they engaged in the unauthorized practice of law? Some states, such as New Jersey, have met this concern by permitting in-house counsel to practice solely for their employers. However, this policy has never been codified in a rule, and is contained in an opinion of the Supreme Court Committee on the Unauthorized Practice of Law.

Even though trial lawyers can rely on the *pro hac vice* process for some protection, temporary admission is not available until a case is filed. What about pre-filing activity such as investigation, and discussions with clients, carriers, or potential adversaries? Just what should a lawyer be permitted to do before suit is filed? Can a rule be devised that reflects the everyday practice in this regard? As the *Benedetto* matter indicates, lawyers can get into difficulties in this area.

Finally, what about lawyers whose clients are subject to ADR proceedings in other jurisdictions? Under what circumstances, if at all, should a lawyer be permitted to appear in an arbitration or mediation session in a jurisdiction where the lawyer is not licensed?

THE SURVEY

One of the first things the NJSBA ad hoc committee on MJP did was to survey New Jersey bar associations and sections within the NJSBA in order to gauge the extent of interest in the issue and to solicit comments and recommendations. A good number of responses were received and they are summarized in Attachment B to this report.

Many associations and sections favor the development of a rule that would better define the unauthorized practice of law, and provide guidance and safe harbors for certain cross-border activities. There appears to be no support from the organized bar for radical alternatives, such as a national law license, or for the elimination or lowering of bar admission requirements. Only the Bergen County Bar Association favors the status quo; nevertheless, they submitted a detailed proposal for a model rule, part of which is incorporated into the committee's proposed rule.

AVAILABLE OPTIONS

A number of MJP proposals have been offered by bar associations and lawyer organizations and considered by the NJSBA :

➤ Proposed model Rule 5.5 of the Rules of Professional Conduct authored by the ABA's Ethics 2000 Commission provides four safe harbors for multi-jurisdictional practice:

a. where a lawyer is preparing for a proceeding in which *pro hac vice* admission is expected;

b. the so-called "transactional" exception where a lawyer acts on a matter "that arises out of or is otherwise reasonably related to the lawyer's practice on behalf of a client" in the jurisdiction of admission;

c. the "in-house" exception where a lawyer is acting on behalf of an employer; and,

d. where a lawyer is "associated in a particular matter" with a lawyer admitted in the jurisdiction.

➤ Proposed Model Rule 5.5 offered by the ABA Commission on Multijurisdictional Practice contains illustrative (but not exclusive) "safe harbors" that would permit a lawyer to practice on a "temporary basis" in a jurisdiction where the lawyer is not licensed if the representation does not pose an "unreasonable risk" to a client, the public or the courts.

The illustrative portion of the rule lists examples of acceptable forms of MJP, including:

a. serving as in-house counsel,

b. performing legal services governed by federal law, international law, the law of a foreign country or the law of the jurisdiction where the lawyer is admitted,

c. legal services performed in association with local counsel,

d. performing services that are permitted to be done in the jurisdiction by non-lawyers,

e. representing a client in ADR proceedings,

f. representing a client who resides in or has an office in the jurisdiction where the lawyer is admitted, and

g. handling a matter that arises out of or is reasonably related to a matter “that has a substantial connection” to the jurisdiction where the lawyer is licensed.

The Commission also makes a number of additional recommendations that are addressed below.

➤ A number of organizations have suggested what they call a “common sense” approach to MJP regulation. Under this proposal a lawyer would be permitted to engage in multijurisdictional practice when:

- a. preparing for a proceeding where *pro hac vice* admission is expected
- b. acting as in-house counsel on behalf of the employer or an organizational affiliate
- c. acting on behalf of a client “on a temporary basis” without establishing a “continuous presence” or holding oneself out as being licensed in the jurisdiction

➤ The “driver’s license” rule proposed by the American Corporate Counsel Association (ACCA) would establish a national compact on licensure that would function much like the current system of state driver’s licenses. Once obtaining a license to practice in one jurisdiction, a lawyer could practice in other states on a temporary basis, and be able to move permanently and be licensed in another state simply upon passing a character and fitness review. The ACCA subsequently helped draft the “common sense” proposal.

➤ A two-tiered approach of the Association of Professional Responsibility Lawyers (APRL) would permit a) cross-border practice on a temporary basis on matters related to a lawyer’s practice in a state of admission, and b) a so-called “green card” approach to licensure that would permit a lawyer to open an office in a state where he or she is not admitted upon a showing of good standing, sponsorship by two lawyers in the state, and admission in some jurisdiction for at least three years. APRL later helped draft the “common sense” proposal.

➤ The ABA Real Property, Probate & Trust Law Section initially recommended that transactional activity be permitted so long as the client consents after being informed of the risks involved, and that a lawyer be permitted to perform any services that could be rendered in the jurisdiction by a non-lawyer. The section later endorsed the “common sense” proposal.

➤ The International Association of Defense Lawyers calls for a model *pro hac*

vice rule that among other things permits pre-litigation “investigative or other activities”.

➤ The American Law Institute recommends that lawyers be permitted to provide legal services “within a jurisdiction where the lawyer is not admitted to the extent that the lawyer’s activities arise out of or are otherwise reasonably related to the lawyer’s practice” in the jurisdiction of admission.

➤ The ABA Section of Business Law favors the “safe harbor” approach in model Rule 5.5 but suggests the rule clearly state that it applies to occasional forays into other states, and includes a provision permitting activity related to representing clients in ADR proceedings.

➤ The Ohio State Bar Association recommends that a lawyer be permitted to provide legal services if the lawyer is “temporarily” in another jurisdiction to represent an existing client in a matter that “arises out of or is otherwise reasonably related to the lawyer’s practice” in the state of licensure. The association also would permit practice in another jurisdiction under other circumstances, including where a lawyer is a) providing advice “on a matter of special experience” in an area of federal law, b) performing work that could be done by a non-lawyer, c) employed as in-house counsel, and d) serving as a mediator or arbitrator.

➤ The Missouri State Bar Association proposes a rule containing a number of exclusive safe harbors that define the permissible limits of MJP. The key provisions permit practice in another jurisdiction when performed on a temporary basis if the legal service :

a. are performed for a client “who resides or has an office in a jurisdiction in which the lawyer is authorized to practice, or

b. “arise out of or are reasonably related to a matter that has a substantial connection” the lawyer’s jurisdiction of admission, or

d. concern a matter that “arises out of or is reasonably related to the lawyer’s practice on behalf of an existing client”.

The rule also contains safe harbors for pre-litigation activity where *pro hac vice* admission is contemplated, activity undertaken in association with local counsel, representation of a client in an ADR proceeding, employment as in-house counsel, and services performed under authority of federal or state law or court rule.

➤ A task force of the California Supreme Court has released a report

containing a number of recommendations without specific rules. Like most other organizations who have commented on MJP, the task force favors a safe harbor for pre-litigation activity where *pro hac vice* admission is expected to be sought. Although the task force opposes admission on motion, it recommends that lawyers practicing public interest law be permitted to practice while preparing for the bar exam. The task force is perhaps the first group to recommend that transactional practice by out-of-state lawyers be tied to specific criteria and restrictions on the duration and frequency of visits. Finally, California's long standing restrictive policy on in-house counsel would be loosened through a "registration" requirement.

THE NJSBA'S COMMENTS AND RECOMMENDATIONS ON RPC 5.5

A. General Comments

The NJSBA considers many of the above recommendations to be too radical in purpose and effect and, as a result, not in the best interests of the public or the bar. We believe that New Jersey and other states have a legitimate interest in closely regulating admission to the bar and the activity of lawyers (including those who come here from other jurisdictions). Such oversight ensures that consumers receive services from lawyers who are conversant with the law, rules and procedures of New Jersey practice and are readily available to clients and adversaries. Further, it is vitally important that bar admission policy foster the efficient administration of justice and contribute to the public's confidence in the court system.

Approaches to MJP that eliminate or reduce substantially practice barriers will add to public suspicion about the competence and credibility of the bar and will hasten the profession's slide into a commercial guild devoid of respect for the core values that have long served as the cornerstone of the profession.

Specifically, the NJSBA opposes the so-called "common sense" approach and related proposals such as the "driver's license" proposal initially offered by the American Corporate Counsel Association, and the "green card" approach initially favored by the Association of Professional Responsibility Lawyers. These schemes might well be called the "revolving door" proposals because they will encourage transitory law practice across jurisdictional borders. These proposals may permit some firms to gain regional market share and a fatter bottom line, but at the expense of true client service.

Adoption of any of these radical proposals may in the long term have a devastating impact on the profession. The core activities of the bar - client protection funds, pro bono service, IOLTA, continuing education, the disciplinary and fee dispute system, referral services - would be weakened by a system that favors mobility over commitment and accountability. The ideal of a "profession" may be lost amidst a

scramble to chase clients across jurisdictional borders. Traditional notions of service to the courts and community would be an afterthought, as would participation in the organized bar. And, what about the public we serve? Clients have come to expect stability and responsiveness from lawyers, attributes that will be lost during a move towards what amounts to a national licensure system.

We respectfully urge the ABA, and the New Jersey Supreme Court, to tread carefully when considering rule amendments to accommodate MJP issues. The practice of law has changed as proponents of the “common sense” approach like to tell us. However, inevitable change is not, by itself, justification for the sweeping changes that are advocated in some quarters.

The NJSBA instead advocates the enactment of limited and exclusive “safe harbors” within Rule 5.5 of the Rules of Professional Conduct. We believe the rule should provide real guidance to lawyers by setting forth the limits of multijurisdictional practice. However, our rule is much more detailed, and stricter in application, than the rule proposed by the ABA Commission on MJP, the Ethics 2000 Commission, the rule suggested by the ALI, and the rules proposed by many other bar associations.

B. NJSBA Proposed Rule

The NJSBA is convinced that *some* rule change is essential, so lawyers will be able to ascertain what cross-border activity may be permissible, and what is prohibited. However, we believe a rule should respect traditional restrictions that curtail unauthorized practice and require the passage of the bar exam prior to engaging in full-time practice. The NJSBA’s proposed rule (see Attachment A) is summarized as follows:

1. Pre- Litigation Activity (R. 5.5 (b)(1))

The NJSBA agrees with the many proposals that recommend a safe harbor not only for *pro hac vice* admission, but also for a lawyer who “is preparing for a proceeding in which the lawyer reasonably expects to be authorized.” However, the NJSBA further suggests that lawyers engaged in such pre-litigation activity be required to associate with local counsel. Because *pro hac vice* admission cannot be obtained until litigation commences, it is important that non-licensed lawyers engaged in pre-litigation activity are “connected” to the jurisdiction through local counsel.

This rule amendment would provide a needed pre-litigation safe harbor for trial lawyers while at the same time providing protection of the interests of clients and the judiciary. It is essential that out-of-state counsel be able to take the steps necessary to

prepare for litigation. It is also essential that they be accountable to clients, potential adversaries, and the courts. This would be facilitated through association with local counsel. We caution, however, that local counsel must play a real role in supervising the litigation and not be a shell used solely for the purpose of gaining entry into the jurisdiction.

2. In-House Counsel (R. 5.5 (b)(2)(i))

The NJSBA's amendment strengthens the rule proposed by the Commission on MJP by making it clear that the lawyer/employee's entire law related compensation must come from the employer and that the lawyer/employee cannot provide legal services to others. The NJSBA's amendments are intended to codify Opinion 14 of the New Jersey Supreme Court's Unauthorized Practice of Law Committee. We believe that the opinion should be the standard for a model rule.

3. Transactional Matters (R. 5.5(b)(2)(ii through v))

The NJSBA's proposed rule on transactional practice is more detailed than the rules proposed by most of the entities who have suggested MJP reforms. For instance, the rule offered by the Ethics 2000 Commission states that a lawyer does not engage in the unauthorized practice of law when "the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's practice on behalf of a client in a jurisdiction in which the lawyer is admitted to practice."

The NJSBA believes the proposed rule quoted above is too open ended, and would permit a lawyer unlimited opportunity to practice in another jurisdiction. The term "otherwise reasonably related" is capable of many interpretations and may potentially be used by creative lawyers to justify inappropriate regular cross-border practice.

The NJSBA is concerned as well with Model Rule 5.5 proposed by the ABA Commission on MJP. The broad language contained in paragraph (b) of the rule, coupled with the non-exclusivity of the safe harbors in paragraph (c) results in a rule that may be interpreted to allow any and all forms of MJP with few restrictions. Although it provides some guidance to lawyers, it does not provide definitive guidance.

We instead recommend a more detailed rule governing transactional practice, one broken down into four separate subparagraphs, as follows:

- ◆ Our proposed Rule 5.5 (b)(2)(ii) would permit transactional negotiation, but would require that it be in furtherance of a lawyer's representation of an existing client and that the transaction originate in or be related to the jurisdiction where the lawyer is

admitted. For instance, a Wisconsin lawyer could come into New Jersey to negotiate the terms of the purchase of goods for a Wisconsin distributor.

- ◆ Our proposed Rule 5.5(b)(2)(iii) would create a safe harbor for the representation of clients in ADR and other forms of non-judicial dispute resolution. The representation, however, would have to be of an existing client from the jurisdiction where the lawyer is licensed. Further, the dispute would have to originate in or be related to that jurisdiction. For instance, a Wisconsin lawyer could participate in an arbitration in Atlantic City, where her Wisconsin clients are parties to a Wisconsin related contract that specifies a New Jersey venue.
- ◆ Our proposed Rule 5.5(b)(2)(iv) permits movement across jurisdictional lines with respect to investigation, interviewing and deposing of witnesses in furtherance of a proceeding in the jurisdiction where the lawyer is admitted to practice. For instance, a Wisconsin lawyer could travel to New Jersey to interview potential witnesses for a trial scheduled in Milwaukee.
- ◆ Our proposed Rule 5.5(b)(2)(v) is intended as a “catch-all” safe harbor to cover circumstances that might arise apart from those covered in paragraphs (i) through (iv). This rule would create a safe harbor for the representation of an existing client provided that the representation “is occasional and is undertaken only when the lawyer’s disengagement would result in substantial inefficiency, impracticality or detriment to the client”.

Under this rule a lawyer would have to satisfy specific criteria before undertaking the representation. First, the client must be from the jurisdiction of admission; second, the representation must meet the “occasional” standard; and third, the hiring of local counsel would be impractical and contrary to the client’s interests.

Thus, a Wisconsin lawyer, with particular expertise in cheese processing technology, may occasionally travel to New Jersey to negotiate or arbitrate a dispute between a New Jersey cheese processor and the New Jersey subsidiary of the Wisconsin client, provided that engaging New Jersey counsel would be detrimental to the client.

The NJSBA believes that the rule creates reasonable safe harbors for transactional practitioners and should be welcomed.

4. Association with Local Counsel in Non-Litigated Matters (R. 5.5(b)(2)(vi))

This provision would permit out-of-state counsel to associate with local counsel so long as the local counsel assumes overall responsibility for the representation. This is often done in order to strengthen the representation provided in a matter or to avoid unauthorized practice questions. The NJSBA recognizes the need to protect such relationships. However, such relationships should not be *pro forma* and should be permitted only on an occasional basis.

5. Additional Compliance Factors (R. 5.5(c))

The NJSBA also suggests that Rule 5.5 include additional provisions, as set forth in paragraph (c) of the proposed rule, designed to provide protection for clients and ensure the lawyer's obligations to the state Supreme Court. For instance, a lawyer could not act in another jurisdiction unless he or she is in good standing in all jurisdictions of admission; agrees to be subject to the RPC's and disciplinary authority of the highest court of the jurisdiction; consents to the appointment to the Clerk of the Court as agent for service of process; and does not hold himself or herself out as having been formally admitted in the jurisdiction.

NJSBA COMMENTS AND RECOMMENDATIONS ON RELATED ISSUES

The interim report of the ABA Commission on Multijurisdictional Practice addresses a number of additional issues beyond those covered in the Commission's proposed Rule 5.5.

A. Matters Involving Federal, International or Foreign Law

The ABA Commission suggests that lawyers be able to provide temporary services in other jurisdictions in matters involving federal law, international law and foreign law because these areas ordinarily involve special expertise that a client has come to rely on.

The NJSBA recommends that such temporary service be permitted only after a lawyer associates with local counsel or acts pursuant to another specified "safe harbor" in Rule 5.5. We believe that the application of any body of law within a particular jurisdiction cannot occur in a vacuum. Local legal issues, procedures and precedent are likely to have an impact and the presence of a knowledgeable local practitioner is essential so that a client may be fairly and competently served, regardless of the type of matter involved.

B. Practice Permitted by Law or Court Rule --

The Commission argues that if state law or court rule so permits, lawyers admitted in other jurisdictions should be permitted to practice temporarily without running afoul of unauthorized practice rules.

The NJSBA agrees, but questions whether there might be instances where conflicting state law or rules restricts or limits such practice. It is suggested that language be added to the draft rule recognizing this possibility and establishing the primacy of the suggested policy.

C. Admission to the Bar On Motion --

The Commission recommends that all jurisdictions permit experienced lawyers admitted to practice in other jurisdictions to gain admission to the bar on motion, without the need to pass a bar exam. In this regard, the Commission endorses a report of the ABA Section on Education that advocates admission on motion upon meeting specific criteria, including:

- Graduation from an ABA accredited law school
- Active practice for at least 5 of the last 7 years preceding application (this may include private practice, public employment in a legal position, teaching law, or serving as a judge, law clerk, or corporate counsel).
- Passage of the multi-state professional responsibility exam
- Being in good standing in all jurisdictions where admitted
- No pending disciplinary charges
- Passage of character and fitness review
- Designation of Clerk of highest court for service of process.

The Commission argues that jurisdictional restrictions impede mobility and are both expensive and burdensome for experienced lawyers. It contends that lawyers who have actively practiced a number of years without disciplinary problems should be permitted to move without need of taking the bar exam, and that this recommendation is particularly relevant now because many bar exams no longer stress local law, and many applicants pass based solely on the multi-state portion of the exam.

The NJSBA opposes admission on motion and favors retention of the bar exam for all bar applicants.

A task force of the California Supreme Court recently recommended that passage of the bar exam remain a requirement and that even experienced lawyers “be required to meet the rigors of the bar exam”. The NJSBA agrees with that conclusion. All lawyers who seek admission to the bar of New Jersey should be required to pass the bar exam. This policy is in the public interest because it effectively screens those seeking admission to practice and helps ensure that the public is served by qualified professionals.

D. Practice by Foreign Lawyers-

The Commission recommends that under certain circumstances lawyers admitted to practice law in foreign countries be permitted to perform services for a client in the U.S. on a temporary basis. For example, a foreign lawyer who is negotiating a transaction on behalf of a client in the lawyer's home country may come to New Jersey to meet other parties to the transaction and their lawyers and to review documents.

The NJSBA agrees with this recommendation and notes that the draft rule supported by the Commission would require a foreign lawyer to associate with local counsel.

E. Model Pro Hac Vice Rule -

The Commission supports the adoption by the ABA of a model *pro hac vice* rule that could be used by state courts. The NJSBA supports this recommendation.

F. Admission in US District Courts-

The Commission report reiterates ABA support for the elimination of local US District Court rules that automatically admit lawyers from the state where the court is located, but require lawyers from other states to enter via *pro hac vice* admission. The Commission points out that local rules tend to "inhibit competition" and increase costs.

The NJSBA opposes this recommendation and believes that US District Courts should be able to adopt admission policies that best serve the needs of the district. We believe that a more "open" admission policy may allow unqualified lawyers into the district court and would ill serve both the public and the court.

G. Discipline in Other Jurisdictions --

The Commission recommends that the RPCs make it clear that lawyers are subject to discipline in jurisdictions where they commit misconduct, regardless of where they are licensed. The NJSBA agrees.

H. Reciprocal Enforcement of Discipline --

The Commission recommends that the jurisdiction where a lawyer is licensed should generally accept and enforce another jurisdiction's disciplinary decision imposed on that lawyer. The Commission favors a system whereby a state supreme

court would impose the same discipline unless the court finds that there was a lack of notice or opportunity to be heard, there was an infirmity of proof as to the misconduct, or the discipline imposed would result in a grave injustice.

The NJSBA supports the approach advocated by the Commission, noting that the New Jersey court rules already require a lawyer to report discipline imposed in another state, and generally require the Supreme Court to accept disciplinary decisions rendered in other states, absent some infirmity in the proceeding that led to the discipline, or in the final discipline imposed.

I. ABA Oversight --

The Commission suggests that the ABA establish a coordinating committee to monitor changes in law practice and lawyer regulation. The NJSBA agrees with this recommendation.

J. Supermajority Needed for Implementation

The NJSBA believes that a key to the successful implementation of model rules relating to MJP will be how many states adopt them. Because these rules would have a substantial impact on the practice of law across the nation, the NJSBA conditions its support for an appropriate model rule (such as the rule suggested by the NJSBA above) only if it is adopted by a super-majority of states, for instance $\frac{3}{4}$ of states which is the percentage needed to obtain an amendment to the US Constitution. It would be unfair to the bar to have to operate under widely differing MJP rules that may, for instance, broadly permit transactional representation in Pennsylvania or New Jersey, while New York retains the status quo. MJP rules are not ordinary rules of practice and procedure for they will have an impact on the very nature and future of the legal profession. For this reason, they should not become effective except upon adoption by a large number of states.

New Jersey State Bar Association

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when the lawyer acts within one of the following “safe harbors”:

(1) the lawyer is authorized to appear before a tribunal in this jurisdiction by law or order of the tribunal or is preparing for a proceeding in which the lawyer reasonably expects to be so authorized and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or

(2) other than making appearances before a tribunal with authority to admit the lawyer to practice pro hac vice:

(i) a lawyer who is an employee of the client acts on the client’s behalf or, in connection with the client’s matters, on behalf of the client’s other employees or its commonly owned organizational affiliates, provided the lawyer’s entire compensation for legal services comes from the employer and the lawyer does not provide to others, including other employees of the employer, legal services not directly related to the legal matters of the employer;

(ii) a lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer’s representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(iii) a lawyer engages in representation of a party to a dispute by participating in an arbitration, mediation, or other alternative non-judicial dispute resolution proceeding, in furtherance of the lawyer’s representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(iv) a lawyer investigates, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding that originates in a jurisdiction in which the lawyer is admitted to practice;

(v) a lawyer practices in circumstances other than (i) through (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client; or

(vi) a lawyer is associated on an occasional basis with a lawyer admitted to practice in this jurisdiction who is in compliance with court rules governing the practice of law and who assumes overall responsibility for representation of the client in this jurisdiction.

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to sub-paragraph (b)(2) above shall:

(i) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;

(ii) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;

(iii) consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction; and

(iv) not hold himself or herself out as being admitted to practice in this jurisdiction.

(d) A lawyer shall not assist another person in the unauthorized practice of law.

NJSBA MJP Committee ---- Comments Received

The Multijurisdictional Practice Committee received comments from county bar associations, and sections and committees within the NJSBA, summarized as follows:

1. NJSBA Professional Responsibility Committee (Letter from Ellen O'Connell) -

The committee believes many lawyers are uncertain of the boundaries of acceptable conduct when their practice involves activities in states where they are not admitted. The committee believes a "national law license" overstates the problem and is not feasible. Instead, the committee favors a model rule that provides clear guidance, but it does not believe the amendments proposed to RPC 5.5 by the Ethics 2000 Commission are definitive enough. The committee points out particular areas of concern: out-of-state depositions; interviews of clients whose employees and agents are out- of-state; reviewing and construing the law in other states, and participation in corporate transactions. The committee believes RPC 5.5 will be useful only if expanded to address a wider range of practice situations. The committee supports, in concept, proposed R.P.C. 8.5 by which lawyers are subject to the ethics rules of the jurisdiction where they perform legal services.

2. NJSBA Unlawful Practice Committee (Memo from Eric Landman) -

The committee believes that it will not be in the best interests of the bar if the NJSBA adopts a restrictive or protectionist MJP position. Proposed R.P.C. 5.5 is seen as a good start toward clarifying MJP issues. In particular, the committee endorses the "safe harbor" concept used in proposed RPC 5.5. The committee noted no particular areas of concern, nor any potential rule language.

3. NJSBA Ethics Diversionary Program Committee (Letter from David Dugan)-

The committee believes that although *pro hac vice* admission and opinions of the Unauthorized Practice of Law Committee address many New Jersey MJP issues, some modification of the RPC's is necessary. However, they reject the proposed R.P.C. 5.5 as too broad. The committee instead favors Section 3 of the American Law Institute's Restatement of the Law Governing Lawyers. Section 3 reads as follows:

"A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:

- (1) at any place within the admitting jurisdiction;
- (2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency;

(3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyers practice under Subsection (1) or (2)."

The committee believes that R.P.C. 5.5 proposed by the Ethics 2000 Commission goes too far in liberalizing the unauthorized practice rule. For instance, the amended rule includes a subjective standard that would expand the *pro hac vice* exception to include work in preparing for a proceeding in which the lawyer "reasonably expects" to obtain *pro hac vice* admission. Further, the amended rule would allow virtually any activity by a lawyer who is "an employee of the client." (i.e. in-house counsel), in contravention of Opinion 14 of the New Jersey Supreme Court's Unauthorized Practice of Law Committee.

4. NJSBA Construction and Public Contract Law Section (Letter from Richard Steen)-

The Section is attuned to MJP issues because practitioners in the construction and public contract bars are often involved in matters in other states, as well as other countries. For instance, counsel may be asked to prepare, review, and negotiate bid documents, agreements, and related contract documents involving projects in states where they are not admitted. Negotiation will routinely involve the choice of state law to be applied. During the course of a building project, a New Jersey lawyer may frequently have to visit an out-of-state site and work out contract revisions. Because the construction industry relies heavily on ADR to settle disputes, New Jersey lawyers often are involved in mediation and other forms of dispute resolution.

The Section believes that states must retain reasonable controls on law practice by out-of-state practitioners coupled with some uniform standards that define appropriate conduct and protect lawyers from unauthorized practice complaints. The Section is primarily interested in a rule that accommodates a full range of ADR proceedings and techniques and the wide range of contract and business services performed by the construction bar. They offered no specific rule proposal, however.

5. NJSBA Environmental Law Section (Memo from Daniel Sheridan)-

The Section favors a liberalization of unauthorized practice rules related to transactional work, such as proposed RPC 5.5 or similar model rule that recognizes a lawyer's ability to go to other states to assist existing clients. But, such a model rule should provide examples of various types of conduct that illustrate the intent of the rule. Further, the Section suggests that a "caution" be included in the rule as a reminder to lawyers that just because they are able to offer legal services in another jurisdiction perhaps they should not do so unless they are certain of the applicable laws and procedures in that jurisdiction.

6. NJSBA Real Property, Probate & Trust Law Section (Memo from Section)-

The Section's comments are focused on estate planning. Because other professionals are now offering estate planning services some unique MJP issues have arisen. Specifically, certain areas of estate planning may no longer be

considered exclusively the practice of law because other professionals have entered the field. As a result, the section suggests that New Jersey lawyers may face lower MJP hurdles than colleagues in other practice areas. For example, if a New Jersey lawyer goes to Maryland to provide estate planning advice would questions of unauthorized practice arise if non-lawyer Maryland professionals could legally offer the same advice?

A particular area of concern among estate lawyers involves the relocation of clients to other states. If a long-standing client moves to Florida can New Jersey counsel continue to prepare documents such as Wills, Powers of Attorney and Medical Directives? Should clients be forced to obtain new counsel after they move, even though they may have a comfortable relationship with their New Jersey lawyer? A related problem occurs when a client who has moved to another state suggests to his neighbors that they seek the advice of their NJ lawyer. Because most estate work deals with federal law, and often involves long-standing clients would it be permissible to undertake such representation? The Section sees no problem in such representation.

The section suggests that an estate planning lawyer should be permitted to offer legal services anywhere, and the only real issue is competence. Therefore, an estate planning lawyer should be "licensed" in some manner for the purpose of ensuring that a client can make a claim or serve process on the lawyer in the state of admission.

7. NJSBA Corporate & Business Law Section (Letter from Lois Shafir)-

The Board of Directors of the Section submitted a position paper *Putting Lawyer Conduct on the Radar Screen*. They have attempted to reconcile the interest of states to regulate appropriately the practice of law with the reality of twenty-first century law practice. The Section attempts to define conduct that constitutes the practice of law. First, it is asserted that counseling an out-of-state client in a manner that affects property rights, or other rights and obligations in that state, constitutes the practice of law whether done personally, or electronically. But, if a lawyer travels to a state where the lawyer is not admitted for the purpose of representing a client who is not a resident, in order to prepare for a matter that will not be tried or transacted in that state, the conduct of the lawyer does not constitute the practice of law.

With these fundamentals in mind the Section's areas of concern are as follows:

- pre-litigation conduct (depositions, other discovery, document review and other trial prep) when there is a reasonable expectation of pro hac vice admission.
- representing a client in ADR proceeding
- transactional practice, particularly where it may be impractical to obtain local counsel. Examples provided include the corporate client who wishes to be represented by its general counsel, a client involved in a securities transaction

needing compliance with the laws of 50 states, a regional shopping center owner who is continuously leasing properties and selling others, etc.

- federal government lawyers who may be called upon to pursue civil matters in states where they are not admitted
- in-house counsel who supervise lawyers doing work in states where the counsel is not admitted

The Section suggests an expansive model rule that would permit the following conduct in a state where a lawyer is not admitted:

1. Pre-litigation conduct with the reasonable expectation of *pro hac vice* application and admission;
 2. ADR representation for an existing client or affiliate, or a new client and affiliates, for whom a continuing retention is reasonably expected;
 3. Transactional legal services for an existing client or affiliate, or a new client and affiliates from whom a continuing retention is reasonably expected;
- provided that the lawyer:

- is licensed and in good standing in all states of admission
- is subject to the ethics rules and professionalism code of the visited state
- has “furnished for public access” biographical information equivalent to meeting the *pro hac vice* criteria of the visited state, through filing with a designated state agency or placement on an appropriate internet site
- has adequate professional liability insurance

8. Burlington County Bar Association (Letter from James Landgraf)-

The association supports proposed RPC 5.5 and further recommends that instances of permissible conduct be provided “in broad, clear and non-inclusive language.” The bar favors a rule (that would be narrower than the Corporate & Business proposal) that has “safe harbors” including:

- discovery and pre-trial activity related to a New Jersey matter, or where *pro hac vice* admission has already been granted
- communications with persons in other jurisdictions which arise out of, or are reasonably related to, the lawyer’s practice on behalf of a client in a jurisdiction where the lawyer is admitted to practice
- appearances in non-judicial tribunals relating to matters arising out of the lawyer’s practice on behalf of a client in a jurisdiction where the lawyer is admitted to practice

9. Bergen County Bar Association (Letter from Charles Ryan)-

The association is not convinced that a model rule is necessary, even though they have drafted a version of RPC 5.5. The BCBA believes that attempts at uniform rules may, in the end, do more harm than good by preventing local bar associations from meeting the particular needs of the public they serve. Further, the association suggests that a standardization of MJP rules may serve the interests of a minority of the bar, particularly transactional practitioners and “may be one more insidious step towards nationalization, and perhaps the globalization of the practice of law”.

The BCBA favors a traditional *ad hoc* approach to addressing unauthorized practice questions. In this regard, the association’s memo recounts the significant New Jersey opinions and rules that define unauthorized practice, including the *pro hac vice* rule, the major unauthorized practice opinions of the New Jersey Supreme Court, and related opinions of the Unauthorized Practice of Law Committee, and Advisory Committee on Professional Ethics, including:

- Appel v. Reiner , 43 N.J. 313 (1964) wherein the Court held that a New York lawyer had not engaged in the unauthorized practice of law even though, during the course of concluding complex financial transactions, he furnished legal services to New Jersey residents. The Court (in an opinion that may have been one of the first to discuss multi-jurisdictional practice) said unauthorized practice prohibitions should not be rigidly applied, and “...recognition must be given to the numerous multi-state transactions arising in modern times. This is particularly true of our state, situated as it is in the midst of the financial manufacturing center of the nation. An inflexible result may well occasion a result detrimental to the public interest....”
- In re Estate of Waring, 47 N.J. 367 (1966) involved a New York firm that did estate work for a New Jersey family, a long standing client. The Court again found no unauthorized practice due to the nature of the attorney-client relationship and noted that clients freedom of choice should not be burdened by “technical restrictions”.
- In re Opinion 33, 160 N.J. 63 (1999) wherein the Court held it was permissible in certain contexts, under the Court’s “public interest” approach to UPL questions, for an out-of-state lawyer to perform legal services in connection with bond issues by New Jersey public entities. The opinion is instructive because it traces the development of the Court’s treatment of unauthorized practice. Justice Stein’s opinion notes the “simple and pragmatic” terms of In re Opinion 26, 139 N.J. 323 (1995) which stated that a determination of whether actions constitute the unauthorized practice of law “is governed not by attempting to apply some definition of what constitutes that practice, but rather by asking whether the public is disserved by such conduct.”
- Opinion 14 of the Committee on Unauthorized Practice of Law which places restrictions on the activities of corporate in-house counsel.

Despite the fact that it is suspicious of any standard UPL or MJP rule, the BCBA offers amendments to proposed R.P.C. 5.5 that reflect some of the opinions discussed above:

1. R.P.C. 5.5 (b)(2) should include the in-house counsel restrictions contained in Opinion 14. This would add to the rule a requirement that a) the lawyer's entire compensation come from the employer, b) the lawyer may appear in a NJ court or tribunal only as permitted by R. 1:21-2, and c) the lawyer may not provide legal services to others, including other employees of the employer (I assume this means legal services outside of anything related to the services performed for an employer).

2. R.P.C.5.5 (b)(2) should also reflect the Appel holding and permit legal work to be done in a jurisdiction where one is not admitted, if that work is "interwoven with a transaction or transactions" arising out of the representation of a client in the jurisdiction of admission, and it would be "grossly impractical and inefficient" to secure separate counsel.

3. The rule should require a certification to be filed by an out-of-state lawyer including, among other things, a statement of reasons for appearing in the jurisdiction, that disciplinary jurisdiction is accepted, and that consent is given to the appointment of the clerk of the court as agent upon whom service of process may be made.

10. Monmouth Bar Association -

The association did not take a position but forwarded a number of individual comments from some of its committee chairs. Almost all of those who responded support a uniform rule such as RPC 5.5, and many had no comment beyond that. However, there were some detailed (and contradictory) comments, as follows:

- a rule with a "safe harbor" approach may be the fairest and most practical alternative
- ABA proposed RPC 5.5 is too vaguely worded because terms such "matters arising out of", or "expecting to be authorized" create subjective standards that are difficult to apply and enforce. Very certain criteria should be included in the rule so that lawyers can act without fear of an unauthorized practice complaint or prosecution.
- to ensure even handed application of a "safe harbor rule" lawyers should be permitted to work for a specific number of hours (e.g. 100 hours in a calendar year) in the "visiting state", and no fee could be collected for more than the permitted number of hours. Further, a lawyer practicing in a state where he or she is not admitted would have to fulfill CLE requirements, and not solicit new clients. Finally, the state where the lawyer is admitted and the state being visited would have to have substantially similar safe harbor rules.
- New Jersey needs to maintain regulatory control over the practice of law within its borders, including the right to discipline any lawyer who performs

legal services here. Most importantly, if a uniform MJP rule is adopted, it must prohibit the solicitation of new clients.

- activity in another jurisdiction that is related to a New Jersey case should be permitted by rule. However, handling a matter in another state, unrelated to a New Jersey matter, should be permitted only by way of *pro hac vice* admission or association with local counsel.
- the ABA and NJSBA should consider a global approach to the practice of law, and proposed R.P.C. 5.5 deals appropriately with the issues.

11. Middlesex County Bar Association (Letter from Dennis Estis)--

The association favors a rule that clearly defines what lawyers can do in jurisdictions where they are not admitted and prevents claims of unauthorized practice for such activity. No further detail or suggestions were provided.

12. Letter from Stephen Richman (Former Chair NJSBA International Law Section)

A letter was received from Steve Richman that was actually in response to a question posed by another NJSBA committee about foreign legal consultants in New Jersey (see R. 1:21-9). But, he also raises questions about MJP. Steve practices international law and he asks whether a “safe harbor” rule is needed to protect multi-national firms. For instance:

- lawyer A is admitted in New Jersey and is part of a firm that has offices in NJ, New York and London. Is the firm engaged in unlawful practice if one of the firm’s London barristers is making phone calls into New Jersey, and sending letters and memos into New Jersey and is otherwise involved on a case pending here? What if the barrister comes to the New Jersey office to work on the case? What if the barrister uses the New Jersey office to work on matters pending in other states and countries?

He therefore suggests that a rule needs to address the activities of lawyers in multi-national firms.