

**AMERICAN BAR ASSOCIATION**

**INTERIM REPORT OF THE COMMISSION ON  
MULTIJURISDICTIONAL PRACTICE**

**NOVEMBER 2001**

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## PREFACE

This is an interim report on the work of the American Bar Association ("ABA") Commission on Multijurisdictional Practice ("MJP Commission"). "Multijurisdictional practice" ("MJP") describes the work of a lawyer in a jurisdiction in which the lawyer is not licensed to practice law. As this report discusses, a wide variety of practices falling within this rubric have been called to the MJP Commission's attention.

This report outlines the Commission's work to date and describes the Commission's preliminary recommendations, which are, in summary, as follows:

1. The ABA should affirm its support for the principle of state judicial licensing and regulation of lawyers. (*See Recommendation 1, infra.*)

2. The ABA should amend Rule 5.5(b) of the *ABA Model Rules of Professional Conduct* (Unauthorized Practice of Law) to provide that, as a general rule, it is not the unauthorized practice of law for a lawyer admitted in another United States jurisdiction to render legal services on a temporary basis in a jurisdiction in which the lawyer is not admitted if the lawyer's services do not create an unreasonable risk to the interests of a lawyer's client, the public or the courts. (*See Recommendation 2, infra.*)

3. The ABA should adopt proposed Rule 5.5(c) of the *ABA Model Rules of Professional Conduct* to identify "safe harbors" that embody specific applications of the general principle of Rule 5.5(b) above. (*See Recommendation 3, infra.*) These would include "safe harbors" relating to the following practice areas:

- Work as co-counsel with a lawyer admitted to practice law in the jurisdiction. (*See Recommendation 3.1, infra.*)
- Professional services that a non-lawyer is legally permitted to render. (*See Recommendation 3.2, infra.*)
- Work ancillary to pending or prospective litigation or administrative agency proceedings. (*See Recommendation 3.3, infra.*)
- Representation of clients in, or ancillary to, an alternative dispute resolution ("ADR") setting, such as arbitration and mediation. (*See Recommendation 3.4, infra.*)
- Non-litigation work ancillary to the lawyer's representation of a client in the lawyer's "home state" (i.e., the jurisdiction in which the lawyer is licensed to practice law) or ancillary to the lawyer's work on a matter that is in the lawyer's home state. (*See Recommendation 3.5, infra.*)
- Services involving primarily federal law, international law, the law of a foreign jurisdiction or the law of the lawyer's home state. (*See Recommendation 3.6, infra.*)

4. The ABA should adopt proposed Rule 5.5(d) of the *ABA Model Rules of Professional Conduct* to identify "safe harbors" relating to work by a lawyer who is an employee of a client or its commonly owned organizational affiliates and work in a "host state" (i.e., a jurisdiction in which the lawyer is not licensed to practice law) that the lawyer is authorized by federal law, state law or court order to render. (*See Recommendations 3.7 and 3.8, infra.*)

5. The ABA should adopt proposed Rule 5.5(e) of the *ABA Model Rules of Professional Conduct* to prohibit a lawyer from establishing an office, maintaining a continuous presence, or holding himself or herself out as authorized to practice law in a jurisdiction in which the lawyer is not admitted, unless permitted to do so by law or Model Rule 5.5. (See Recommendation 3.9, *infra*.)

6. With regard to a lawyer seeking to establish a law practice on a permanent basis in a jurisdiction in which the lawyer is not licensed to practice law, the ABA should endorse a model "admission on motion" rule consistent with the rule proposed by the ABA Section of Legal Education and Admissions to the Bar to facilitate the licensing of a lawyer by a host state if the lawyer has been engaged in active law practice in other United States jurisdictions for a significant period of time. (See Recommendation 4, *infra*.)

7. The ABA should encourage jurisdictions that have not adopted a foreign legal consultant rule to do so consistent with ABA policy. (See Recommendation 5, *infra*.)

8. With regard to lawyers admitted to practice law outside the United States, the ABA should amend either the *Model Rule for the Licensing of Legal Consultants* or Rule 5.5 of the *ABA Model Rules of Professional Conduct* to identify circumstances where it is not the unauthorized practice of law for a lawyer admitted in a non-United States jurisdiction to perform legal services for a client in a United States jurisdiction. (See Recommendation 5.1, *infra*.)

9. The ABA should endorse a model *pro hac vice* rule consistent with the one under development by the ABA Section of Litigation, the ABA Section of Torts and Insurance Practice and the International Association of Defense Counsel, to govern the admission of lawyers to practice law before state courts and government agencies *pro hac vice* in jurisdictions in which the lawyer is not licensed. (See Recommendation 6, *infra*.)

10. With regard to *pro hac vice* admission in federal district court, the ABA should reaffirm its support, in accordance with ABA policy adopted in 1995, for "efforts to lower barriers to practice before U.S. District Courts based on state bar membership by eliminating state bar membership requirements in cases in U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules." (See Recommendation 6.1, *infra*.)

11. The ABA should amend Rule 8.5 of the *Model Rules of Professional Conduct* (Disciplinary Authority; Choice of Law), and adopt and promote other measures to enhance professional regulation and disciplinary enforcement with respect to lawyers who, pursuant to the above recommendations, practice law in jurisdictions other than those in which they are licensed. (See Recommendation 7, *infra*.)

12. The ABA should amend Rule 8.5 of the *ABA Model Rules of Professional Conduct* in order to better address multijurisdictional law practice. (See Recommendation 7.1, *infra*.)

13. The ABA should amend Rules 6 and 22 of the *ABA Model Rules for Lawyer Disciplinary Enforcement* to promote effective disciplinary enforcement when lawyers engage in multijurisdictional practice of law and should renew efforts to encourage states to adopt Rule 22, which provides for reciprocal discipline. (See Recommendation 7.2, *infra*.)

14. The ABA should take steps to promote interstate disciplinary enforcement mechanisms.

(See Recommendation 7.3, *infra*.)

15. The ABA should establish a Coordinating Committee on Multijurisdictional Practice to monitor changes in law practice and the impact of regulatory reform, and to identify additional reform that may be needed. (See Recommendation 8, *infra*.)

## PROPOSED MODEL 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 in another United States jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law when the lawyer represents a client on a temporary basis in this jurisdiction if the lawyer's services do not create an unreasonable risk to the interests of the lawyer's client, the public, or the courts.

(c) Services for a client that are within paragraph (b), if performed on a temporary basis by a lawyer admitted and in good standing in another United States jurisdiction, include services that:

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

(2) may be performed by a person who is not a lawyer without a law license or other authorization from a state or local governmental body;

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

(4) are in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding held or to be held in this or another jurisdiction;

(5) are not within paragraph (c)(3) or (c)(4) and:

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

(ii) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is admitted to practice; or

(6) are governed primarily by federal law, international law, the law of a foreign nation, or the law of a jurisdiction in which the lawyer is admitted to practice.

(d) 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:

(1) if the lawyer is an employee of a client and acts on behalf of the client or its commonly owned organizational affiliates except for work for which *pro hac vice* admission is required; or

(2) when the lawyer renders services in this jurisdiction pursuant to other authority granted by federal law or the law or a court rule of this jurisdiction.

(e) Except as authorized by these rules or other law, a lawyer who is not admitted to practice in this jurisdiction shall not (i) establish an office or other permanent presence in this jurisdiction for the practice of law; or (ii) represent or hold out to the public that the lawyer is admitted to practice law in this jurisdiction.

## **CHAIR'S NOTE**

Although not every Commissioner agrees with every one of these recommendations, each of these recommendations is supported by a majority of the Commission. Even so, these recommendations are made preliminarily and for the purpose of eliciting feedback. From the start, the Commission has been committed to undertaking an objective and comprehensive study of the issues relating to multijurisdictional practice, and it intends to continue in that spirit until its work is completed. Thus, it is crucial to this initiative for the Commission to receive responses and perspectives from the widest possible range of individuals and organizations, both those from whom the Commission has already heard and those from whom it has not.

## INTRODUCTION

### **The Appointment of the MJP Commission and its Work**

#### *The MJP Commission's Charge*

ABA President Martha Barnett appointed this Commission<sup>1</sup> in July 2000 to undertake the following responsibilities:

(1) "Research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law;" (2) "analyze the impact of those rules on the practice of in-house counsel, transactional lawyers, litigators and arbitrators and on lawyers and law firms maintaining offices and practicing in multiple state and federal jurisdictions;" (3) "make policy recommendations to govern the multijurisdictional practice of law that serve the public interest and take any other actions as may be necessary to carry out its jurisdictional mandate;" and (4) "review international issues related to multijurisdictional practice in the United States."

#### *Concerns Leading to the MJP Commission's Appointment*

In the early twentieth century, states adopted "unauthorized practice of law" (UPL) provisions that apply equally to lawyers licensed in other states and to nonlawyers. These laws prohibit lawyers from engaging in the practice of law except in states in which they are licensed or otherwise authorized to practice law. UPL restrictions have long been qualified by *pro hac vice* provisions, which allow courts or administrative agencies to authorize an out-of-state lawyer to represent a client in a particular case before the tribunal.<sup>2</sup> In recent years, some jurisdictions have adopted provisions authorizing out-of-state lawyers to perform other legal work in the jurisdiction.<sup>3</sup>

Jurisdictional restrictions on law practice were not historically a matter of concern, because most clients' legal matters were confined to a single state and a lawyer's familiarity with that state's law was a qualification of particular importance. However, the wisdom of the application of UPL laws to licensed lawyers has been questioned repeatedly since the 1960s in light of the changing nature of clients' legal needs and the changing nature of law practice. Both the law and the transactions in which lawyers assist clients have increased in complexity, requiring a growing number of lawyers to concentrate in particular areas of practice rather than being generalists in state law. Often, the most significant qualification to render assistance in a legal matter is not knowledge of any given state's law, but knowledge of federal or international law or familiarity with a particular type of business or personal transaction or legal proceeding. Additionally, modern transportation and communications technology have enabled clients to travel easily and transact business throughout the country, and even internationally. Because of this globalization of business and finance, clients sometimes now need lawyers to assist them in transactions in multiple jurisdictions (state and national) or to advise them about multiple jurisdictions' laws.

Although client needs and legal practices have evolved, lawyer regulation has not yet responded effectively to that evolution. As the work of lawyers has become more varied, specialized and national in scope, it has become increasingly uncertain when a lawyer's work (other than as a trial lawyer in state court) implicates the UPL law of a state in which the lawyer is not licensed. Lawyers recognize that the geographic scope of lawyers' practice must be adequate to enable lawyers

to serve the legal needs of their clients in a national and global economy. They have expressed concern that if UPL restrictions are applied literally to United States lawyers who perform any work outside the jurisdictions in which they are licensed, the laws will impede lawyers' ability to meet their clients' multi-state and interstate legal needs efficiently and effectively.

This concern was sharpened by a recent California Supreme Court decision, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*, 949 P.2d 1 (Cal. 1998), which held that lawyers not licensed to practice law in California violated California's misdemeanor UPL provision when they assisted a California corporate client in connection with an impending California arbitration under California law, and were therefore barred from recovering fees under a written fee agreement for services rendered in California. Although the state law was subsequently and temporarily amended to allow out-of-state lawyers to obtain permission to participate in certain California arbitrations, concerns have persisted.

In response, the American Bar Association Center for Professional Responsibility convened a symposium on "Multijurisdictional Practice of Law" at Fordham University School of Law on March 10-11, 2000, and issued a report on the discussions that took place.<sup>4</sup> Participants identified three broad goals for enhancing the existing regulatory system: (1) promoting greater uniformity in how states address the work of out-of-state lawyers; (2) developing greater clarity in the laws governing the geographic scope of legal practice, so that lawyers have more guidance about what legal services they may render in a state where they are not licensed; and (3) promoting opportunities for out-of-state lawyers to serve the emerging needs of clients for multijurisdictional legal services consistent with the state regulatory interest in protecting clients and the public through an effective and efficient enforcement mechanism. Participants encouraged the ABA to establish a broadly-representative commission to study the growing movement toward multi-state and international law practice and to charge that body with responsibility to propose solutions. The appointment of this Commission followed.

#### *The MJP Commission's Work to Date*

The MJP Commission recognized the importance of engaging in an objective and comprehensive inquiry and of encouraging as many others as possible to lend assistance. To stimulate discussion, the Commission issued a series of background papers that identified examples of multijurisdictional practice, described relevant regulatory interests, and listed some of the enhancements and reforms that others had proposed. The Commission invited testimony and written submissions by state and local bar associations, ABA entities, and other representative organizations of the legal profession and the public, and solicited the views and experiences of law firms, government and in-house corporate law offices, and individuals. The Commission conducted public hearings in Atlanta, Chicago, Dallas, Kansas City, Miami, New York, and San Diego,<sup>5</sup> and individual Commissioners spoke at bar association meetings and other programs throughout the country.<sup>6</sup> The Commission drew liberally on the experience of individuals appointed to serve as liaisons and on the resources of the various organizations they represented, as well as on the resources of the Center for Professional Responsibility. It collected and reviewed the relevant legal literature.<sup>7</sup> Of particular importance, it gave close study to the relevant proposals of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the relevant provisions of the Restatement (Third) of the Law Governing Lawyers.

As of November, 2001, the Commission received more than 50 written submissions and

heard testimony from individuals from around the nation and the world who recognize the importance and timeliness of its inquiry.<sup>8</sup> Some submissions, such as those of the California, Missouri, New Jersey and Washington state bar associations, were the product of a committee appointed for the specific purpose of formulating a position on the issues before the Commission.<sup>9</sup> To encourage additional participation and interaction, the Commission established a website that contains relevant writings, including transcripts of hearing testimony and written submissions,<sup>10</sup> and has established an extensive listserv on which relevant information is posted.<sup>11</sup>

Thus far, those who have responded to the Commission's request for assistance have consensus on two propositions. First, multijurisdictional practice of law is a practical reality derived from the emerging needs of clients and a necessary and appropriate practice. Second, existing UPL laws as written inhibit lawyers from rendering legal services in a manner that best serves the public. To the extent that commentators differ, it is over the extent to which jurisdictional restrictions on law practice should be modified to authorize lawyers to perform work in jurisdictions in which they are not licensed.

Some commentators have recommended comprehensive and sweeping reforms that would effectively abandon jurisdictional limitations by authorizing a lawyer who is licensed and in good standing to render any legal services in any jurisdiction. Other commentators, however, do not support such wholesale elimination of jurisdictional restrictions. They believe that more modest change will better reconcile the interests in client choice, effective and efficient provision of legal services, lawyer mobility and other interests underlying multijurisdictional practice of law with the fundamental interests of public protection underlying jurisdictional restrictions. They offer a range of proposed reforms. The most frequently advanced suggestion is that safe harbors be established as exceptions to jurisdictional restrictions in order to authorize specific work by lawyers in states in which they are not licensed. Additional suggestions have been made concerning the expansion and promotion of *pro hac vice* admission, admission of experienced practitioners on motion, limited admission of lawyers employed by organizational clients, and strengthening the regulatory process through enhancement of reciprocal discipline enforcement throughout the United States.

## **The Basis for Change**

### *Background: state licensing and jurisdictional restrictions*

*State admissions and regulation.* Lawyers in the United States are not licensed to practice law on a national basis, but are licensed by a state judiciary<sup>12</sup> to practice law within the particular state.<sup>13</sup> In general, state admissions processes are intended to protect the public by ensuring that those who are licensed to practice law in the state have the requisite knowledge of that state's laws and the general fitness and character to practice law.

The state-based licensing process originated more than two centuries ago when the need for legal services was locally based and often involved the need for representation in court. Over time, the nature of law practice has expanded. Increasingly, lawyers counsel and assist clients outside the courthouse. Although understandings differ about the extent to which a law license gives lawyers exclusive authority to render legal services in addition to litigation, it is generally understood that a state license to practice law permits a lawyer to offer a range of services, including but not limited to courtroom advocacy, and that some of those services may not be rendered in the state either by

nonlawyers or by lawyers who are licensed only in a different jurisdiction.

The traditional route to bar admission includes graduating from an accredited law school, passing the admitting state's bar examination, and satisfying the state's bar examiners that the applicant possesses the requisite character to practice law. There is some state variation, however, in the process for licensing lawyers. For example, Wisconsin recognizes a "diploma privilege" whereby graduates of either of that state's law schools may be admitted to practice law without taking the state's bar examination.<sup>14</sup> California and a few other states do not require, as most states do, that applicants to the bar be graduates of law schools that are accredited by the ABA.

As a practical matter, a lawyer who seeks to engage in a national law practice cannot presently gain admission to the bar of every state. States generally require out-of-state lawyers to pass the state's bar examination to be licensed. Bar examinations generally differ from state to state, although the degree of difference has narrowed over the years, as states have come to rely increasingly on a standardized examination.<sup>15</sup> Being a member in good standing of another state's bar generally does not qualify a lawyer for "reciprocal" admission, although many states do allow lawyers to be admitted on motion upon a showing of good standing and a demonstrated record of active law practice elsewhere for a specific period.<sup>16</sup>

Under the jurisdiction of the judicial branch, states establish rules to govern the professional conduct of lawyers. Lawyers are required to represent clients competently and to refrain from undertaking work that they are not qualified to handle. State courts oversee disciplinary agencies that enforce the rules of professional conduct through disciplinary proceedings. Lawyers may be reprimanded, suspended, disbarred or otherwise sanctioned for misconduct. Disciplinary mechanisms are designed to encourage proper conduct, discourage misconduct and provide for appropriate sanctions when misconduct occurs. Enforcement of professional norms is also promoted through various indirect means, including civil lawsuits for malpractice.

Over the years, many states have supplemented and improved their regulatory processes. For example, to promote professional competence and familiarity with state ethics rules, many states now require ongoing Continuing Legal Education ("CLE"). Many require their lawyers to contribute to a client protection fund for the benefit of clients in the state who suffer financial loss because of a lawyer's dishonesty. One state, Oregon, mandates malpractice insurance for bar members.<sup>17</sup>

Nationally, disciplinary enforcement has been improved and refined with assistance from the Conference of Chief Justices, the American Bar Association and the National Organization of Bar Counsel. There has been improved coordination among disciplinary authorities of different states as called for in the 1992 ABA report, *LAWYER REGULATION FOR A NEW CENTURY* (McKay Report).<sup>18</sup>

States sanction members of their own bar for misconduct occurring outside the jurisdiction, and some states also bring disciplinary proceedings predicated on misconduct committed in the state by a lawyer who is licensed elsewhere. Consistent with ABA policy, *ABA Model Rules for Lawyer Disciplinary Enforcement* Rule 22, most states give reciprocity to disciplinary decisions of other jurisdictions. To assist them in doing so, the ABA operates the National Lawyer Regulatory Data Bank, which collects and disseminates information about lawyer discipline.

*Geographical boundaries.* In general, a lawyer may not represent clients before a state

tribunal or otherwise practice law within a particular state unless the lawyer is licensed by the state or is otherwise authorized to do so. Jurisdictional restrictions promote a variety of state regulatory interests. Most obviously, by limiting law practice in the state to those whom the state judiciary, through its admissions process, has deemed to be qualified to practice law in the state, they promote the state interest in ensuring that those who represent clients in the state are competent to do so. Jurisdictional restrictions also promote the state interest in ensuring that lawyers practicing law within the state do so ethically and professionally. Lawyers licensed by the state are thought to be more conversant than out-of-state lawyers with state disciplinary provisions as well as with unwritten but understood expectations about how members of the local bar should behave, and lawyers in the state may be disciplined more easily and effectively than out-of-state lawyers when they engage in professional improprieties. By strengthening lawyers' ties to the particular communities in which they maintain their offices, jurisdictional restrictions may also help maintain an active and vibrant local bar, which in many communities serves a crucial public role, because lawyers serve voluntarily on court committees, in public office, and on boards of not-for-profit institutions in the community.

States give effect to jurisdictional restrictions through UPL statutes and proscriptions in the rules of professional conduct such as those based on ABA Model Rule 5.5. Although UPL provisions are most often applied to nonlawyers, they have also been applied to lawyers. They subject lawyers to the risk of sanction (in some states, criminal sanction) for practicing law within a state where they are not licensed. Besides being enforced directly, these provisions may be invoked in disciplinary proceedings based on disciplinary rules that prohibit lawyers from engaging in, or assisting others in, the unauthorized practice of law, in fee forfeiture actions or other civil actions by clients against their lawyers or by opposing parties in the context of disqualification motions.

Today, no state categorically excludes out-of-state lawyers and there is general agreement that, as a practical matter, lawyers cannot serve clients effectively unless accommodations are made for multijurisdictional law practice, at least on a temporary or occasional basis. For example, every jurisdiction permits *pro hac vice* admission of out-of-state lawyers appearing before a tribunal, although the processes and standards for *pro hac vice* admission differ.

For transactional and counseling practices, and other work outside court or agency proceedings, there is no counterpart to *pro hac vice* admission, but, as discussed below, multijurisdictional law practice is common for certain types of practitioners. The laws of two states, Michigan and Virginia, specifically authorize occasional or incidental practice by out-of-state lawyers. Michigan's UPL statute provides that it does not apply to an out-of-state lawyer who is "temporarily in [Michigan] and engaged in a particular matter."<sup>19</sup> The Virginia rules permit an out-of-state lawyer occasionally to provide legal advice or services in Virginia "incidental to representation of a client whom the attorney represents elsewhere."<sup>20</sup> As noted earlier, California now specifically authorizes out-of-state lawyers to represent clients in arbitrations.<sup>21</sup> Some state courts have identified similar "safe harbors" in judicial decisions.<sup>22</sup>

Some states also accommodate certain out-of-state lawyers who seek to establish a law office in the state or to practice law in the state on a regular basis. For example, states have adopted provisions permitting in-house corporate lawyers, or lawyers employed generally by organizational clients, to provide legal services on behalf of the organization from an office located in a state where the lawyer is not licensed. Typically, the lawyer is required to register and to submit to the state's

regulatory authority.<sup>23</sup>

With respect to foreign lawyers, many states, beginning with New York in 1974, have adopted "foreign legal consultant" provisions, which allow members of the legal professions of foreign jurisdictions to be licensed without examination to engage in the practice of law in the state on a restricted basis. In 1993, the ABA adopted a resolution recommending that all states adopt such a provision and approved a *Model Rule for the Licensing of Legal Consultants*. (See Appendix H.)

### *The increasing prevalence of multijurisdictional practice*

Testimony before the Commission was unanimous in recognizing that lawyers commonly engage in cross-border practices. Further, there was general consensus that such practices are on the increase and that this trend is not only inevitable, but necessary. The explosion of technology and the increasing complexity of legal practice have resulted in the need for lawyers to cross state borders to afford clients competent representation.

In connection with litigation, it is not uncommon for parties to retain lawyers in whom they have particular confidence, or with whom they have a prior relationship, to represent them in lawsuits in jurisdictions in which the lawyers are not licensed, and for these lawyers to be admitted *pro hac vice* to appear on behalf of the client. However, lawyers also perform work outside their home states for which they cannot obtain *pro hac vice* admission, which is not available prior to the filing of a lawsuit or to authorize work that is not related to a judicial proceeding in the particular state. For example, litigators commonly go to states other than those in which they are authorized to practice law in order to review documents, interview witnesses, enter into negotiations, and conduct other activities that are either ancillary to a lawsuit pending in a state in which they are authorized to practice or that are performed before a lawsuit is filed.

In ADR proceedings as well, it is common for lawyers to render services outside the particular states in which they are licensed. Sometimes, the parties choose to conduct the ADR proceeding in a state that has no relation to the parties or the dispute, because they prefer a neutral site. Because particular knowledge of state law and procedure is not necessary, the parties often select lawyers based on other considerations, such as the lawyers' prior knowledge of the relevant facts or a preexisting client-lawyer relationship.

Lawyers who provide legal advice or assistance in transactions also commonly provide services in states in which they are not licensed. Like litigators, transactional lawyers who are representing clients in the state in which they are licensed travel outside the state in order to conduct negotiations, gather information, provide advice, or perform other tasks relating to the representation. Lawyers also travel outside their home states in order to provide assistance to clients who are in special need of their expertise. For example, lawyers who concentrate their practice in federal law--such as securities, antitrust, labor law, or intellectual property law--are often retained by clients outside their home states because of the clients' regard for their particular expertise. The same is true of foreign lawyers whose expertise in foreign law is sought, as well as of other lawyers, such as bond lawyers or mergers-and-acquisition lawyers, who practice in specialized areas.

For some lawyers, multijurisdictional practice grows out of an ongoing relationship with a client. Sometimes, the work is for a client who resides in the lawyer's home state but who has business dealings outside the state. Other times, the work is for a client who has moved out of state.

A lawyer who drafts a will for a client in one state may be asked by that client to draft a codicil to the will after the client has moved to another state. For in-house lawyers in particular, ongoing work for a corporate employer commonly involves travel to the different states where the corporation has offices or business interests.

### *The impact of jurisdictional restrictions on legal practice*

Lawyers have general understandings about how jurisdictional restrictions apply to their work in states where they are not licensed. These understandings are shaped less by the wording of the UPL provisions or by decisional law, which is sparse,<sup>24</sup> than by conventional wisdom or by what the U.S. Supreme Court has called "the lore of the profession."<sup>25</sup> On one hand, lawyers understand that they may not open a permanent office in a state where they are not licensed and also that they may not appear in the court of a state where they are not licensed without judicial authorization. On the other hand, lawyers believe that they may give advice in their own states concerning the law of other jurisdictions, that they may represent out-of-state clients in connection with transactions and litigation that take place where the lawyer is licensed, and that they may travel to other jurisdictions in connection with legal work on behalf of clients who reside in and have matters in the state where the lawyer is licensed.

Lawyers' general understandings are, to some extent, reinforced by the sporadic enforcement of state UPL laws. Regulatory actions are rarely brought against lawyers who assist clients on a temporary or occasional basis in connection with multi-state or interstate matters. This might fairly suggest that there is a profession-wide understanding that the UPL laws, however broadly they may be written and however they may be interpreted in theory, will be interpreted by courts and enforcement agencies to accommodate reasonable and conventional professional practices. Further, one might assume that, because of the sporadic nature of proceedings to enforce jurisdictional restrictions, lawyers may comfortably rely on their professional understandings and that, therefore, there is no need to reform existing laws, however inconsistent or non-specific they may be. These assumptions would be mistaken, however.

The existing system of lawyer regulation is and should be a matter of serious concern for many lawyers. Even in contexts where jurisdictional restrictions clearly apply, as in state-court proceedings, problems are caused by the lack of uniformity among the *pro hac vice* provisions of different states, unpredictability about how some of the provisions will be applied by the courts in individual cases, and, in some cases, the provisions' excessive restrictiveness. Of even greater concern, however, is that, outside the context of litigation, the reach of the jurisdictional restrictions is vastly uncertain as well as, potentially, far too restrictive. Lawyers may recognize that UPL enforcement proceedings are infrequent, and that when UPL laws are invoked, courts have the ability to interpret them realistically to accommodate the interests of clients with interstate or multi-state legal problems. Nevertheless, some lawyers will turn down clients or take other steps to avoid or reduce the risk of having to defend against UPL charges or of appearing to violate UPL laws as written.

The existing system of lawyer regulation has costs for clients. For example, out of concern for jurisdictional restrictions, lawyers may decline to provide services that they are able to render skillfully and ethically. In doing so, they may deprive the client of a preferred lawyer including, at times, a lawyer who can serve the client more efficiently and economically than other available lawyers by drawing on knowledge gained in the course of prior work for the particular client or by

drawing on expertise in the particular subject area. For example, the same considerations that may lead a corporation to prefer the services of an in-house lawyer, irrespective of where that lawyer is licensed, might lead a corporation to prefer the services of a lawyer or law firm with which it has a sustained relationship. Cautious lawyers may deny both institutional and individual clients the benefit of an ongoing client-lawyer relationship. Alternatively, lawyers may insist that the client engage local counsel or co-counsel in situations where doing so adds unnecessarily to the expense of the representation, because the out-of-state lawyer possesses all the necessary knowledge and expertise and would represent the client competently and ethically.

These costs are real, and not merely hypothetical, for the clients of both transactional lawyers and litigators. Irrespective of the low risk of enforcement, lawyers and law firms take jurisdictional restrictions seriously. Further, even if lawyers felt free to ignore UPL laws in areas where there is a professional consensus that the laws are outmoded and there appears to be a tacit understanding that they will not be enforced, it is undesirable to retain the laws as written, rather than amending them to accord with contemporary understandings and practices that serve clients well. Keeping antiquated laws on the books breeds public disrespect for the law, and this is especially so where the laws relate to the conduct of lawyers, for whom there is a professional imperative to uphold the law.

## RECOMMENDATIONS

### Recommendation 1

#### Regulation of the Profession by the Judiciary

**The ABA should affirm its support for the principle of state judicial licensing and regulation of lawyers.**

The most fundamental question for this Commission, and for the legal profession in the long term, is whether jurisdictional restrictions on law practice continue to make sense and should be retained in this country. The Commission believes that the tradition of state judicial licensing and regulation of lawyers, which includes jurisdictional limits on legal practice, should be preserved, and therefore recommends that the ABA affirm its support for this principle.

A number of organizations and individuals have noted that, in the European Union, a lawyer of one member state may establish a law practice in another member state with relative ease,<sup>26</sup> and have proposed that jurisdictional restrictions similarly be relaxed in the United States. These proposals have come in several forms.

Some advocate that United States lawyers be permitted to practice law nationally without restriction on the nature and extent of the work that they may perform in jurisdictions in which they are not licensed. This would include being able to establish a law practice in any state, subject to whatever disciplinary rules and regulatory requirements apply in that state, and being able to practice law regularly and/or occasionally in other states in which the lawyer has not established a law practice.

Proponents have suggested various ways in which the concept of law practice without jurisdictional limitations might be implemented. One suggestion is that all jurisdictions enact laws providing that any United States lawyer may practice law in the jurisdiction, permanently or on a temporary basis, without a requirement of additional admission.<sup>27</sup> Another plan contemplates a national compact, whereby states would permit other states' lawyers to perform legal services in the state on a temporary basis, and whereby a lawyer from one state could move to another state and become a member of the bar there without having to take another bar exam, provided the lawyer establishes that he or she is a member in good standing of a state bar and is of good character and pays all relevant fees.<sup>28</sup> A third proposal for comprehensive reform, the so-called "driver's license" model, envisions a uniform registration system that would enable a lawyer licensed in one jurisdiction to open an office or otherwise engage in continuous or regular representation in another state.<sup>29</sup> Under all of these proposals, lawyers who undertake legal work that they are unqualified to render could be subject to disciplinary proceedings and malpractice actions, but jurisdictional restrictions would not play any role in protecting clients from unqualified lawyers.

More modestly, a coalition of several national organizations proposes that by rule or statute in each state, lawyers would be authorized to practice on a temporary basis in a state in which they are not licensed as long as they do not establish an office in that state and so long as they are in good standing in their states of admission.<sup>30</sup> Proponents have advanced various arguments in favor of permitting national law practice, at least temporarily and occasionally, if not on a regular or established basis. First and foremost, it has been argued that eliminating geographic limits will

promote client interests, and that regulatory interests that are said to justify these limits can be adequately served without them. In general, consistent with the duty of competence, it is said that out-of-state lawyers will undertake work only if they are qualified to perform that work, as is ordinarily true of lawyers practicing within their own states. The ethical obligation will be reinforced by the risk of civil liability or disciplinary sanction if lawyers perform negligently, as well as the risk to their professional reputation. In addressing the professional misconduct engaged in by a few incompetent or unethical lawyers, it is argued, geographic restrictions of any kind are overly exclusive, in that they deny clients access to many out-of-state lawyers who would represent them competently and ethically. State regulatory interests might be served equally well in other ways: first, by providing increased resources to disciplinary authorities to enable them to bring actions against lawyers who perform incompetently or unethically or who undertake work for which they are not qualified; second, by encouraging greater coordination among disciplinary authorities across the country; third, by providing additional financing to client protection funds for clients so that these funds may better compensate clients who are harmed by lawyers' dishonesty; and, fourth, by requiring all lawyers to carry malpractice insurance in order to better compensate clients who are financially harmed by lawyers' negligence.

Many of those from whom the Commission has heard so far have not advocated the elimination of jurisdictional restrictions on a wholesale basis, but have advocated loosening restrictions on a limited basis. Some groups have affirmatively opposed or specifically declined to endorse national practice,<sup>31</sup> because they believe that regulatory interests served by jurisdictional restrictions cannot otherwise be served adequately in some contexts, such as when unsophisticated state residents retain counsel to render services concerning matters in the state that are governed by state law.<sup>32</sup> Traditionally, it has been assumed that the lawyer licensed in the state will, on average, be better qualified to render this work. That lawyer will be more likely to have studied state law, both prior to admission and afterwards, and to have gained experience in state law matters by virtue of having established a practice in the state and having worked with other state lawyers who serve either as supervisors or as mentors. In general, states have greater confidence in their own admissions processes than in that of sister states. Likewise, states believe that lawyers practicing in the states in which they are licensed are more likely than out-of-state lawyers to comply with state disciplinary obligations and are more readily and directly subject to sanction when they fail to do so. Further, states may believe that fostering the development of the local bar through jurisdictional restrictions serves the public interest.

Consistent with these beliefs, those who oppose eliminating jurisdictional restrictions have raised a variety of concerns about harms that may result from eliminating jurisdictional restrictions entirely, including: unscrupulous lawyers may provide services that they are unqualified to render; well-intentioned lawyers may misjudge their ability to render competent advice in a foreign jurisdiction; overworked disciplinary agencies may not be able to regulate out-of-state lawyers effectively; lawyers may "race to the bottom" by gaining admission in states that are perceived to have lower admissions criteria and then practicing law in states that are perceived to have more stringent criteria; and national practice may erode the commitment of the bar to objectives such as undertaking pro bono representation, working to improve of the law, maintaining client protection funds, and promoting continuing legal education programs.

This debate is difficult to resolve, in large part, because of the absence of empirical evidence about how the elimination of jurisdictional restrictions would affect law practice in the United States, and the inability to obtain such evidence without authorizing national practice. Although there is

no evidence that multijurisdictional practices that are presently common pose a significant disciplinary threat or result in the rendition of incompetent representation, one cannot necessarily conclude from this that eliminating geographical restrictions in their entirety will be harmless. Many believe that common wisdom suggests otherwise. Nor is there evidence that clients will be better served by permitting national law practice, rather than by authorizing multijurisdictional practice on a more limited basis. Thus, the question is how to proceed in an area of uncertainty.

The Commission believes that, at the present juncture, and given the present state of knowledge, the ABA should not recommend the wholesale elimination of jurisdictional limits on law practice, whether for established practice, regular practice, or temporary and occasional practice. Given the principle of state-based judicial regulation, the assumptions underlying that principle, and the support of a large segment of the bar for preserving it, the Commission believes that a stronger case would have to be made that national law practice is essential and that a more measured approach will not suffice to facilitate law practice and to promote the public interest. While that case may be made over time as lesser changes are adopted and as law practice continues to evolve, the Commission does not believe it has been made yet. The Commission's preliminary conclusion is that, for the present, an effort should be made to identify those particular interstate practices, comparable to *pro hac vice* representation, that should explicitly be permitted, because client choice and other interests in favor of multijurisdictional law practice outweigh the countervailing regulatory interests, and to identify other reforms to facilitate and effectively regulate appropriate interstate and multi-state law practice. While no line-drawing will be perfect, the Commission believes that meaningful lines can be drawn and that, once those lines are drawn by the judicial branch of government, liberalized jurisdictional restrictions will serve the public interest. Further, it believes that liberalized restrictions will be more acceptable to the public and the profession, more readily complied with, and more readily enforceable than the current restrictions.<sup>33</sup>

## Recommendation 2

### Multijurisdictional Practice in the United States

**The ABA should amend Rule 5.5(b) of the Model Rules of Professional Conduct (Unauthorized Practice of Law) to provide that, as a general rule, it is not the unauthorized practice of law for a lawyer admitted in another United States jurisdiction to render legal services on a temporary basis in a jurisdiction in which the lawyer is not admitted if the lawyer's services do not create an unreasonable risk to the interests of a lawyer's client, the public or the courts.**

The ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") anticipated the MJP Commission's work by proposing "safe harbors" for inclusion in ABA Model Rule 5.5 as exceptions to the general rule that a lawyer may practice law only in a jurisdiction in which the lawyer is licensed. The Ethics 2000 Commission's proposed "safe harbors" were specific applications of a general principle that it did not fully articulate and incorporate in the proposed rule itself. That general principle is that, under certain circumstances, it is in the public interest for a lawyer admitted in one United States jurisdiction to be allowed to render legal services in another United States jurisdiction, because the interests of the lawyer's client will be served if the lawyer is permitted to render the particular services and doing so does not create an unreasonable risk to the interests of the lawyer's client, the public or the courts. In such circumstances, as a general rule, it should not be the unauthorized practice of law for a lawyer admitted in another United States jurisdiction to render legal services in a jurisdiction in which the lawyer is not admitted.

The MJP Commission recommends that ABA Model Rule 5.5 be amended to articulate and incorporate this general principle as well as to identify an illustrative and non-exclusive list of "safe harbors" in which the general principle ordinarily would apply. Accordingly, the MJP Commission has worked to develop and refine the Ethics 2000 Commission's initial list of "safe harbors" in light of the study conducted by the MJP Commission. The effort of both Commissions has been to identify circumstances in which jurisdictional restrictions do not serve the public interest because they impose an unnecessary obstacle to clients' ability to hire counsel of their choice, make the provision of legal services, particularly with respect to interstate matters, unnecessarily expensive or inefficient, or otherwise thwart the public interest in enabling clients to meet their legal needs. A draft of ABA Model Rule 5.5 that reflects the amendments proposed here and in Recommendation 3, *infra*, is in Appendix J.

### Recommendation 3

#### "Safe Harbors"

**The ABA should adopt proposed Model Rule 5.5(c)-(e) to identify "safe harbors" that embody specific applications of the general principle stated in Recommendation 2; to identify other appropriate "safe harbors"; and to make clear that, except where authorized by law or rule, a lawyer may not establish an office, maintain a continuous presence, or hold himself or herself out as authorized to practice law in a jurisdiction where the lawyer is not licensed to practice law.**

The purpose of the proposed general exception to the prohibition against rendering legal services in jurisdictions in which the lawyer is not licensed, together with the illustrative "safe harbors", is not to eliminate all uncertainty, but to eliminate a substantial amount of uncertainty regarding interstate law practice that, in the MJP Commission's view, should be permitted. Line-drawing is, of course, an imprecise art. In identifying illustrative "safe harbors", the MJP Commission has taken a conservative approach, addressing only those classes of conduct that can be described categorically when those categories do not encompass work that poses unacceptable risk to the public interest. Consequently, the proposed "safe harbors", both individually and collectively, are under-inclusive, in that they fail specifically to authorize some interstate work that, in individual cases, would serve the public interest and therefore be desirable. Thus, there are other cases that may fall within the general principle that are not exemplified by a "safe harbor". Because the exercise of determining what is and is not permissible calls for judgment and balancing, there will be unavoidable disagreement about the scope of both the general exception and the "safe harbors". It is not possible by artful drafting to eliminate all uncertainty, and provisions that leave room for further development may even be desirable.

The "safe harbors" identified by the MJP Commission in proposed Model Rule 5.5(c) address six areas of professional work: (1) work as co-counsel with a lawyer admitted to practice law in the jurisdiction; (2) services that a non-lawyer is legally permitted to render in the jurisdiction; (3) work ancillary to pending or prospective litigation; (4) representation of clients in, or ancillary to, an alternative dispute resolution ("ADR") setting, such as arbitration and mediation; (5) non-litigation work ancillary to the lawyer's representation of a client in the lawyer's "home state" (i.e., the jurisdiction in which the lawyer is licensed to practice law) or ancillary to the lawyer's work on a matter that is in the lawyer's home state; and (6) services involving primarily federal law, international law, the law of a foreign jurisdiction or the law of the lawyer's home state.

Additionally, the MJP Commission has identified two "safe harbors" in proposed Model Rule 5.5(d) that would enable a lawyer to render particular legal services outside the lawyer's home state on an established basis as well as a temporary basis. These relate to work by a lawyer who is an employee of a client or its commonly owned organizational affiliates and work in a "host state" (i.e., a jurisdiction in which the lawyer is not licensed to practice law) that the lawyer is authorized by federal law, state law or court order to render. The second of these "safe harbors" recognizes that a lawyer who is legally authorized to appear in the jurisdiction for a particular purpose does not violate otherwise applicable jurisdictional restrictions on law practice by out-of state lawyers.

Finally, the ABA Commission proposes the adoption of proposed Model Rule 5.5(e) to make clear that, except when authorized by law or rule, a lawyer may not establish an office or other

systematic and continuous presence in this jurisdiction for the practice of law or hold out to the public that the lawyer is authorized to practice law in this jurisdiction.

### **3.1 The ABA should adopt proposed Model Rule 5.5(c)(1) to allow work as co-counsel with a lawyer admitted to practice in the jurisdiction.**

Consistent with a similar recommendation made by the Ethics 2000 Commission, the MJP Commission supports the adoption of a safe harbor for work on a temporary basis in a state by an out-of-state lawyer who is associated in the matter with a lawyer who is admitted to practice in the jurisdiction and who actively participates in the representation. This exception would promote the client's interest in counsel of choice in many circumstances where the client has good reason to engage both a local lawyer and an out-of-state lawyer and it is in the public interest for the client to do so. One recurring example is where local counsel recommends engaging the assistance of a lawyer with special or particularized expertise. Another is where the client has a prior or ongoing relationship with the out-of-state lawyer in whom the client has particular confidence and whose advice is sought in evaluating the services of the local counsel. Lawyers who assist litigation counsel but who do not themselves appear in judicial proceedings would also be covered by this exception.

For this exception to apply, the lawyer admitted to practice in the jurisdiction could not serve merely as a conduit for the out-of-state lawyer, but would have to share actual responsibility for the representation.<sup>34</sup> When that condition is met, the state's regulatory interest in protecting the interests of both clients and the public is adequately served. The lawyer who is licensed in the jurisdiction will have an opportunity to oversee the out-of-state lawyer's work and personally to assure that the work is performed competently and ethically. The local lawyer, having been found to have the requisite fitness and character to practice law in the state, is presumptively qualified to carry out this responsibility.

This "safe harbor" would permit a lawyer to render legal services on a temporary basis in an office of the lawyer's firm outside the lawyer's home state, as long as the lawyer is in a genuine co-counsel relationship with a lawyer of the firm who is licensed in the jurisdiction. However, this "safe harbor" is not intended to cover associates who rotate among a law firm's offices for periods that would be longer than "temporary."

### **3.2 The ABA should adopt proposed Model Rule 5.5(c)(2) to allow lawyers to perform professional services that any non-lawyer is legally permitted to render.**

The MJP Commission recommends the adoption of a "safe harbor" to permit an out-of-state lawyer to render law-related professional services, on a temporary basis in the state, that non-lawyers may render in the state without the requirement of a license or other authorization from a government body. In doing so, the out-of-state lawyer would be subject to the applicable rules of professional conduct in the jurisdiction where the work is performed (e.g., rules relating to confidentiality, competence, conflicts of interest, candor to third parties, etc.).

There are various professional services that are law-related, but that non-lawyers are nevertheless permitted to render without a license or other authorization. For example, in certain administrative agency proceedings, nonlawyers are explicitly authorized to assist parties. With respect to certain types of advice and transactions, it is also understood that parties may enlist the assistance of nonlawyers. The inapplicability of UPL laws to nonlawyers with respect to such

services reflects the state's judgment that it is in the public interest for clients to have access to a broad range of service providers and that it is not essential, for the public protection, that the particular services be rendered only by those who have a lawyer's special training and expertise and who are subject to the legal profession's regulatory framework.

Some courts have held that, although nonlawyers may render services in a state, out-of-state lawyers may not do so in their capacity as lawyers.<sup>35</sup> This restriction appears to be, if not entirely anomalous, unnecessary. If the state forms a judgment that the public interest is adequately served by allowing any nonlawyer to render a particular service, even though the nonlawyer may lack particular training and is not subject to lawyer regulation, then there is no reason to assume that, as a general matter, jurisdictional restrictions are necessary to protect the public from out-of-state lawyers. The exception would not apply, however, where the state limits the authorization to render the particular services by requiring a license other than, or as an alternative to, a law license.

### **3.3 The ABA should adopt proposed Model Rule 5.5(c)(3) to allow lawyers to perform work ancillary to pending or prospective litigation.**

The MJP Commission supports the adoption of a "safe harbor" for certain work performed by a lawyer in connection with pending or potential litigation. Specifically, the "safe harbor" would permit a lawyer's temporary presence in a state where the lawyer is not presently authorized to practice, if (a) the work is in anticipation of litigation reasonably expected to be filed in a state where the lawyer is admitted or expects to be admitted *pro hac vice*, or (b) the work is ancillary to pending litigation in which the lawyer lawfully appears, either because the lawyer is licensed in the jurisdiction where the litigation takes place or because the lawyer has been admitted *pro hac vice* to participate in the litigation. This "safe harbor" would not supplant *pro hac vice* requirements, however. In order to appear before a tribunal in a state where the lawyer is not licensed, the out-of-state lawyer would be required to comply with existing *pro hac vice* provisions.

When a lawyer represents a party in a pending lawsuit in a jurisdiction in which the lawyer is licensed or in a pending litigation in which the lawyer appears *pro hac vice*, this safe harbor would cover work related to the lawsuit that is performed in other states. Often, a lawyer representing a party in pending litigation must travel outside the jurisdiction where the litigation takes place in order to interview or depose witnesses, review documents, conduct negotiations, and perform other necessary work. It is generally recognized that work of this nature, insofar as it does not involve appearances in court by the out-of-state lawyer, is and should be permissible. It would be exceedingly costly and inefficient for a party to retain separate counsel in every state in which work must be performed ancillary to a pending litigation, and requiring parties to do so would not strongly serve any regulatory interest, since lawyers in litigation are generally supervised adequately by the courts before which they appear.

Additionally, this "safe harbor" would cover work of a similar nature in connection with prospective litigation when there is a reasonable expectation that the lawsuit will be filed in a jurisdiction in which the lawyer is admitted to practice law or reasonably expects to be admitted *pro hac vice*. Prior to the filing of a lawsuit in a particular jurisdiction, lawyers may need to conduct a variety of work, such as interviewing witnesses and reviewing documents, which may occur in multiple states. As in the case of pending litigation, in the context of prospective litigation it would be exceedingly costly and inefficient to require a party to retain separate counsel in every state in which such preliminary work must be done.

Certain other work ancillary to litigation, although not expressly covered by this safe harbor, would be covered by the general exception proposed by the Commission. For example, when a group of lawyers from an out-of-state law firm work collectively on a substantial litigation, it is understood that those lawyers who are making formal appearances in court or in depositions must seek *pro hac vice* admission, but it is customary for subordinate lawyers not to do so if they serve exclusively in certain supporting roles, such as conducting legal research and drafting documents. The Commission proposes amending the Comment to ABA Model Rule 5.5 to make clear that as long as the supervisory lawyers making formal appearances in the litigation are authorized to appear in the proceeding, this type of supporting legal work by subordinate lawyers is permissible, even if some of it is performed outside the states in which the subordinate lawyers are licensed.

In addition, proposed Model Rule 5.5(c)(3) would make clear that jurisdictional restrictions do not apply when an out-of-state lawyer is authorized by law or court order to appear before a tribunal or administrative agency in the jurisdiction. As the Ethics 2000 Commission provided in Comment [3] to its proposed provision on this subject, "Lawyers not admitted to practice generally in the jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. Such authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency." To avoid confusion, the proposed Rule would incorporate the substance of this Comment.

### **3.4 The ABA should adopt proposed Model Rule 5.5(c)(4) to allow representation of a client in an arbitration, mediation or other ADR setting.**

The MJP Commission recommends the adoption of a "safe harbor" for work on a temporary basis in a jurisdiction in which the lawyer is not licensed in connection with the representation of clients in pending or anticipated arbitrations, mediations or other ADR proceedings (with the exception of when admission is governed by a *pro hac vice* provision because the ADR proceeding is under the auspices of a court or government agency).

It is generally recognized that, in the ADR context, there is often a strong justification for choosing a lawyer from outside the jurisdiction in which the proceeding takes place. This is true, in part, because that jurisdiction may have no relation to the law governing the proceeding or to the dispute. Unlike in litigation, in ADR parties may select the site of the proceeding simply on the basis of convenience. At times, as in the case of international arbitrations, a site is chosen precisely because it has no connection to either party or to the dispute. Thus, in ADR proceedings, the in-state lawyer is not ordinarily better qualified than other lawyers by virtue of greater familiarity with state law, state legal processes and state institutions.<sup>36</sup> Further, as noted by the ABA Section of Litigation in its comments to the Commission, "Clients have important considerations in ADR, which include confidentiality, consistency, uniformity, costs, and convenience. After all, non-binding ADR procedures usually require client 'buy in' to succeed. Denying a client her preferred counsel could hamper early ADR efforts and impede prompt resolution of disputes."<sup>37</sup> It is for these reasons that many found the *Birbrower* decision troubling, and that the California legislature subsequently adopted a law temporarily authorizing out-of-state lawyers to represent clients in arbitration proceedings.

This proposed "safe harbor" would not address the work of arbitrators, mediators and others serving in ADR contexts in comparable non-representative roles. It is questionable whether work

as an adjudicator or "neutral" in an ADR proceeding comprises the practice of law for purposes of UPL restrictions. Assuming it does, this work would generally be covered by the proposed "safe harbor", discussed above, applicable to professional services that non-lawyers are legally permitted to render, since it is generally understood that nonlawyers may serve as arbitrators and mediators and in similar roles in the ADR context.

### **3.5 The ABA should adopt proposed Model Rule 5.5(c)(5) to allow transactional representation, counseling and other non-litigation work.**

The MJP Commission recommends that, on a temporary basis, a lawyer be permitted to render non-litigation services outside the lawyer's home state when the lawyer's work is reasonably related to legal work that is performed in and has a close connection to the lawyer's home state. Specifically, the work outside the lawyer's home state would have to be on behalf of a client who is in the lawyer's home state (e.g., in the case of an individual, the client resides in the jurisdiction, or, in the case of an entity, the client has an office in the jurisdiction), or arise out of or be reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is admitted to practice law.

This "safe harbor" would address several types of work *outside* the lawyer's home state that are related to work *in* the home state. First, it would cover work that is ancillary to particular work in the home state. For example, in order to conduct negotiations on behalf of a home state client or in connection with a home state matter, the lawyer may need to meet with the client and/or other parties to the transaction outside the lawyer's home state. A client should be able to have a single lawyer conduct all aspects of a transaction, even though doing so requires traveling to different states. It is reasonable that the lawyer be one who practices law in the client's state or in a state with a connection to the legal matter that is the subject of the representation. In such circumstances, it should be sufficient to rely on the lawyer's home state as the jurisdiction with the primary responsibility to ensure that the lawyer has the requisite character and fitness to practice law; the home state has a substantial interest in ensuring that all aspects of the lawyer's work, wherever they occur, are conducted competently and professionally.

Second, this "safe harbor" would respect preexisting and ongoing client-lawyer relationships by permitting a client to retain a lawyer to work on multiple related matters. Clients who have multiple or recurring legal matters in multiple jurisdictions have an interest in retaining a single lawyer or law firm to provide legal representation in all the related matters. In general, clients are better served by having a sustained relationship with a lawyer or law firm in whom the client has confidence. Through past experience, the client can gain some assurance that the lawyer performs work competently and can work more efficiently by drawing on past experience regarding the client, its business, and its objectives. In order to retain the client's business, lawyers representing clients in multiple matters have a strong incentive to work competently, and to engage other counsel to perform work that they are not qualified to render.

To be covered by this "safe harbor", the lawyer's contact with any particular host state would have to be temporary. As the California Supreme Court Advisory Task Force noted in its preliminary report on MJP, "clients often request an out-of-state transactional or other nonlitigating lawyer to come temporarily to [a host state] to provide legal services on a discrete matter. In many circumstances, such conduct poses no significant threat to the public or the legal system, particularly where the attorney is representing a client located in another state [or] has a longstanding

relationship with the client . . . ." When a lawyer seeks to practice law regularly in a state, to open an office for the solicitation of clients, or otherwise to establish a practice in the state, however, the state has a more substantial interest in regulating the lawyer's law practice by requiring the lawyer to gain admission to the bar. Although the line between the "temporary" practice of law and the "regular" or "established" practice of law is not a bright one, the line can become clearer over time as the "safe harbor" is interpreted by courts, disciplinary authorities, committees of the bar, and other relevant authorities.

Additionally, for this "safe harbor" to apply, there must be a reasonable relationship between the lawyer's work in the host state and the lawyer's work in the home state, so that as a matter of efficiency or for other reasons, the client's interest in retaining a single lawyer should be respected. For example, if a corporate client is seeking legal advice about its environmental liability or about its employment relations in each of the twenty states in which it has plants, it is likely to be unnecessarily costly and inefficient for the client to retain twenty different lawyers. Likewise, if a corporate client is seeking to open a retail store in each of twenty states, the client may be best served by retaining a single lawyer to assist it in coordinating its efforts. In the context of determining whether work performed outside the lawyer's home state is reasonably related to the lawyer's work on a matter in the home state, as is true in the many other legal contexts in which a "reasonableness" standard is employed, some judgment must be exercised.

### **3.6 The ABA should adopt proposed Model Rule 5.5(c)(6) to allow lawyers to provide temporary services involving primarily federal law, international law, the law of a foreign nation or the law of the lawyer's home state.**

The Commission recommends that, on a temporary basis, a lawyer be permitted to render non-litigation services outside the lawyer's home state with respect to matters that primarily involve federal, international or foreign law or the law of the lawyer's home state. Federal, international and foreign law are areas that ordinarily involve special expertise; a client has an interest in retaining a specialist in federal tax, securities or antitrust law, or the law of a foreign jurisdiction, regardless of where the lawyer has been admitted to practice law. Likewise, a client has an interest in retaining a lawyer who is admitted in the jurisdiction whose law governs the particular matter and who has experience regarding that law.<sup>38</sup>

The proposal would bring the law into line with prevalent law practices. For example, many lawyers who specialize in federal law currently practice nationally, without regard to jurisdictional restrictions, which are unenforced.<sup>39</sup> The same is true of lawyers specializing in other law that applies across state lines.

### **3.7 The ABA should adopt proposed Model Rule 5.5(d)(1) to provide that it is not unauthorized practice of law for a lawyer admitted in another United States jurisdiction to render legal services in a jurisdiction in which the lawyer is not admitted, other than work for which *pro hac vice* admission is required, if the lawyer is an employee of a client or its commonly owned organizational affiliates.**

The Commission proposes that a lawyer employed by an organizational entity (e.g., an in-house corporate lawyer or a government lawyer) be permitted to represent the employer or an affiliated entity (that is, an entity controlling, controlled by, or under common control with, the lawyer's organizational employer).<sup>40</sup> This proposed "safe harbor", to be included in ABA Model

Rule 5.5, would authorize the employed lawyer to give advice to the employer-client or assist in transactions on the employer-client's behalf in jurisdictions where the lawyer does not maintain an office. This "safe harbor" would not apply, however, to appearances in judicial and agency proceedings that are subject to *pro hac vice* provisions; to participate in such proceedings, out-of-state employed lawyers, like other out-of-state lawyers, would be required to seek and obtain admission *pro hac vice*.

This proposed "safe harbor" reflects contemporary law practice that is well-accepted. Corporations and similar entities with ongoing and recurring legal issues have an interest in retaining in-house lawyers to provide legal assistance with respect to those matters, wherever they arise. In recent years, in-house corporate lawyers' work has grown increasingly national and global along with the business of corporate clients. The organization's interest in being provided legal assistance in an efficient, cost-effective and competent manner by a lawyer in whom it reposes confidence is furthered by permitting an organization to employ a lawyer to assist it with recurring matters. From a regulatory perspective, a lawyer who is employed to represent an organization on an ongoing basis poses less of a risk to the client and the public than a lawyer retained by an individual on a one-time basis, since, as the California report observed, an in-house attorney is "under the constant scrutiny of his or her employer."<sup>41</sup>

The proposed "safe harbor" would allow an out-of-state lawyer to work permanently from the office of a corporate, government or other organizational employer. This is consistent with the explicit understanding in many jurisdictions. In New Jersey, for example, established practice by an employed lawyer is authorized by opinion.<sup>42</sup> In other states, this practice is authorized by a court rule or statute that requires the employed lawyer to apply to the admissions authority and receive permission to practice to this limited extent.<sup>43</sup> Although the in-house corporate lawyer may not represent corporate officers or employees in their individual capacity, customers of the corporate employer, or other third parties, the lawyer is permitted to provide legal assistance to the corporation and its corporate affiliates (other than appearances in court) even though the lawyer is not licensed to practice law in the jurisdiction. The MJP Commission is unaware of significant regulatory concerns raised by the practice in these jurisdictions and, accordingly, recommends that ABA Model Rule 5.5 be amended to recognize this practice.

### **3.8 The ABA should adopt proposed Model Rule 5.5(d)(2) to provide that a lawyer may perform legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal law or by the law or a court rule of the jurisdiction.**

The MJP Commission recommends providing in Model Rule 5.5(d)(2) that a lawyer may perform legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal law or by the law or a court rule of the jurisdiction. Among other things, the proposed provision would make clear that in a jurisdiction that has adopted rules permitting established practice by out-of-state lawyers who serve as in-house corporate counsel, or by foreign lawyers who serve as legal consultants, a lawyer may establish a law practice in the jurisdiction as permitted by such a rule.

Because it is axiomatic that a lawyer may perform work when authorized by federal law to do so, the Ethics 2000 Commission initially proposed relegating a provision to this effect to a Comment to Model Rule 5.5. However, the MJP Commission has been told that it is important to lawyers who perform such work that this provision be codified, because at times they have been

threatened with sanction for violating state UPL laws. Although this qualification of jurisdictional restrictions would apparently apply to federal prosecutors and federal patent attorneys, among others, the MJP Commission has not undertaken to identify every federal law that authorizes particular work and thereby may preempt state UPL laws.<sup>44</sup> Nor has the Commission attempted to identify every state law that specifically authorizes out-of-state lawyers to render particular legal services in the state as an exception to the state's general UPL restriction.

**3.9 The ABA should adopt proposed Model Rule 5.5(e) to prohibit a lawyer from establishing an office, maintaining a continuous presence, or holding himself or herself out as authorized to practice law in a jurisdiction in which the lawyer is not admitted, unless permitted to do so by law or this rule.**

No proposed "safe harbor" would authorize lawyers to open an office or otherwise establish a permanent law practice in states where they are not licensed or otherwise authorized to do so. Nor would the "safe harbors" permit lawyers to hold themselves out as licensed to practice law in jurisdictions where they are not in fact licensed. The Commission recommends including provisions in Model Rule 5.5 to make these limitations clear. As discussed below, the Commission has developed a separate recommendation on "Admission on Motion" directed at lawyers seeking to establish a practice in jurisdictions where they are not licensed to practice law. (*See* Recommendation 4.)

## Recommendation 4

### Admission on Motion

**The ABA should endorse a model "admission on motion" rule consistent with the one proposed by the ABA Section of Legal Education and Admissions to the Bar to facilitate the licensing of a lawyer by a host state if the lawyer has been engaged in active law practice in other United States jurisdictions for a significant period of time.**

At one time, lawyers tended to maintain their law offices in a single jurisdiction over the course of their entire legal careers because of the local nature of law practice. Today, in contrast, geographic mobility is unexceptional. Lawyers move from one state to another in order to continue to serve clients who are relocating or to better serve clients that function outside the state, for personal reasons, for career advancement, or for a host of other reasons. Lawyers change law firms or employers, or simply reestablish their individual practices in different jurisdictions. Lawyers in large law firms move from one office of their firm to another. Lawyers employed by corporations move from one corporate office to another.

Jurisdictional restrictions impede national and international mobility, because in many cases the process for admitting lawyers to practice law in a new jurisdiction is lengthy, expensive and burdensome. Some states subject a lawyer who is already licensed and experienced in legal practice to the process designed for admitting new law school graduates: The practicing lawyer is required to take the state bar examination and, upon receiving a passing grade, to undergo character review.

Although the primary concern in the submissions to the Commission has been the application of UPL restrictions to United States lawyers' occasional practice in jurisdictions where they do not maintain an office, the Commission has also received submissions focusing on the difficulty of establishing a law practice in a new jurisdiction.

A number of states facilitate the admission of experienced lawyers who are moving their law practice by allowing them to gain admission to the state bar without sitting for the state bar examination, if they demonstrate that they have been in active law practice in another jurisdiction for a specified period of time and are members in good standing of the other jurisdiction's bar.<sup>45</sup> The admission on motion processes in these states recognize the reality that lawyers who have been admitted to another state's bar and have practiced actively for a significant period of time without disciplinary sanction are qualified to establish a law practice in the new state, and that, for experienced lawyers, the bar examination therefore serves as an unnecessary obstacle to establishing a practice in the new state. This is particularly true because, with the advent of multistate bar examinations, most bar examinations have become increasingly less distinctive and less focused on the idiosyncrasies of individual states' law. There is nothing to suggest that in states with admission on motion, particular regulatory problems are disproportionately presented by lawyers who gain admission by this process.

Further, as urged by the ABA Section of Legal Education and Admissions to the Bar, it is worthwhile to attempt to distill and standardize the criteria used by states that employ streamlined admissions processes. Accordingly, the Commission recommends that the ABA adopt a *Model Motion Rule*, consistent with the one developed by the ABA Section of Legal Education and Admissions to the Bar. (See Appendix K.) It should be understood that admission on motion is not

an alternative to "safe harbors", since no lawyer can realistically be admitted to every state bar, even on motion. The motion rules are directed at those lawyers who expect to relocate their practices or to practice regularly in two or more jurisdictions.

## Recommendation 5

### Foreign Legal Consultants

**The ABA should encourage jurisdictions that have not adopted a foreign legal consultant rule to do so consistent with ABA policy.**

In 1993, the ABA House of Delegates approved the *Model Rule for the Licensing of Legal Consultants*, which addresses the work of foreign lawyers in United States jurisdictions.<sup>46</sup> The proposal responded, in part, to the concern of foreign lawyers that, while American lawyers enjoyed a broad right of practice in other countries (or sought such a right in countries that did not afford it), foreign lawyers generally could not engage in the practice of law in the United States, even if limited to advising on the law of their own countries, without attending an accredited American law school, sitting for the bar examination and becoming a full member of the bar. The ABA identified both a need for a streamlined admissions process for foreign lawyers seeking to provide limited services and a need for greater uniformity.

Many states have not adopted either the ABA's Model Rule or an alternative provision for licensing foreign legal consultants. The experience of those states that have done so does not disclose regulatory problems resulting from licensing foreign legal consultants. Therefore, the Commission recommends that the ABA renew its support for foreign legal consultant provisions by encouraging states that have not done yet so to adopt the ABA Model Rule.

**5.1 The ABA should amend either its *Model Rule for the Licensing of Legal Consultants* or Rule 5.5 of the *Model Rules of Professional Conduct* to identify circumstances where it is not unauthorized practice of law for a lawyer admitted in a non-United States jurisdiction to perform services for a client in a United States jurisdiction.**

At present, no rules address temporary work performed in the United States by foreign lawyers. The *Model Rule for the Licensing of Legal Consultants* focuses on work performed on a regular or established basis by foreign lawyers. The streamlined admissions process established by the rule is not practical for foreign lawyers who perform services in the United States on only 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 the United States to meet other parties to the transaction and their lawyers or to review documents. Or a foreign lawyer conducting litigation in the lawyer's home country may come to the United States to meet with witnesses. While it is not feasible for foreign lawyers in circumstances such as these to seek admission as legal consultants, it should nevertheless be permissible for them to provide these temporary and limited services.

There is therefore a need for United States jurisdictions to identify by rule those circumstances where it is not the unauthorized practice of law for a lawyer admitted in a non-United States jurisdiction to perform services on a temporary basis for a client in a United States jurisdiction. The Commission is uncertain, however, whether the provision should be included in the *Model Rule for the Licensing of Legal Consultants* or whether it should be included in Model Rule 5.5 of the *Model Rules of Professional Conduct*. The Commission specifically seeks input on this question. The substance of the MJP Commission's proposed rule is reflected in Appendix L.

## Recommendation 6

### *Pro Hac Vice Admission*

**The ABA should endorse a model *pro hac vice* rule consistent with the one under development by the ABA Section of Litigation, the ABA Section of Torts and Insurance Practice and the International Association of Defense Counsel, to govern the admission of lawyers to practice before state courts and government agencies *pro hac vice* in jurisdictions in which the lawyers are not licensed.**

As noted, every jurisdiction allows out-of-state lawyers to seek authorization to appear in a particular judicial proceeding *pro hac vice*; many administrative agencies also provide for limited admission of out-of-state lawyers. Typically, the process does not allow out-of-state lawyers to practice regularly in the jurisdiction, requires that the applicant attest to knowledge of and compliance with local rules of conduct and practice, and requires participation of a sponsoring or local counsel.

The ABA Section of Litigation has reported to the Commission that "generally the *pro hac vice* procedure is an adequate method for oversight of attorneys who appear and render legal services in pending litigation outside the states where licensed," but that "[a] more uniform *pro hac vice* procedure . . . would be strongly preferable to the disparate requirements now in place." The International Association of Defense Counsel (IADC) has expressed a similar view, and has advocated that the ABA adopt its draft *Model Rule on Pro Hac Vice*. (See Appendix M.) Since then, representatives of the ABA Section of Litigation, the IADC, and the ABA Section of Torts and Insurance Practice have been collaborating to refine the initial proposal. The Commission supports the effort to develop a model *pro hac vice* rule for the ABA to recommend to state supreme courts for their adoption. Lawyers who appear on behalf of clients in courts of different states, and their clients, would benefit both from the elimination of unduly restrictive provisions that exist in a handful of states and from increased consistency of practice from state to state.

**6.1 With respect to *pro hac vice* admission in federal district court, the ABA should renew its support, in accordance with ABA policy adopted in 1995, for "efforts to lower barriers to practice before U.S. District Courts based on state bar membership by eliminating state bar membership requirements in cases in U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules."**

With respect to *pro hac vice* admission in federal district court proceedings, the Commission recommends that the ABA renew its efforts to implement its recommendation adopted in 1995, which provides "[t]hat the American Bar Association supports efforts to lower barriers to practice before U.S. District Courts based on state bar membership by eliminating the state bar membership requirements in cases in U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules." The 1995 recommendation responded to the concern that, given the global nature of contemporary law practice, restricting the privilege to practice before a U.S. District Court to lawyers who are admitted to the state bar in which the district is located was unduly burdensome. In particular, it was urged, such a requirement inhibits competition, restricts lawyers from representing clients without incurring the substantial cost of local counsel and drives up costs to clients.

## Recommendation 7

### Disciplinary Enforcement and Reciprocal Discipline

**The ABA should amend Rule 8.5 of the Model Rules of Professional Conduct (Disciplinary Authority; Choice of Law), and adopt and promote other measures to enhance professional regulation and disciplinary enforcement with respect to lawyers who, pursuant to the above recommendations, practice law in jurisdictions other than those in which they are licensed.**

It is important that state regulatory authorities acknowledge the increasing prevalence of cross-border law practice and respond appropriately. Allowances must be made for effectively regulating lawyers who practice law outside the states in which they are licensed. Sanctions must be available both against lawyers who do unauthorized work outside their home states and against those who violate rules of professional conduct when they engage in otherwise permissible interstate law practice. The Commission's preliminary recommendations identify a series of appropriate improvements to the state regulatory processes: first, that lawyers should be subject to sanction in the jurisdictions where they commit misconduct, even when they are not licensed in these jurisdictions; second, that the jurisdictions in which a lawyer is licensed should respect the disciplinary decisions of other United States jurisdictions; and, third, that the ABA promote national registration and the use of its National Lawyer Regulatory Data Bank. Each of these recommendations is consistent with established ABA policy.

#### **7.1 The ABA should amend Rule 8.5 of the *Model Rules of Professional Conduct* in order to better address multijurisdictional law practice.**

The MJP Commission endorses the addition to ABA Model Rule 8.5(a) proposed by the Ethics 2000 Commission to better address multijurisdictional law practice. The addition would provide that: "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer renders or offers to render any legal services in this jurisdiction." The proposal is consistent with existing ABA policy, as embodied in Rule 6 of the *ABA Model Rules for Lawyer Disciplinary Enforcement*. As the Ethics 2000 Commission has noted, "this is an appropriate Rule to adopt in the Model Rules of Professional Conduct, given that a jurisdiction in which a lawyer is not admitted may be the one most interested in disciplining the lawyer for improper conduct." As a further enhancement to this Rule, the Commission recommends that the following statement be added to the end of Comment [1]: "Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See Rules 6 and 22, *Model Rules for Lawyer Disciplinary Enforcement*." (See Appendix N.)

#### **7.2 The ABA should amend the Rules 6 and 22 of the *Model Rules of Disciplinary Enforcement* to promote effective disciplinary enforcement when lawyers engage in multijurisdictional practice of law and should renew efforts to encourage states to adopt Rule 22, which provides for reciprocal discipline.**

Effective regulation of lawyers engaged in law practice in multiple jurisdictions requires that they be subject to meaningful sanctions for misconduct committed outside the jurisdictions in which they are licensed. As discussed above, a jurisdiction should be able to discipline a lawyer for misconduct that occurred in the jurisdiction, even though the lawyer is licensed only in another jurisdiction. However, the host jurisdiction has a limited array of sanctions at its disposal. Few

jurisdictions provide for sanctions, such as fines, that would allow for disciplining out-of-state lawyers other than by restricting their right to practice law in the particular jurisdiction. The host jurisdiction may suspend or disbar the lawyer from practicing in that particular jurisdiction, but doing so would not in itself deprive the lawyer of the right to practice law in the lawyer's home jurisdiction or in other jurisdictions. Only the judiciary in the lawyer's home jurisdiction can suspend or disbar the lawyer from practicing law in that jurisdiction. Effective discipline therefore requires that, when a lawyer engages in misconduct outside the jurisdiction in which the lawyer is licensed, the lawyer be sanctioned appropriately in the jurisdiction in which the lawyer is licensed to practice law.

To address this problem, Rule 22 of the *ABA Model Rules for Lawyer Disciplinary Enforcement* would require a jurisdiction in which a lawyer is licensed generally to accept and reciprocally enforce another jurisdiction's disciplinary decision. Reciprocal enforcement promotes the regulatory interest in ensuring that, when a lawyer practicing in multiple jurisdictions is found by a host jurisdiction to have engaged in sanctionable misconduct, a meaningful sanction will be imposed. The MJP Commission recommends that the ABA renew its efforts to encourage all states to adopt this requirement.

Further, the MJP Commission recommends that the ABA amend the *Model Rules for Lawyers Disciplinary Enforcement* in several ways to clarify their application to lawyers engaged in multijurisdictional practice and to ensure that such lawyers are subject to effective disciplinary enforcement when they engage in disciplinary misconduct in jurisdictions in which they are not licensed to practice law. Rule 6 defines which lawyers are subject to the disciplinary jurisdiction of the highest court in the state. Rule 6 should be amended by removing the brackets around the following language: [, and any lawyer not admitted in this state who practices law or renders or offers to render any legal services in this state]. This change would clarify that the provisions of Rule 6 apply not only to lawyers admitted in the jurisdiction but also to lawyers not admitted in the jurisdiction but who are practicing law in the jurisdiction on a temporary basis. Rule 22, which specifically addresses reciprocal discipline, should be amended to make it clear that reciprocal discipline is to be imposed based upon the record created by the jurisdiction which imposed the discipline. Further, in light of its public policy, the home jurisdiction may impose a different disciplinary sanction from that imposed by the host jurisdiction. The proposed amendments to Rules 6 and 22 of the *Model Rules for Lawyer Disciplinary Enforcement* are reflected in Appendix O.

### **7.3 The ABA should take steps to promote interstate disciplinary enforcement mechanisms.**

The 1992 McKay Report, in a section titled "Improving Interstate Enforcement," identified the need to enhance the ABA National Lawyer Regulatory Data Bank, which is a national clearinghouse for information about lawyers publicly disciplined for misconduct. The Data Bank was intended to facilitate the imposition of reciprocal discipline and to deter lawyers who are suspended or disbarred in one state from practicing in another state. The report noted, however, that the effectiveness of the Data Bank had been greatly reduced, in large part, because "of lawyers practicing in more than one jurisdiction," and that "[a]s the interstate practice of law continues to grow, the need for the National Discipline Data Bank increases." The report made two specific recommendations: that the Data Bank be funded adequately to automate the dissemination of reciprocal discipline information, and that the ABA and regulatory officials in each jurisdiction establish a system of assigning a universal identification number to each lawyer licensed to practice

law.

Over the past decade, as the number of lawyers has increased and the interstate practice of law has become even more prevalent, the need to improve interstate enforcement has grown. The Commission therefore recommends that the ABA undertake renewed efforts, in conjunction with the National Organization of Bar Counsel and other appropriate entities, to encourage the adoption of the International Standard Lawyer Numbers system and the universal use of the National Lawyer Regulatory Data Bank.

Specifically, the ABA should renew its efforts to encourage states to implement Recommendation 21.2 of the McKay Report, which provides: "The highest court in each jurisdiction should require all lawyers licensed in the jurisdiction to (a) register annually with the agency designated by the Court stating all other jurisdictions in which they are licensed to practice law, and (b) immediately report to the agency designated by the Court changes of law license status in other jurisdictions such as admission to practice, discipline imposed, or resignation." Additionally, the ABA should provide adequate technological support to permit direct on-line reporting to the ABA National Lawyer Regulatory Data Bank of public regulatory actions involving lawyers' licenses by reporting agents designated by each jurisdiction's highest court. Finally, the ABA should provide adequate technological support to make available on its Website selected public information from the National Lawyer Regulatory Data Bank, such as the lawyer's name, date of birth, and registration/identification number, regulatory actions involving the lawyer's license, and links to state websites containing lawyer regulatory data.

## **Recommendation 8**

### **Coordinating Committee on Multijurisdictional Practice**

**The ABA should establish a Coordinating Committee on Multijurisdictional Practice to monitor changes in law practice and the impact of regulatory reform, and to identify additional reform that may be needed.**

Regardless of what recommendations are ultimately adopted by the ABA to address the multijurisdictional practice of law, there will be a need to promote the recommendations, to encourage their implementation, to study the effect of their implementation and to monitor other changes relevant to multijurisdictional practice, and perhaps to recommend additional reform. These will be significant tasks. Aside from this Commission, there is no entity of the ABA that would be specifically dedicated to it. Therefore, the Commission recommends that, after its work is completed, the ABA establish a Coordinating Committee on Multijurisdictional Practice, within the ABA Center for Professional Responsibility, to coordinate the continued study of the multijurisdictional practice of law and make recommendations as appropriate relating to this practice.

## **CONCLUSION**

The MJP Commission plans to issue a final report in May, 2002, for consideration by the ABA House of Delegates at its annual meeting in August of 2002. To do so, it is critical for the Commission to receive timely comments and responses to the preliminary recommendations described in this Interim Report. Although the Commission will review responses whenever they are received, the Commission strongly urges entities and individuals to make their submissions by March 15, 2002, so that the Commission has adequate time in which to give the submissions the full consideration they deserve before deciding whether to adopt, modify, supplant or augment its initial views.

## ENDNOTES

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<sup>1</sup> The Commission's charge ([http://www.abanet.org/cpr/mjp-mission\\_statement.html](http://www.abanet.org/cpr/mjp-mission_statement.html)) is appended to this report at Appendix A. A roster of its members ([http://www.abanet.org/cpr/mjp-comm\\_members.html](http://www.abanet.org/cpr/mjp-comm_members.html)) is at Appendix B.

<sup>2</sup> For a collection of different jurisdictions' *pro hac vice* provisions, see [http://www.crossingthebar.com/pro\\_hac\\_vice.htm](http://www.crossingthebar.com/pro_hac_vice.htm).

<sup>3</sup> See notes 19 – 23 and accompanying text, *infra*.

<sup>4</sup> Bruce A. Green, "Assisting Clients with Multi-State and Interstate Legal Problems: The Need to Bring the Professional Regulation of Lawyers into the 21<sup>st</sup> Century" (June 2000), [http://www.abanet.org/cpr/mjp-bruce\\_green\\_report.html](http://www.abanet.org/cpr/mjp-bruce_green_report.html).

<sup>5</sup> A list of the Commission's public hearings is appended to this report at Appendix C.

<sup>6</sup> A list of meetings and programs attended by Commissioners is included in Appendix D.

<sup>7</sup> A selected bibliography is appended to this report at Appendix E. See <http://www.abanet.org/cpr/mjp-bibliography.html>.

<sup>8</sup> A list of those who made written submissions to the Commission are appended to this report at Appendix F; a list of those who offered oral testimony is included as Appendix G.

<sup>9</sup> California Supreme Court Advisory Task Force on Multijurisdictional Practice, Preliminary Report and Recommendations (Aug. 1, 2001), [http://www.abanet.org/cpr/mjp-comm\\_csc.doc](http://www.abanet.org/cpr/mjp-comm_csc.doc); Report of the Missouri Bar Committee on Multi-jurisdictional Practice to the American Bar Association Commission on Multijurisdictional Practice (July 20, 2001), [http://www.abanet.org/cpr/mjp-comm\\_mba.html](http://www.abanet.org/cpr/mjp-comm_mba.html); New Jersey State Bar Association Committee on Multijurisdictional Practice, Preliminary Report and Recommendations (June 25, 2001), [http://www.abanet.org/cpr/mjp-comm\\_njsba.html](http://www.abanet.org/cpr/mjp-comm_njsba.html); Report to the Board of Governors, Future of the Legal Profession Study Group, Washington State Bar Association (July 2001), [http://www.abanet.org/cpr/mjp-comm\\_washba.doc](http://www.abanet.org/cpr/mjp-comm_washba.doc).

<sup>10</sup> The website is <http://www.abanet.org/cpr/mjp-home.html>.

<sup>11</sup> The listserv is [MJP-GENERAL@MAIL.ABANET.ORG](mailto:MJP-GENERAL@MAIL.ABANET.ORG).

<sup>12</sup> In virtually every state, the state's highest court oversees the licensing process. The exception is New York, where the four intermediate appellate courts are responsible for admission to practice law as well as lawyer discipline.

<sup>13</sup> For ease of reference, this report refers to "states" to include both states and the District of Columbia.

<sup>14</sup> Wisconsin SCR 40.03.

<sup>15</sup> Standardized examinations are produced by the National Conference of Bar Examinations (NCBE). At present, 52 jurisdictions employ the Multistate Professional Responsibility

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Examination (MPRE); 53 jurisdictions employ the Multistate Bar Examination (MBE), a standardized multiple-choice examination that covers six core subjects; 15 jurisdictions employ the Multistate Essay Examination (MEE), a standardized essay examination that covers ten subjects; and 27 jurisdictions employ the Multistate Performance Test (MPT), a standardized lawyer-skills examination. Five jurisdictions—Nebraska, North Dakota, South Dakota, Washington, D.C., and West Virginia—use only NCBE examinations; all others include some multiple choice or essay questions of their own. (Jurisdictions include the fifty states, the District of Columbia, and the following territories: Guam, Northern Mariana Islands, the Republic of Palau and the Virgin Islands.)

<sup>16</sup> See note 45, *infra*.

<sup>17</sup> Or. Rev. Stat. sec 9.080, subsection 2.

<sup>18</sup> See Recommendations 20 (National Discipline Data Bank) and 21 (Coordinating Interstate Identification).

<sup>19</sup> Mich. Comp. Law Ann. sec. 600.916.

<sup>20</sup> Va. State Bar Rule, Pt. 6, sec 1(C).

<sup>21</sup> Rule 983.4, California Rules of Court. Among the California "safe harbors" is an additional one authorizing a judge advocate who is admitted in another United States jurisdiction to appear on behalf of an individual in military service.

<sup>22</sup> See, e.g., *In the Matter of Opinion 33 of the Committee on the Unauthorized Practice of Law*, 733 A.2d 478 (N.J. 1999)(authorizing work by out-of-state bond lawyers).

<sup>23</sup> See, e.g., Fla. Ct. R. ch 17 (counsel exclusively employed by a business organization may relocate to Florida, without taking bar exam, upon annual registration with The Florida Bar, including annual fee, and sworn statement submitting to the Supreme Court of Florida for disciplinary purposes); Idaho Bar Commission Rule 220 (house counsel license available for lawyers licensed in other jurisdictions who "limit their professional activities to internal counseling and practice limited to the business of his or her employer," subject to \$640 fee, submission to Idaho disciplinary rules, and annual renewal); Kan. Sup. Ct. R. 706 (special temporary permit granted to out-of-state lawyer receiving entire compensation from employer upon verified petition including written certification from employer); Ky. Ct. R. 2.11 (limited certificate of admission for counsel performing legal services solely for employer, subject to all obligations of admitted members of Kentucky Bar Association, upon signed statement by employer, application fee of \$1000 plus current annual dues or fees of the Kentucky Bar Association); Mich. Bd. of L. Examiners R. 5 (special certificate available for institutional lawyer licensed for 3 of 5 years preceding application, character report and payment of fees required); Minn. Ct. Admission to Bar R. 9 (temporary license limited to 12 months for in-house counsel employed solely for a single organization, available upon employer affidavit, character and fitness investigation, and fee); Mo. Sup. Ct. R. 8.105 (limited license valid for five years available for employed lawyer upon application with affidavit from employer, character and fitness report, and application fee); Ohio Gov. Bar R. VI section 4 (lawyer employed full-time by a nongovernmental Ohio employer may be granted "corporate status" upon filing a Certificate of

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Registration and paying fee; may be renewed biennially as long as attorney is so employed); OK State Bar Rule Article 2, Section 5 (special temporary permit without examination for lawyer who becomes a resident of Oklahoma in order to accept or continue full-time employment; application must include various certificates, including from employer); Oregon Admission Rule 16.05(effective Nov. 1, 2001)(lawyer employed by business entity may apply for admission as house counsel upon application, including affidavit signed by applicant and business entity, application fees, annual and other fees required of active members of the Oregon State Bar, investigation of applicant, passing of the Professional Responsibility Examination, and submission to Oregon rules governing admitted attorneys); S. C. Sup. Ct. Rule 405(limited certificate of admission to practice available for lawyer who “performs most of his duties for the business employer in South Carolina and has his principal office in South Carolina” upon application accompanied by \$100 fee and statement signed by employer; lawyer is subject to all duties and obligations of active member of the South Carolina Bar); Washington Court Rules APR 8(f)(limited license for in-house counsel available if lawyer is employed in Washington, exclusively for business entity, upon application with affidavit of employer, application fees, and current year’s annual membership fee; lawyer must pass the Professional Responsibility exam, and be subject to rules governing lawyers.)

For a canvass of corporate admission rule status in all states, *see* <http://www.acca.com/v1/barad/chart.html>.

<sup>24</sup> Recent decisions applying UPL restrictions include: *Z.A. v. San Bruno Park School Dist.*, 165 F.3d 1273 (9<sup>th</sup> Cir. 1998) (California UPL law held to forbid out-of-state lawyer from providing legal assistance, as distinguished from lay advice, in connection with state administrative proceeding); *In re: Desilets*, 247 B.R. 660 (Bankr., W.D. Mich. 2000) (finding that Texas attorney engaged in UPL by attempting to operate a bankruptcy practice in Michigan based on his *pro hac vice* admission to the federal courts); *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Ca. 1998) (denying portion of fee to New York law firm that represented New York and California clients in connection with California arbitration); *Koscove v. Bolte*, 2001 WL 125900, 2001 Colo. App. LEXIS 290 (Colo. Ct. App. 2001) (finding that Wisconsin lawyer engaged in UPL in Colorado by investigating and pursuing client’s claim for royalty payments and assisting in contemplated lawsuit, prior to being admitted *pro hac vice*); *Torrey v. Leesburg Regional Medical Center*, 769 So. 2d 11040 (Fla. 2000) (finding that Michigan lawyer engaged in UPL by filing civil complaint in Florida, where other members of his firm were licensed but he was not); *Attorney Grievance Commission of Maryland v. Harris-Smith*, 737 A.2d 567 (Md. 1999) (finding that attorney admitted in three other states engaged in UPL in Maryland by practicing for three years in Maryland law firm, where she screened cases for her federal bankruptcy court practice); *In re Jackman*, 761 A.2d 1103 (N.J. 2000) (finding that lawyer admitted in Massachusetts engaged in UPL for seven years by serving as an associate in a New Jersey law firm and, in that role, working on transactional matters in which he interviewed and counseled clients, prepared and signed documents, and negotiated with other lawyers); *Office of Disciplinary Counsel v. Pavlik*, 732 N.E.2d 985 (Ohio 2000) (sanctioning Ohio lawyer for aiding and abetting UPL by Illinois lawyer whom he hired to assist his law firm’s corporate clients as a business broker and financial consultant).

For a review of decisions on the application of UPL provisions to out-of-state lawyers, *see* William T. Barker, *Extrajudicial Practice by Lawyers*, 56 BUS LAW 1501(August, 2001).

<sup>25</sup> *In re Snyder*, 472 U.S. 634, 645 (1985).

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<sup>26</sup> See generally Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?* 34 Int'l Law 307 (Spring, 2000); D. Bruce Shine, *The European Union's Lack of Internal Borders in the Practice of Law. A Model for the United States?*; The Law Society of England and Wales, *The Experience of the Law Society of England and Wales*, (draft submitted to MJP Commission June 2001), testimony of Jonathan Goldsmith, Law Society of England and Wales, MJP Commission Hearing transcript of August 3, 2001 at 104, [http://www.abanet.org/cpr/mjp-trans\\_chicago.doc](http://www.abanet.org/cpr/mjp-trans_chicago.doc); testimony of Dr. Rupert Wolff, Council of the Bars and Law Societies of the European Union, MJP Commission Hearing transcript of August 3, 2001 at 117, [http://www.abanet.org/cpr/mjp-trans\\_chicago.doc](http://www.abanet.org/cpr/mjp-trans_chicago.doc); cf. Laurel Terry, Memorandum (May 2001), [http://www.abanet.org/cpr/mjp-comm\\_terry.doc](http://www.abanet.org/cpr/mjp-comm_terry.doc); for Terry charts analyzing various global MJP schemes, click on [http://www.abanet.org/cpr/mjp-written\\_comments.html](http://www.abanet.org/cpr/mjp-written_comments.html)); The Law Society of Alberta, *"Should We Build Walls or Gates?"* (February, 2001), [http://www.abanet.org/cpr/mjp-comm\\_lsa.html](http://www.abanet.org/cpr/mjp-comm_lsa.html) (offers Canada's reciprocal protocol as a model for achieving greater inter-jurisdictional mobility.)

<sup>27</sup> Association of Professional Responsibility Lawyers (APRL), Proposal to the American Bar Association Commission on Multijurisdictional Practice (February, 2001)(first tier of proposal suggests decriminalizing the purely temporary presence of out-of-state lawyers); The Association of the Bar of the City of New York, Statement of Evan A. Davis, President, before the ABA Commission on Multijurisdictional Practice (March 30, 2001), [http://www.abanet.org/cpr/mjp-comm\\_bacny.html](http://www.abanet.org/cpr/mjp-comm_bacny.html).

<sup>28</sup> See American Corporate Counsel Association ("ACCA"), Memorandum dated February 16, 2001 to ABA Commission on Multijurisdictional Practice, [http://www.abanet.org/cpr/mjp-mcguckin\\_witness.html](http://www.abanet.org/cpr/mjp-mcguckin_witness.html). Under this proposed arrangement, states would retain control over lawyer admission, discipline, and other practice requirements such as those relating to CLE, *pro bono* work, participation in Interest on Lawyers' Trust Accounts (IOLTA) programs and professional liability insurance.

<sup>29</sup> See The Association of Professional Responsibility Lawyers ("APRL"), Proposal to the ABA Commission on Multijurisdictional Practice (February, 2001), [http://www.abanet.org/cpr/mjp-comm\\_aprl.html](http://www.abanet.org/cpr/mjp-comm_aprl.html). This proposed model would include various requirements: Three years' prior admission to a U.S. jurisdiction; a certificate of good standing from the home jurisdiction; statements of two sponsors affirming the applicant's character and fitness; certification that the lawyer has read the state's ethics rules; a registration fee of \$500 or more, as well as annual fees; annual certification that the lawyer remains in good standing in other jurisdictions where admitted; appearance with local co-counsel in court unless permitted otherwise under existing *pro hac vice* rules. In this model, registered lawyers would be subject to the jurisdiction of the host state's disciplinary agency and the state's character and fitness authority would have the right to review and object to any applicant.

<sup>30</sup> See Joint Proposal of The Association of Corporate Counsel of America (ACCA), The Association of Professional Responsibility Lawyers (APRL), The National Organization of Bar Counsel (NOBC), *"A Common Sense Proposal for Multijurisdictional Practice."* (October 29, 2001). The proposal is appended to this report at Appendix I.

<sup>31</sup> See, e.g., ABA Section of Litigation, Preliminary Position Statement on Multi-Jurisdictional

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Practice (June, 2001) [http://www.abanet.org/cpr/mjp-comm\\_sl.html](http://www.abanet.org/cpr/mjp-comm_sl.html); Akron Bar Association, Written Testimony On Behalf of the Akron Bar Association Re: Multijurisdictional Practice (Feb. 5, 2001), [http://www.abanet.org/cpr/mjp-comm\\_akronba.html](http://www.abanet.org/cpr/mjp-comm_akronba.html); California Supreme Court Advisory Task Force on Multijurisdictional Practice, Preliminary Report and Recommendations (Aug. 19, 2001), [http://www.abanet.org/cpr/mjp-comm\\_csc.doc](http://www.abanet.org/cpr/mjp-comm_csc.doc); Camden County Bar Association ad hoc Committee on Multi-jurisdictional Practice, (letter dated April 14, 2001), [http://www.abanet.org/cpr/mjp-comm\\_ccba.html](http://www.abanet.org/cpr/mjp-comm_ccba.html); Delaware State Bar Association, Report of the Multijurisdictional Practice Special Committee, (April 23, 2001); Louisiana State Bar Association, Special Committee on Multijurisdictional Practice, Preliminary Report, [http://www.abanet.org/cpr/mjp-comm\\_lsba.html](http://www.abanet.org/cpr/mjp-comm_lsba.html); Nebraska State Bar Association Memorandum (May 11, 2001), [http://www.abanet.org/cpr/mjp-comm\\_nsba.doc](http://www.abanet.org/cpr/mjp-comm_nsba.doc); Nevada State Bar Commission on MJP Memorandum to ABA Commission on Multijurisdictional Practice (June 21, 2001), [http://www.abanet.org/cpr/mjp-comm\\_nsba.html](http://www.abanet.org/cpr/mjp-comm_nsba.html); New Jersey State Bar Association, Committee on Multijurisdictional Practice, Preliminary Report and Recommendations (June 25, 2001), [http://www.abanet.org/cpr/mjp-comm\\_njsba.html](http://www.abanet.org/cpr/mjp-comm_njsba.html).

<sup>32</sup> See, e.g., *Matter of Stambulis*, No. 022701294 (Ill. Sup. Ct. 2001) (Illinois lawyer suspended for, *inter alia*, engaging in UPL by assisting at least 100 clients in more than a half dozen different states in the preparation of trust documents, at least some of which were not properly prepared in accordance with the law of the client's state).

<sup>33</sup> Many entities offering comments to the Commission have urged liberalizing restrictions. See, e.g., ABA Section of Antitrust Law, Memorandum to ABA Commission on Multijurisdictional Practice (Jan. 22, 2001), [http://www.abanet.org/cpr/mjp-comm\\_sal.html](http://www.abanet.org/cpr/mjp-comm_sal.html); ABA Section of Business Law, Position Statement on Multijurisdictional Practice, (as adopted by the Council on Jan. 14, 2001), [http://www.abanet.org/cpr/mjp-comm\\_sbl.html](http://www.abanet.org/cpr/mjp-comm_sbl.html); Federal Communications Bar Association (FCBA), Statement for Delivery by Henry M. Rivera at the San Diego Hearing of the ABA Commission on Multijurisdictional Practice (Feb. 17, 2001), [http://www.abanet.org/cpr/mjp-comm\\_fcba.html](http://www.abanet.org/cpr/mjp-comm_fcba.html); ABA Law Student Division, Resolution (Aug. 3, 2001), [http://www.abanet.org/cpr/mjp-comm\\_lsd.doc](http://www.abanet.org/cpr/mjp-comm_lsd.doc); American College of Real Estate Lawyers (ACREL), Position Statement to the American Bar Association Commission on Multijurisdictional Practice (June 2001), [http://www.abanet.org/cpr/mjp-comm\\_acrel.html](http://www.abanet.org/cpr/mjp-comm_acrel.html); ABA Section of Real Property, Probate and Trust Law, Comments on Multi-jurisdictional Practice (Jan. 23, 2001), [http://www.abanet.org/cpr/mjp-comm\\_srppt.html](http://www.abanet.org/cpr/mjp-comm_srppt.html) & Supplemental Comments on Multijurisdictional Practice (June 29, 2001), [http://www.abanet.org/cpr/mjp-comm\\_srppt2.html](http://www.abanet.org/cpr/mjp-comm_srppt2.html); ABA Senior Lawyers Division, Resolution (April 21, 2001), [http://www.abanet.org/cpr/mjp-comm\\_sld.html](http://www.abanet.org/cpr/mjp-comm_sld.html); ABA Standing Committee on Solo and Small Firm Practitioners, Memorandum to the ABA Commission on Multijurisdictional Practice (Aug. 16, 2001) [http://www.abanet.org/cpr/mjp-comm\\_solo.doc](http://www.abanet.org/cpr/mjp-comm_solo.doc).

<sup>34</sup> See, e.g., South Car. Advisory Op. 93-35 (1993).

<sup>35</sup> That is, if permitted to assist clients at all, out-of-state lawyers may not provide assistance with the promise of confidentiality protected by the attorney-client privilege, but will be treated as non-lawyers, at least for certain purposes. See, e.g., *Z.A. v. San Bruno Park School Dist.*, 165 F.3d 1273 (9<sup>th</sup> Cir. 1998).

<sup>36</sup> See American Arbitration Association (AAA), Letter to the ABA Commission on Multijurisdictional Practice, (June 15, 2001), [http://www.abanet.org/cpr/mjp-comm\\_aaa.html](http://www.abanet.org/cpr/mjp-comm_aaa.html).

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<sup>37</sup> ABA Section of Litigation, Preliminary Position Statement on Multi-jurisdictional Practice (June, 2001) at 24, [http://www.abanet.org/cpr/mjp-comm\\_sl.html](http://www.abanet.org/cpr/mjp-comm_sl.html).

<sup>38</sup> The ABA Section of Intellectual Property Law comments that "...our expertise in intellectual property law and in the subject matter, often combined with knowledge of a client's business, is the overriding reason our clients retain us.... In fact, our clients frequently place a greater value on our expertise than on our location, retaining us even though we do not have an office in any state where they do business. Such clients are seeking uniform, well-informed and efficiently rendered advice regardless of state lines, and they do not want to hire multiple lawyers for multiple states." ABA Section of Intellectual Property Law, Memorandum to the ABA Commission on Multijurisdictional Practice (Feb. 2, 2001) at 2, [http://www.abanet.org/cpr/mjp-comm\\_silp.html](http://www.abanet.org/cpr/mjp-comm_silp.html).

<sup>39</sup> For example, according to the ABA Section of Health Law, "[R]egardless of geographic bar admission, many lawyers concentrating in health law effectively already practice on a national basis: the Federal law of Medicare, Medicaid and Federal health care reimbursement is interpreted, analyzed and applied by health lawyers nation-wide, usually without reference to the individual attorney's bar admissions." ABA Section of Health Law, Position Statement on Multijurisdictional Practice, at 1 (June 29, 2001), [http://www.abanet.org/cpr/mjp-comm\\_shl.html](http://www.abanet.org/cpr/mjp-comm_shl.html).

A number of entities that commented to the MJP Commission endorsed a provision allowing lawyers to practice federal law in jurisdictions where they are not licensed. *See e.g.*, ABA Section of Antitrust Law, Memorandum to the ABA Commission on Multijurisdictional Practice (Jan.22, 2001), [http://www.abanet.org/cpr/mjp-comm\\_sal.html](http://www.abanet.org/cpr/mjp-comm_sal.html); Colorado Bar Association Subcommittee on Multijurisdictional Practice, Proposal (June 22, 2001), [http://www.abanet.org/cpr/mjp-comm\\_cba.html](http://www.abanet.org/cpr/mjp-comm_cba.html); Federal Communications Bar Association ("FCBA"), Statement at the San Diego Hearing of the ABA Commission on Multijurisdictional Practice (Feb. 17, 2001), [http://www.abanet.org/cpr/mjp-comm\\_fcba.html](http://www.abanet.org/cpr/mjp-comm_fcba.html); New York County Lawyers' Association ad hoc Committee on Multi-jurisdictional Practice (Jan. 29, 2001), [http://www.abanet.org/cpr/mjp-comm\\_nycla.html](http://www.abanet.org/cpr/mjp-comm_nycla.html); ABA Section of Public Utility, Communications and Transportation Law, submission dated March 10, 2001, [http://www.abanet.org/cpr/mjp-comm\\_puctl.html](http://www.abanet.org/cpr/mjp-comm_puctl.html).

<sup>40</sup> *Cf.* 17 CRF 230.144(a)(1) ("an affiliate' of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer").

<sup>41</sup> California Supreme Court Advisory Task Force on Multijurisdictional Practice, Preliminary Report and Recommendations (Aug. 1, 2001) at 25, [http://www.abanet.org/cpr/mjp-comm\\_csc.doc](http://www.abanet.org/cpr/mjp-comm_csc.doc).

<sup>42</sup> N.J. Comm. On Unauthorized Practice of Law, Formal Op. 14 (May 1, 1975).

<sup>43</sup> *See* note 23; *see also* M. Peter Moser, Memorandum dated Oct.4, 2000, [http://www.abanet.org/cpr/mjp-comm\\_mpmoser.doc](http://www.abanet.org/cpr/mjp-comm_mpmoser.doc); *see generally* Carol A. Needham, *The Application of Unauthorized Practice of Law Regulations to Attorneys Working in Corporate Law Departments* (Symposium on the Multijurisdictional Practice of Law, March 2000)(unpublished manuscript, *see* <http://www.abanet.org/cpr/mjp-home.html>); Carol A. Needham, *The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice*, 36 S. Tex. L. Rev. 1075 (1995).

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<sup>44</sup> Lawyers serving in the United States armed forces have submitted that federal statutory law specifically authorizes them to represent certain United States military personnel and their families in any jurisdiction, and have asked the MJP Commission to recommend a safe harbor that would codify their understanding of the existing federal law. *See* United States Army, letters to ABA Commission on Multijurisdictional Practice dated July 30, 2001, ([http://www.abanet.org/cpr/mjp-comm\\_usarmy.doc](http://www.abanet.org/cpr/mjp-comm_usarmy.doc)) and August 2, 2001, ([http://abanet.org/cpr/mjp-comm\\_jag.html](http://abanet.org/cpr/mjp-comm_jag.html)); United States Navy, letter to ABA Commission on Multijurisdictional Practice dated July 11, 2001 [http://www.abanet.org/cpr/mjp-comm\\_usn.pdf](http://www.abanet.org/cpr/mjp-comm_usn.pdf). Upon review of the federal law, however, the MJP Commission is uncertain whether military lawyers are in fact legally authorized to represent individuals outside the jurisdictions in which the lawyers are licensed. Assuming that military lawyers are correct in their reading of the federal law, this proposed safe harbor would authorize their work. Otherwise, military lawyers' work for a branch of the United States armed forces would be covered by the proposed safe harbor relating to the work of lawyers employed by an organization, and their work for individual clients would be covered by the MJP Commission's recommendations insofar as that work was covered by another proposed safe harbor or by the general principle of Proposed Model Rule 5.5(b).

<sup>45</sup> *See, e.g.*, Alaska Bar Rule 2, Section 2 (applicant must have passed bar in at least one jurisdiction and have engaged in active practice of law five of seven years preceding date of application in state that offers reciprocal admission to Alaska lawyers, provided conditions are not more demanding than those in Alaska, and pay a non-refundable fee); Colorado Admission Rule 201.3(1)(admits applicants actively and substantially engaged in the practice of law for five of seven years preceding application in state providing reciprocal admission without exam to members of the Colorado Bar); Connecticut Rules of the Superior Court Regulation Admission to the Bar, Sec. 2-13(applicant must have practiced law in a reciprocal jurisdiction for at least five of seven years preceding date of application, be in good standing, have good moral character and have passed an examination in professional responsibility or completed a course in professional responsibility, intend to practice law on a continuing basis and devote a major portion of work time to practicing law in Connecticut, and file a fee and affidavits regarding character, education and disciplinary record); Illinois Admission Rule 705 (applicant must meet educational, character and fitness requirements for Illinois attorneys, pass the Multistate Professional Responsibility Examination, practice continuously five of seven years in jurisdiction offering reciprocity, and pay fee for admission on foreign license); Missouri Supreme Court Rules Governing the Missouri Bar, Rule 8.10 (applicant must have graduated from an ABA approved law school and be licensed and actively practicing five of preceding ten years in at least one jurisdiction offering mutuality of admission without examination; applicant must also meet continuing education requirements, pay a non-refundable fee, file a form for a character and fitness report and file various affidavits regarding work experience and good moral character); New York, Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, Section 520.10 (applicant must have been admitted to practice in highest law court in a state or territory of the United States or in another country whose jurisprudence is based upon the principles of the English Common Law and be admitted to the bar of a jurisdiction that would similarly admit New York lawyers without examination; in addition, the applicant must be over 26 years of age, possess a first degree from approved law school, have practiced five of preceding seven years, pay a fee and submit to other tests of character and fitness at discretion of Appellate Division); North Carolina Supreme Court Rules Governing Admission to the Practice of Law Section .0502 (applicant must be in good standing in every state in which applicant is licensed, have active practice four of preceding six years in a state providing comity admission for North

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Carolina lawyers, supply complete background information, pay nonrefundable fee of \$1500, establish good moral character, pass the Multistate Professional Responsibility Examination, and supply various types of documentation including certificates of moral character, a recent photograph and fingerprints; applications are not considered until at least six months after the date of filing); Oklahoma Rules Governing Admission to the Practice of Law, Rule 2 (applicant must have graduated from an ABA- approved law school, show good moral character, have practiced five of seven preceding years and be in good standing in a reciprocal jurisdiction, and provide at applicant's expense a report by the National Conference of Bar Examiners; if rules of reciprocal admission and fees in applicant's former jurisdiction are more stringent for admitting Oklahoma lawyers, applicant shall be governed by the more stringent standards); Pennsylvania Bar Admission Rule 204 (applicants must have graduated from an ABA-approved law school, practiced for five of preceding seven years in a reciprocal jurisdiction, passed the Multistate Professional Responsibility Examination and meet various other conditions); Virginia Supreme Court Rule 1A:1 (application must be filed under oath with a certificate saying lawyer has been licensed for at least five years; applicant must also complete character and fitness questionnaire, furnish report of the National Conference of Bar Examiners upon request, and pay \$500 filing fee; thereafter, the Board will determine whether applicant has established an intention to practice full time as a member of the Virginia Bar and whether applicant "has made such progress in the practice of law that it would be unreasonable to require the applicant to take an examination"); Washington Admission to Practice Rule 18 (admission of lawyers from jurisdictions with substantially similar conditions for admitting Washington lawyers, upon proof of admission to practice, current good standing, active legal practice, moral character and fitness, and payment of a filing fee; if the jurisdiction that licensed the applicant requires Washington lawyers to meet other conditions, the applicant must meet a substantially similar requirement); West Virginia Supreme Court of Appeals Rules for Admission, Rule 4.0-4.5 (applicant must demonstrate intention to practice in West Virginia on at least a minimal basis, have practiced five of last seven years, held valid license from state in which admissions standards are substantially equivalent to standards in West Virginia, show proof of good moral character and submit affidavits of good character from at least two lawyers, pass the MPRE, provide records of criminal, disciplinary and civil proceedings, and pay application fee); Wisconsin Supreme Court Rule 40.05 (reciprocity for applicants admitted in jurisdictions that grant similar admission to Wisconsin lawyers and recognize Wisconsin's diploma privilege and applicant must have practiced for three of preceding five years); Wyoming Statute 33-5-110 (admits foreign attorneys who have been awarded a JD or LLB from an ABA-approved law school, engaged in practice five of prior seven years in a reciprocal jurisdiction, upon presentation of certificate of admission to that state and upon a showing of qualification, character and fitness to practice law). cf. Maryland Code Sec.10-210 and Rule 13, Maryland Rules Governing Admission to Bar.

<sup>46</sup> See generally Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 Fordham Int'l L.J. 1126 (1998).