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ETHICS ISSUES IN A MULTIJURISDICTIONAL FRANCHISE PRACTICE

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Table of Contents

I. PRACTICING LAW IN THE REAL WORLD..............................................................................1
II. OVERVIEW OF THE LEGAL FRAMEWORK REGARDING THE AUTHORIZED AND UNAUTHORIZED PRACTICE OF LAW........................................................................2
   A. General Rules .......................................................................................................4
      1. 2002 ABA Model Rules of Professional Conduct ............................................4
      2. State Adoption of Model Rule 5.5....................................................................6
      3. What Is the Practice of Law in a Particular Jurisdiction? .................................6
   B. Modification of the Traditional Rules .....................................................................8
      1. The Prohibited Activities ..................................................................................8
      2. Associating With A Licensed Lawyer in the Other Jurisdiction...............9
      3. Actual or Potential Pro Hac Vice Admissions ...........................................9
      4. Other Dispute Resolution Proceedings ...................................................9
      5. Services Reasonably Related To Lawyer’s Practice in the State Where Admitted ...............................................................10
      6. What Are Legal Services Provided on a “Temporary Basis.”....................11
      7. Special Protections for In-House Lawyers.................................................11
      8. Federal Law Practice.....................................................................................12
   C. The Restatement of the Law ..............................................................................13
   D. The Relevant Case Law and Ethics Opinions .....................................................15
III. POLICY CONSIDERATIONS .........................................................................................15
IV. DISPUTE RESOLUTION SCENARIOS ..........................................................................16
   A. Litigation ..............................................................................................................16
   B. Arbitration ..........................................................................................................18
   C. Mediation ............................................................................................................18
   D. Pre-Litigation Settlement Discussions ..........................................................19
   E. Conclusions .........................................................................................................19
V. TRANSACTIONAL SCENARIOS ......................................................................................20
VI. REGULATORY ISSUES ...............................................................................................22
VII. IN-HOUSE ATTORNEYS ............................................................................................22
VIII. INTERNAL INVESTIGATIONS ...................................................................................24
IX. CONSEQUENCES OF PRACTICING LAW WITHOUT A LICENSE .......................24
    A. General Rules ...................................................................................................24
B. Disciplinary Actions ........................................................................................................26
C. Other Consequences of Violating the Admission Rule................................................27

X. IMPROVEMENT OF PRESENT SITUATION ................................................................29
XI. RISK REDUCTION SUGGESTIONS ........................................................................30
XII. CONCLUSION ............................................................................................................31

Attachments

A. Papers on Multijurisdictional Practice
B. Model Rules 5.5, 8.4 and 8.5 with Comments
C. ABA Summary of State Implementation of Model Rule 5.5
D. Association of Corporate Counsel List of States Authorizing Non-Locally Licensed In-House Counsel
E. ABA Summary of State Adoption of Model Rule 5.5
ETHICS ISSUES IN A MULTIJURISDICTIONAL FRANCHISE PRACTICE

I. PRACTICING LAW IN THE REAL WORLD

If you read further than this sentence, you may be in for the scariest moment in your life as a lawyer, because you will learn that almost all of us could be in danger - on a moment’s notice - of losing our licenses to practice law, not to mention being unable to collect our fees for legal services rendered, even if competently delivered.† Have we got your attention?

Most of us take our licenses to practice law for granted. We assume that as long as we have graduated from an accredited law school, passed the bar of the state where we hang out our sign, pay our bar dues, and comply with applicable continuing legal education requirements - and, of course, obey applicable ethical precepts - lightning will not strike us. The Birbrower law firm probably felt the same way until a court found that members of the firm had been practicing law illegally in California and therefore that the law firm was not entitled to collect fees from a former client - at least to the extent that its activities constituted the practice of law in California.

The multijurisdictional practice of law - now virtually a daily fact of life for most of us - has evolved under the radar screen for too long not to have received more attention than it has. Yet, little has been done to alleviate, or at least clarify, the problems resulting from the way we, as lawyers, do multijurisdictional business in the United States. Perhaps when those forefathers of our country we are always hearing about established our two-level system of government - federal and state - the concept of local licenses to practice law was not difficult to accept. Travel from one jurisdiction to another was less common; there were no telephones or other means of communications such that a person in one jurisdiction could readily have access to another; and business activities were also more likely to have been local. In other words, there was probably much less multijurisdictional legal practice. Society may also have been less litigious in those days.

As Cole Porter said in “Anything Goes,” times have changed. No longer are many lawyers’ legal practices confined to one state. And that holds true in spades for franchise lawyers, whose clients often own or are members of franchise systems that span the country, if not the world.

In this paper, we will explore various aspects of the problems created by having a multijurisdictional practice. We will begin by giving a brief history of the laws, ethical rules, court rules and precedents that have addressed these issues, and examine where the law stands today - to the extent that is determinable. Next, we will examine some of the policy considerations that purportedly justify the limitations on multijurisdictional practices. Then, we will look at some of the common scenarios that face franchise lawyers, in both dispute resolution and transactional situations, that present multijurisdictional practice issues. We will also look at some of the other problems facing franchise lawyers as a result of multijurisdictional practice, including regulatory issues, problems peculiar to in-house counsel, and problems relating to in-house investigations. We will examine the consequences of the unauthorized practice of law. And finally, we will look at some alternatives that could improve the

† The authors wish to thank Tyler Scarborough, a summer associate at Kilpatrick Stockton LLP, and Omer S. Rafatullah, a summer associate at Sonnenschein Nath & Rosenthal LLP, for their assistance in preparing this paper.
environment for multistate legal practice and make some suggestions as to how to reduce the risks of such practice in the present environment.

II. OVERVIEW OF THE LEGAL FRAMEWORK REGARDING THE AUTHORIZED AND UNAUTHORIZED PRACTICE OF LAW

The power to regulate the practice of law rests generally in the state’s judiciary, and the definition of the practice of law, or the unauthorized practice of law, varies among the jurisdictions.\(^1\) The historic presumption was that lawyers only practiced law representing clients that were located in close proximity to the lawyer’s offices and in the same jurisdiction, and the various ethics rules over the years reflected this presumption.

Since 1908, the American Bar Association has adopted various codes of ethics that have served as model rules that could be adopted by a state’s highest court. Most of the states eventually adopted codes of professional conduct modeled after the then current ABA codes.

Under the Model Rules of Professional Conduct adopted by the ABA in 1983, Rule 5.5 provided as follows:

**Unauthorized Practice of Law**

A lawyer shall not:

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

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

Most of the states adopted codes of conduct with an identical or similar provision, and this still remains the rule in many jurisdictions.

In addition, many of the states have statutes prohibiting the unauthorized practice of law. For example, the Illinois Attorney Act provides, in pertinent part:

No person shall be permitted to practice as an attorney or counselor at law within this State without having previously obtained a license for that purpose from the Supreme Court of this State.

No person shall receive any compensation directly or indirectly for any legal services other than a regularly licensed attorney, nor may an unlicensed person advertise or hold himself or herself out to provide legal services.

A license, as provided for herein, constitutes the person receiving the same an attorney and counselor at law, according to the law and customs thereof, for and during his good behavior in the practice and authorizes him to demand and receive fees for

any services which he may render as an attorney and counselor at law in this State. . . .”

Lawyers have lived with those strictures for generations, yet the multijurisdictional practice of law has steadily expanded for a variety of reasons. So what is different? One recent event causing multijurisdictional practice to become a significant issue was the California Supreme Court decision in *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998) (“Birbrower”), which one book describes as “[a] controversial decision that adopts a view of unauthorized practice of law that makes life difficult for multistate law firms . . . .” In *Birbrower*, a California corporation retained a New York law firm to investigate and prosecute a claim against another California-based business. The New York lawyers visited California on numerous occasions, prepared to file an arbitration claim and eventually settled the matter. The California client sued the Birbrower firm for legal malpractice, and the Birbrower firm filed a counterclaim for attorneys’ fees for work performed in both California and New York. The California client argued that by practicing law without a license in California and by failing to associate local counsel with them, the Birbrower firm violated Section 6125 of the Business & Professions Code, which provided at that time that no person could practice law in California unless that person is an active member of the State Bar. A violation of Section 6125 was a misdemeanor.

The statute did not define what constitutes the practice of law, and the California Supreme Court said that the primary inquiry is whether the unlicensed lawyers “engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.” The Court held that the practice of law is not limited to appearances in a courtroom, and it rejected the Birbrower firm’s argument that the statute was only intended to prevent non-attorneys from practicing law, stating that “The statute does not differentiate between attorneys or nonattorneys, nor does it excuse a person who is a member of another state bar.” The Court also refused to create an exception for work incidental to private arbitration or other alternative dispute resolution proceedings. Moreover, the Court rejected the Birbrower firm’s suggestion that there should be an exception for the multi-state practice of law. The Supreme Court said that the Birbrower firm’s extensive activities within California “amounted to considerably more than any of our state’s recognized exceptions to section 6125 would allow.”

The Court held that the Birbrower firm could not recover fees generated for the unauthorized legal services it performed in California, but did allow the firm to recover fees generated for the limited legal services it performed in New York. The Court observed that “[i]t is a general rule that an attorney is barred from recovering compensation for services rendered in another state where the attorney was not admitted to the bar.” The Court said none of the exceptions to the general rule applied to the Birbrower firm’s activities in California.

The decision had such far-reaching consequences that it forced California to overrule the decision by new legislation and the American Bar Association to focus on the

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4 *Birbrower*, 17 Cal. 4th at 128, 949 P.2d at 5, 70 Cal. Rptr. 2d at 309.
5 *Id.* at 131, 949 P.2d at 7, 70 Cal. Rptr. 2d at 311.
6 *Id.* at 133-35, 949 P.2d at 8-10, 70 Cal. Rptr. 2d at 311-13.
7 *Id.* at 135, 949 P.2d at 10, 70 Cal. Rptr. 2d at 313.
8 *Id.* at 135, 949 P.2d at 10, 70 Cal. Rptr. 2d at 313.
9 *Id.* at 136, 949 P.2d at 10, 70 Cal. Rptr. 2d at 313-14.
multijurisdictional issue. Coincidently, in 1997 the ABA had created a Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”) to comprehensively review the existing Model Rules and propose amendments.¹⁰

The current Model Rules of Professional Conduct were adopted in 2002 (“2002 Model Rules”) as a result of a report prepared by the Ethics 2000 Commission. To the credit of the ABA, in 2000 it had created a separate Commission on Multijurisdictional Practice which resulted in further amendments to proposed Model Rules 5.5 and 8.5 of the Model Rules as recommended by the Ethics 2000 Commission.¹¹ The Report of that Commission recognized that the practice of law had changed dramatically and proposed significant revisions to Rules 5.5 and 8.5.

At the October 2002 Forum on Franchising, Nancy G. Gourley and Professor Thomas D. Morgan presented a paper entitled Multijurisdictional Practice: Is It a Trap for the Unwary Franchise Lawyer? The Gourley & Morgan paper provides a detailed discussion of the Final Report of the Commission on Multijurisdictional Practice and the proposed text of the Model Rule addressing multijurisdictional practice, but, as they pointed out in footnote 30, at 8, “The authors emphasize that this Rule is not the law in any jurisdiction in the United States at this time”. Since that paper was published, a majority of states have adopted the 2002 Model Rules, including Rules 5.5 and 8.5. This paper, in essence, is a sequel to the Gourley & Morgan paper.

A number of other papers have addressed various aspects of the multijurisdictional practice of law that are beyond the scope of this paper. We have provided in Attachment A a list of those papers that are most relevant to the practice of franchise law.

A. General Rules

In this section, we will discuss Rule 5.5, the Model Rule that explicitly deals with multijurisdictional practice, and contrast it with the Restatement of the Law position. In Section IX, we will address the consequences of violating the multijurisdictional practice rule.

1. 2002 ABA Model Rules of Professional Conduct

The ABA completely revised Rule 5.5 in 2002 as a result of the recommendation of the Report of Commission on Multijurisdictional Practice. Although it is quite detailed, we are presenting the entire provision:

**Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law**

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

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

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

¹⁰ ABA Center for Professional Responsibility, Model Rules of Professional Conduct, Preface at viii (2008 ed.).
¹¹ See, Id., at Preface vii, viii.
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

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

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

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

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

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

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

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

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

While the 1983 version of Model Rule 5.5 dealt only with the unauthorized practice of law, the 2002 version now permits a lawyer to provide certain legal services in another jurisdiction, either temporarily or permanently, if certain conditions are met.12 As Rotunda & Dzienkowski observed in connection with Model Rule 5.5(c):

These four exceptions provide a safe harbor for temporary practice out of state. Although these exceptions represent a bold step towards new latitude in multijurisdictional practice of law, they recognize that such activity is taking place whether or not bar authorities sanction it. Thus, the ABA sought to regulate this

12 Annotated 2002 Model Rules, Annotation to Rule 5.5, at 457.
behavior and limit it to instances of temporary law practice, rather than allow it to go unregulated.\textsuperscript{13}

To a large extent, Rule 5.5 addresses many of the subjects discussed in Section I of this paper, but unfortunately it does not directly address the very common type of multijurisdictional transactional practice in which many franchisor, franchisee and in-house lawyers engage.

Of critical importance in analyzing the meaning of new Rule 5.5 are the 21 Comments adopted by the ABA and reprinted in Attachment B (the “Comments”). Those Comments provide what amounts to a legislative history of the meaning, interpretation and application of the various provisions.\textsuperscript{14} As the Preamble to the 2002 Model Rules explains, “Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.”\textsuperscript{15}

2. State Adoption of Model Rule 5.5

As of January 24, 2008, 35 jurisdictions had adopted Model Rule 5.5 or a modified version. However, only 11 of those jurisdictions adopted Model Rule 5.5 exactly as written. All of the other adopting jurisdictions modified Rule 5.5 in some respect. While a comprehensive 50-state survey is beyond the scope of this paper, attached as Attachment C is an ABA summary giving a brief overview of Rule 5.5 as it has been adopted by the various jurisdictions. Note that a number of other states currently have pending recommended adoption of Model Rule 5.5 or a variation of it.

As noted above, of critical importance in analyzing and applying Model Rule 5.5 are the ABA Comments. An issue that arises at the state level is whether the states, when adopting the 2002 Model Rules, have also adopted the Comments. For example, Illinois, which has not yet adopted the 2002 Model Rules, never adopted the previous versions of the ABA Comments. A Joint Illinois State Bar Association/Chicago Bar Association Committee on Ethics 2000 has recommended to the Illinois Supreme Court that the state adopt the 2002 Model Rules (with certain state-specific modifications) along with the Comments. That recommendation has not yet been acted on by the Illinois Supreme Court, although hearings have been held.

3. What Is the Practice of Law in a Particular Jurisdiction?

What constitutes the practice of law (authorized or unauthorized) in a particular jurisdiction varies by state,\textsuperscript{16} but various court decisions, disciplinary proceedings and ethics opinions make clear that the practice of law is not limited to having a physical presence in a particular jurisdiction or appearing in a judicial proceeding.

\textsuperscript{13} Rotunda & Dzienkowski § 5.5.2, at 971.
\textsuperscript{14} Rotunda & Dzienkowski observed that the Comments to the 1983 Model Rules “are sometimes like legislative history explaining the reasons behind a rule.” Rotunda & Dzienkowski § 1-1(e)(3), at 6.
\textsuperscript{15} ABA Center for Professional Responsibility, Model Rules of Professional Conduct, Preamble: A Lawyer’s Responsibilities, Comment [14], (2008 ed.).
Some early court cases may have suggested that the practice of law involved only representations before a tribunal. Most of the subsequent decisions and ethics opinions have rejected that approach. As the court in *Birbrower* observed:

In our view, the practice of law “in California” entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer’s activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law “in California.” The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.

Each of the following situations, among others, is likely to be deemed to be the practice of law within a particular jurisdiction:

1. Being licensed to practice law in a particular jurisdiction;
2. Having an office in a particular jurisdiction;
3. Representing a client located in a particular jurisdiction;
4. Providing legal services in person in a particular jurisdiction;
5. Appearing in a court, arbitration or mediation proceeding in a particular jurisdiction.

There are numerous court decisions and ethics opinions from a variety of jurisdictions that have held such activities to be the practice of law and unauthorized if the lawyer is not licensed in that jurisdiction. A few examples are illustrative:

1. In December 2007, the Kansas Supreme Court suspended a lawyer who had set up an office in California and had practiced law in California for nearly four decades without a California license.

2. An Illinois State Bar Association ethics opinion held that a lawyer who is not licensed in the state commits the unauthorized practice of law by representing parties to an arbitration proceeding in the state. ISBA Ethics Opinion 94-5 (July 1994). However, a subsequent Illinois court decision held that an out-of-state lawyer could participate in an arbitration proceeding in Illinois without engaging in the unauthorized practice of law, in part because the AAA arbitration rules allow a party to be represented by a non-attorney.

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18 *Birbrower*, 17 Cal. 4th at 128, 949 P.2d at 5, 70 Cal. Rptr. 2d 309.
3. In Birbrower, the California Supreme Court said one may be practicing law in the State even if not physically present by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means.²¹

For a collection of numerous court decisions and ethics opinions addressing the issue, see David A. Gerregano, Annotation, What Constitutes “Unauthorized Practice of Law” by Out-of-State Counsel, 83 A.L.R.5th 497 (2000).

B. Modification of the Traditional Rules

Model Rule 5.5, for those jurisdictions that have adopted it, has modified many aspects of the traditional rules and made it easier for lawyers in certain circumstances to engage in a multijurisdictional practice without the fear of being engaged in the unauthorized practice of law. This section will review the applicable provisions insofar as they affect certain practice areas and provide an overview of whether the Model Rules 5.5(c) and 5.5(d) are sufficient to provide comfort to the practitioner, while Sections IV, V, VI, VII and IX will address actual franchise practice scenarios. The Annotated Model Rules explain that subsections (c) and (d) of Model Rule 5.5 expand the concept of the “authorized” practice of law “to include authorization by means other than formal licensure or admission pro hac vice.”²²

1. The Prohibited Activities

Model Rule 5.5(a) provides that a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. In Section X, we discuss the consequences of violating this proscription.

Model 5.5(b)(1) provides that a lawyer who is not admitted to practice in a jurisdiction may not establish an office in that jurisdiction or “other systematic and continuous presence in this jurisdiction for the practice of law.” Comment [4] explains that “[p]resence may be systematic and continuous even if the lawyer is not physically present here.” The issue that arises for franchise lawyers is whether Rules 5.5(c) and 5.5(d) provide sufficient exceptions to this proscription.

Model Rule 5.5(b)(2) says that a lawyer who is not admitted to practice in a jurisdiction shall not “hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction.” While this proscription appears simply to prohibit an affirmative holding out of an ability to represent a client in a particular jurisdiction, some prior cases suggest that there may be an affirmative duty to make clear to a client in another jurisdiction that the lawyer is not a member of that bar.²³ Furthermore, Comment [20] to Model Rule 5.5 imposes an affirmative duty of disclosure in some circumstances:

In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

²¹ Birbrower, 17 Cal. 4th at 128-29, 949 P.2d at 5-6, 70 Cal. Rptr. 2d at 308-09.
²² Annotated 2002 Model Rules, Annotation to Model Rule 5.5, at 463.
2. **Associating With A Licensed Lawyer in the Other Jurisdiction**

Model Rule 5.5(c)(1) allows a lawyer to provide legal services on a temporary basis in another jurisdiction if the services are undertaken in association with a lawyer admitted to practice in that jurisdiction who actively participates in that matter. In essence, this provision provides protection for those lawyers who associate with local counsel in the other jurisdiction and have that co-counsel actively participate in the matter. For lawyers in law firms with multiple offices in several jurisdictions, simply having an office in a jurisdiction where a client is located will not protect the lawyer providing the services unless one of the lawyers in that local office actively participates in the matter.

3. **Actual or Potential Pro Hac Vice Admissions**

Model Rule 5.5(c)(2) provides that a lawyer can provide legal services on a temporary basis in another jurisdiction where those services are reasonably related to a pending or potential proceeding before a tribunal in that or another jurisdiction if the lawyer is authorized to appear in such proceeding “or reasonably expects to be so authorized.”

This provision reflects the long-practiced procedure of litigators to be admitted pro hac vice before a court in another jurisdiction when a litigated matter is involved. But the provision goes beyond the past practice and allows temporary services where a lawyer reasonably expects to be admitted pro hac vice in a potential proceeding before a tribunal. Comment [10] explains:

Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

Comment [11] then extends this protection to “conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.”

This provision provides substantial protection to litigators and other lawyers who assist them in handling the matter.

4. **Other Dispute Resolution Proceedings**

Rule 5.5(c)(3) provides that a lawyer can deliver services on a temporary basis in another jurisdiction when those services are reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding in that or another
jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction where he is admitted to practice and are not services requiring a pro hac vice admission.

Birbrower raised the spectre of lawyers being barred from participating in cross-border alternative dispute resolution proceedings, such as private arbitrations in the state. Subsequently, the California legislature created a procedure allowing nonresident lawyers to appear in California arbitration proceedings if they comply with certain filing requirements.24

This Rule exception fills an important gap in the protection for lawyers involved in alternative dispute resolution proceedings that has caused significant concern.25

5. Services Reasonably Related To Lawyer's Practice in the State Where Admitted

Rule 5.5(c)(4) provides that a lawyer can provide services on a temporary basis in another jurisdiction when those services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted. Does this provision provide adequate protection to a transactional lawyer with a national practice?

Comment [14] clarifies that the services must be reasonably related to the lawyer’s practice where the lawyer is admitted:

A variety of factors evidence such a relationship. The lawyer’s client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer’s work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client’s activities or the legal issues involve multiple jurisdictions, such as when the officers of multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. (Emphasis added.)

As the Annotated Model Rules observe, this provision provides “some latitude for transactional lawyers to provide legal services in jurisdictions in which they are not formally

This provision seems to recognize that a lawyer with “recognized expertise” can have a national practice if the area of law involves a federal (Amended FTC Franchise Rule ?), nationally-uniform (NASAA Guidelines, which have adopted verbatim the Amended FTC Franchise Rule ?), foreign or international law. This provision would not appear to provide protection to a lawyer who does not have a “recognized expertise” in the subject matter.

This provision is consistent with Comment [2] of Model Rule 5.5 which states, “Whatever the definition [of the practice of law], limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.”

6. What Are Legal Services Provided on a “Temporary Basis.”

All of the permitted multijurisdictional practice areas covered by Model Rule 5.5(c) are subject to the caveat that the legal services be provided “on a temporary basis” in the other jurisdiction. This suggests an occasional or one-time representation, and not a continuing relationship with a client in another jurisdiction. As the Annotated Model Rules point out, there is no “bright-line test to determine when a lawyer’s presence is ‘temporary’ rather than permanent.”

As noted above, Comment [4] cautions that a lawyer may have systematic and continuous presence in another jurisdiction “even if the lawyer is not physically present here.” However, Comment [5] says that the four permitted circumstances identified in Rules 5.5(c)(1) to (4) are not inclusive: “The fact that conduct is not so identified does not imply that the conduct is or is not authorized.” So the real issue becomes what does “temporary basis” mean? Comment [6] explains:

There is no single test to determine whether a lawyer’s services are provided on a ‘temporary basis’ in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be ‘temporary’ even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

This explanation may be satisfactory for situations involving dispute resolution, but gives scant comfort to lawyers involved in a transactional practice who represent a client in another jurisdiction on a regular and continuous basis. This is a significant deficiency in the Rule 5.5 that conceivably could lead to challenges to lawyers with a national franchise practice who have a continuous representation of a client located in another jurisdiction.

7. Special Protections for In-House Lawyers

Rule 5.5(d)(1) provides that a lawyer admitted in one jurisdiction can provide services in another jurisdiction if the services (they need not be on a “temporary basis”) are provided to the lawyer’s employer or its organizational affiliates, and are not services for which the other jurisdiction requires pro hac vice admission.

\[26\] Annotated 2002 Model Rules, Annotation to Rule 5.5, at 467.
\[27\] See also, Annotated 2002 Model Rules, Annotation to Rule 5.5, at 458.
\[28\] Id. at 465.
This provision essentially allows in-house lawyers to provide services in another jurisdiction without the fear of engaging in the unauthorized practice of law. Comment [16] explains:

Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

What this provision does not address is whether the in-house lawyer must be licensed in the jurisdiction where the lawyer has his or her office. Comment [15] states: “Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.” Moreover, Comment [17] provides:

If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

Many of the states have rules authorizing non-locally licensed in-house counsel. Attachment D is a List of States Authorizing Non-Locally Licensed In-House Counsel prepared by the Association of Corporate Counsel.

8. Federal Law Practice

Finally, Rule 5.5(d)(2) allows a lawyer to provide legal services (not just on a “temporary basis”) in another jurisdiction when the services are services that the lawyer is authorized to provide by federal law or other laws of that other jurisdiction. The scope of this provision is not clear. Comment [18] simply says:

Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

This provision would not seem to be of any help to a franchise lawyer advising on the Amended FTC Franchise Rule because there is no appearance that needs to be filed with the FTC to prepare a Franchise Disclosure Document. Nevertheless, it may be of help to those franchise lawyers who have a regulatory practice filing registrations and disclosure documents.
in the 14 franchise sales law jurisdictions or 25 state business opportunity jurisdictions because the states routinely accept filings from out of state lawyers. See further discussion in Section VI below. In addition, a litigator can appear in a federal court proceeding, as long as he/she is properly admitted by the federal court, without violating the state licensing rules, as long as he/she does not set up an office in the state to take on all comers.

C. The Restatement of the Law

Model Rule 5.5 has to be contrasted with the Restatement of The Law Governing Lawyers. Section 3 of the Restatement discusses the jurisdictional limits on a permissible practice by a lawyer:

§ 3. Jurisdictional Scope of the Practice of Law by a Lawyer

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

1. at any place within the admitting jurisdiction;
2. before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency; and
3. at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer’s activities arise out of or are otherwise reasonably related to the lawyer’s practice under Subsection (1) or (2).

This provision is significantly broader than Model Rule 5.5. A comment to the Restatement says that “there is much to be said for a rule permitting a lawyer to practice in any state, except for litigation matters or for the purpose of establishing a permanent in-state branch office.” However, the Restatement says the approach of Section 3 is focused on the needs of clients. “The customary practices of lawyers who engage in interstate law practice is one appropriate measure of the reasonableness of a lawyer’s activities out of state.” One Restatement Illustration is especially striking:

5. Lawyer is admitted to practice and has an office in Illinois, where Lawyer practices in the area of trusts and estate, an area involving, among other things, both the law of wills, property, taxation, and trusts of a particular state and federal income, estate, and gift tax law. Client A, whom Lawyer has represented in estate-planning matters, has recently moved to Florida and calls Lawyer from there with a request that leads to Lawyer’s

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29 See Rittenhouse v. Delta Home Improvement, Inc. (In re Desilets), 291 F.3d 925 (6th Cir. 2002); Brown v. Smith (In re Mendez), 231 B.R. 86 (9th Cir. 1999), aff’d without op., 230 F.3d 1367 (9th Cir. 2000); Annotated 2002 Model Rules, Annotation to Rule 5.5, at 468-69.
32 Restatement § 3 cmt. e, at 26.
33 Id. at 28.
preparation of a codicil to A’s will, which Lawyer takes to Florida to obtain the necessary signatures. While there, A introduces Lawyer to B, a friend of A, who, after learning of A’s estate-planning arrangements from A, wishes Lawyer to prepare a similar estate arrangement for B. Lawyer prepares the necessary documents and conducts legal research in Lawyer’s office in Illinois, frequently conferring by telephone and letter with B in Florida. Lawyer then takes the documents to Florida for execution by B and necessary witnesses. Lawyer’s activities in Florida on behalf of both A and B were permissible.  

While generally the Restatements are intended to clarify or restate the law, there is some argument that the Restatement of the Law Governing Lawyers was intended to change the law. As Professors Rotunda and Dzienkowski observed:

Even if this Restatement is not successful in persuading most courts to adopt significant changes in the law, we can expect that judges, practicing lawyers, and academics will often turn to this Restatement to examine its position on the important areas involving legal ethics. In addition, we may expect the Restatement to have a role in bringing clarity and structure to the vast and amorphous area that falls under the heading of legal ethics.

Those authors may be right that the Restatement may have a salutory effect. In Colmar, Ltd., v. Fremantlemedia North America, Inc., the Illinois Appellate Court, in finding that an out-of-state attorney did not engage in the unauthorized practice of law by participating in an arbitration proceeding in Illinois, rejected Birbrower and declined to follow it, saying “both the Restatement and ABA Commission have criticized Birbrower as creating too harsh a result.”

The Court noted that there is no procedure for pro hac vice admission of an out-of-state attorney to represent a client in arbitration proceedings in Illinois and that this discrepancy can lead to problems for transactional and other attorneys representing clients in matters out of court.

The Court then quoted from Section 3 of the Restatement, and, relying on § 3(3), found that the out-of-state lawyer’s activities in the arbitration proceeding were authorized primarily because they related to his representation of his client in California and involved issues not specific to Illinois law. It also cited Model Rule 5.5(c), even though Illinois had not yet adopted it, saying that “we find it persuasive in that it reflects the modern trend in the law of multijurisdictional practice and is also in keeping with well-reasoned decisions from other jurisdictions that have found that an out-of-state attorney’s representation of a client during arbitration does not violate the rules prohibiting the unauthorized practice of law.”

34 Id. at 30.
35 Rotunda & Dzienkowski, at 28.
36 344 Ill. App.3d. at 989, 801 N.E.2d at 1026.
37 Id. at 986, 801 N.E.2d at 1024.
38 Id. at 986-87, 801 N.E.2d at 1024-25.
39 344 Ill. App.3d at 988, 801 N.E.2d at 1026. See also, Superadio Ltd. P’ship v. Winstar Radio Prods., LLC, 446 Mass. 330, 336, 844 N.E.2d 246, 251 (2006) (citing Restatement, court refused to vacate arbitration award obtained by a licensed out-of-state attorney, saying he was generally permitted to provide legal services in another jurisdiction to a client in matters reasonable related to his home-state practice).
D. The Relevant Case Law and Ethics Opinions

The authors were unable to find a court case or ethics opinion that discussed multijurisdictional practice in the context of a franchise representation. Franchise lawyers will have to rely on cases and opinions in the non-franchising context for guidance, keeping in mind that almost all of the reported cases and ethics opinions of any relevance were decided before any of the states adopted Model Rule 5.5 or some variation of it.

III. POLICY CONSIDERATIONS

The policy considerations underlying the restrictions on a multijurisdictional practice are rooted in the well-established reality that the individual states regulate the practice of law in their jurisdictions and the absence of any recognized interstate commerce exception. *Birbrower* rejected the argument that a lawyer licensed in another jurisdiction has demonstrated sufficient competence to protect California clients.

Birbrower’s argument overlooks the obvious fact that other states’ laws may differ substantially from California law. Competence in one jurisdiction does not necessarily guarantee competence in another. By applying section 6125 to out-of-state attorneys who engage in the extensive practice of law in California without becoming licensed in our state, we serve the statute’s goal of assuring the competence of all attorneys practicing law in this state.40

The parochial view expressed in *Birbrower* was rejected by the Restatement as being “unduly restrictive.”41 The Restatement rejects “unauthorized practice rules that simply do not reflect the way law is practiced today.”42 Unfortunately, the revisions made to Rule 5.5 as a result of the Report of Commission on Multijurisdictional Practice preserves to a large extent the right of states to control activities within their borders.

It is unlikely that franchise lawyers will revert to a practice of law confined wholly to the jurisdictions in which they are licensed. What is the fair way to handle multijurisdictional practice of law issues? Do we simply ignore technical violators and focus only on the bad apples? To some extent, that is often what happens. *Birbrower* was initiated by the client filing a malpractice action against its lawyers, and the lawyers counterclaiming for their fees. In contrast, the *In re Trester* matter out of Kansas (see footnote 19 above) resulted from a flagrant opening of an office in another jurisdiction where the lawyer was not licensed and practicing there for 40 years.

Do we ignore the question of whether we are violating the Model Rule and “pray” that we are not the target of a disgruntled client or over-eager enforcement agent? To some extent, that is exactly what most of us are doing, hoping that our provision of competent services will not raise any red flags. Unfortunately, except for litigators who are admitted pro hac vice for a pending legal proceeding and in-house lawyers who obtain limited licenses in certain states,

40 Birbrower, 17 Cal. 4th at 132, 949 P.2d at 8, 70 Cal. Rptr. 2d at 311.
41 Rotunda & Dzienkowski, § 5.5-2, at 966. See Restatement § 3, Reporter’s Note, cmt. e.
42 Rotunda & Dzienkowski, § 5.5-2, at 968. For a more enlightened opinion, see *Fought & Co. v. Steel Eng’g and Erection, Inc.*, 87 Haw. 37, 951 P.2d 487 (1998), where the Hawaii Supreme Court allowed an Oregon firm to collect part of a statutory fee award because prohibiting such an award would make it difficult for Hawaii clients to get high quality legal services at competitive rates. The case is discussed in Rotunda & Dzienkowski in § 5.5-2, at 965.
there are no safe harbors for most of the activities we franchise lawyers commonly engage in. Sections IV, V, VI, VII and VIII will discuss various scenarios where we review the policy considerations against the actual reality of the every day multijurisdictional practice of law.

IV. DISPUTE RESOLUTION SCENARIOS

In Sections IV and V of this paper, we will present several scenarios and how the authors view these situations. Section IV will be devoted to dispute resolution. Section V will focus on transactional situations. We will start with the easiest scenarios and then gradually present the more challenging ones, changing certain variables so that we may consider some of the vast array of situations that we, as franchise lawyers, face. We will not try to cover all imaginable scenarios.

For purposes of our analysis in this and the following section, our characters will be as follows:

- Franchisor client: Belmount
- Franchisor lawyer: Judy
- Franchisee: Steve
- Home state (where Judy is licensed to practice): X
- Foreign state (where Belmount or Steve might be located, or whose laws may be applicable to the scenario): Y

The variables we will be changing in this section are:

- Place of litigation, arbitration, mediation or other event.
- Belmount’s principal place of business.
- Steve’s principal place of business.\(^43\)
- Applicable state law chosen by the clients.
- Other state law considerations.

We will also assume that the claim at issue is for breach of the franchise agreement and that Model Rule 5.5 has been adopted in both X and Y.

We would also note that while this paper is focused primarily on the licensing problems with respect to the practice of law in multijurisdictional situations (the “Licensing Issue”), we cannot help but focus upon the issue of lawyer competency where the laws of a state in which the attorney is not licensed to practice are involved (the “Competency Issue”).

As so, as the Romans said: Let the games begin.

A. Litigation

**Scenario 1:** Judy is asked by Belmount to bring suit against Steve in X, where Steve’s franchise is located. Belmount is also located in X. State X’s law governs the relationship.\(^44\)

\(^43\) We are assuming that Steve and his entity are domiciled or resident in the same jurisdiction, but, of course, that may not be the case, which in turn can create even more difficulties for Judy, from a licensing and competency standpoint.

\(^44\)
Analysis: No Licensing Issue. No Competency Issue. This is, in fact, not a multijurisdictional situation, but serves as the base line for our analyses.

Scenario 2: Same as Scenario 1, but Belmount is headquartered in Y.

Analysis: No Licensing Issue. But consider whether Judy is competent to counsel Belmount on Y issues. Since the litigation will be brought in X, it is unlikely that Y’s laws will have much effect on the dispute. However, look at the New York Franchise Law. If Belmount were headquartered in New York but had not registered under the New York Franchise Law, which requires a franchisor located in that state to register its franchises even if it is not selling in that state, Judy might easily improperly advise Belmount. In developing her litigation strategy, Judy might fail to counsel Belmount about the failure-to-register defense or counterclaim and unwittingly recommend litigation where litigation would have been inadvisable had the client been fully informed of the risks.

Scenario 3: Same as Scenario 1, but Steve is in Y.

Analysis: No Licensing Issue. However, there may well be a Competency Issue. As in Scenario 2, the laws of State Y could be outcome determinative, and this is more likely than in Scenario 2 because it is far from unusual for a state to enact laws that protect franchisees from abuses. Even though X’s courts might not find Y’s state policies controlling, Belmount is certainly entitled to know of their potential effect on the litigation.

Scenario 4: Belmount is headquartered in Y. Steve is located in X. The laws of Y govern the relationship.

Analysis: No Licensing Issue. However, there is likely to be a Competency Issue. For example, suppose the dispute involved a non-compete provision. Is Y’s law or X’s law more favorable to a franchisee? Belmount needs to know that, because it may affect Belmount’s decision as to whether and where to bring the litigation. Judy must be knowledgeable about the laws of both states in order to recommend the appropriate forum for litigation.

Scenario 5: Litigation is in Y.

Analysis: In any litigation situation where suit is brought in Y, Judy may have a Licensing Issue. Judy is not authorized to practice in that jurisdiction, and it would be difficult (if not impossible) for her to appear in the courts in that jurisdiction regarding a contract issue, subject to certain exceptions, without making a pro hac vice application and associating local counsel. Judy also has a Competency Issue, the extent to which would depend upon where Steve was located, where Belmount was located, and which state’s law applied.

44 Note that we have carefully chose the word “relationship” rather than “contract.” Relationship is a broader term, and if the choice of law provision only related to contract issues, lawyer Judy could find herself in a situation where there might be even more issues of competency to consider. For example, if only the contract were governed by the laws of X, Y’s laws might be applicable to a claim of tortuous interference with contractual relations.
46 As noted elsewhere in this paper, if only a federal claim were involved, Judy might not have to be authorized to practice law in Y, but might still need to be specially admitted to the applicable federal court.
Fortunately, she can solve both these problems by hiring counsel licensed to practice in Y. This would give her a safe harbor under Model Rule 5.5(c)(1), assuming that her appearance was “temporary.”

Note that from Belmount’s perspective, this is not a great solution because it will require Belmount to retain two sets of lawyers to handle the case, assuming the client wants Judy involved. If Steve is in Y, Belmount is in Y or Y’s law is chosen as the applicable law, Belmount must balance the costs and benefits of Judy’s involvement. If Judy served as outside general counsel to Belmount, that may justify keeping her on the case. Judy may have also been involved with similar cases for Belmount, thereby giving her special expertise in the matters at issue.

B. Arbitration

Scenario 1: Arbitration in State X.

Analysis: From Judy’s perspective, there is again no Licensing Issue, regardless of how the other variables are altered. Judy is qualified to practice law in X. If Steve is in X, X’s law applies, and Belmount is located in X, then there is no Competency Issue either. If Steve is from Y, if Belmount is located in Y, or if Y’s laws are applicable, there is a Competency Issue for the reasons set forth in Subsection A of this section.

Scenario 2: Arbitration will be held in Y.

Analysis: There may be a Licensing Issue, and there is definitely a Competency Issue. The Competency Issue is the same as set forth in Subsection A of this section.

As for the Licensing Issue, Judy can always play it safe by engaging Y-licensed legal counsel. However, is this necessary? At least one case has suggested that under the Rules of the American Arbitration Association, a participant can be represented by someone other than a lawyer.47 Moreover, since there is no court oversight over the proceeding, so far as the AAA is involved, it is not likely to be concerned.48

C. Mediation

Scenario 1: Mediation in X.

Analysis: No Licensing Issue. Could be Competency Issue, depending upon Steve’s and Belmount’s principal places of business, and what law applies.

Scenario 2: Mediation in Y.

Analysis: Again, Judy has an easy out - hire Y-licensed counsel to assist her. From a policy consideration, however, we should ask whether this makes sense? Judy also might be protected from a Licensing Problem under Model Rule 5.5(c)(3), although there still would be a Competency Issue.

47 See text accompanying note 20 above.
48 Question: Assuming Judy needed to be licensed in Y to represent Belmount in this proceeding, by participating in the arbitration hearing, would the franchisee’s lawyer be violating Model Rule 5.5(a), in that he or she was aiding someone in the unauthorized practice of law, or may he or she, too, simply turn the other cheek?
With respect to mediation, there is also a timing issue. For court-ordered mediation, since the proceeding has already been brought, presumably the Licensing Issue has already been addressed. If mediation is voluntary or required by contract, the issue is slightly different. Model Rule 5.5(c)(2) suggests that it would be permissible for Judy to participate.

D. Pre-Litigation Settlement Discussions

Scenario 1: Discussions held in X.

Analysis: No Licensing Issue. Competency Issue same as discussed above.

Scenario 2: Discussions held in Y.

Analysis: For the reasons cited with respect to the Mediation scenarios, Judy should not be required to be licensed in Y in order to engage in these discussions. Competency Issue remains.

E. Conclusions

Model Rule 5.5 has made life considerably easier for litigators than it has for transactional lawyers (discussed below). The real culprit in a multijurisdictional situation for litigators appears not to be a licensing issue as much as one of competency. As a rule of thumb (and assuming the lawyer’s activities are temporary):

- A lawyer will have no Licensing Issue if he or she stays within the jurisdiction in which he or she has been licensed to practice law (an obvious answer).

- A lawyer may have a Competency Issue whenever the laws of another state may affect the representation for which he or she has been engaged, even when a proceeding is within the state in which he or she is licensed to practice.

- A lawyer generally has a safe harbor available when involved in a proceeding in another state - associate with local counsel. This can solve both the Licensing Issue and the Competency Issue.

- The lawyer accepts some risk by participating in an out-of-state arbitration or mediation, but as a practical matter, this occurs all the time. Birbrower has been roundly criticized, but it certainly exposed the issue. California at least had the good sense to ameliorate some of the impact of this decision.49

- Until a proceeding has been initiated, Model Rule 5.5 gives lawyers less to fear, from a licensing perspective, when they counsel clients about litigation strategies and other items that need to be addressed before the proceeding is commenced.

49 In 2004, the California Supreme Court modified its rules to allow out-of-state lawyers to practice law in four categories without being admitted in California. See, Calif. Rules of Court Rule 9.45 (registered legal services attorneys), Rule 9.46 (registered in-house counsel), Rule 9.47 (attorneys practicing law temporarily in California as part of litigation) and Rule 9.48 (nonlitigating attorneys temporarily in California to provide legal services). See Peter Panken & Miranda Valbrune, Representing Nationwide Clients Where They Do Business – But You Are Not Admitted - Do Good Fences Make Good Neighbors? A Review Of Statutory And Judicial Authority As Well As Recent Developments In The Regulation Of Multijurisdiction Practice Of Law, SL018 A.L.I. - A.B.A. 731, at 6 (July 28-30 2005).
V. TRANSACTIONAL SCENARIOS

We are surprised that the non-litigators within the franchise bar have not shown more impatience with the American Bar Association and state bar associations for their failure to address and deal with the multijurisdictional issues raised in the shadow of *Birbrower*. While Model Rule 5.5 gives litigators a reasonably safe harbor as well as a few new avenues to explore in order to avoid the need for local counsel in the context of or in anticipation of a proceeding, it has done little to protect those who day in and day out deal with problems that involve the commercial laws of multiple states and do not retain local counsel. While we do not want to cry wolf simply for the sake of so doing, *Birbrower*, if widely accepted, would dictate a significant change in the way we practice transactional law. In the shadow of *Birbrower*, the transactional lawyer could end up being disbarred, and his or her fees could become uncollectable. Moreover, as transactional lawyers adjust their modus operandi to reduce these risks by retaining local counsel more frequently, clients will find their legal bills increasing, with no additional benefits perceived.

But enough histrionics! Let’s look at some more scenarios—this time in the context of transactions. We will use the same cast of characters, but the variables that come into play are slightly different. They include:

- Which state law applies?
- Where is the client located?
- Where is the party on the other side of the transaction located?
- Where do the activities that make up the transaction occur?

We will, again, assume here that Model 5.5 is the operative law relating to what constitutes permissible practice of law. We will also assume that there are no more than two parties to the transaction and that the situation involves the negotiation of an area development agreement.  

Scenario 1: Belmount and Steve are both located in X. Contract governed by X’s laws. Negotiations are in X.

Analysis: No Licensing Issue. No Competency Issue.

Scenario 2: Same as Scenario 1, except that negotiations are held in Y.

Analysis: No Competency Issue, and there should be no Licensing Issue because of Model Rule 5.5(c)(4), since the legal services “arise out of, or are reasonably related to” Judy’s practice in X.

Scenario 3: Belmount is in X. Steve is in Y. Contract governed by X’s law. Negotiations occur in X.

Analysis: No Licensing Issue. Could be a Competency Issue for the reasons stated in Scenario 2 under the Litigation subsection in Section IV, above. Y may be a registration state whose laws Judy is not familiar with. Or it may have a relationship law, which Judy also is not familiar with.

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50 We would need a computer to help us deal with all the permutations that might arise in the context of three or more parties. Consider for example, franchisor is in X; franchisee is in Y; franchisee’s owners are in states A, B and C; and the lender is in state D.
Scenario 4: Belmount is in Y. Steve is in X. Contract governed by law where franchisee’s business is operated (X in this case). Negotiations occur in X.

Analysis: Could be a Licensing Issue, if Judy’s representation of Belmount is not temporary. The only variable that is multijurisdictional is where Belmount is located (Y). How could it be said that Judy is practicing law in Y? Again, Model Rule 5.5(c)(4) should give Judy some comfort. Could be Competency Issue for reasons previously stated.51

Scenario 5: Belmount is in Y. Steve is in X. Contract governed by the laws of X. Negotiations occur in Y.

Analysis: This is not a likely scenario, since Belmount probably would not make X’s law apply. There could be a Competency Issue even though X’s law applies. There could be a Licensing Issue with Belmount being in Y. We feel that the better position, given the temporary nature of this transaction, is that Model Rule 5.5(c)(4) would give Judy adequate protection. Judy’s ongoing relationship with Y could be a significant factor.

Scenario 6: Belmount is in Y. Y’s law applies. Negotiations in Y. Steve is in X or Y.

Analysis: This is the killer scenario, but for many if not most transactional lawyers, it is the real world.

First, there is a Licensing Issue. As explained elsewhere in this paper, while Judy routinely practices in X, it is questionable whether the services rendered meet the “reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice”, with Belmount being in Y. Would it make a difference if Belmount is a regular client of Judy, or if this were, instead, a “one-off”? Except for Steve’s location, there is no nexus between this deal and X.

Second, there is a Competency Issue for reasons previously stated.

Also consider: should the result be different if the negotiations were held in X?

Conclusions:

• The situation may not be as dire as initially suggested above.

• The risk of practicing law without authorization probably is a function of how many contacts there are with Y, with there being no clear bright line.

• Associating local counsel gives the transactional lawyer, like the litigator, an available safe harbor, but doing so will dramatically increase the costs of doing commercial transactions. Unlike the situation in litigation, where hiring local counsel has been routine from time immemorial and has other benefits,52 in franchise transactions associating local counsel usually occurs only when there might be critical issues of local concern, such as real estate related issues or, perhaps, non-compete provisions.

51 See scenarios under Litigation subsection above.
52 For example, not only will the local counsel be familiar with the local court rules, he or she is likely to be more familiar with the judge who presides over a case.
VI. REGULATORY ISSUES

For transactional franchise lawyers, a large part of their practice involves filing and presenting franchise and business opportunity registrations and exemptions. No appearance needs to be filed with the state agencies administering those laws, but the Application form has a space to insert the name, address, telephone and facsimile numbers, and e-mail address, required under the NASAA 2008 Guidelines, of the person to whom communications regarding the application should be addressed. Typically, the name of the preparing counsel is inserted in that space, and the state examiners will religiously direct all communications to that designated person. Generally, most of those communications are by mail or overnight courier, and sometimes by facsimile or e-mail, and there are seldom direct personal meetings. One state, New York, often requires filing of an appearance form by the franchisor’s counsel if certain types of relief are sought, such as an exemption from registration.

State franchise examiners routinely accept filings by counsel located in other jurisdictions and do not raise objections to the fact that the franchisor’s counsel is not a locally licensed attorney. These services would appear to be within the scope of Rule 5.5(c)(4) because they arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. This would clearly be the case where the lawyer and his/her client are both located in the same state, and arguably permissible for a lawyer located in one state representing a client in a second state but filing a franchise application in a third state. Although such services would be repeated for material change amendments and annual renewals, those services would appear to be performed on a temporary basis.

VII. IN-HOUSE ATTORNEYS

Many in-house franchise attorneys routinely provide advice to their client (the franchisor) in jurisdictions other than the state in which the lawyer is admitted. Due to the efforts of the Association of Corporate Counsel, many in-house lawyers need only be licensed in one state but can perform services in a second state where their employer is located without having to be formally admitted to practice in that state. Instead, the in-house lawyer need only make a filing with the state and will receive a limited license to practice law for the employer. Illinois Supreme Court Rule 716, “Limited Admission of House Counsel,” is typical of these rules. Rule 716(e) provides in relevant part:

(e) Limitation of Practice. Licensed house counsel, while in the employ of an employer described in subparagraph (a) of this rule, may perform legal services in this state solely on behalf of such employer; provided, however, that such services shall

(1) be limited to

(a) the giving of advice to the directors, officers, employees and agents of the employer with respect to its business and affairs; and

(b) negotiating, documenting and consummating transactions to which the employer is a party; and

(2) not include appearances as counsel in any court, administrative tribunal, agency or commission situated in this state
unless the rules governing such court or body shall otherwise authorize or the lawyer is specially admitted by such court or body in a particular case or matter.

Lawyers licensed under this rule shall not offer legal services or advice to the public or in any manner hold themselves out to be so engaged or authorized.53

What concerns in-house lawyers is the providing of services to the employer in a jurisdiction other than where the employer is located or where he or she is licensed. For instance, take an in-house lawyer licensed to practice law in Illinois and who is a registered in-house counsel member of the California bar. The issue that arises is whether the in-house lawyer is engaging in the unauthorized practice of (transactional) law, when he/she: (1) counsels clients located in another jurisdiction, or (2) engages in negotiations with parties located in other jurisdictions, or (3) prepares a contract or regulatory filing in another jurisdiction? An in-house transactional franchise counsel for a company franchising nationwide (and worldwide) is more often than not working on matters that are either (a) focused on a single jurisdiction other than CA or IL; or (b) focused generally across all U.S. jurisdictions.

Model Rule 5.5(d)(1) appears to provide protections to the in-house lawyer in the jurisdiction in which his employer is located. As Comment [16] explains, the lawyer’s ability to represent the employer outside of the jurisdiction in which the lawyer is licensed generally serves the interest of the employer and does not create an unreasonable risk to the client and others because the employer can assess the lawyer’s qualifications and the quality of his/her work. But Rule 5.5(d)(1) does not address performing services in yet a third jurisdiction. The in-house lawyer, like outside counsel, would have to rely on the exceptions in Model Rule 5.5(c)(4).

Franchisors often have offices in other jurisdictions. Comment [17] cautions that:

If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

The ABA Section of Legal Education and Admissions to the Bar has submitted to the ABA House of Delegates for approval at the 2008 Annual Meeting in August a new Model Rule for Registration of In-House Counsel. The proposed rule would be used by jurisdictions who adopt Model Rule 5.5(d). The Executive Summary explains:

Explanation of How the Proposed Policy Addresses the Issues

The Registration Rule would provide a mechanism for jurisdictions to identify and monitor in-house counsel who are practicing in the jurisdiction. In addition to requiring registered lawyers to participate in continuing legal education and support client

protection funds, the Rule would also provide for sanctions for those who fail to register.\textsuperscript{54}

What is the rationale or justification for giving in-house counsel special treatment? Rotunda/Dzienkowski say that “the reason underlying this rule is that corporations and their affiliates . . . hire lawyer employees for the sole purpose of having the lawyer represent the entity.”\textsuperscript{55}

VIII. INTERNAL INVESTIGATIONS

Neither the ABA Model Rules nor the Restatement specifically address the issue of conducting internal investigations. However, Model Rules 5.5(c)(4) and Comment [14] would seem to permit such activities to the extent that the services are reasonably related to the lawyer’s practice in the jurisdiction where he/she is licensed.

A thorough discussion of the ethics issues involved in internal investigations was presented at the 2005 Annual Forum on Franchising by Howard Bundy and Leonard Vines.\textsuperscript{56}

IX. CONSEQUENCES OF PRACTICING LAW WITHOUT A LICENSE

A. General Rules

The consequences of practicing law without a license can be severe. Model Rule 8.4(a) provides:

\begin{quote}
RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
\end{quote}

Comment [1] then explains that:

Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer’s behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

Model Rule 8.5 then prescribes the disciplinary authority available to the body regulating the practice of law in the state.

\textsuperscript{54} ABA Section of Legal Education and Admission to the Bar, Report to the House of Delegates, Executive Summary (Undated).
\textsuperscript{55} Rotunda & Dzienkowski § 5.5-2(d), at 973.
\textsuperscript{56} Howard Bundy and Leonard Vines, Ethics Issues in the Practice of Franchise Law, ABA 28\textsuperscript{th} Annual Forum on Franchising, 28-34 (Oct 19-21, 2005).
RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

Model Rule 8.5 allows the jurisdiction where the conduct occurred to take disciplinary action against a lawyer even if not licensed there. When a lawyer’s conduct involves contacts with more than one jurisdiction, the Model Rule seeks to provide for consistent disciplinary action. Comments [5] and [6] provide as follows:

[5] When a lawyer’s conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer’s conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all

57 Thomas Spahn, Which State’s Ethics Rules Apply to Lawyer’s Conduct Outside Their Home State?, Experience, Senior Lawyers Div. of ABA, 45-46 (Spring 2008).
appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

Model Rule 8.5(b)(1) provides that a lawyer involved in a matter pending before a tribunal will be subject to the rules of the jurisdiction in which the tribunal sits, unless the tribunal rules provide otherwise. Comment [4] clarifies that as to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, Rule 8.5(b)(2) comes into play and the lawyer is subject to the rules of the jurisdiction in which the conduct occurred.

The choice of law provision in Model Rule 8.5(b)(2) provides some safe harbor for conduct that conforms to the rules of the jurisdiction where the lawyer reasonably believes the predominant effect of the conduct will occur. Comment [7] says that “[t]he choice of law provision applies to lawyers engaged in transactional practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.”

The Annotated 2002 Model Rules explain that Model Rule 8.4(a) “characterizes the violation of any of the ethics rules as an act of misconduct” and a finding by a disciplinary authority that a lawyer violated any ethics rules can be accompanied by a finding that the lawyer violated Rule 8.4(a). Moreover, it is misconduct even to attempt to violate an ethics rule.

Model Rule 8.5 was amended as part of the package of proposals put forward by the ABA Commission on Multijurisdictional Practice when Model Rule 5.5 was amended. A lawyer is subject to the disciplinary authority of the jurisdiction in which he or she is licensed, regardless of where the conduct occurred, as well as a jurisdiction in which he/she is not licensed but provides services. “The same misconduct, therefore, can serve as the basis for two or more disciplinary proceedings by two or more disciplinary authorities.”

As of January 24, 2008, 36 states had adopted Model Rule 8.5. See Attachment E.

B. Disciplinary Actions

The Annotated Model Rules discuss cases in which a lawyer has been disciplined by the jurisdiction in which he/she was licensed for conduct outside that jurisdiction. One case is People v. Wheeler, 146 P.3d 86 (Colo. O.P.D.J. 2006), where a Colorado lawyer was disbarred after he was disciplined in California for failure to comply with the California rules. The Annotated Model Rules also discusses cases in which an out-of-state lawyer was disciplined for in-state misconduct.

An Illinois Supreme Court Rule illustrates the type of disciplinary action that may be taken. Rule 770 provides:

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58 Annotated Model Rules, Annotation to Model Rule 8.4, at 577.
59 Annotated Model Rules, Annotation to Model Rule 8.5, at 603.
60 Id.
61 Id. at 603-04.
62 Id. at pp. 604-05.
Rule 770  Types of Discipline

Conduct of attorneys which violates the Rules of Professional Conduct contained in article VIII of these rules or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute shall be grounds for discipline by the court. Discipline may be:

(a) disbarment;
(b) disbarment on consent;
(c) suspension for a specified period and until further order of court;
(d) suspension for a specified period of time;
(e) suspension until further order of the court;
(f) suspension for a specified period of time or until further order of the court with probation;
(g) censure; or
(h) reprimand by the court, the Review Board or a hearing panel.63

In addition, the Illinois Attorney Act provides, in pertinent part:

Any person practicing, charging or receiving fees for legal services or advertising or holding himself or herself out to provide legal services within this State, either directly or indirectly, without being licensed to practice as herein required, is guilty of contempt of court and shall be punished accordingly, upon complaint being filed in any Circuit Court of this State. The remedies available include, but are not limited to: (i) appropriate equitable relief; (ii) a civil penalty not to exceed $5,000, which shall be paid to the Illinois Equal Justice Foundation; and (iii) actual damages. Such proceedings shall be conducted in the Courts of the respective counties where the alleged contempt has been committed in the same manner as in cases of indirect contempt and with the right of review by the parties thereto.

The provisions of this Act shall be in addition to other remedies permitted by law and shall not be construed to deprive courts of this State of their inherent right to punish for contempt or to restrain the unauthorized practice of law.64

C. Other Consequences of Violating the Admission Rule

The Annotated 2002 Model Rules make clear that most courts considering the proprietary of lawyers providing legal services in jurisdictions where they are not licensed had found the activities to be improper, resulting in a variety of consequences, including disciplinary measures, injunctions and/or denial of legal fees.65

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Disbarment or suspension proceedings are most likely when a lawyer’s misconduct is egregious, such as where he/she opens an office in another jurisdiction where not licensed. However, there are other consequences that are more likely to impact the lawyer. For example, a defense often asserted to a lawsuit for the collection of a fee is that the lawyer seeking the fees engaged in the unauthorized practice of law, even if the client had no complaint about the quality of the work performed.66

The most famous case on legal fees is *Birbrower*, where the California Supreme Court held that when a New York law firm engaged in extensive unauthorized practice of law in California, its fee agreement was invalid to the extent it authorized payment for the services performed in California. However, the court said that this did not prohibit payment of fees for services performed in New York.67 Interestingly, the fee agreement stipulated that California law would govern all matters in the representation. There are numerous other cases denying fees to lawyers not licensed in a particular jurisdiction.68

The California Supreme Court in *Birbrower* also pointed out that the unauthorized practice of law was a misdemeanor.69 Although criminal sanctions are possible for the unauthorized practice of law, we did not find any recent cases applying a criminal sanction in the context of a multijurisdictional practice violation. Criminal prosecutions are more likely when someone who is not a lawyer hold himself/herself out as a lawyer.70

Another issue is whether the attorney-client privilege will be lost if a lawyer engages in the unauthorized practice of law. Rotunda and Dzienkowski state that under the law of evidence, a communication is privileged if the client consults with a lawyer or someone who the client reasonably believes is a lawyer. “Obviously, the client or prospective client does not lose the protection merely because the lawyer failed to pay his bar dues, or is practicing outside the jurisdiction in which he is admitted.”71 As the Restatement states, “Thus, a lawyer admitted to practice in another jurisdiction or a lawyer admitted to practice in a foreign nation is a lawyer for the purposes of the privilege.”72

Another risk was reflected in *Colmar, Ltd. v. Fremantlemedia North America, Inc.*, where the Illinois Appellate Court stated that the general rule in Illinois is that judgments resulting from legal proceedings brought in a court on a party’s behalf by a person who is not licensed to practice law in the state are void.73 Interestingly, at least in Illinois, there is no private right of action under the Illinois Attorney Act for engaging in the unauthorized practice of law.74

66 Rotunda & Dzienkowski § 5.5-5, at 986.
67 *Birbrower*, 17 Cal. 4th at 124, 135-140, 949 P.2d at 2-3, 10-13, 70 Cal. Rptr. 2d at 306, 313-16.
68 See, e.g., Lozoff v. Shorte Heights, Ltd., 66 Ill. 2d 398, 362 N.E.2d 1047 (1977) (a Wisconsin attorney could not recover attorney’s fees when he represented the parties to an Illinois real estate transaction). *But see, Bethold Types Ltd. v. Adobe Sys., Inc.*, 186 F. Supp. 2d 834 (N.D. Ill. 2002) (under Illinois law, California attorneys were not barred from receiving fees for representing a California company in a contract dispute with an Illinois company absent a showing that the attorneys provided legal services in Illinois).
69 *Birbrower*, 17 Cal 4th at 124, 135-140, 949 P.2d at 2-3, 10-13, 70 Cal. Rptr. 2d at 306, 313-16.
70 Rotunda & Dzienkowski, § 5.5-5, at 986.
71 Id. at 985.
72 Restatement, § 72 cmt. e. See also Cronin-Harris, Block & Pressman at 23-24.
Finally, the practice of law, either in court or out of court, by a person not licensed to practice law, in most states constitutes contempt of court.75 Courts can also grant declaratory or injunctive relief.76

X. IMPROVEMENT OF PRESENT SITUATION

In the next two sections of this paper, we will address, first, how might clarity be brought to the problems of the limited geographical nature of licenses to practice law in the context of multijurisdictional practices, and, second, within the existing framework, how can lawyers reduce the risks associated with practices that span several states.

In the ideal world, in which none of us lives, the best solution would be federal pre-emption. However, the likelihood of this is less than slim. Regulating the practice of law, as noted earlier, has historically been a function left to the states. The likelihood (or should we say unlikelihood) of federal pre-emption can be easily discerned by we who practice franchise law simply by looking at the challenges presented in trying to promote pre-emption within our own world. We have seen that the states, as the original proponents of disclosure and registration, have for the most part not been willing to cede power to the FTC in the area of disclosure, although there has been a gradual movement away from requiring registration at the state level over the past ten years. Correspondingly, there has been an absence of enthusiasm by the FTC to seek or accept full responsibility for disclosure, not to mention registration. If we cannot achieve pre-emption in the realm of our relatively narrow slice of the world, is it likely that in the much broader area of legal practice licensing, the politics will be less intensive?

A second alternative would be a dual level of licensing, with both the federal government and the states having the power to authorize the practice of law. However, for this to work, the federal government might have to restrict the powers of the states to regulate interstate legal practice, in contrast to franchising, where the federal government has set minimum standards.

A third alternative would be reciprocity. If X would allow a person authorized to practice law in Y to practice in X, then, correspondingly, a lawyer licensed in X would be permitted to practice in Y. While setting forth the procedures to accomplish this might be difficult, the greatest impediment, again as seen from the history of legal practice licensing, is that some states may not go along with this scheme, so that the concerns that presently exist with respect to what constitutes permissible practice of law in another jurisdiction would still be with us, although perhaps only an issue in a few jurisdictions.77

Fourth would be reliance upon a national rating service, similar to what Martindale-Hubbell accomplishes through its “av” rating system. Lawyers who demonstrated the appropriate level of competence would automatically be permitted to practice nationally in their area of expertise. This could be granted for the practice of law generally, or limited to designated specialties, such as commercial law, litigation, trusts and estates, and, of course, franchising. It is doubtful, however, that the states would permit an outside group to assume the

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76 Rotunda & Dzienkowski § 5.5-5, at 963.
77 Existing rules on reciprocity generally allow a lawyer who is licensed in another jurisdiction and has practiced in that other jurisdiction for five years of the seven years immediately prior to making the application to become admitted to the bar of another state if that lawyer intends to practice law actively in the other jurisdictions and devote the major portion of his time to practice in the other state. See, e.g., Connecticut Bar Examining Committee, Rules of the Superior Court Regulating Admission to the Bar, Rule 2-13. See also, Supreme Court of Illinois Rules on Admission and Discipline of Attorneys, Rule 705 (must establish that he or she will engage in the active and continuous practice of law in Illinois).
establish standards, or to administer standards, for the bar. Again, compare franchising regulation, where a body of outsourced examiners could be appointed to review franchise disclosure documents on behalf of all registration states. However, the best that the North American Securities Administrators Association has offered is the Coordinated Review process, where one state acts essentially as a communications coordinator among the regulators from the registration states. And, as we all know, that process has been put in abeyance for the moment.

At a minimum, we should encourage all states to adopt Model Rule 5.5, and at the same time, expand Section (c)(4) so as to allow transactional lawyers to feel more comfortable operating in a multijurisdictional environment.

As mentioned earlier, while this paper is intended to be a critique on the problems inherent in licensing lawyers, we felt that there was one other point we needed to raise, and it is the tie between licensing and competency. Competency has at least two elements to it. One is the capacity to deliver legal services to clients generally, and to make sure that lawyers have some general understanding of the practice of law. This is really what law school and the bar exam are all about. However, a lawyer can meet these standards, and still be incompetent when dealing with areas with which he or she has not been trained. A first year associate who has made law review, published papers, graduated magna cum laude, and passed the bar exam is still unlikely to be able to advise clients in sophisticated matters. We know several franchise consultants who could give better legal advice to clients than these rookies. Stated differently, if the state governments want to ensure good legal protection to the public regarding the quality of services they will receive, licensing only goes halfway to address the problem.

XI. RISK REDUCTION SUGGESTIONS

Besides becoming licensed in each jurisdiction in which a lawyer has a client or performs any type of legal services, the following are several risk reduction suggestions:

1. The engagement letter should clearly state in which jurisdiction(s) the lawyer is licensed.

2. Whenever possible, engage a lawyer in the other jurisdiction who is licensed there and who will take an active role in your representation of the client, particularly on matters affecting the local laws of the client's jurisdiction.

3. Perform most of the services from the jurisdiction in which you are licensed, and limit the number of visits to the client located in another jurisdiction.

4. Provide services for your national franchise practice for which you have "recognized expertise" and delegate to lawyers licensed in the other jurisdiction matters that are of peculiar local law.

5. Do not advertise your services in a publication specifically targeted to jurisdictions in which you are not licensed.

6. If challenged, rely on the Restatement position and cite Colmar, Ltd. v. Fremantlemedia North America, Inc., and other cases citing the Restatement, as reasoned opinions supporting an enlightened point of view.
XII. CONCLUSION

_Birbrower_ has put the entire legal community at risk. At a minimum, we would encourage state bars to contain if not eliminate its effect, either through ethics opinions, statutory amendments, or court or state bar generated codes of conduct, and, if appropriate, through legal proceedings. While the public is entitled to protection from incompetent lawyers, the ability of the legal community to deliver legal services in a cost-efficient manner is also of critical concern. As practicing lawyers, we should be demanding more clarification on what we are, and are not, permitted to do, when our practices take us across state lines. We should encourage leadership within the American Bar Association to be doing the same.\textsuperscript{78}

Attachment A

Papers on Multijurisdictional Practice


Attachment B

Model Rules 5.5, 8.4 and 8.5
With Comments
RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

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

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:
   (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
   (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
   (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
   (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
   (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
   (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
   (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
   (2) are services that the lawyer is authorized to provide by federal or other law of this jurisdiction.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction
to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word ""admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant
to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as
lawyers from the affected jurisdiction who seek to practice law temporarily in another
jurisdiction, but in which they are not otherwise authorized to practice law, should consult the
[Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice
in another United States jurisdiction, and is not disbarred or suspended from practice in any
jurisdiction, may establish an office or other systematic and continuous presence in this
jurisdiction for the practice of law as well as provide legal services on a temporary basis.
Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in
another jurisdiction and who establishes an office or other systematic or continuous presence in
this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services
to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are
under common control with the employer. This paragraph does not authorize the provision of
personal legal services to the employer’s officers or employees. The paragraph applies to in-
house corporate lawyers, government lawyers and others who are employed to render legal
services to the employer. The lawyer’s ability to represent the employer outside the jurisdiction
in which the lawyer is licensed generally serves the interests of the employer and does not
create an unreasonable risk to the client and others because the employer is well situated to
assess the lawyer’s qualifications and the quality of the lawyer’s work.

[17] If an employed lawyer establishes an office or other systematic presence in this
jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be
subject to registration or other requirements, including assessments for client protection funds
and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in
which the lawyer is not licensed when authorized to do so by federal or other law, which
includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or
otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to
paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law
in this jurisdiction. For example, that may be required when the representation occurs primarily
in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to
prospective clients in this jurisdiction by lawyers who are admitted to practice in other
jurisdictions. Whether and how lawyers may communicate the availability of their services to
prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

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It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not
violate paragraph (d). A trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

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jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A
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jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of
professional conduct to be applied shall be as follows:

   (1) for conduct in connection with a matter pending before a tribunal, the rules of the
       jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
   
   (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred,
       or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that
       jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the
       lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes
       the predominant effect of the lawyer's conduct will occur.

Comment

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is
subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of
this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction
is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's
disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6
and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the
disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated
by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject
to the disciplinary authority of this jurisdiction may be a factor in determining whether personal
jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct
which impose different obligations. The lawyer may be licensed to practice in more than one
jurisdiction with differing rules, or may be admitted to practice before a particular court with rules
that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice.
Additionally, the lawyer's conduct may involve significant contacts with more than one
jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing
conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provided otherwise.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.
Attachment C

ABA Summary of State Implementation of Model Rule 5.5
## State Implementation of ABA Model Rule 5.5
### (Multijurisdictional Practice of Law)

| States whose MJP study committees have recommended adoption of a rule similar to ABA Model Rule 5.5 (2) |
| States that have created committees to study ABA MJP recommendations (4) |
| States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (3) |
| Recommendation pending in highest Court to adopt a rule similar to ABA Model Rule 5.5 (3) |
| Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 5.5 (3) |
| Highest Court has adopted a rule similar to ABA Model Rule 5.5 (24) |
| Highest Court has adopted a rule identical to ABA Model Rule 5.5 (11) |
| States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (3) |

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| Highest Court has adopted a rule identical to ABA Model Rule 5.5 (11) |
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| States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (3) |

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| Highest Court has adopted a rule identical to ABA Model Rule 5.5 (11) |
| States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (3) |

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| Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 5.5 (3) |
| Highest Court has adopted a rule similar to ABA Model Rule 5.5 (24) |
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| Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 5.5 (3) |
| Highest Court has adopted a rule similar to ABA Model Rule 5.5 (24) |
| Highest Court has adopted a rule identical to ABA Model Rule 5.5 (11) |
| States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (3) |

| States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (3) |
| Recommendation pending in highest Court to adopt a rule similar to ABA Model Rule 5.5 (3) |
| Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 5.5 (3) |
| Highest Court has adopted a rule similar to ABA Model Rule 5.5 (24) |
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| States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (3) |

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| States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (3) |

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| States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (3) |

<p>| States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (3) |
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| Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 5.5 (3) |
| Highest Court has adopted a rule similar to ABA Model Rule 5.5 (24) |
| Highest Court has adopted a rule identical to ABA Model Rule 5.5 (11) |
| States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (3) |</p>
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### State-by-State Adoption and Modification of Model Rule 5.5

<table>
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<tr>
<th>STATE</th>
<th>Adoption of 5.5</th>
<th>Notes</th>
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<tbody>
<tr>
<td>ALABAMA</td>
<td>AL Y</td>
<td>Uses the term “temporary or incidental basis”.</td>
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<tr>
<td>ALASKA</td>
<td>AK N</td>
<td>Proposed Rule 5.5 is identical to ABA Model Rule 5.5.</td>
</tr>
<tr>
<td>ARIZONA</td>
<td>AZ Y</td>
<td>Adds paragraphs making it clear that: lawyers engaged in multijurisdictional practice must advise their clients that they are not admitted to practice law in Arizona and must obtain the client's informed consent to the representation.</td>
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<tr>
<td>ARKANSAS</td>
<td>AR Y</td>
<td>Identical.</td>
</tr>
<tr>
<td>CALIFORNIA</td>
<td>CA Y</td>
<td>Rule 966/967 permit lawyers licensed in another state to temporarily practice law in CA without registering. Under 967, a “material aspect” of the matter has to take place in a jurisdiction in which the lawyer is licensed. 964 allows registered legal services lawyer to practice up to 3 years.</td>
</tr>
<tr>
<td>COLORADO</td>
<td>CO N</td>
<td>Only pro hac vice admission.</td>
</tr>
<tr>
<td>CONNECTICUT</td>
<td>CT Y</td>
<td>Requires registration, notification to Statewide Bar Counsel and payment of an administrative fee; requires reciprocity; the services under (c) (4) must be “substantially related the services provided to an existing client”.</td>
</tr>
<tr>
<td>DELAWARE</td>
<td>DE Y</td>
<td>A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis.</td>
</tr>
<tr>
<td>DISTRICT OF COLUMBIA</td>
<td>DC Y</td>
<td>Rule 49 of the Rules of the District of Columbia Court of Appeal is similar to 5.5.</td>
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<tr>
<td>State</td>
<td>Abbreviation</td>
<td>Adoption</td>
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<td>Committee has recommended identical rule.</td>
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<td>Committee has recommended rule similar to 5.5.</td>
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<td>Established committee.</td>
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<td>Committee has recommended rule similar to 5.5.</td>
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<td>WYOMING</td>
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<td>Y</td>
<td>Only allows temporary practice by out-of-state lawyers in three situations: a) on a temporary basis in Wyoming in a pending proceeding before a tribunal, if the lawyer, is authorized by law or order to appear in such proceeding with a lawyer who is admitted to practice in Wyoming; b) legal services provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or (c) legal services that the lawyer is authorized to provide by federal law or tribal law of this jurisdiction.</td>
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</tbody>
</table>

Pages C-6 to C-10 excerpted by Sonnenschein Nath & Rosenthal LLP from *State Implementation of ABA MJP Policies*, ABA (April 9, 2008), which is a 2008 copyrighted ABA document.
Attachment D

Association of Corporate Counsel
“List of States Authorizing Non-Locally Licensed In-House Counsel”
Association of Corporate Counsel  
LIST OF STATES AUTHORIZING NON-LOCALLY LICENSED IN-HOUSE COUNSEL

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<thead>
<tr>
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<th>In-house Rule or Registration Permitted²</th>
<th>In-house practice authorized by exception or ethical opinion³</th>
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<td>Texas</td>
<td>Alaska ⁵</td>
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¹ These states have authorized in-house counsel by passage of a version of the ABA’s Model Rule 5.5, Unauthorized Practice Of Law; Multijurisdictional Practice Of Law.  
² These states have adopted In-house counsel authorization or registration rules either as stand alones or in conjunction with the adoption of a version of the ABA’s Model Rule 5.5.  
³ These States have either defined In-house counsel as not being the practice of law or have issued an ethical opinion which authorizes In-house practitioners.  
⁴ These states do not make exceptions or allowances for non-locally licensed in-house counsel.  
⁵ Has proposed adoption of ABA 5.5  
⁶ ABA 5.5 Proposed but not yet adopted.  
⁷ ABA 5.5 Proposed but not yet adopted.  
⁸ ABA 5.5 Proposed but not yet adopted.
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09/17/07

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Attachment E

ABA Summary of State Adoption of Model Rule 8.5
# State Implementation of ABA Model Rule 8.5

## (Disciplinary Authority; Choice of Law)

<table>
<thead>
<tr>
<th>States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 8.5</th>
<th>States whose MJP study committees have recommended adoption of a rule similar to ABA Model Rule 8.5</th>
<th>States that have created committees to study ABA MJP recommendations</th>
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</table>
John R. F. Baer

John R. F. Baer is a partner in the Chicago office of Sonnenschein Nath & Rosenthal LLP. Mr. Baer has a broad transactions practice with extensive experience representing companies engaged in franchising and distribution, including the use of sales representatives, both domestically and internationally. His practice covers a wide range of other related areas, including commercial, sales, warranties, product safety and regulatory matters. Mr. Baer has spoken and written extensively on both domestic and international franchise issues.

Mr. Baer is Chair of the Illinois Attorney General’s Franchise Advisory Board and Editor of the CCH Sales Representative Law Guide. From August 2003 to August 2006, he was a member of the Governing Committee of the ABA Forum on Franchising. He is the Secretary of the International Franchising Committee of the International Bar Association’s International Sales, Franchising and Product Law Section. Mr. Baer is a member of the Industry Advisory Committee to the North America Securities Administrators Association Franchise Project Group. He is a member of the Illinois State Bar Association Standing Committee on Franchising and Distribution Law and the Legal/Legislative Committee of the International Franchise Association. He is also on the Board of Editors of LJN’s Franchising Business & Law Alert and a member of the Editorial Advisory Board of the International Journal of Franchising Law. Mr. Baer formerly was the Editor-in-Chief of the ABA Forum on Franchising’s The Franchise Lawyer, an Associate Editor of ABA Forum on Franchising’s Franchise Law Journal, the Publications Officer of the ABA Forum on Franchising, and a Vice President of the Franchising Committee of Union Internationale des Avocats.

Mr. Baer also is a member of the Illinois State Bar Association (“ISBA”) Committee on Professional Conduct. He was a member of the ISBA/CBA Special Joint Committee on Ethics 2000 (1999 to 2008), the ISBA Committee on Liaison with the ARDC (1990 to 1993), the ISBA Professional Responsibility Committee (1983 to 1984) and the ISBA Professional Ethics Committee (1977 to 1983, and Chairman from 1982 to 1983).

Mr. Baer has been selected for inclusion in Who's Who Legal, The International Who's Who of Business Lawyers, Franchise (2008), as a Franchise Times Legal Eagle (2008), and in Chambers USA: America's Leading Lawyers for Business 2008: Franchising (National), and Chambers Global 2008: Franchising (Global Practice Area).
Rupert M. Barkoff

Rupert Barkoff has been practicing franchise, distribution and corporate law with Kilpatrick Stockton in Atlanta, Georgia since 1973. His franchise practice emphasizes solutions to registration and structuring issues and developing individual and collective solutions to franchisor-franchisee relationship problems. He is recognized as one of the United States’ leading franchise attorneys by The Best Lawyers in America, published by Woodward/White, and was recently voted by his peers as one of the ten most respected franchise lawyers in the world.

Mr. Barkoff served three years as Chair of the American Bar Association’s 2000 member Forum on Franchising and served six additional years on its Governing Committee. He is the Co-Editor-in-Chief of Fundamentals of Franchising and a Co-Editor of Franchise Law Bibliography (2d. ed.), has written almost 200 published pieces on franchise law, was the Technical Editor for the first edition of Franchising for Dummies, currently serves as a columnist on franchise law for the prestigious New York Law Journal and for Franchise Update magazine, and serves on the editorial boards of two franchise publications. He has also served as a member of the advisory committee to the North American Securities Administrators Association’s Franchise and Business Opportunities Project Group, and has testified twice before the U.S. House of Representatives Small Business Committee. He has spoken on numerous occasions at programs sponsored by the American Bar Association’s Forum on Franchising and the International Franchise Association.

Mr. Barkoff attended the University of Michigan for both his undergraduate and legal educations, receiving his undergraduate degree with High Distinction in 1970 and his J.D. degree magna cum laude in 1973. He is a member of Phi Beta Kappa and the Order of the Coif, and served as the Articles Editor of the Michigan Law Review. He is a native of New Orleans, Louisiana.