

# **CLIENT REPRESENTATION IN THE 21ST CENTURY**

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

**AMERICAN BAR ASSOCIATION  
CENTER FOR PROFESSIONAL RESPONSIBILITY**

The recommendations contained herein were adopted by the House of Delegates of the American Bar Association on August 12, 2002.

Nothing contained in this book is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel.

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## PREFACE

In response to professional concerns about the regulation of multijurisdictional law practice, ABA President Martha Barnett appointed the Commission on Multijurisdictional Practice in July 2000 to undertake the following responsibilities:

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

From the outset, the MJP Commission recognized the importance of engaging in an objective and comprehensive inquiry and of encouraging as many others as possible to lend assistance. To stimulate discussion, the Commission began by issuing a series of background papers that identified examples of multijurisdictional practice, described relevant regulatory interests, and listed some of the enhancements and reforms that others had proposed. The Commission invited testimony and written submissions by state and local bar associations, ABA entities, and other representative organizations of the legal profession and the public, and solicited the views and experiences of law firms, government and in-house corporate law offices, and individuals. The Commission conducted public hearings in Atlanta, Chicago, Dallas, Kansas City, Miami, New York, and San Diego, and individual Commissioners spoke at bar association meetings and other programs throughout the country. The Commission drew liberally on the experience of individuals appointed to serve as liaisons and on the resources of the various organizations they represented, as well as on the resources of the Center for Professional Responsibility. It collected and reviewed the relevant legal literature.<sup>1</sup> Of particular importance, it gave close study to the relevant proposals of the ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") and the relevant provisions of the ALI Restatement (Third) of the Law Governing Lawyers.

In November 2001, the Commission issued an Interim Report describing its preliminary recommendations. By that time, the Commission had received more than 50 written submissions and heard testimony from individuals from around the nation and the world who recognized the importance and timeliness of its inquiry.<sup>2</sup> Some submissions, such as those of the California, Missouri, New Jersey and Washington state bar associations, were the product of a committee appointed for the specific purpose of formulating a position on the issues before the Commission. To encourage additional participation and interaction, the Commission established

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<sup>1</sup>For a selected bibliography on the multijurisdictional practice of law, see <http://www.abanet.org/cpr/mjp-bibliography.html>.

<sup>2</sup>Lists of those who made written submissions to the Commission and who offered oral testimony are available on the Commission's website. See note 5, *infra*.

a website containing relevant writings, including transcripts of hearing testimony and written submissions,<sup>3</sup> and established an extensive listserv on which relevant information was posted.<sup>4</sup>

The Commission made clear that the purpose of its Interim Report was to elicit feedback. From the start, the Commission had been committed to undertaking an objective and comprehensive study of the issues relating to multijurisdictional practice, and it intended to continue in that spirit until its work was completed. Thus, it was crucial to this initiative for the Commission to receive responses and perspectives from the widest possible range of individuals and organizations.

In response to its Interim Report, the Commission received many additional submissions, some of which supported the preliminary recommendations but many of which proposed changes and improvements.<sup>5</sup> Additionally, the Commission conducted hearings in Philadelphia and New York at which it received testimony concerning its proposals. Based on the comments it received, the Commission revised its preliminary recommendations.

In June 2002, the Commission filed its Final Report with the ABA House of Delegates. When the Commission brought the Final Report before the House of Delegates, on August 12, 2002, it accepted friendly amendments to Recommendation 3 (Disciplinary Authority), Recommendation 6 (*Pro Hac Vice* Admission) and Recommendation 7 (Admission by Motion). The ABA House of Delegates then adopted all nine recommendations contained in the Final Report, as revised.

The Commission would like to take this opportunity to thank ABA Presidents Martha W. Barnett and Robert E. Hirshon for their leadership in providing us with the opportunity to address these complicated issues; our Reporter Bruce A. Green for his steadfast commitment to the many drafts and redrafts inherent in this process; Commission Counsel John A. Holtaway for his thorough commitment and good counsel throughout; Dean Burnele V. Powell and Jeanne P. Gray of the ABA Center for Professional Responsibility for their support; and to the many ABA staff who assisted us with their dedicated efforts.

The Commission expresses its gratitude to all the individuals and organizations who assisted it in identifying the legitimate needs of clients for lawyers to engage in multijurisdictional practice, the regulatory concerns that this practice presents, and the possibilities for reform. The recommendations presented in this report draw extensively on the written submissions and testimony presented to the Commission over the course of nearly two years and could not have taken shape without the generous assistance provided by many to the Commission.

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<sup>3</sup>The website is <http://www.abanet.org/cpr/mjp-home.html>.

<sup>4</sup>The listserv is [mjp-general@mail.abanet.org](mailto:mjp-general@mail.abanet.org).

<sup>5</sup> Written responses to the Commission's Interim Report are available on the website at [http://www.abanet.org/cpr/mjp/comm\\_summ2.html](http://www.abanet.org/cpr/mjp/comm_summ2.html).

## INTRODUCTION

The predicate for this national study undertaken by the American Bar Association was the dynamic change and evolution in nature and scope of legal practice during the past century, facilitated by a transformation in communications, transportation and technology. In the early twentieth century, states adopted "unauthorized practice of law" (UPL) provisions that apply equally to lawyers licensed in other states and to nonlawyers. These laws prohibit lawyers from engaging in the practice of law except in states in which they are licensed or otherwise authorized to practice law. UPL restrictions have long been qualified by *pro hac vice* provisions, which allow courts or administrative agencies to authorize an out-of-state lawyer to represent a client in a particular case before the tribunal.<sup>6</sup> In recent years, some jurisdictions have adopted provisions authorizing out-of-state lawyers to perform other legal work in the jurisdiction.<sup>7</sup>

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

Although client needs and legal practices have evolved, lawyer regulation has not yet responded effectively to that evolution. As the work of lawyers has become more varied, specialized and national in scope, it has become increasingly uncertain when a lawyer's work (other than as a trial lawyer in court) implicates the UPL law of a jurisdiction in which the lawyer is not licensed. Lawyers recognize that the geographic scope of a lawyer's practice must be adequate to enable the lawyer to serve the legal needs of clients in a national and global economy. They have expressed concern that if UPL restrictions are applied literally to United States lawyers who perform any legal work outside the jurisdictions in which they are admitted to practice, the laws will impede lawyers' ability to meet their clients' multi-state and interstate legal needs efficiently and effectively.

This concern was sharpened by the California Supreme Court decision, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*, 949 P.2d 1 (Cal. 1998), which held that lawyers not licensed to practice law in California violated California's

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<sup>6</sup>For a collection of different jurisdictions' *pro hac vice* provisions, see [http://www.crossingthebar.com/pro\\_hac\\_vice.htm](http://www.crossingthebar.com/pro_hac_vice.htm).

<sup>7</sup>See notes 17 – 20 and accompanying text, *infra*.

misdemeanor UPL provision when they assisted a California corporate client in connection with an impending California arbitration under California law, and were therefore barred from recovering fees under a written fee agreement for services the lawyers rendered while they were physically or “virtually” in California. Although the state law was subsequently and temporarily amended to allow out-of-state lawyers to obtain permission to participate in certain California arbitrations, concerns have persisted.

## Summary of Recommendations

"Multijurisdictional practice" ("MJP") describes the legal work of a lawyer in a jurisdiction in which the lawyer is not admitted to practice law. As this report discusses, a wide variety of practices falling within this rubric have been called to the attention of the MJP Commission. The guiding principle that informs the Commission's recommendations is simple to state: we searched for the proper balance between the interests of a state in protecting its residents and justice system, on the one hand; and the interests of clients in a national and international economy in the ability to employ or retain counsel of choice efficiently and economically. A key word here is “balance.” Our challenges did not lend themselves to mathematical solutions. Rather, accommodating our state-based system of bar admission, which we fully support, with the realities of modern life and our tradition of respect for client choice required the exercise of informed judgment. Our judgment was informed not only by the diverse experience and perspectives of the members of the Commission and its liaisons, but also by the wealth of testimony, written and spoken, of which we have been the most fortunate beneficiary.

Following is a summary of the Commission's recommendations:

1. The American Bar Association affirms its support for the principle of state judicial regulation of the practice of law. (*See* Recommendation 1, *infra*.)
2. The American Bar Association amends the title of Rule 5.5 of the ABA *Model Rules of Professional Conduct* as “Unauthorized Practice of Law; Multijurisdictional Practice of Law”.

The American Bar Association amends Rule 5.5(a) of the ABA *Model Rules of Professional Conduct* to provide that a lawyer may not practice law in a jurisdiction, or assist another in doing so, in violation of the regulations of the legal profession in that jurisdiction.

The American Bar Association adopts amended Rule 5.5(b) to prohibit a lawyer from establishing an office or other systematic and continuous presence in a jurisdiction, unless permitted to do so by law, or another provision of Rule 5.5; or holding out to the public or otherwise representing that the lawyer is admitted to practice law in a jurisdiction in which the lawyer is not admitted.

The American Bar Association adopts Rule 5.5(c) to identify circumstances in which a lawyer who is admitted in a United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may practice law on a temporary basis in another jurisdiction. These would include:

- Work on a temporary basis in association with a lawyer admitted to practice law in the jurisdiction, who actively participates in the representation;



- Services ancillary to pending or prospective litigation or administrative agency proceedings in a state where the lawyer is admitted or expects to be admitted *pro hac vice* or is otherwise authorized to appear;
- Representation of clients in, or ancillary to, an alternative dispute resolution ("ADR") setting, such as arbitration or mediation; and
- Non-litigation work that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

The American Bar Association adopts Rule 5.5(d) to identify multijurisdictional practice standards relating to (i) legal services by a lawyer who is an employee of a client and (ii) legal services that the lawyer is authorized by federal or other law to render in a jurisdiction in which the lawyer is not licensed to practice law. (*See Recommendation 2, infra.*)

3. The American Bar Association adopts amended Rule 8.5 of the ABA *Model Rules of Professional Conduct* in order to clarify the authority of a jurisdiction to discipline lawyers licensed in another jurisdiction who practice law within their jurisdiction pursuant to the provisions of Rule 5.5 or other law. (*See Recommendation 3, infra.*)

4. The American Bar Association adopts amended Rule 6A and Rule 22 of the ABA *Model Rules for Lawyer Disciplinary Enforcement* to promote effective disciplinary enforcement with respect to lawyers who engage in the multijurisdictional practice of law and to renew efforts to encourage states to adopt Rule 22, which provides for reciprocal discipline. (*See Recommendation 4, infra.*)

5. The American Bar Association encourages the use of the National Lawyer Regulatory Data Bank to promote interstate disciplinary enforcement mechanisms and urges jurisdictions to adopt the International Standard Lawyer Numbering System®. The American Bar Association also urges jurisdictions to require lawyers to report to the lawyer regulatory agency in the jurisdiction in which they are licensed to practice law, all other jurisdictions in which they are licensed to practice law and any status changes in those other jurisdictions. (*See Recommendation 5, infra.*)

6. The American Bar Association adopts a *Model Rule on Pro Hac Vice Admission* to govern the admission of lawyers to practice law before courts and administrative agencies *pro hac vice* in jurisdictions in which the lawyer is not admitted to practice law. (*See Recommendation 6, infra.*)

7. With regard to the establishment of a law practice on a permanent basis in a jurisdiction in which a lawyer is not admitted to practice law, the American Bar Association adopts a *Model Rule on Admission by Motion* to facilitate the licensing of the lawyer, if the lawyer is admitted to practice law in another United States jurisdiction, has been engaged in the active practice of law for a significant period of time and is in good standing in all jurisdictions where admitted to practice law. (*See Recommendation 7, infra.*)

8. With regard to lawyers admitted to practice law only in non-United States jurisdictions, the American Bar Association encourages United States jurisdictions to adopt the ABA *Model Rule for the Licensing of Legal Consultants* or to conform their already existing rule to the Model Rule. (*See Recommendation 8, infra.*)

9. With regard to lawyers who seek to provide legal services in the United States and are admitted to practice law only in non-United States jurisdictions, the American Bar Association adopts a *Model Rule on Temporary Practice by Foreign Lawyers* to identify circumstances where it is not the unauthorized practice of law for a lawyer admitted in a non-United States jurisdiction to provide legal services on a temporary basis for a client in a United States jurisdiction. (See Recommendation 9, *infra*.)

## **The Basis for Change**

### *Background: State Licensing and Jurisdictional Restrictions*

*State admissions and regulation.* Lawyers in the United States are not licensed to practice law on a national basis, but are licensed by a state judiciary<sup>8</sup> to practice law within the particular state.<sup>9</sup> In general, state admissions processes are intended to protect the public by ensuring that those who are licensed to practice law in the state have the requisite knowledge of that state's laws and the general fitness and character to practice law.

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

The traditional route to bar admission includes graduating from an accredited law school, passing the admitting state's bar examination, and satisfying the state's bar examiners that the applicant possesses the requisite character to practice law. There is some state variation, however, in the process for licensing lawyers. For example, Wisconsin recognizes a "diploma privilege" whereby graduates of either of that state's law schools may be admitted to practice law without taking the state's bar examination.<sup>10</sup> California and a few other states do not require, as most states do, that applicants to the bar be graduates of law schools that are accredited by the American Bar Association.<sup>11</sup>

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<sup>8</sup>In virtually every state, the state's highest court oversees the licensing process. The exception is New York, where the four intermediate appellate courts are responsible for admission to practice law as well as lawyer discipline.

<sup>9</sup>For ease of reference, this report refers to "states" to include both states and the District of Columbia.

<sup>10</sup>Wisconsin SCR 40.03.

<sup>11</sup>See, e.g., California Rules Regulating Admission to Practice Law, Rule VII (as amended Dec. 8, 2001) (applicant may have studied four years in law school authorized by the state of California, in a law office under personal supervision of California state bar member or in a judge's chambers, or by instruction from a correspondence law school); Supreme Court of Georgia, Rules Governing Admission to the Practice of Law, Part B, Section 4(b)(2)(Oct. 12, 2000) (applicant must have JD or LLB from law school approved by the ABA or by the Georgia Board of Bar Examiners); Rules for Admission to the Practice of Law in West Virginia, Rule 3.0 (1992) (applicant may be graduate of non-ABA accredited law school if admitted in another state, graduate of a reputable law school determined by Board of Law Examiners to be equivalent to ABA-accredited law school, or graduate of law school

As a practical matter, a lawyer who seeks to engage in a national law practice cannot presently gain admission to the bar of every state. States generally require out-of-state lawyers to pass the state's bar examination to be licensed. Bar examinations generally differ from state to state, although the degree of difference has narrowed over the years, as states have come to rely increasingly on a standardized examination.<sup>12</sup> Being a member in good standing of another state's bar generally does not qualify a lawyer for "reciprocal" admission, although many states do allow lawyers to be admitted on motion upon a showing of good standing and a demonstrated record of active law practice elsewhere for a specific period.<sup>13</sup>

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

Over the years, many states have supplemented and improved their regulatory processes. For example, to promote professional competence and familiarity with state ethics rules, many states now require ongoing continuing legal education. Many require their lawyers to contribute to a client protection fund for the benefit of clients in the state who suffer financial loss because of a lawyer's dishonesty. One state, Oregon, mandates malpractice insurance for bar members.<sup>14</sup>

Nationally, disciplinary enforcement has been improved and refined with assistance from the Conference of Chief Justices, the American Bar Association and the National Organization of Bar Counsel. There has been improved coordination among disciplinary authorities of different states as called for in the 1992 ABA report, *LAWYER REGULATION FOR A NEW CENTURY* (McKay Report).<sup>15</sup>

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of a foreign country where basis of jurisprudence is common law of England and applicant has studied 30 credit hours in basic courses at an ABA-accredited law school).

<sup>12</sup>Standardized examinations are produced by the National Conference of Bar Examinations (NCBE). At present, 52 jurisdictions employ the Multistate Professional Responsibility Examination (MPRE); 53 jurisdictions employ the Multistate Bar Examination (MBE), a standardized multiple-choice examination that covers six core subjects; 15 jurisdictions employ the Multistate Essay Examination (MEE), a standardized essay examination that covers ten subjects; and 27 jurisdictions employ the Multistate Performance Test (MPT), a standardized lawyer-skills examination. Five jurisdictions-Nebraska, North Dakota, South Dakota, Washington, D.C., and West Virginia-use only NCBE examinations; all others include some multiple choice or essay questions of their own. (Jurisdictions include the fifty states, the District of Columbia, and the following territories: Guam, Northern Mariana Islands, the Republic of Palau and the Virgin Islands.)

<sup>13</sup>See note 51, *infra*. Recently, three states-Idaho, Oregon and Washington-entered into a reciprocity agreement providing that a lawyer admitted in any one of those states may be admitted to practice law in the other states without having to pass their bar examinations. See, e.g., Rules for Admission of Attorneys in Oregon, Rule 15 (effective Jan. 1, 2002).

<sup>14</sup>Or. Rev. Stat. sec. 9.080, subsection 2.

<sup>15</sup>See Recommendations 20 (National Discipline Data Bank) and 21 (Coordinating Interstate Identification).

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

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

States give effect to jurisdictional restrictions through UPL statutes and proscriptions in the rules of professional conduct such as those based on ABA Model Rule 5.5. Although UPL provisions are most often applied to nonlawyers, they have also been applied to lawyers. They subject lawyers to the risk of sanction (in some states, criminal sanction) for practicing law within a state where they are not licensed. Besides being enforced directly, these provisions may be invoked in disciplinary proceedings based on disciplinary rules that prohibit lawyers from engaging in, or assisting others in, the unauthorized practice of law, in fee forfeiture actions or other civil actions by clients against their lawyers or by opposing parties in the context of disqualification motions.<sup>16</sup>

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

For transactional and counseling practices, and other work outside court or agency proceedings, there is no counterpart to *pro hac vice* admission, but, as discussed below, multijurisdictional law practice is common for certain types of practitioners. The laws of two

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<sup>16</sup>See note 22, *infra*.

states, Michigan and Virginia, specifically authorize occasional or incidental practice by out-of-state lawyers. Michigan's UPL statute provides that it does not apply to an out-of-state lawyer who is "temporarily in [Michigan] and engaged in a particular matter."<sup>17</sup> The Virginia rules permit an out-of-state lawyer occasionally to provide legal advice or services in Virginia "incidental to representation of a client whom the attorney represents elsewhere."<sup>18</sup> As noted earlier, California now specifically authorizes out-of-state lawyers to represent clients in arbitrations.<sup>19</sup> Some state courts have identified similar exceptions in judicial decisions.<sup>20</sup>

Some states also accommodate certain out-of-state lawyers who seek to establish a law office in the state or to practice law in the state on a regular basis. For example, states have adopted provisions permitting in-house corporate lawyers, or lawyers employed generally by organizational clients, to provide legal services on behalf of the organization from an office located in a state where the lawyer is not licensed. Typically, the lawyer is required to register and to submit to the state's regulatory authority.<sup>21</sup>

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<sup>17</sup>Mich. Comp. Law Ann. sec. 600.916.

<sup>18</sup>Va. State Bar Rule, Pt. 6, sec. 1(C).

<sup>19</sup>Rule 983.4, California Rules of Court. Among the California "safe harbors" is an additional one authorizing a judge advocate who is admitted in another United States jurisdiction to appear on behalf of an individual in military service.

<sup>20</sup>*See, e.g., In the Matter of Opinion 33 of the Committee on the Unauthorized Practice of Law*, 733 A.2d 478 (N.J. 1999) (authorizing work by out-of-state bond lawyers).

<sup>21</sup>*See, e.g., Fla. Ct. R. ch 17* (counsel exclusively employed by a business organization may relocate to Florida, without taking bar exam, upon annual registration with The Florida Bar, including annual fee, and sworn statement submitting to the Supreme Court of Florida for disciplinary purposes); Idaho Bar Commission Rule 220 (house counsel license available for lawyers licensed in other jurisdictions who "limit their professional activities to internal counseling and practice limited to the business of his or her employer," subject to \$640 fee, submission to Idaho disciplinary rules, and annual renewal); Kan. Sup. Ct. R. 706 (special temporary permit granted to out-of-state lawyer receiving entire compensation from employer upon verified petition including written certification from employer); Ky. Ct. R. 2.11 (limited certificate of admission for counsel performing legal services solely for employer, subject to all obligations of admitted members of Kentucky Bar Association, upon signed statement by employer, application fee of \$1000 plus current annual dues or fees of the Kentucky Bar Association); Mich. Bd. of L. Examiners R. 5 (special certificate available for institutional lawyer licensed for 3 of 5 years preceding application; character report and payment of fees required); Minn. Ct. Admission to Bar R. 9 (temporary license limited to 12 months for in-house counsel employed solely by a single organization, available upon employer affidavit, character and fitness investigation, and fee); Mo. Sup. Ct. R. 8.105 (limited license valid for five years available for employed lawyer upon application with affidavit from employer, character and fitness report, and application fee); Ohio Gov. Bar R. VI section 4 (lawyer employed full-time by a nongovernmental Ohio employer may be granted "corporate status" upon filing a Certificate of Registration and paying fee; may be renewed biennially as long as attorney is so employed); Okla. State Bar Rule Article 2, Section 5 (special temporary permit without examination for lawyer who becomes a resident of Oklahoma in order to accept or continue full-time employment; application must include various certificates, including from employer); Oregon Admission Rule 16.05 (effective Nov. 1, 2001) (lawyer employed by business entity may apply for admission as house counsel upon application, including affidavit signed by applicant and business entity, application fees, annual and other fees required of active members of the Oregon State Bar, investigation of applicant, passing of the Professional Responsibility Examination, and submission to Oregon rules governing admitted attorneys); S.C. App. Ct. Rule 405 (limited certificate of admission to practice available for lawyer who "performs most of his duties for the business employer in South Carolina and has his principal office in South Carolina" upon application accompanied by \$100 fee and statement signed by employer; lawyer is subject to all duties and obligations of active member of the South Carolina Bar); Washington Court Rules APR 8(f) (limited license for in-house counsel available if lawyer is employed in Washington, exclusively for business entity, upon application with affidavit of employer, application

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

### *The Increasing Prevalence of Multijurisdictional Practice*

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

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

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

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

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fees, and current year's annual membership fee; lawyer must pass the Professional Responsibility exam, and be subject to rules governing lawyers.)

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

as of other lawyers, such as bond lawyers or mergers-and-acquisition lawyers, who practice in specialized areas. For some lawyers, multijurisdictional practice grows out of an ongoing relationship with a client. Sometimes, the work is for a client who resides in the lawyer's home state but who has business dealings outside the state. Other times, the work is for a client who has moved out of state. A lawyer who drafts a will for a client in one state may be asked by that client to draft a codicil to the will after the client has moved to another state. For in-house lawyers in particular, ongoing work for a corporate employer commonly involves travel to the different states where the corporation has offices or business interests.

### *The Impact of Jurisdictional Restrictions on Legal Practice*

Lawyers have general understandings about how jurisdictional restrictions apply to their work in states where they are not licensed. These understandings are shaped less by the wording of the UPL provisions or by decisional law, which is sparse,<sup>22</sup> than by conventional wisdom or by what the U.S. Supreme Court has called "the lore of the profession."<sup>23</sup> On one hand, lawyers understand that they may not open a permanent office in a state where they are not licensed and also that they may not appear in the court of a state where they are not licensed without judicial authorization. On the other hand, lawyers recognize that they may give advice in their own states concerning the law of other jurisdictions, that they may represent out-of-state clients in connection with transactions and litigation that take place where the lawyer is licensed, and that they may travel to other jurisdictions in connection with legal work on behalf of clients who reside in and have matters in the state where the lawyer is licensed.

Lawyers' general understandings are, to some extent, reinforced by the sporadic enforcement of state UPL laws. Regulatory actions are rarely brought against lawyers who assist clients on a temporary basis in connection with multi-state or interstate matters. This might fairly suggest that there is a profession-wide understanding that the UPL laws, however broadly they may be written and however they may be interpreted in theory, will be interpreted by courts

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<sup>22</sup>Recent decisions applying UPL restrictions include: *Z.A. v. San Bruno Park School Dist.*, 165 F.3d 1273 (9<sup>th</sup> Cir. 1998) (California UPL law held to forbid out-of-state lawyer from providing legal assistance, as distinguished from lay advice, in connection with state administrative proceeding); *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Ca. 1998) (denying portion of fee to New York law firm that represented New York and California clients in connection with California arbitration); *Koscove v. Bolte*, 30 P.3d 784 (Colo. Ct. App. 2001) (finding that Wisconsin lawyer engaged in UPL in Colorado by investigating and pursuing client's claim for royalty payments and assisting in contemplated lawsuit, prior to being admitted *pro hac vice*); *Torrey v. Leesburg Regional Medical Center*, 769 So. 2d 1040 (Fla. 2000) (finding that Michigan lawyer engaged in UPL by filing civil complaint in Florida, where other members of his firm were licensed but he was not); *Attorney Grievance Commission of Maryland v. Harris-Smith*, 737 A.2d 567 (Md. 1999) (finding that attorney admitted in three other states engaged in UPL in Maryland by practicing for three years in Maryland law firm, where she screened cases for her federal bankruptcy court practice); *In re Jackman*, 761 A.2d 1103 (N.J. 2000) (finding that lawyer admitted in Massachusetts engaged in UPL for seven years by serving as an associate in a New Jersey law firm and, in that role, working on transactional matters in which he interviewed and counseled clients, prepared and signed documents, and negotiated with other lawyers); *Office of Disciplinary Counsel v. Pavlik*, 732 N.E.2d 985 (Ohio 2000) (sanctioning Ohio lawyer for aiding and abetting UPL by Illinois lawyer whom he hired to assist his law firm's corporate clients as a business broker and financial consultant).

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

<sup>23</sup>*In re Snyder*, 472 U.S. 634, 645 (1985).

and enforcement agencies to accommodate reasonable and conventional professional practices. Further, one might assume that, because of the sporadic nature of proceedings to enforce jurisdictional restrictions, lawyers may comfortably rely on their professional understandings and that, therefore, there is no need to reform existing laws, however inconsistent or non-specific they may be. These assumptions would be mistaken, however.

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

The existing system of lawyer regulation has costs for clients. For example, out of concern for jurisdictional restrictions, lawyers may decline to provide services that they are able to render skillfully and ethically. In doing so, they may deprive the client of a preferred lawyer including, at times, a lawyer who can serve the client more efficiently and economically than other available lawyers by drawing on knowledge gained in the course of prior work for the particular client or by drawing on expertise in the particular subject area. For example, the same considerations that may lead a corporation to prefer the services of an in-house lawyer, irrespective of where that lawyer is licensed, might lead a corporation to prefer the services of a lawyer or law firm with which it has a sustained relationship. Cautious lawyers may deny both institutional and individual clients the benefit of an ongoing client-lawyer relationship. Alternatively, lawyers may insist that the client engage local counsel or co-counsel in situations where doing so adds unnecessarily to the expense of the representation, because the out-of-state lawyer possesses all the necessary knowledge and expertise and would represent the client competently and ethically.

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



## Recommendation 1

### Regulation of the Practice of Law by the Judiciary

**The American Bar Association affirms its support for the principle of state judicial regulation of the practice of law.**

#### Discussion

The most fundamental question for this Commission, and for the legal profession, is whether jurisdictional restrictions on the practice of law have continued validity and should be retained in the United States. The Commission believes that the principle of the regulation of the practice of law by the state judicial branch of government, which includes jurisdictional limits on legal practice, should be preserved, and therefore recommends that the ABA affirm its support for this fundamental principle.

A number of organizations and individuals have noted that, in the European Union, a lawyer in one member state may establish a law practice in another member state with relative ease,<sup>24</sup> and have proposed that jurisdictional restrictions similarly be relaxed in the United States. These proposals have come in several forms.

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

Proponents of a national scheme have suggested various ways in which the concept of law practice without jurisdictional limitations might be implemented. One suggestion is that all jurisdictions enact laws providing that any United States lawyer may practice law in any jurisdiction, permanently or on a temporary basis, without a requirement of additional

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<sup>24</sup>See generally, Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 INT'L LAW 307 (2000); See also, Ronald A. Brand, *Uni-State Lawyers And Multinational Practice: Dealing With International, Transnational, And Foreign Law*, 34 VAND. J. TRANSNAT'L L. 1135 (2001); Wayne J. Carroll, *Innocents Abroad: Opportunities and Challenges for the International Legal Advisor*, 34 VAND. J. TRANSNAT'L L. 1097 (2001); Julian Lonbay, *Lawyer Ethics in the Twenty-first Century: The Global Practice Reconciling Regulatory and Deontological Differences - The European Experience*, 34 VAND. J. TRANSNAT'L L. 907 (2001); Steven Mark, *Harmonization Or Homogenization? The Globalization Of Law And Legal Ethics--An Australian Viewpoint*, 34 VAND. J. TRANSNAT'L L. 1173 (2001); Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001); The Law Society of England and Wales, Comment to the ABA Commission on Multijurisdictional Practice (submitted March 19, 2002), [www.abanet.org/cpr/mjp/comm2\\_lsew.pdf](http://www.abanet.org/cpr/mjp/comm2_lsew.pdf); Union Internationale des Avocats, Memorandum to the ABA Commission on Multijurisdictional Practice (March 13, 2002) [www.abanet.org/cpr/mjp/comm2\\_uida.html](http://www.abanet.org/cpr/mjp/comm2_uida.html); cf. Laurel Terry, Memorandum (May 2001), [http://www.abanet.org/cpr/mjp-comm\\_terry.doc](http://www.abanet.org/cpr/mjp-comm_terry.doc) (for Terry charts analyzing various global MJP schemes, click on [http://www.abanet.org/cpr/mjp-written\\_comments.html](http://www.abanet.org/cpr/mjp-written_comments.html)); The Law Society of Alberta, *Should We Build Walls or Gates?* (February 2001), [http://www.abanet.org/cpr/mjp-comm\\_lsa.html](http://www.abanet.org/cpr/mjp-comm_lsa.html) (offers Canada's reciprocal protocol as a model for achieving greater inter-jurisdictional mobility).

admission.<sup>25</sup> Another plan contemplates a national compact, whereby states would permit other states' lawyers to provide legal services in the state on a temporary basis, and whereby a lawyer from one state could move to another state and become a member of the bar in that state without having to take another bar exam, provided the lawyer establishes that he or she is a member in good standing of a state bar, is of good character and pays all relevant fees.<sup>26</sup> A third proposal for comprehensive reform, the so-called "driver's license" model, envisions a uniform registration system that would enable a lawyer licensed in one jurisdiction to establish an office or otherwise engage in a systematic and continuous presence in another jurisdiction for the practice of law.<sup>27</sup> Under all of these proposals, lawyers who are unqualified to undertake legal work could be subject to disciplinary proceedings and legal malpractice actions, but jurisdictional restrictions would not play any role in protecting clients from unqualified lawyers.

Those in favor of permitting national law practice have advanced various arguments to support their position. First and foremost, they have suggested that eliminating geographic limits will promote client interests, and that regulatory interests that are said to justify these limits can be adequately served without them. In general, consistent with the duty of competence, they argue that out-of-state lawyers will undertake legal work only if they are qualified to perform that work, as is ordinarily true of lawyers practicing within their own states. The ethical obligation will be reinforced by the risk of civil liability or disciplinary sanction, as well as the risk to their professional reputation, if lawyers perform negligently.

In addressing the professional misconduct engaged in by a few incompetent or unethical lawyers, proponents of national law practice posit that geographic restrictions of any kind are overly exclusive, in that they deny clients access to many out-of-state lawyers who would represent them competently and ethically. They suggest that state regulatory interests might be served equally well in other ways: first, by providing increased resources to disciplinary authorities to enable them to bring actions against lawyers who perform incompetently or unethically or who undertake work for which they are not qualified; second, by encouraging greater coordination among disciplinary authorities across the country; third, by providing

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<sup>25</sup>Association of Professional Responsibility Lawyers ("APRL"), Proposal to the ABA Commission on Multijurisdictional Practice (February 2001) (first tier of proposal suggests decriminalizing the purely temporary presence of out-of-state lawyers); the Association of the Bar of the City of New York, Statement of Evan A. Davis, President, before the ABA Commission on Multijurisdictional Practice (March 30, 2001), [http://www.abanet.org/cpr/mjp-comm\\_bacny.html](http://www.abanet.org/cpr/mjp-comm_bacny.html).

<sup>26</sup>See American Corporate Counsel Association ("ACCA"), Memorandum dated February 16, 2001 to ABA Commission on Multijurisdictional Practice, [http://www.abanet.org/cpr/mjp-mcguckin\\_witness.html](http://www.abanet.org/cpr/mjp-mcguckin_witness.html). Under this proposed arrangement, states would retain control over lawyer admission, discipline, and other practice requirements such as those relating to CLE, *pro bono* work, participation in Interest on Lawyers' Trust Accounts (IOLTA) programs and professional liability insurance.

<sup>27</sup>See Association of Professional Responsibility Lawyers ("APRL"), Proposal to the ABA Commission on Multijurisdictional Practice (February 2001), [http://www.abanet.org/cpr/mjp-comm\\_aprl.html](http://www.abanet.org/cpr/mjp-comm_aprl.html). This proposed model would include various requirements: Three years prior admission to a U.S. jurisdiction; a certificate of good standing from the home jurisdiction; statements of two sponsors affirming the applicant's character and fitness; certification that the lawyer has read the state's ethics rules; a registration fee of \$500 or more, as well as annual fees; annual certification that the lawyer remains in good standing in other jurisdictions where admitted; appearance with local co-counsel in court unless permitted otherwise under existing *pro hac vice* rules. In this model, registered lawyers would be subject to the jurisdiction of the host state's disciplinary agency and the state's character and fitness authority would have the right to review and object to any applicant.

additional financing to client protection funds to enable these funds to better compensate clients who are harmed by lawyers' dishonesty; and, fourth, by requiring all lawyers to maintain professional liability insurance in order to better compensate clients who are financially harmed by lawyers' negligence.

Many of those from whom the Commission heard did not advocate the elimination of jurisdictional restrictions on a wholesale basis, but advocated loosening restrictions on a limited basis. A coalition of several national organizations proposed amending Model Rule 5.5 (and changing state UPL laws where necessary) to authorize lawyers to practice on a temporary basis in a state in which they are not licensed as long as they do not establish an office in that state and so long as they are in good standing in their states of admission.<sup>28</sup>

Some groups affirmatively opposed or specifically declined to endorse national practice,<sup>29</sup> because they believe that regulatory interests served by jurisdictional restrictions cannot otherwise be served adequately in some contexts, such as when unsophisticated state residents retain out-of-state counsel to render services concerning matters in the state that are governed by state law.<sup>30</sup> Traditionally, it has been assumed that the lawyer licensed in the state will, on average, be better qualified to perform this work. That lawyer will be more likely to have studied state law, both prior to admission and afterwards, and to have gained experience in state law matters by virtue of having established a practice in the state and having worked with other in-state lawyers who serve either as supervisors or as mentors. In general, states have greater confidence in their own admissions processes than in that of sister states. Likewise, states believe that lawyers practicing in the states in which they are licensed are more likely than out-of-state lawyers to comply with state disciplinary obligations and are more readily and directly subject to sanction when they fail to do so. Further, states may believe that fostering the development of the local bar through jurisdictional restrictions serves the public interest.

Consistent with these beliefs, those who oppose eliminating jurisdictional restrictions raised a variety of concerns about harms that may result from eliminating jurisdictional

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<sup>28</sup>See Joint Proposal of the American Corporate Counsel Association (ACCA), the Association of Professional Responsibility Lawyers (APRL), the National Organization of Bar Counsel (NOBC), and others, *A Common Sense Proposal for Multijurisdictional Practice*. The proposal, which has gone through a series of revisions, is available at: <http://www.acca.com/advocacy/mjp/commonsenseproposal.html> and <http://www.acca.com/commonsenseproposal.html>.

<sup>29</sup>See, e.g., Akron Bar Association, Written Testimony On Behalf of the Akron Bar Association Re: Multijurisdictional Practice (Feb. 5, 2001), [http://www.abanet.org/cpr/mjp-comm\\_akronba.html](http://www.abanet.org/cpr/mjp-comm_akronba.html); Camden County Bar Association ad hoc Committee on Multi-jurisdictional Practice, (letter dated April 14, 2001), [http://www.abanet.org/cpr/mjp-comm\\_cbba.html](http://www.abanet.org/cpr/mjp-comm_cbba.html); Delaware State Bar Association, Report of the Multijurisdictional Practice Special Committee, (April 23, 2001); Louisiana State Bar Association, Special Committee on Multijurisdictional Practice, Preliminary Report, [http://www.abanet.org/cpr/mjp-comm\\_lsba.html](http://www.abanet.org/cpr/mjp-comm_lsba.html); Nebraska State Bar Association Memorandum to the ABA Commission on Multijurisdictional Practice (May 11, 2001), [http://www.abanet.org/cpr/mjp-comm\\_nsba.doc](http://www.abanet.org/cpr/mjp-comm_nsba.doc); Nevada State Bar Commission on MJP Memorandum to ABA Commission on Multijurisdictional Practice (June 21, 2001), [http://www.abanet.org/cpr/mjp-comm\\_nsba.html](http://www.abanet.org/cpr/mjp-comm_nsba.html); New Jersey State Bar Association, Committee on Multijurisdictional Practice, Preliminary Report and Recommendations (June 25, 2001), [http://www.abanet.org/cpr/mjp-comm\\_njsba.html](http://www.abanet.org/cpr/mjp-comm_njsba.html).

<sup>30</sup>See, e.g., *Matter of Stambulis*, No. 022701294 (Ill. Sup. Ct. 2001) (Illinois lawyer suspended for, *inter alia*, engaging in UPL by assisting at least 100 clients in more than a half dozen different states in the preparation of trust documents, at least some of which were not properly prepared in accordance with the law of the client's state).

restrictions entirely, including: unscrupulous lawyers may provide services that they are unqualified to render; well-intentioned lawyers may misjudge their ability to render competent advice in a foreign jurisdiction; overworked disciplinary agencies may not be able to regulate out-of-state lawyers effectively; lawyers may "race to the bottom" by gaining admission in states that are perceived to have lower admissions criteria and then practicing law in states that are perceived to have more stringent criteria; and national practice may erode the commitment of the bar to objectives such as undertaking *pro bono* representation, working to improve the law, maintaining client protection funds, and promoting continuing legal education programs.<sup>31</sup>

This debate is difficult to resolve, in large part, because of the absence of empirical evidence about how the elimination of jurisdictional restrictions would affect law practice in the United States, and the inability to obtain such evidence without authorizing national practice. Although there is no evidence that current common multijurisdictional practices pose a significant disciplinary threat or result in the provision of incompetent representation, one cannot necessarily conclude from this that eliminating geographical restrictions in their entirety will be harmless. Many believe that common wisdom suggests otherwise. Nor is there evidence that clients will be better served by permitting national law practice, rather than by authorizing multijurisdictional practice by the judicial branch of government on a more limited basis. Thus, the question is how to proceed in an area of uncertainty.

The Commission believes that, at the present juncture, and given the present state of knowledge, the ABA should not recommend the wholesale elimination of jurisdictional limits on law practice, whether for established practice, regular practice, or temporary and occasional practice. Given the principle of state-based judicial regulation of the legal profession, the assumptions underlying that principle, and the support of a large segment of the bar for preserving it, the Commission believes that a stronger case would have to be made that national law practice is essential and that a more measured approach will not suffice to facilitate law practice and to promote the public interest. While that case may be made over time as lesser changes are adopted and as law practice continues to evolve, the Commission does not believe it has been made yet. The Commission's conclusion is that, for the present, the judicial branch of government in each state should identify those particular interstate practices, comparable to *pro hac vice* representation, that should explicitly be authorized, because client choice and other interests in favor of multijurisdictional law practice outweigh the countervailing regulatory interests, and identify other reforms to facilitate and effectively regulate appropriate interstate and multi-state law practice. The Commission believes that allowing such practices will not only serve the public interest, but also improve obedience to and enforcement of the applicable rules.<sup>32</sup>

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<sup>31</sup>See, e.g., New Jersey State Bar Association, Report and Recommendations on Multijurisdictional Practice (March 2002), [www.abanet.org/cpr/mjp/comm2\\_njsba.html](http://www.abanet.org/cpr/mjp/comm2_njsba.html).

<sup>32</sup>Many entities offering comments to the Commission have urged liberalizing restrictions. See, e.g., ABA Section of Antitrust Law, Memorandum to ABA Commission on Multijurisdictional Practice (March 13, 2002), [http://www.abanet.org/cpr/mjp/comm2\\_al.html](http://www.abanet.org/cpr/mjp/comm2_al.html); ABA Section of Business Law, Memorandum to the ABA Commission on Multijurisdictional Practice (March 13, 2002), [http://www.abanet.org/cpr/mjp/comm2\\_bl2.pdf](http://www.abanet.org/cpr/mjp/comm2_bl2.pdf); Council of the Bars and Law Societies of the European Union, Memorandum to the ABA Commission on Multijurisdictional Practice (March 12, 2002), [www.abanet.org/cpr/mjp/comm2\\_ccbe.pdf](http://www.abanet.org/cpr/mjp/comm2_ccbe.pdf); Federal Communications Bar Association (FCBA), Statement at the Philadelphia Hearing of the ABA Commission on Multijurisdictional Practice (Feb. 1, 2002), [http://www.abanet.org/cpr/mjp-comm\\_fcba.html](http://www.abanet.org/cpr/mjp-comm_fcba.html); ABA Law Student Division, Resolution (Aug. 3, 2001), [http://www.abanet.org/cpr/mjp-comm\\_lsd.doc](http://www.abanet.org/cpr/mjp-comm_lsd.doc); American College of Real Estate Lawyers (ACREL), Comments on the Interim Report of the ABA Commission on Multijurisdictional Practice (March 2002),

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[http://www.abanet.org/cpr/mjp/comm2\\_acrel2.html](http://www.abanet.org/cpr/mjp/comm2_acrel2.html); ABA Section of Real Property, Probate and Trust Law, Comments on Multi-jurisdictional Practice (Jan. 23, 2001), [http://www.abanet.org/cpr/mjp-comm\\_srpt.html](http://www.abanet.org/cpr/mjp-comm_srpt.html) & Supplemental Comments on Multijurisdictional Practice (June 29, 2001), [http://www.abanet.org/cpr/mjp-comm\\_srpt2.html](http://www.abanet.org/cpr/mjp-comm_srpt2.html); ABA Senior Lawyers Division, Resolution (April 21, 2001), [http://www.abanet.org/cpr/mjp-comm\\_sld.html](http://www.abanet.org/cpr/mjp-comm_sld.html); ABA Standing Committee on Solo and Small Firm Practitioners, Memorandum to the ABA Commission on Multijurisdictional Practice (Aug. 16, 2001) [http://www.abanet.org/cpr/mjp-comm\\_solo.doc](http://www.abanet.org/cpr/mjp-comm_solo.doc).

## Recommendation 2

### Multijurisdictional Practice of Law

The American Bar Association adopts amended Rule 5.5 of the ABA *Model Rules for Professional Conduct* as follows:

#### **RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW**

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

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

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

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

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

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

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

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

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

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

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

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

## **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.

[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.

## Discussion

Rule 5.5 of the ABA *Model Rules of Professional Conduct* (Unauthorized Practice of Law) currently prohibits a lawyer from practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction and from assisting a person who is not a member of the bar in the unauthorized practice of law. The MJP Commission proposes to re-title the Rule “Unauthorized Practice of Law; Multijurisdictional Practice of Law.” Additionally, the Commission proposes two sets of amendments to the Rule.

First, Rule 5.5 would be clarified and strengthened by adoption of amended sections 5.5(a) and (b). As amended, Rule 5.5(a) would make clear that a lawyer is prohibited not only from engaging in the unauthorized practice of law, but also from assisting another in the unauthorized practice of law. Proposed Rule 5.5(b) would make clear that, except when authorized by law or rule, a lawyer may not establish an office or other systematic and continuous presence for the practice of law in a jurisdiction in which the lawyer is not admitted to practice. Nor may the lawyer hold out to the public or otherwise represent that the lawyer is admitted to practice law in that jurisdiction.

Second, the standards identified in proposed sections 5.5(c) and (d) would recognize specific exceptions to otherwise applicable restrictions on the practice of law by out-of-state lawyers, in order to facilitate multijurisdictional law practice in identifiable situations that serve the interests of clients and the public and do not create an unreasonable regulatory risk. These standards draw on the prior work of the Ethics 2000 Commission, the American Law Institute’s Restatement of the Law Governing Lawyers, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Section of Business Law, other ABA entities and state and local bar associations.

The Ethics 2000 Commission anticipated the MJP Commission’s work by proposing for inclusion in ABA Model Rule 5.5 exceptions to the general rule that a lawyer may practice law only in a jurisdiction in which the lawyer is licensed. The Ethics 2000 Commission’s proposed multijurisdictional practice standards were specific applications of the general principle that, under certain circumstances, it is in the public interest for a lawyer admitted in one United States jurisdiction to be allowed to provide legal services in another United States jurisdiction because the interests of the lawyer’s client will be served if the lawyer is permitted to render the particular services, and doing so does not create an unreasonable risk to the interests of the lawyer’s client, the public or the courts.<sup>33</sup> In such circumstances, it should not be the

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<sup>33</sup>In our November 2001 Interim Report, we referred to the several categories of authorized cross-border practice as “safe harbors.” However, none of the Commission’s recommendations in that Report, and none in this one, contain the phrase “safe harbor.” Rather, the term, a familiar one to lawyers, has been a useful metaphor for conceptualizing the categories of legal work that a lawyer admitted in one jurisdiction may do in another jurisdiction. The phrase “safe harbor” does not, however, help clarify the policies behind, or the language chosen for, our recommendations.

unauthorized practice of law for a lawyer admitted in another United States jurisdiction to provide legal services in a jurisdiction in which the lawyer is not admitted. To similar effect, Restatement (Third) of the Law Governing Lawyers § 3(3) identified specific situations where a lawyer not admitted to practice law in a jurisdiction may provide legal services to a client in that jurisdiction.

The MJP Commission worked to develop, refine and harmonize the Ethics 2000 Commission's initial list of multijurisdictional practice standards and the Restatement provision in light of the study conducted by the MJP Commission. Both before and after the Commission issued its Interim Report, the Commission received extremely helpful proposals for developing and refining the provisions of proposed Rule 5.5.<sup>34</sup> The Commission drew liberally on the suggestions it received.

The multijurisdictional practice standards will not eliminate all uncertainty regarding interstate law practice but will provide a framework for the activities that the Commission believes should be authorized. In identifying these new standards, the Commission has taken a conservative approach, addressing only those classes of conduct that do not pose unacceptable risks to the public interest. Because the exercise of determining what constitutes authorized conduct requires judgment and balancing, the application of the new standards leaves room for individual opinion and judicial interpretation.

While the MJP Commission's proposed Model Rule 5.5 identifies situations in which United States lawyers may practice law outside the jurisdictions in which they are licensed, the adoption of this rule by state judiciaries may not, in itself, provide the necessary authorization to out-of-state lawyers. As discussed earlier, restrictions on unauthorized practice of law are also embodied in laws and rules that differ from state to state. Particularly in jurisdictions in which the UPL restrictions are contained in legislation, state legislative reform may also be necessary.

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We have deleted the term from this Report, but do not intend this drafting choice to alter the fundamental organization of our recommendations or the policies that we believe support them. For example, our proposed Rule 5.5 forbids certain conduct in violation of the regulation of the legal profession. So did the draft of this Rule in our Interim Report. Our proposal then describes certain categories of work that are nonetheless authorized in a jurisdiction in which a lawyer is not admitted to practice. The draft of the Rule in the Interim Report did the same (although the Report, but not the Rule or comment, labeled these categories "safe harbors.") Although we have rewritten the scope of the authorized work in light of testimony and comments we received in response to our Interim Report, the structure of Rule 5.5 – forbidding certain conduct but authorizing other conduct – remains unchanged.

<sup>34</sup>See, e.g., Report and Recommendations of the State Bar of Arizona (submitted March 15, 2002), [www.abanet.org/cpr/mjp/comm2\\_asb.doc](http://www.abanet.org/cpr/mjp/comm2_asb.doc); ABA Section of Business Law, Memorandum to ABA Commission on Multijurisdictional Practice (March 13, 2002), [www.abanet.org/cpr/mjp/comm2\\_bl.pdf](http://www.abanet.org/cpr/mjp/comm2_bl.pdf); Connecticut Bar Association, Updated Report of the CBA Task Force on Multijurisdictional Practice, (March 18, 2002), [www.abanet.org/cpr/mjp/comm2\\_connba.pdf](http://www.abanet.org/cpr/mjp/comm2_connba.pdf); ABA Standing Committee on Ethics and Professional Responsibility, Memorandum to the ABA Commission on Multijurisdictional Practice (March 15, 2002) [www.abanet.org/cpr/mjp/comm2\\_ethics2.pdf](http://www.abanet.org/cpr/mjp/comm2_ethics2.pdf); Federal Communications Bar Association (FCBA) Statement at the Philadelphia Hearing of the ABA Commission on Multijurisdictional Practice (Feb. 1, 2002), [http://www.abanet.org/cpr/mjp/comm2\\_fcba.html](http://www.abanet.org/cpr/mjp/comm2_fcba.html); ABA Section of International Law and Practice, Follow-up Testimony on Multi-jurisdictional Practice Attorney Conduct Rules (June 1, 2001), [www.abanet.org/cpr/mjp-comm\\_silp2.html](http://www.abanet.org/cpr/mjp-comm_silp2.html); Missouri Bar Multijurisdictional Practice Committee, Comments on the Interim Report of the American Bar Association's Commission on Multijurisdictional Practice (Jan. 16, 2002), [www.abanet.org/cpr/mjp/comm2\\_mbc3.html](http://www.abanet.org/cpr/mjp/comm2_mbc3.html).

**Proposed Model Rule 5.5(a)** would make clear that a lawyer may not assist another, whether a lawyer or nonlawyer, in the unauthorized practice of law. Existing Rule 5.5 has two provisions: Rule 5.5(a) forbids a lawyer from engaging in the practice of law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction and Rule 5.5(b) forbids a lawyer from assisting a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. The Commission proposes combining and refining these restrictions into a single provision, which would provide that “[a] lawyer shall not practice law in a jurisdiction, or assist *another* in doing so, in violation of the regulation of the legal profession in that jurisdiction.” (emphasis added) However, this would not effect a substantive change to the Model Rules, since this is simply a specific application of Model Rule 8.4(a) (Misconduct), which prohibits a lawyer from “knowingly assist[ing]” another in violating the Rules of Professional Conduct.

**Proposed Model Rule 5.5(b)** would prohibit a lawyer from establishing an office or maintaining a systematic and continuous presence in a jurisdiction, except as authorized by the Model Rules or other law; and it would also prohibit a lawyer from representing that the lawyer is admitted in a jurisdiction if the lawyer is not admitted. Nothing in the proposed rule would authorize lawyers to open an office or otherwise establish a permanent law practice in states where they are not licensed or otherwise authorized to do so. Nor would any part of the proposed rule permit lawyers to hold themselves out as licensed to practice law in jurisdictions where they are not in fact licensed. The amendments recommended by the Commission make these limitations clear. As discussed below, the Commission has developed a separate recommendation on "admission on motion" directed at lawyers seeking to establish a law practice in jurisdictions where they are not currently licensed to practice law. (*See Recommendation 7, infra.*)

**Proposed Model Rule 5.5(c)(1)** would allow work on a temporary basis in a state by an out-of-state lawyer who is associated in the matter with a lawyer who is admitted to practice in the jurisdiction and who actively participates in the representation. This provision would promote the client's interest in counsel of choice in many circumstances where the client has good reason to engage both a local and an out-of-state lawyer. One recurring example is where local counsel recommends engaging the assistance of a lawyer with special or particularized expertise. Another is where the client has a prior or ongoing relationship with the out-of-state lawyer in whom the client has particular confidence and whose advice is sought in evaluating the services of the local counsel. Lawyers who assist litigation counsel but who do not themselves appear in judicial proceedings would also be covered by this provision.

For this provision to apply, the lawyer admitted to practice in the jurisdiction could not serve merely as a conduit for the out-of-state lawyer, but would have to share actual responsibility for the representation.<sup>35</sup> When that condition is met, the state's regulatory interest in protecting the interests of both clients and the public is adequately served. The lawyer who is licensed in the jurisdiction will have an opportunity to oversee the out-of-state lawyer's work and to assure that the work is performed competently and ethically. The local lawyer, having been found to have the requisite fitness and character to practice law in the state, is presumptively qualified to carry out this responsibility.

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<sup>35</sup>*See, e.g.*, Ethics Advisory Committee of the South Carolina Bar, Advisory Opinion 93-35 (1993).

This provision would permit a lawyer to provide legal services on a temporary basis in an office of the lawyer's firm outside the lawyer's home state, as long as the lawyer is in a genuine co-counsel relationship with a lawyer of the firm who is licensed in the jurisdiction. However, this provision is not intended to cover associates who rotate among a law firm's offices for periods that would be longer than "temporary."<sup>36</sup>

**Proposed Model Rule 5.5(c)(2)** would allow lawyers to provide services ancillary to pending or prospective litigation. Specifically, it would permit a lawyer's temporary presence in a state where the lawyer is not presently admitted to practice, if (a) the lawyer's services are in anticipation of litigation reasonably expected to be filed in a state where the lawyer is admitted or expects to be admitted *pro hac vice*, or (b) the lawyer's services are ancillary to pending litigation in which the lawyer lawfully appears (or reasonably expects to appear), either because the lawyer is licensed in the jurisdiction where the litigation takes place or because the lawyer has been or reasonably expects to be admitted *pro hac vice* to participate in the litigation. This provision would not supplant *pro hac vice* requirements, however. In order to appear before a tribunal in a state where the lawyer is not licensed, the out-of-state lawyer would be required to comply with existing *pro hac vice* provisions.

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

Additionally, this provision would cover work of a similar nature in connection with prospective litigation when there is a reasonable expectation that the lawsuit will be filed in a jurisdiction in which the lawyer is admitted to practice law or reasonably expects to be admitted *pro hac vice*. Prior to the filing of a lawsuit in a particular jurisdiction, lawyers may need to

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<sup>36</sup>Law firms sometimes "rotate" lawyers among offices of the firm located in different jurisdictions; there are various salutary reasons to do so, such as to improve the lawyers' understanding of firm work, culture and operations, to enhance their skills, or to increase their exposure to the work of other lawyers or firm clients. Alternatively, a lawyer may be brought into the office with the expectation that the lawyer will obtain admission to that state's bar, but the admissions process may take several months or longer to achieve.

Proposed Model Rule 5.5(c) often will not apply to an extended residence in a law office in a jurisdiction in which these lawyers are not licensed, because the intended presence in the jurisdiction will not be "temporary." However, UPL provisions will ordinarily permit these lawyers to engage in certain work, as long as they are competent to perform it, the work is performed under the supervision of a lawyer admitted in the jurisdiction who takes responsibility for the work, the out-of-state lawyers identify their jurisdictional limitations on all communications with the public, clients or prospective clients, and they do not otherwise hold themselves out as locally admitted. See *In re Jackman* 761 A.2d 1103, 1107 (N.J. 2000); *Shapiro v. Steinberg*, 440 N.W.2d 9, 11 (Mich. App. 1989); *Dietrich Corp. v. King Resources Co.*, 596 F.2d 422, 426 (10th Cir. 1979); New York County Lawyers' Association Committee on Professional Ethics, Opinion 682 (1990).

perform a variety of tasks, such as interviewing witnesses and reviewing documents, which may occur in multiple states. As in the case of pending litigation, in the context of prospective litigation it would be exceedingly costly and inefficient to require a party to retain separate counsel in every state in which such preliminary work must be done.

This provision would also cover supporting work by assisting lawyers who do not appear before the tribunal and are not themselves admitted *pro hac vice*. When a group of lawyers from an out-of-state law firm works collectively on a substantial litigation, it is understood that those lawyers who are making formal appearances in court or in depositions must seek *pro hac vice* admission, but it is customary for assisting lawyers not to do so if they serve exclusively in certain supporting roles, such as conducting legal research and drafting documents. The Commission's proposed amendment would establish that as long as the supervisory lawyers involved in the litigation are or reasonably expect to be authorized to appear in the proceeding, this type of supporting legal work by assisting lawyers is permissible, even if some of it is performed outside the states in which the assisting lawyers are licensed.

Proposed Model Rule 5.5(c)(2) would also make clear that jurisdictional restrictions do not apply when out-of-state lawyers are authorized by law or court order to appear before a tribunal or administrative agency in the jurisdiction. As the Ethics 2000 Commission provided in Comment [3] to its proposed provision on this subject,

Lawyers not admitted to practice generally in the jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. Such authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency.<sup>37</sup>

To avoid confusion, the proposed Rule would incorporate the substance of this Comment.

**Proposed Model Rule 5.5(c)(3)** would allow a lawyer to provide services on a temporary basis in a jurisdiction in which the lawyer is not licensed to practice law in connection with the representation of clients in pending or anticipated arbitrations, mediations or other alternative dispute resolution ("ADR") proceedings, where the work arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The provision would not apply, however, when participation in an ADR proceeding is governed by a *pro hac vice* provision.

It is generally recognized that, in the ADR context, there is often a strong justification for choosing a lawyer who is not admitted to practice law in the jurisdiction in which the proceeding takes place but who has an ongoing relationship with the client, who is admitted to practice in the jurisdiction in which the client is located, or has developed a particular knowledge or expertise that would be advantageous in providing the representation. Admission to practice law in the jurisdiction in which the proceeding takes place may be relatively unimportant, in part, because that jurisdiction may have no relation to the law governing the proceeding or to the dispute. Unlike litigation, in ADR parties may select the site of the proceeding simply on the basis of

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<sup>37</sup>See Commission on Evaluation of the Rules of Professional Conduct, Report 401 to the ABA House of Delegates (February 2002).

convenience. At times, as in the case of international arbitrations, a site is chosen precisely because it has no connection to either party or to the dispute. Thus, in ADR proceedings, the in-state lawyer is not ordinarily better qualified than other lawyers by virtue of greater familiarity with state law, state legal processes and state institutions.<sup>38</sup> Further, as noted by the ABA Section of Litigation in its comments to the Commission, "Clients have important considerations in ADR, which include confidentiality, consistency, uniformity, costs, and convenience. After all, non-binding ADR procedures usually require client 'buy in' to succeed. Denying a client her preferred counsel could hamper early ADR efforts and impede prompt resolution of disputes."<sup>39</sup> It is for these reasons that many found the *Birbrower* decision troubling, and that the California legislature subsequently adopted a law temporarily authorizing out-of-state lawyers to represent clients in arbitration proceedings.<sup>40</sup>

This proposed provision would not address the work of arbitrators, mediators and others serving in ADR proceedings in comparable non-representative roles. It is questionable whether work as an adjudicator or "neutral" in an ADR proceeding comprises the practice of law for purposes of UPL restrictions. Assuming it does, this work would typically be covered by the proposed provision, discussed below in Model Rule 5.5(c)(4), applicable to providing services that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

**Proposed Model Rule 5.5(c)(4)** would permit, on a temporary basis, transactional representation, counseling and other non-litigation work that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. This provision would address legal services provided by the lawyer *outside* the lawyer's state of admission that are related to the lawyer's practice *in* the home state. The provision is drawn from § 3(3) of the Restatement (Third) of the Law Governing Lawyers. The Commission's proposed Comment to Rule 5.5 offers guidance as to its scope and limitations, and it is anticipated that courts and other authorities would provide additional guidance.

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

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<sup>38</sup>See American Arbitration Association ("AAA"), Letter to the ABA Commission on Multijurisdictional Practice, (June 15, 2001), [http://www.abanet.org/cpr/mjp-comm\\_aaa.html](http://www.abanet.org/cpr/mjp-comm_aaa.html).

<sup>39</sup>ABA Section of Litigation, Preliminary Position Statement on Multi-jurisdictional Practice (June 2001) at 24, [http://www.abanet.org/cpr/mjp-comm\\_sl.html](http://www.abanet.org/cpr/mjp-comm_sl.html).

<sup>40</sup>Rule 983.4, California Rules of Court. No final resolution of the issue has been arrived at in California as the statute is scheduled to sunset on January 1, 2006.

Second, this provision would respect preexisting and ongoing client-lawyer relationships by permitting a client to retain a lawyer to work on multiple related matters, including some having no connection to the jurisdiction in which the lawyer is licensed. Clients who have multiple or recurring legal matters in multiple jurisdictions have an interest in retaining a single lawyer or law firm to provide legal representation in all the related matters. In general, clients are better served by having a sustained relationship with a lawyer or law firm in whom the client has confidence. Through past experience, the client can gain some assurance that the lawyer performs work competently and can work more efficiently by drawing on past experience regarding the client, its business, and its objectives. In order to retain the client's business, lawyers representing clients in multiple matters have a strong incentive to work competently, and to engage other counsel to provide legal services work that they are not qualified to render.

Third, this provision would authorize legal services to be provided on a temporary basis outside the lawyer's home state by a lawyer who, through the course of regular practice in the lawyer's home state, has developed a recognized expertise in a body of law that is applicable to the client's particular matter. This could include expertise regarding nationally applicable bodies of law, such as federal, international or foreign law. A client has an interest in retaining a specialist in federal tax, securities or antitrust law, or the law of a foreign jurisdiction, regardless of where the lawyer has been admitted to practice law. This could also include expertise regarding the law of the lawyer's home state if that law governs the matter, since a client has an interest in retaining a lawyer who is admitted in the jurisdiction whose law governs the particular matter and who has experience regarding that law.<sup>41</sup> The provision would, thus, bring the law into line with prevalent law practices. For example, many lawyers who specialize in federal law currently practice nationally, without regard to jurisdictional restrictions, which are unenforced.<sup>42</sup> The same is true of lawyers specializing in other law that applies across state lines.

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<sup>41</sup>The ABA Section of Intellectual Property Law comments that:

our expertise in intellectual property law and in the subject matter, often combined with knowledge of a client's business, is the overriding reason our clients retain us... In fact, our clients frequently place a greater value on our expertise than on our location, retaining us even though we do not have an office in any state where they do business. Such clients are seeking uniform, well-informed and efficiently rendered advice regardless of state lines, and they do not want to hire multiple lawyers for multiple states.

ABA Section of Intellectual Property Law, Memorandum to the ABA Commission on Multijurisdictional Practice (Feb. 2, 2001) at 2, [http://www.abanet.org/cpr/mjp-comm\\_silp.html](http://www.abanet.org/cpr/mjp-comm_silp.html).

<sup>42</sup>For example, according to the ABA Section of Health Law,

[R]egardless of geographic bar admission, many lawyers concentrating in health law effectively already practice on a national basis: the Federal law of Medicare, Medicaid and Federal health care reimbursement is interpreted, analyzed and applied by health lawyers nation-wide, usually without reference to the individual attorney's bar admissions.

ABA Section of Health Law, Position Statement on Multijurisdictional Practice, at 1 (June 29, 2001), [http://www.abanet.org/cpr/mjp-comm\\_shl.html](http://www.abanet.org/cpr/mjp-comm_shl.html).

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



To be covered by this provision, the lawyer's contact with any particular host state would have to be temporary. As the California Supreme Court Advisory Task Force noted in its preliminary report on MJP,

clients often request an out-of-state transactional or other nonlitigating lawyer to come temporarily to [a host state] to provide legal services on a discrete matter. In many circumstances, such conduct poses no significant threat to the public or the legal system, particularly where the attorney is representing a client located in another state [or] has a longstanding relationship with the client . . .<sup>43</sup>

When a lawyer seeks to practice law regularly in a state, to open an office for the solicitation of clients, or otherwise to establish a practice in the state, however, the state has a more substantial interest in regulating the lawyer's law practice by requiring the lawyer to gain admission to the bar. Although the line between the "temporary" practice of law and the "regular" or "established" practice of law is not a bright one, the line can become clearer over time as Rule 5.5 is interpreted by courts, disciplinary authorities, committees of the bar, and other relevant authorities.

Additionally, for this provision to apply, the lawyer's work in the host state must arise out of or be reasonably related to the lawyer's practice in the home state, so that as a matter of efficiency or for other reasons, the client's interest in retaining the lawyer should be respected. For example, if a corporate client is seeking legal advice about its environmental liability or about its employment relations in each of the twenty states in which it has plants, it is likely to be unnecessarily costly and inefficient for the client to retain twenty different lawyers. Likewise, if a corporate client is seeking to open a retail store in each of twenty states, the client may be best served by retaining a single lawyer to assist it in coordinating its efforts. On the other hand, work for an out-of-state client with whom the lawyer has no prior professional relationship and for whom the lawyer is performing no other work ordinarily will not have the requisite relationship to the lawyer's practice where the matter involves a body of law in which the lawyer does not have special expertise. In the context of determining whether work performed outside the lawyer's home state is reasonably related to the lawyer's practice in the home state, as is true in the many other legal contexts in which a "reasonableness" standard is employed, some judgment must be exercised.

**Proposed Model Rule 5.5(d)(1)** would permit a lawyer employed by an organizational entity (e.g. an in-house corporate lawyer or a government lawyer), admitted in another United States jurisdiction, to provide legal services in a jurisdiction in which the lawyer is not admitted, other than representations for which *pro hac vice* admission is required, on behalf of the employer, an affiliated entity (i.e., an entity controlling, controlled by, or under common control with, the lawyer's organizational employer).<sup>44</sup> This proposed provision would authorize the

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Public Utility, Communications and Transportation Law, submission dated March 10, 2001, [http://www.abanet.org/cpr/mjp-comm\\_puctl.html](http://www.abanet.org/cpr/mjp-comm_puctl.html).

<sup>43</sup>California Supreme Court Advisory Task Force on Multijurisdictional Practice, Preliminary Report and Recommendations (Aug. 1, 2001) at 30, [http://www.abanet.org/cpr/mjp-comm\\_csc.doc](http://www.abanet.org/cpr/mjp-comm_csc.doc).

<sup>44</sup>*Cf.* 17 CRF 230.144(a)(1) (“an affiliate” of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer”).

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

This proposed provision reflects well-accepted contemporary law practice. Corporations and similar entities with ongoing and recurring legal issues have an interest in retaining in-house lawyers to provide legal assistance with respect to those matters, wherever they arise. In recent years, in-house corporate lawyers' work has grown increasingly national and global along with the business of corporate clients. The organization's interest in being provided legal assistance in an efficient, cost-effective and competent manner by a lawyer in whom it reposes confidence is furthered by permitting an organization to employ a lawyer to assist it with recurring matters. From a regulatory perspective, a lawyer who is employed to represent an organization on an ongoing basis poses less of a risk to the client and the public than a lawyer retained by an individual on a one-time basis, since, as the California report observed, an in-house lawyer is "under the constant scrutiny of his or her employer."<sup>45</sup>

The proposed provision would allow an out-of-state lawyer to work permanently from the office of a corporate, government or other organizational employer. This is consistent with the explicit understanding in many jurisdictions. In New Jersey, for example, established practice by an employed lawyer is authorized by opinion.<sup>46</sup> In other states, this practice is authorized by a court rule or statute that requires the employed lawyer to apply to the admissions authority and receive permission to practice to this limited extent.<sup>47</sup> The Commission is unaware of significant regulatory concerns raised by the practice in these jurisdictions and, accordingly, recommends that ABA Model Rule 5.5 be amended to recognize this practice.

Comment [16] to Rule 5.5 clarifies that paragraph (d)(1) would not authorize representing the employer's officers or employees solely in their personal capacity. Nor would this provision authorize representation of customers of the corporate employer, or other third parties, if the lawyer is not licensed to practice law in the jurisdiction. Comment [17] to Rule 5.5 makes clear that the employed lawyer who has an office in the jurisdiction must comply with registration requirements and any other requirements that are applicable.

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<sup>45</sup>California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002) at 28, [http://www.abanet.org/cpr/mjp/comm2\\_csca.pdf](http://www.abanet.org/cpr/mjp/comm2_csca.pdf).

<sup>46</sup>N.J. Comm. On Unauthorized Practice of Law, Formal Op. 14 (May 1, 1975).

<sup>47</sup>See note 21 *supra*; see generally Carol A. Needham, *The Application of Unauthorized Practice of Law Regulations to Attorneys Working in Corporate Law Departments* (Symposium on the Multijurisdictional Practice of Law, March 2000) (unpublished manuscript, see <http://www.abanet.org/cpr/mjp-home.html>); Carol A. Needham, *The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice*, 36 S. TEX. L. REV. 1075 (1995).

**Proposed Model Rule 5.5(d)(2)** would permit a lawyer to render legal services in a jurisdiction in which the lawyer is not licensed to practice law when authorized to do so by federal law or other law. Among other things, the proposed provision would make clear that in a jurisdiction that has adopted rules permitting established practice by foreign lawyers who serve as legal consultants, a lawyer may establish a law practice in the jurisdiction as permitted by such a rule.

Because it is axiomatic that a lawyer may perform work when authorized by federal law to do so, the Ethics 2000 Commission initially proposed relegating a provision to this effect to a Comment to Model Rule 5.5. However, the MJP Commission has been told that it is important to lawyers who perform such work that this provision be codified in black letter law, because at times they have been threatened with sanctions for violating state UPL laws. Although this qualification of jurisdictional restrictions would apparently apply to federal prosecutors and federal patent attorneys, among others, the Commission has not undertaken to identify every federal law that authorizes particular work and thereby may preempt state UPL laws. Nor has the Commission attempted to identify every state law that specifically authorizes out-of-state lawyers to render particular legal services in the state as an exception to the state's general UPL restriction.

### Recommendation 3

#### Disciplinary Authority

The American Bar Association adopts amended Rule 8.5 of the *ABA Model Rules of Professional Conduct* as follows:

#### **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**

#### **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, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[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.

## Discussion

It is important that state regulatory authorities acknowledge the increasing prevalence of cross-border law practice and respond appropriately. Allowances must be made for effectively regulating lawyers who practice law outside the states in which they are licensed. Sanctions must be available both against lawyers who do unauthorized work outside their home states and against those who violate rules of professional conduct when they engage in otherwise permissible multijurisdictional law practice.

The Ethics 2000 Commission proposed amending Rule 8.5(a) (Disciplinary Authority) to make clear that a jurisdiction in which a lawyer engages in disciplinary misconduct may sanction the lawyer regardless of whether the lawyer is licensed to practice law in that jurisdiction. Most significantly, a sentence would be added to provide that: "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."<sup>48</sup> The proposal is consistent with existing ABA policy, as embodied in Rule 6 of the *ABA Model Rules for Lawyer Disciplinary Enforcement*. As the Ethics 2000 Commission noted, "this is an appropriate Rule to adopt in the *Model Rules of Professional Conduct*, given that a jurisdiction in which a lawyer is not admitted may be the one most interested in disciplining the lawyer for improper conduct." As a further enhancement to this Rule, the MJP Commission recommends that the following statement be added to the end of Comment [1]: "Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. *See* Rules 6 and 22, *ABA Model Rules for Lawyer Disciplinary Enforcement*."

Additionally, the Ethics 2000 Commission proposed amending Rule 8.5(b) (Choice of Law) in two principal respects. First, a number of changes would clarify the choice of law rule applicable to lawyers participating in adjudications. It would provide that a lawyer who participates in a formal adjudication before any "tribunal"—and not only a "court"—is bound by the rules of professional conduct of the jurisdiction in which the tribunal sits or by the rules of the tribunal itself if they provide otherwise.

Second, the Ethics 2000 Commission proposed changing the choice of law rule applicable to legal work outside the context of adjudications. The current rule provides that a lawyer is governed by the rules of professional conduct of the jurisdiction in which the lawyer is licensed. When a lawyer is licensed in multiple jurisdictions, it identifies a principle to determine which of the jurisdictions' rules apply. The proposed amendment recognizes that when lawyers engage in multijurisdictional practice, the jurisdiction in which they practice has an interest in enforcing compliance with its Rules of Professional Conduct. Under the proposed amendment, the applicable rules would be those of the jurisdiction in which lawyer's conduct had its predominant effect or, where the conduct did not have its predominant effect in a single jurisdiction, the rules of the jurisdiction in which the conduct occurred. However, a lawyer who acts reasonably in the face of uncertainty about which jurisdiction's rules apply would not be subject to discipline. Rule 1.0 (Terminology) of the *ABA Model Rules of Professional Conduct*

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<sup>48</sup>See Commission on Evaluation of the Rules of Professional Conduct, Report 401 to the ABA House of Delegates (February 2002).

provides that reasonable, when used in reference to a lawyer's actions, denotes the conduct of a reasonably prudent and competent lawyer.

## Recommendation 4

### Reciprocal Discipline

**The American Bar Association adopts amended Rule 6A and amended Rule 22 of the ABA *Model Rules for Lawyer Disciplinary Enforcement* as follows:**

#### **RULE 6. JURISDICTION.**

**A. Lawyers Admitted to Practice.** Any lawyer admitted to practice law in this jurisdiction, including any formerly admitted lawyer with respect to acts committed prior to resignation, suspension, disbarment, or transfer to inactive status, or with respect to acts subsequent thereto which amount to the practice of law or constitute a violation of these Rules or of the Rules of Professional Conduct [Code of Professional Responsibility] or any Rules or Code subsequently adopted by the court in lieu thereof, and any lawyer specially admitted by a court of this jurisdiction for a particular proceeding and any lawyer not admitted in this jurisdiction who practices law or renders or offers to render any legal services in this jurisdiction, is subject to the disciplinary jurisdiction of this court and the board.

#### **RULE 22. RECIPROCAL DISCIPLINE AND RECIPROCAL DISABILITY INACTIVE STATUS.**

**A. Disciplinary Counsel Duty to Obtain Order of Discipline or Disability Inactive Status from Other Jurisdiction.** Upon being disciplined or transferred to disability inactive status in another jurisdiction, a lawyer admitted to practice in [this jurisdiction] shall promptly inform disciplinary counsel of the discipline or transfer. Upon notification from any source that a lawyer within the jurisdiction of the agency has been disciplined or transferred to disability inactive status in another jurisdiction, disciplinary counsel shall obtain a certified copy of the disciplinary order and file it with the board and with the court.

**B. Notice Served Upon Respondent.** Upon receipt of a certified copy of an order demonstrating that a lawyer admitted to practice in [name of jurisdiction] has been disciplined or transferred to disability inactive status in another jurisdiction, the court shall forthwith issue a notice directed to the lawyer and to disciplinary counsel containing:

(1) A copy of the order from the other jurisdiction; and

(2) An order directing that the lawyer or disciplinary counsel inform the court, within [thirty] days from service of the notice, of any claim by the lawyer or disciplinary counsel predicated upon the grounds set forth in paragraph D, that the imposition of the identical discipline or disability inactive status in this jurisdiction would be unwarranted and the reasons for that claim.

**C. Effect of Stay in Other Jurisdiction.** In the event the discipline or transfer imposed in the other jurisdiction has been stayed there, any reciprocal discipline or transfer imposed in this jurisdiction shall be deferred until the stay expires.

**D. Discipline to be Imposed.** Upon the expiration of [thirty] days from service of the notice pursuant to the provisions of paragraph B, this court shall



impose the identical discipline or disability inactive status unless disciplinary counsel or the lawyer demonstrates, or this court finds that it clearly appears upon the face of the record from which the discipline is predicated, that:

(1) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or

(3) The discipline imposed would result in grave injustice or be offensive to the public policy of the jurisdiction; or

(4) The reason for the original transfer to disability inactive status no longer exists.

If this court determines that any of those elements exists, this court shall enter such other order as it deems appropriate. The burden is on the party seeking different discipline in this jurisdiction to demonstrate that the imposition of the same discipline is not appropriate.

**E. Conclusiveness of Adjudication in Other Jurisdictions.** In all other aspects, a final adjudication in another jurisdiction that a lawyer, whether or not admitted in that jurisdiction, has been guilty of misconduct or should be transferred to disability inactive status shall establish conclusively the misconduct or the disability for purposes of a disciplinary or disability proceeding in this state.

## **Commentary**

If a lawyer suspended or disbarred in one jurisdiction is also admitted in another jurisdiction and no action can be taken against the lawyer until a new disciplinary proceeding is instituted, tried, and concluded, the public in the second jurisdiction is left unprotected against a lawyer who has been judicially determined to be unfit. Any procedure which so exposes innocent clients to harm cannot be justified. The spectacle of a lawyer disbarred in one jurisdiction yet permitted to practice elsewhere exposes the profession to criticism and undermines public confidence in the administration of justice.

Disciplinary counsel in the forum jurisdiction should be notified by disciplinary counsel of the jurisdiction where the original discipline or disability inactive status was imposed. Upon receipt of such information, disciplinary counsel should promptly obtain and serve upon the lawyer an order to show cause why identical discipline or disability inactive status should not be imposed in the forum jurisdiction. The certified copy of the order in the original jurisdiction should be incorporated into the order to show cause.

The imposition of discipline or disability inactive status in one jurisdiction does not mean that every other jurisdiction in which the lawyer is admitted must necessarily impose discipline or disability inactive status. The agency has jurisdiction to recommend reciprocal discipline or disability inactive status on the basis of public discipline or disability inactive status imposed by a jurisdiction in which the respondent is licensed.

A judicial determination of misconduct or disability by the respondent in another jurisdiction is conclusive, and not subject to relitigation in the forum jurisdiction. The court should impose identical discipline or disability inactive

status unless it determines, after review limited to the record of the proceedings in the foreign jurisdiction, that one of the grounds specified in paragraph D exists. This Rule applies whether or not the respondent is admitted to practice in that jurisdiction. See also, Model Rule 8.5, Comment [1], *ABA Model Rules of Professional Conduct*.

## **Discussion**

Effective regulation of lawyers engaged in law practice in multiple jurisdictions requires that they be subject to meaningful sanctions for misconduct committed outside the jurisdictions in which they are licensed. As discussed above, a jurisdiction should be able to discipline a lawyer for misconduct that occurred in the jurisdiction, even though the lawyer is licensed only in another jurisdiction. However, the host jurisdiction has a limited array of sanctions at its disposal. Few jurisdictions provide for sanctions, such as fines, that would allow for disciplining out-of-state lawyers other than by restricting their right to practice law in the particular jurisdiction. The host jurisdiction may suspend or disbar the lawyer from practicing in that particular jurisdiction, but doing so would not in itself deprive the lawyer of the right to practice law in the lawyer's home jurisdiction or in other jurisdictions. Only the judiciary in the lawyer's home jurisdiction can suspend or disbar the lawyer from practicing law in that jurisdiction. Effective discipline therefore requires that, when a lawyer engages in misconduct outside the jurisdiction in which the lawyer is licensed, the lawyer be sanctioned appropriately in the jurisdiction in which the lawyer is licensed to practice law.

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

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

## Recommendation 5

### Interstate Disciplinary Enforcement Mechanisms

**The American Bar Association encourages the use of the National Lawyer Regulatory Data Bank to promote interstate disciplinary enforcement mechanisms and urges jurisdictions to adopt the International Standard Lawyer Numbering System®. The American Bar Association urges jurisdictions to require lawyers to report to the lawyer regulatory agency in the jurisdiction in which they are licensed, all other jurisdictions in which they are licensed and any status changes in those other jurisdictions.**

#### Discussion

The ABA National Regulatory Data Bank (“Data Bank”) was established in 1968 to facilitate effective reciprocal discipline by providing a national clearinghouse for information about lawyers publicly disciplined for misconduct. The 1992 McKay Report, in a section titled “Improving Interstate Enforcement,” identified the need to enhance the Data Bank in order to promote the imposition of reciprocal discipline and to deter lawyers who are suspended or disbarred in one state from practicing in another state. The report noted that the effectiveness of the Data Bank had been greatly reduced, in large part, because “of lawyers practicing in more than one jurisdiction,” and that “[a]s the interstate practice of law continues to grow, the need for the National Discipline Data Bank increases.” The report made two specific recommendations: that the Data Bank be funded adequately to automate the dissemination of reciprocal discipline information, and that the ABA and regulatory officials in each jurisdiction establish a system of assigning a universal identification number to each lawyer licensed to practice law.

Over the past decade, the growth in the lawyer population and advances in technology and communications have fostered a significant increase in the interstate practice of law. As a result, the need and the demand for the information in the Data Bank as a vehicle to improve interstate enforcement has grown. The Commission therefore recommends that the ABA urge jurisdictions to adopt the Martindale-Hubbell International Standard Lawyer Numbering System® and to universally use of the National Lawyer Regulatory Data Bank.

Specifically, the ABA should urge jurisdictions to adopt Recommendation 21.2 of the McKay Report, which provides:

The highest court in each jurisdiction should require all lawyers licensed in the jurisdiction to (a) register annually with the agency designated by the Court stating all other jurisdictions in which they are licensed to practice law, and (b) immediately report to the agency designated by the Court changes of law license status in other jurisdictions such as admission to practice, discipline imposed, or resignation.

Additionally, through its website, the ABA should provide direct on-line reporting to the Data Bank of public regulatory actions involving lawyers' licenses by reporting agents designated by each jurisdiction's highest court. This process will greatly enhance the speed and accuracy with which data is incorporated into and disseminated from the Data Bank.

Finally, the ABA should make available on its website selected public information from the Data Bank, such as the lawyer's name, date of birth, and registration/identification number, regulatory actions involving the lawyer's license, and links to state websites containing lawyer regulatory data and other contact information for lawyer disciplinary agencies.

## Recommendation 6

### *Pro Hac Vice* Admission

The American Bar Association adopts a *Model Rule on Pro Hac Vice Admission* as follows:

#### Model Rule on *Pro Hac Vice* Admission

- I. Admission In Pending Litigation Before A Court Or Agency**
- A. Definitions**
1. An “out-of-state” lawyer is a person not admitted to practice law in this state but who is admitted in another state or territory of the United States or of the District of Columbia and not disbarred or suspended from practice in any jurisdiction.
  2. An out-of-state lawyer is “eligible” for admission *pro hac vice* if that lawyer:
    - a. lawfully practices solely on behalf of the lawyer’s employer and its commonly owned organizational affiliates, regardless of where such lawyer may reside or work; or
    - b. neither resides nor is regularly employed at an office in this state; or
    - c. resides in this state but (i) lawfully practices from offices in one or more other states and (ii) practices no more than temporarily in this state, whether pursuant to admission *pro hac vice* or in other lawful ways.
  3. A “client” is a person or entity for whom the out-of-state lawyer has rendered services or by whom the lawyer has been retained prior to the lawyer’s performance of services in this state.
  4. An “alternative dispute resolution” (“ADR”) proceeding includes all types of arbitration or mediation, and all other forms of alternative dispute resolution, whether arranged by the parties or otherwise.
  5. “This state” refers to [state or other jurisdiction promulgating this rule]. This Rule does not govern proceedings before a federal court or federal agency located in this state unless that body adopts or incorporates this Rule.
- B. Authority of Court or Agency To Permit Appearance By Out-Of-State Lawyer**
1. **Court Proceeding.** A court of this state may, in its discretion, admit an eligible out-of-state lawyer retained to appear in a particular proceeding pending before such court to appear *pro hac vice* as counsel in that proceeding.
  2. **Administrative Agency Proceeding.** If practice before an agency of this state is limited to lawyers, the agency may, using the same standards and procedures as a court, admit an eligible out-of-state lawyer who has been retained to appear in a particular agency proceeding to appear as counsel in that proceeding *pro hac vice*.

**C. In-State Lawyer's Duties.** When an out-of-state lawyer appears for a client in a proceeding pending in this state, either in the role of co-counsel of record with the in-state lawyer, or in an advisory or consultative role, the in-state lawyer who is co-counsel or counsel of record for that client in the proceeding remains responsible to the client and responsible for the conduct of the proceeding before the court or agency. It is the duty of the in-state lawyer to advise the client of the in-state lawyer's independent judgment on contemplated actions in the proceeding if that judgment differs from that of the out-of-state lawyer.

**D. Application Procedure**

**1. Verified Application.** An eligible out-of-state lawyer seeking to appear in a proceeding pending in this state as counsel *pro hac vice* shall file a verified application with the court where the litigation is filed. The application shall be served on all parties who have appeared in the case and the [lawyer regulatory authority]. The application shall include proof of service. The court has the discretion to grant or deny the application summarily if there is no opposition.

**2. Objection to Application.** The [lawyer regulatory authority] or a party to the proceeding may file an objection to the application or seek the court's imposition of conditions to its being granted. The [lawyer regulatory authority] or objecting party must file with its objection a verified affidavit containing or describing information establishing a factual basis for the objection. The [lawyer regulatory authority] or objecting party may seek denial of the application or modification of it. If the application has already been granted, the [lawyer regulatory authority] or objecting party may move that the *pro hac vice* admission be withdrawn.

**3. Standard for Admission and Revocation of Admission.** The courts and agencies of this state have discretion as to whether to grant applications for admission *pro hac vice*. An application ordinarily should be granted unless the court or agency finds reason to believe that such admission:

a. may be detrimental to the prompt, fair and efficient administration of justice,

b. may be detrimental to legitimate interests of parties to the proceedings other than the client(s) the applicant proposes to represent,

c. one or more of the clients the applicant proposes to represent may be at risk of receiving inadequate representation and cannot adequately appreciate that risk, or

d. the applicant has engaged in such frequent appearances as to constitute regular practice in this state.

**4. Revocation of Admission.** Admission to appear as counsel *pro hac vice* in a proceeding may be revoked for any of the reasons listed in Section I.D.3 above.

**E. Application**

**1. Required Information.** An application shall state the information listed on Appendix A to this rule. The applicant may also include any other matters supporting admission *pro hac vice*.

2. **Application Fee.** An applicant for permission to appear as counsel *pro hac vice* under this Rule shall pay a non-refundable fee as set by the [lawyer regulatory authority] at the time of filing the application.

3. **Exemption for *Pro Bono* Representation.** An applicant shall not be required to pay the fee established by I.E.2 above if the applicant will not charge an attorney fee to the client(s) and is:

a. employed or associated with a *pro bono* project or nonprofit legal services organization in a civil case involving the client(s) of such programs; or

b. involved in a criminal case or a *habeas* proceeding for an indigent defendant.

**F. Authority of the [Lawyer Regulatory Authority] and Court:  
Application of Ethical Rules, Discipline, Contempt, and Sanctions**

**1. Authority Over Out-of-State Lawyer and Applicant.**

a. During pendency of an application for admission *pro hac vice* and upon the granting of such application, an out-of-state lawyer submits to the authority of the courts and the [lawyer regulatory authority] of this state for all conduct relating in any way to the proceeding in which the out-of-state lawyer seeks to appear. The applicant or out-of-state lawyer who has obtained *pro hac vice* admission in a proceeding submits to this authority for all that lawyer's conduct (i) within the state while the proceeding is pending or (ii) arising out of or relating to the application or the proceeding. An applicant or out-of-state lawyer who has *pro hac vice* authority for a proceeding may be disciplined in the same manner as an in-state lawyer.

b. The court's and [lawyer regulatory authority's] authority includes, without limitation, the court's and [lawyer regulatory authority's] rules of professional conduct, rules of discipline, contempt and sanctions orders, local court rules, and court policies and procedures.

2. **Familiarity With Rules.** An applicant shall become familiar with the rules of professional conduct, rules of discipline of the [lawyer regulatory authority], local court rules, and policies and procedures of the court before which the applicant seeks to practice.

**II. Out-of-State Proceedings, Potential In-State and Out-of-State Proceedings, and All ADR**

**A. In-State Ancillary Proceeding Related to Pending Out-of-State Proceeding.** In connection with proceedings pending outside this state, an out-of-state lawyer admitted to appear in that proceeding may render in this state legal services regarding or in aid of such proceeding.

**B. Consultation by Out-of-State Lawyer**

1. **Consultation with In-State Lawyer.** An out-of-state lawyer may consult in this state with an in-state lawyer concerning the in-state's lawyer's client's pending or potential proceeding in this state.

**2. Consultation with Potential Client.** At the request of a person in this state contemplating a proceeding or involved in a pending proceeding, irrespective of where the proceeding is located, an out-of-state lawyer may consult in this state with that person about that person's possible retention of the out-of-state lawyer in connection with the proceeding.

**C. Preparation for In-State Proceeding.** On behalf of a client in this state or elsewhere, the out-of-state lawyer may render legal services in this state in preparation for a potential proceeding to be filed in this state, provided that the out-of-state lawyer reasonably believes he is eligible for admission *pro hac vice* in this state.

**D. Preparation for Out-of-State Proceeding.** In connection with a potential proceeding to be filed outside this state, an out-of-state lawyer may render legal services in this state for a client or potential client located in this state, provided that the out-of-state lawyer is admitted or reasonably believes the lawyer is eligible for admission generally or *pro hac vice* in the jurisdiction where the proceeding is anticipated to be filed.

**E. Services Rendered Outside This State for In-State Client.** An out-of-state lawyer may render legal services while the lawyer is physically outside this state when requested by a client located within this state in connection with a potential or pending proceeding filed in or outside this state.

**F. Alternative Dispute Resolution ("ADR") Procedures.** An out-of-state lawyer may render legal services to prepare for and participate in an ADR procedure regardless of where the ADR procedure is expected to take or actually takes place.

**G. No Solicitation.** An out-of-state lawyer rendering services in this state in compliance with this Rule or here for other reasons is not authorized by anything in this rule to hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction. Nothing in this Rule authorizes out-of-state lawyers to solicit, advertise, or otherwise hold themselves out in publications as available to assist in litigation in this state.

**H. Temporary Practice.** An out-of-state lawyer will only be eligible for admission *pro hac vice* or to practice in another lawful way only on a temporary basis.

**I. Authorized Services.** The foregoing services may be undertaken by the out-of-state lawyer in connection with a potential proceeding in which the lawyer reasonably expects to be admitted *pro hac vice*, even if ultimately no proceeding is filed or if *pro hac vice* admission is denied.

## APPENDIX A

The out-of-state lawyer application shall include:

1. the applicant's residence and business address;
2. the name, address and phone number of each client sought to be represented;



3. the courts before which applicant has been admitted to practice and the respective period(s) of admission;
4. whether the applicant (a) has been denied admission *pro hac vice* in this state, (b) had admission *pro hac vice* revoked in this state, or (c) has otherwise formally been disciplined or sanctioned by any court in this state. If so, specify the nature of the allegations; the name of the authority bringing such proceedings; the caption of the proceedings, the date filed, and what findings were made and what action was taken in connection with those proceedings;
5. whether any formal, written disciplinary proceeding has ever been brought against the applicant by a disciplinary authority in any other jurisdiction within the last five (5) years and, as to each such proceeding: the nature of the allegations; the name of the person or authority bringing such proceedings; the date the proceedings were initiated and finally concluded; the style of the proceedings; and the findings made and actions taken in connection with those proceedings;
6. whether the applicant has been held formally in contempt or otherwise sanctioned by any court in a written order in the last five (5) years for disobedience to its rules or orders, and, if so: the nature of the allegations; the name of the court before which such proceedings were conducted; the date of the contempt order or sanction, the caption of the proceedings, and the substance of the court's rulings (a copy of the written order or transcript of the oral rulings shall be attached to the application);
7. the name and address of each court or agency and a full identification of each proceeding in which the applicant has filed an application to appear *pro hac vice* in this state within the preceding two years; the date of each application; and the outcome of the application;
8. an averment as to the applicant's familiarity with the rules of professional conduct, rules of discipline of the [lawyer regulatory authority], local rules and court procedures of the court before which the applicant seeks to practice; and
9. the name, address, telephone number and bar number of an active member in good standing of the bar of this state who will sponsor the applicant's *pro hac vice* request. The bar member shall appear of record together with the out-of-state lawyer.
10. Optional: the applicant's prior or continuing representation in other matters of one or more of the clients the applicant proposes to represent and any relationship between such other matter(s) and the proceeding for which applicant seeks admission.
11. Optional: any special experience, expertise, or other factor deemed to make it particularly desirable that the applicant be permitted to represent the client(s) the applicant proposes to represent in the particular cause.

## Discussion

As noted earlier, courts in all United States jurisdictions regularly admit lawyers from other United States jurisdictions to appear as counsel *pro hac vice*. Such admission has been almost a matter of course when sought in conjunction with locally admitted counsel. Many administrative agencies also provide for limited admission of out-of-state lawyers. Typically, the *pro hac vice* process does not allow out-of-state lawyers to practice regularly in the jurisdiction and requires that the applicant attest to knowledge of and compliance with local rules of conduct and practice. In most jurisdictions, there is little procedural structure for addressing *pro hac vice* applications, which are entrusted solely to the discretion of the court asked to admit the lawyer.

The ABA Section of Litigation has reported to the Commission that "generally the *pro hac vice* procedure is an adequate method for oversight of attorneys who appear and render legal services in pending litigation outside the states where licensed," but that "[a] more uniform *pro hac vice* procedure . . . would be strongly preferable to the disparate requirements now in place."<sup>49</sup> The ABA Section of Tort and Insurance Practice and the International Association of Defense Counsel (IADC) have expressed a similar view, and have worked with the ABA Section of Litigation to develop a proposed *Model Rule on Pro Hac Vice Admission*. The Commission proposes that the ABA adopt the *Model Rule* and recommend it to state supreme courts for their adoption. This rule seeks to provide a procedural framework, to provide standards to guide the discretion of the court, and to address ancillary issues not dealt with in traditional *pro hac vice* practice. Lawyers who appear on behalf of clients in courts of different states, and their clients, would benefit both from the elimination of unduly restrictive provisions that exist in a few states and from increased consistency of practice from state to state.

The proposed rule recognizes that parties should generally be permitted to obtain the assistance of the lawyers of their choice. An application for *pro hac vice* admission ordinarily should be granted. However, a court could deny an application if there were a basis for finding that the lawyer's admission may be detrimental to the prompt, fair and efficient administration of justice or to the legitimate interests of parties other than the client the lawyer proposes to represent, or that one or more of the clients the lawyer proposes to represent may be at risk of receiving inadequate representation and cannot adequately appreciate that risk, or that the applicant has engaged in such frequent appearances as to constitute regular practice in this state.

In many circumstances, retaining a lawyer who is admitted in another jurisdiction promotes the client's interest and does not pose an unreasonable regulatory risk. For example, clients with sufficiently extensive legal affairs that they have employee lawyers handling some or all of those affairs are better situated than most other clients, in terms both of the ability to assess a lawyer's competence and ethical standards and of the incentive to do so. The same may be said of clients who have the advice of another lawyer in retaining the applicant for *pro hac vice* admission. Further, clients have a special interest in being able to use lawyers with whom they have previously formed client-lawyer relationships. Such clients have had the ability to assess the lawyer's prior work, to develop trust in that lawyer, and to educate that lawyer on client affairs, objectives, and priorities. Clients ought not lightly to be deprived of the ability to use such lawyers in proceedings in other jurisdictions. Likewise, parties should generally be able to use a lawyer with special experience or expertise.

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<sup>49</sup>See ABA Section of Litigation, Preliminary Position Statement on Multi-jurisdictional Practice (June 2001) at 5 and 3, [http://www.abanet.org/cpr/mjp-comm\\_sl.html](http://www.abanet.org/cpr/mjp-comm_sl.html).

In general, admission *pro hac vice* would be available only to lawyers who regularly practice law and reside outside the jurisdiction, since lawyers who reside in or are employed in the state can reasonably be expected to seek general admission to the bar if they desire to practice there and ordinarily should not be permitted to rely on *pro hac vice* admission as an alternative to general admission. The rule would permit a court to deny an application if the applicant has engaged in such frequent appearances as to constitute regular practice in the jurisdiction, since *pro hac vice* admission should not be used repetitively as a way to engage in regular practice in a jurisdiction. In addition to inquiring into the number of appearances by the particular applicant, a court could inquire into *pro hac vice* appearances by other lawyers in the same firm and consider whether the firm as a whole is engaged in regular practice through *pro hac vice* appearances. The court could also consider whether the lawyer or the lawyer's firm has targeted marketing efforts at nonlawyers who reside in or have offices in the jurisdiction. As exceptions to the general restriction on *pro hac vice* admission of lawyers who establish offices in and reside in the jurisdiction, the rule would allow admission of lawyers who have recently established a connection to the state and who are promptly and diligently pursuing an initial application for general admission to its bar, in-house lawyers lawfully practicing on behalf of their employers without being admitted, and lawyers residing in the jurisdiction who rarely appear in court there but are regularly practicing elsewhere.

Under the proposed rule, an eligible out-of-state lawyer desiring to appear as counsel *pro hac vice* would be required to file with the court a verified application, with proof of service on all parties who have appeared in the cause and on the relevant lawyer regulatory authority. Much of the information in the application is intended to assist the court in determining whether the lawyer has observed the requirements of professional responsibility in the jurisdictions in which the lawyer practices.

Additionally, under the proposed rule, the party must be represented by an in-state lawyer who serves as counsel of record and actively participates in the representation. Throughout the litigation, local counsel must remain responsible to the client and for the conduct of the proceeding. This includes advising the client of the lawyer's professional judgment when it differs from that of the out-of-state lawyer on contemplated actions. Ordinarily, the interests in protecting the client, the public and the court will be served where the court ascertains that the lawyer is admitted to practice elsewhere and has complied with professional obligations, given the ability of the locally-admitted co-counsel to protect against deficiencies in the out-of-state lawyer's representation, the ability of the court to detect any obvious incompetence in the conduct of the case, and the ability of the court and the jurisdiction's disciplinary authority to sanction the lawyer for misconduct in the proceeding.

The proposed rule would provide the jurisdiction's lawyer regulatory authority an opportunity to assist the court by objecting to the application or seeking revocation of admission once granted. Since processing of applications imposes burdens on the agency, as does the potential responsibility to investigate and act on disciplinary complaints against the applicant, a fee could be imposed to defray these costs. Under the rule, the court or administrative agency to which the application for *pro hac vice* admission was directed would not need to delay action on the application to await any response by the authority, but could freely reconsider any action in light of any information provided by or any objection expressed by the regulatory authority. The rule would assure that the applicant will have notice of and an opportunity to respond to any

alleged grounds that may be relied upon to deny the application. If the propriety of admission turns on contested issues of fact, an evidentiary hearing would be held.

Although the proposed rule would require a lawyer to seek and obtain *pro hac vice* admission in order to appear as counsel before a tribunal in a jurisdiction in which the lawyer was not admitted to practice, certain work relating to litigation and other dispute resolution proceedings could be conducted by an out-of-state lawyer without the necessity of obtaining *pro hac vice* admission, subject to proposed Rule 5.5(c) of the ABA *Model Rules of Professional Conduct*. For example, *pro hac vice* admission would not be required for lawyers who did not appear in court but who confined their role to giving advice to the in-state lawyer responsible for the matter or to assisting in the preparation of the case for trial. A lawyer who reasonably expected to be admitted *pro hac vice* could conduct activities in contemplation of filing a lawsuit. Lawyers appearing in a litigation in a jurisdiction in which they are authorized to represent a party could participate in meetings, discovery or investigative proceedings related to that litigation in a jurisdiction in which they were not licensed. Participation in private arbitration or other private dispute resolution proceedings also would be covered by Rule 5.5(c) but not by the *pro hac vice* rule. (See Recommendation 2 and accompanying Discussion.)

## **Recommendation 7**

### **Admission on Motion**

The American Bar Association adopts a *Model Rule on Admission by Motion* as follows:

#### **Model Rule on Admission by Motion**

**1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction.**

**The applicant shall:**

- (a) have been admitted to practice law in another state, territory, or the District of Columbia;**
- (b) hold a first professional degree in law (J.D. or LL.B.) from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the graduate matriculated;**
- (c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed;**
- (d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;**
- (e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdiction;**
- (f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and**
- (g) designate the Clerk of the jurisdiction's highest court for service of process.**

**2. For the purposes of this rule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted to practice; however, in no event shall activities listed under (2)(e) and (f) that were performed in advance of bar admission in the jurisdiction to which application is being made be accepted toward the durational requirement:**

- (a) Representation of one or more clients in the practice of law;**
- (b) Service as a lawyer with a local, state, territorial or federal agency, including military service;**
- (c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;**
- (d) Service as a judge in a federal, state, territorial or local court of record;**
- (e) Service as a judicial law clerk; or**

**(f) Service as corporate counsel.**

**3. For the purposes of this Rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.**

**4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this rule shall not be eligible for admission on motion.**

## **Discussion**

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

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

Although the primary concern in the submissions to the Commission has been the application of UPL restrictions to United States lawyers' occasional practice in jurisdictions in which they do not maintain an office, the Commission has also received submissions focusing on the difficulty of establishing a law practice in a new jurisdiction.<sup>50</sup>

A number of states facilitate the admission of experienced lawyers who are moving their law practice by allowing them to gain admission to the bar without sitting for the bar examination, if they demonstrate that they have been in active law practice in another jurisdiction for a specified period of time and are members in good standing of the other jurisdiction's bar.<sup>51</sup> The admission on motion processes in these states recognize the reality that

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<sup>50</sup>See, e.g., J. Eric Schaal, Associate General Counsel, USG Corporation, letter dated January 8, 2002 to the ABA Commission on Multijurisdictional Practice, [www.abanet.org/cpr/mjp/comm2\\_usg.html](http://www.abanet.org/cpr/mjp/comm2_usg.html).

<sup>51</sup>See, e.g., Alaska Bar Rule 2, Section 2 (applicant must have passed bar in at least one jurisdiction and have engaged in active practice of law five of seven years preceding date of application in state that offers reciprocal admission to Alaska lawyers, provided conditions are not more demanding than those in Alaska, and pay a non-refundable fee); Colorado Admission Rule 201.3(1) (admits applicants actively and substantially engaged in the practice of law for five of seven years preceding application in state providing reciprocal admission without exam to members of the Colorado Bar); Connecticut Rules of the Superior Court Regulation Admission to the Bar, Sec. 2-13 (applicant must have practiced law in a reciprocal jurisdiction for at least five of seven years preceding date of application, be in good standing, have good moral character and have passed an examination in professional

lawyers who have been admitted to another state's bar and have practiced actively for a significant period of time without disciplinary sanction are qualified to establish a law practice in the new state, and that, for experienced lawyers, the bar examination therefore serves as an unnecessary obstacle to establishing a practice in the new state. This is particularly true because, with the advent of multi-state bar examinations, most bar examinations have become increasingly less distinctive and less focused on the idiosyncrasies of individual states' law.

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responsibility or completed a course in professional responsibility, intend to practice law on a continuing basis and devote a major portion of work time to practicing law in Connecticut, and file a fee and affidavits regarding character, education and disciplinary record); Illinois Admission Rule 705 (applicant must meet educational, character and fitness requirements for Illinois attorneys, pass the Multistate Professional Responsibility Examination, practice continuously five of seven years in jurisdiction offering reciprocity, and pay fee for admission on foreign license); Missouri Supreme Court Rules Governing the Missouri Bar, Rule 8.10 (applicant must have graduated from an ABA approved law school and be licensed and actively practicing five of preceding ten years in at least one jurisdiction offering mutuality of admission without examination; applicant must also meet continuing education requirements, pay a non-refundable fee, file a form for a character and fitness report and file various affidavits regarding work experience and good moral character); New York, Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, Section 520.10 (applicant must have been admitted to practice in highest law court in a state or territory of the United States or in another country whose jurisprudence is based upon the principles of the English Common Law and be admitted to the bar of a jurisdiction that would similarly admit New York lawyers without examination; in addition, the applicant must be over 26 years of age, possess a first degree from approved law school, have practiced five of preceding seven years, pay a fee and submit to other tests of character and fitness at discretion of Appellate Division); North Carolina Supreme Court Rules Governing Admission to the Practice of Law Section .0502 (applicant must be in good standing in every state in which applicant is licensed, have active practice four of preceding six years in a state providing comity admission for North Carolina lawyers, supply complete background information, pay nonrefundable fee of \$1500, establish good moral character, pass the Multistate Professional Responsibility Examination, and supply various types of documentation including certificates of moral character, a recent photograph and fingerprints; applications are not considered until at least six months after the date of filing); Oklahoma Rules Governing Admission to the Practice of Law, Rule 2 (applicant must have graduated from an ABA- approved law school, show good moral character, have practiced five of seven preceding years and be in good standing in a reciprocal jurisdiction, and provide at applicant's expense a report by the National Conference of Bar Examiners; if rules of reciprocal admission and fees in applicant's former jurisdiction are more stringent for admitting Oklahoma lawyers, applicant shall be governed by the more stringent standards); Pennsylvania Bar Admission Rule 204 (applicants must have graduated from an ABA-approved law school, practiced for five of preceding seven years in a reciprocal jurisdiction, passed the Multistate Professional Responsibility Examination and meet various other conditions); Virginia Supreme Court Rule 1A:1 (application must be filed under oath with a certificate saying lawyer has been licensed for at least five years; applicant must also complete character and fitness questionnaire, furnish report of the National Conference of Bar Examiners upon request, and pay \$500 filing fee; thereafter, the Board will determine whether applicant has established an intention to practice full time as a member of the Virginia Bar and whether applicant "has made such progress in the practice of law that it would be unreasonable to require the applicant to take an examination"); Washington Admission to Practice Rule 18 (admission of lawyers from jurisdictions with substantially similar conditions for admitting Washington lawyers, upon proof of admission to practice, current good standing, active legal practice, moral character and fitness, and payment of a filing fee; if the jurisdiction that licensed the applicant requires Washington lawyers to meet other conditions, the applicant must meet a substantially similar requirement); West Virginia Supreme Court of Appeals Rules for Admission, Rule 4.0-4.5 (applicant must demonstrate intention to practice in West Virginia on at least a minimal basis, have practiced five of last seven years, hold valid license from state in which admissions standards are substantially equivalent to standards in West Virginia, show proof of good moral character and submit affidavits of good character from at least two lawyers, pass the MPRE, provide records of criminal, disciplinary and civil proceedings, and pay application fee); Wisconsin Supreme Court Rule 40.05 (reciprocity for applicants admitted in jurisdictions that grant similar admission to Wisconsin lawyers and recognize Wisconsin's diploma privilege and applicant must have practiced for three of preceding five years); Wyoming Statute 33-5-110 (admits foreign attorneys who have been awarded a J.D. or LL.B. from an ABA-approved law school, engaged in practice five of prior seven years in a reciprocal jurisdiction, upon presentation of certificate of admission to that state and upon a showing of qualification, character and fitness to practice law). *cf.* Maryland Code Sec.10-210 and Rule 13, Maryland Rules Governing Admission to Bar.

There is nothing to suggest that in states with admission on motion, particular regulatory problems are disproportionately presented by lawyers who gain admission by this process.

Further, as urged by the ABA Section of Legal Education and Admissions to the Bar, it is worthwhile to attempt to distill and standardize the criteria used by states that employ streamlined admissions processes.<sup>52</sup> Accordingly, the Commission recommends that the ABA adopt the *Model Rule on Admission by Motion* developed by the ABA Section of Legal Education and Admissions to the Bar. It should be understood that admission on motion is not an alternative to the multijurisdictional practice standards in proposed Rule 5.5 of the *Model Rules of Professional Conduct*, since no lawyer can realistically be admitted to every state bar, even on motion. The motion rules are directed at those lawyers who expect to relocate their practices or to practice regularly in two or more jurisdictions.

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<sup>52</sup>See Counsel of the Section of Legal Education and Admissions to the Bar, Memorandum to the ABA Commission on Multijurisdictional Practice (Feb. 14, 2001), [http://www.abanet.org/cpr/mjp/comm2\\_leab.html](http://www.abanet.org/cpr/mjp/comm2_leab.html).



## Recommendation 8

### Licensing of Legal Consultants

**The American Bar Association encourages jurisdictions to adopt the *ABA Model Rule for the Licensing of Legal Consultants*.**

#### Discussion

In 1993, the ABA House of Delegates approved the *Model Rule for the Licensing of Legal Consultants*, which addresses the work of foreign lawyers in United States jurisdictions.<sup>53</sup> The Model Rule responded, in part, to the concern of foreign lawyers that, while American lawyers enjoyed a broad right of practice in other countries (or sought such a right in countries that did not afford it), foreign lawyers generally could not engage in the practice of law in the United States, even if limited to advising on the law of their own countries, without attending an accredited American law school, sitting for the bar examination and becoming a full member of the bar. The ABA identified both a need for a streamlined admissions process for foreign lawyers seeking to establish a law practice providing limited legal services and a need for greater uniformity.

Many states have not adopted either the ABA's Model Rule or an alternative provision for licensing foreign legal consultants.<sup>54</sup> The experience of those states that have adopted such a rule does not disclose regulatory problems resulting from licensing foreign legal consultants.<sup>55</sup> Therefore, the Commission recommends that the ABA renew its support for foreign legal consultant provisions by encouraging states that have not yet done so to adopt the ABA Model Rule. States with a foreign legal consultant rule that vary from the ABA Model Rule, possibly because their rule was adopted before 1993, should be urged to amend their rule to conform to the *ABA Model Rule for the Licensing of Legal Consultants* in the interest of uniformity and clarity.

#### ***ABA MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS***

##### **§ 1. General Regulation as to Licensing**

In its discretion, the [name of court] may license to practice in this State as a legal consultant, without examination, an applicant who:

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<sup>53</sup>See generally Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 *FORDHAM INT'L L.J.* 1126 (1998).

<sup>54</sup>To date, 24 states have enacted a rule licensing foreign legal consultants in the United States. See ABA Section of International Law and Practice, Report 113E to the House of Delegates, at 2 (February 3, 2002).

<sup>55</sup>See ABA Section of International Law and Practice, Follow-up Testimony on Multi-jurisdictional Practice Attorney Conduct Rules (June 1, 2001), [http://www.abanet.org/cpr/mjp-comm\\_silp2.html](http://www.abanet.org/cpr/mjp-comm_silp2.html).

- (a) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;
- (b) for at least five of the seven years immediately preceding his or her application has been a member in good standing of such legal profession and has actually been engaged in the practice of law in the said foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign country;<sup>56</sup>
- (c) possesses the good moral character and general fitness requisite for a member of the bar of this State;
- (d) is at least twenty-six years of age;<sup>57</sup> and
- (e) intends to practice as a legal consultant in this State and to maintain an office in this State for that purpose.

## **§ 2. Proof Required**

An applicant under this Rule shall file with the clerk of the [name of court]:

- (a) a certificate from the professional body or public authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as such attorney or counselor at law or the equivalent;
- (b) a letter of recommendation from one of the members of the executive body of such professional body or public authority or from one of the judges of the highest law court or court of original jurisdiction of such foreign country;
- (c) a duly authenticated English translation of such certificate and such letter if, in either case, it is not in English; and
- (d) such other evidence as to the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of Section 1 of this Rule as the [name of court] may require.

## **§ 3. Reciprocal Treatment of Members of the Bar of this State**

In considering whether to license an applicant to practice as a legal consultant, the [name of court] may in its discretion take into account whether a member of the bar of this State would have a reasonable and practical opportunity to establish an office for the giving of legal advice to clients in the applicant's country of admission. Any member of the bar who is seeking or has

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<sup>56</sup> Section 1(b) is optional; it may be included as written, modified through the substitution of shorter periods than five and seven years, respectively, or omitted entirely.

<sup>57</sup> Section 1(d) is optional; it may be included as written, modified through the substitution of a lesser age than twenty-six years, or omitted entirely.

sought to establish an office in that country may request the court to consider the matter, or the [name of court] may do so *sua sponte*.

#### **§ 4. Scope of Practice**

A person licensed to practice as a legal consultant under this Rule may render legal services in this State subject, however, to the limitations that he or she shall not:

- (a) appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this State (other than upon admission *pro hac vice* pursuant to [citation of applicable rule]);
- (b) prepare any instrument effecting the transfer or registration of title to real estate located in the United States of America;
- (c) prepare:
  - (i) any will or trust instrument effecting the disposition on death of any property located in the United States of America and owned by a resident thereof, or
  - (ii) any instrument relating to the administration of a decedent's estate in the United States of America;
- (d) prepare any instrument in respect of the marital or parental relations, rights or duties of a resident of the United States of America, or the custody or care of the children of such a resident;
- (e) render professional legal advice on the law of this State or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise) except on the basis of advice from a person duly qualified and entitled (otherwise than by virtue of having been licensed under this Rule) to render professional legal advice in this State;
- (f) be, or in any way hold himself or herself out as, a member of the bar of this State; or
- (g) carry on his or her practice under, or utilize in connection with such practice, any name, title or designation other than one or more of the following:
  - (i) his or her own name;
  - (ii) the name of the law firm with which he or she is affiliated;
  - (iii) his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country; and
  - (iv) the title "legal consultant," which may be used in conjunction with the words "admitted to the practice of law in [name of the foreign country of his or her admission to practice]".

#### **§ 5. Rights and Obligations**

Subject to the limitations set forth in Section 4 of this Rule, a person licensed as a legal consultant under this Rule shall be considered a lawyer affiliated with the bar of this State and shall be entitled and subject to:

- (a) the rights and obligations set forth in the [Rules] [Code] of Professional [Conduct] [Responsibility] of [citation] or arising from the other conditions and requirements that apply to a member of the bar of this State under the [rules of court governing members of the bar]; and
- (b) the rights and obligations of a member of the bar of this State with respect to:
  - (i) affiliation in the same law firm with one or more members of the bar of this State, including by:
    - (A) employing one or more members of the bar of this State;
    - (B) being employed by one or more members of the bar of this State or by any partnership [or professional corporation] which includes members of the bar of this State or which maintains an office in this State; and
    - (C) being a partner in any partnership [or shareholder in any professional corporation] which includes members of the bar of this State or which maintains an office in this State; and
  - (ii) attorney-client privilege, work-product privilege and similar professional privileges.

## **§ 6. Disciplinary Provisions**

A person licensed to practice as a legal consultant under this Rule shall be subject to professional discipline in the same manner and to the same extent as members of the bar of this State and to this end:

- (a) Every person licensed to practice as a legal consultant under these Rules:
  - (i) shall be subject to control by the [name of court] and to censure, suspension, removal or revocation of his or her license to practice by the [name of court] and shall otherwise be governed by [citation of applicable statutory provisions]; and
  - (ii) shall execute and file with the [name of court], in such form and manner as such court may prescribe:
    - (A) his or her commitment to observe the [Rules] [Code] of Professional [Conduct] [Responsibility] of [citation] and the [rules of court governing members of the bar] to the extent applicable to the legal services authorized under Section 4 of this Rule;
    - (B) an undertaking or appropriate evidence of professional liability insurance, in such amount as the court may prescribe, to assure his or her proper professional conduct and responsibility;

- (C) a written undertaking to notify the court of any change in such person's good standing as a member of the foreign legal profession referred to in Section 1(a) of this Rule and of any final action of the professional body or public authority referred to in Section 2(a) of this Rule imposing any disciplinary censure, suspension, or other sanction upon such person; and
- (D) a duly acknowledged instrument, in writing, setting forth his or her address in this State and designating the clerk of such court as his or her agent upon whom process may be served, with like effect as if served personally upon him or her, in any action or proceeding thereafter brought against him or her and arising out of or based upon any legal services rendered or offered to be rendered by him or her within or to residents of this State, whenever after due diligence service cannot be made upon him or her at such address or at such new address in this State as he or she shall have filed in the office of such clerk by means of a duly acknowledged supplemental instrument in writing.

- (b) Service of process on such clerk, pursuant to the designation filed as aforesaid, shall be made by personally delivering to and leaving with such clerk, or with a deputy or assistant authorized by him or her to receive such service, at his or her office, duplicate copies of such process together with a fee of \$10. Service of process shall be complete when such clerk has been so served. Such clerk shall promptly send one of such copies to the legal consultant to whom the process is directed, by certified mail, return receipt requested, addressed to such legal consultant at the address specified by him or her as aforesaid.

#### **§ 7. Application and Renewal Fees**

An applicant for a license as a legal consultant under this Rule shall pay an application fee which shall be equal to the fee required to be paid by a person applying for admission as a member of the bar of this State under [rules of court governing admission without examination of persons admitted to practice in other States]. A person licensed as a legal consultant shall pay renewal fees which shall be equal to the fees required to be paid by a member of the bar of this State for renewal of his or her license to engage in the practice of law in this State.

#### **§ 8. Revocation of License**

In the event that the [name of court] determines that a person licensed as a legal consultant under this Rule no longer meets the requirements for licensure set forth in Section 1(a) or Section 1(c) of this Rule, it shall revoke the license granted to such person hereunder.

#### **§ 9. Admission to Bar**

In the event that a person licensed as a legal consultant under this Rule is subsequently admitted as a member of the bar of this State under the provisions of the Rules governing such admission, the license granted to such person hereunder shall be deemed superseded by the license granted to such person to practice law as a member of the bar of this State.

#### **§ 10. Application for Waiver of Provisions**

The [name of court], upon application, may in its discretion vary the application or waive any provision of this Rule where strict compliance will cause undue hardship to the applicant. Such application shall be in the form of a verified petition setting forth the applicant's name, age and residence address, the facts relied upon and a prayer for relief.

## Recommendation 9

### Temporary Practice By Foreign Lawyers

The American Bar Association adopts a *Model Rule for Temporary Practice by Foreign Lawyers* as follows:

#### Model Rule for Temporary Practice by Foreign Lawyers

(a) A lawyer who is admitted only in a non-United States jurisdiction shall not, except as authorized by this Rule or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law, or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. Such a lawyer does not engage in the unauthorized practice of law in this jurisdiction when on a temporary basis the lawyer performs services 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 held or to be held in a jurisdiction outside the United States if the lawyer, or a person the lawyer is assisting, is authorized by law or by order of the tribunal 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 held or to be held 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;

(4) are not within paragraphs (2) or (3) and

(i) are performed for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or

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

(5) are governed primarily by international law or the law of a non-United States jurisdiction.

(b) For purposes of this grant of authority, the lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority.

#### Discussion

The ABA *Model Rule for Licensing of Legal Consultants*, approved in 1993, permits foreign lawyers to perform limited work from established offices in American jurisdictions. The streamlined admissions process established by this rule is impractical for foreign lawyers who perform services in the United States only on a temporary basis. For example, a foreign lawyer

who is negotiating a transaction on behalf of a client in the lawyer's own country may come to the United States briefly to meet other parties to the transaction and their lawyers or to review documents. Or a foreign lawyer conducting litigation in the lawyer's home country may come to the United States to meet witnesses. While it is not feasible for foreign lawyers in such circumstances to seek admission as foreign legal consultants, it should nevertheless be permissible for them to provide these temporary and limited services in the United States.

The proposed *Model Rule for Temporary Practice by Foreign Lawyers* identifies five circumstances in which a foreign lawyer may provide legal services in the United States. The proposal takes its definition of "lawyer" from the *ABA Model Rule for Licensing of Legal Consultants*. To come within the proposal, a lawyer must be a member in good standing of a recognized legal profession in the lawyer's home country, and the members of that profession must be subject to effective regulation and discipline by a duly constituted professional body or public authority.

Under the proposal, foreign lawyers would be able to provide legal services in the United States on a temporary basis if they do so in association with a lawyer admitted to practice in the jurisdiction and who actively participates in the matter. This language is identical to language in proposed Rule 5.5(c)(1) of the *ABA Model Rules of Professional Conduct* for lawyers admitted in a United States jurisdiction.

A foreign lawyer would also be able to provide legal services in the United States on a temporary basis if the work is reasonably related to a pending or potential proceeding in a jurisdiction outside the United States, so long as the lawyer is authorized to appear in that jurisdiction, or reasonably expects to be so authorized, or is assisting such a person. This provision tracks Rule 5.5(c)(2) with appropriate modifications to take account of the fact that the lawyer is not admitted in a United States jurisdiction.

Also, a foreign lawyer could provide legal services in the United States on a temporary basis if the services are reasonably related to a pending or potential alternative dispute resolution proceeding so long as the work has a nexus to the lawyer's practice in the lawyer's jurisdiction of admission. This language parallels proposed Rule 5.5(c)(3). It recognizes that lawyers may be asked to participate in arbitrations, mediations or other ADR proceedings (other than those that are court-affiliated) anywhere in the world.

A foreign lawyer could also, temporarily, provide legal services in the United States if the services are for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice or if the services are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice. The scope of the work the lawyer could perform under this provision would be limited to the services the lawyer may perform in the authorizing jurisdiction. For example, if a German lawyer came to the United States to negotiate on behalf of a client in Germany, the lawyer would be authorized to provide only those services that the lawyer is authorized to provide for that client in Germany. A foreign lawyer may also be authorized as a foreign legal consultant in one United States jurisdiction and cite that authority as the basis for temporary presence in a second United States jurisdiction. If so, the lawyer could provide in the second jurisdiction only those services that the lawyer is authorized to perform in the jurisdiction in which the lawyer is a foreign legal consultant provided the additional requirements of this paragraph were satisfied.



Finally, a foreign lawyer may provide legal services temporarily in the United States if those services are governed primarily by international law or the law of a non-United States jurisdiction.

## CONCLUSION

This Report contains recommendations to amend existing rules and to adopt new rules regulating the multijurisdictional practice of law, including rules relating to lawyers' professional conduct, bar admission, lawyer discipline, *pro hac vice* admission and foreign legal consultants. Effective implementation of the new and amended rules will require coordination among various ABA entities, the judiciary and state and local bar associations. These proposals will enable lawyers to meet the emerging needs of clients consistent with the state regulatory interest in protecting clients and the public through an effective and efficient enforcement mechanism.

The American Bar Association should place the highest priority on encouraging the adoption of its policies governing the multijurisdictional practice of law. The protection of the public and the interests of the profession would be most effectively served by an affirmative effort by the Association to assist the judicial branch of government, its regulatory agencies and the organized bar in the consideration, adoption and implementation of consistent policies on multijurisdictional practice of law throughout the United States. Through the Center for Professional Responsibility and its constituent entities, the Association should evaluate the implementation of ABA policies relating to the multijurisdictional practice of law, should coordinate the continued study of multijurisdictional practice and monitor developments in the United States and in international practice, and make such recommendations as appropriate to govern the multijurisdictional practice of law that serve the public interest.

Nearly two years ago, we embarked on a mission to study and report on the myriad issues concerning the multijurisdictional practice of law. We fully appreciated the inherent difficulty of attempting to reconcile the common threads and values of our various jurisdictions which have developed over two hundred and twenty-five years of history, with the sea changes brought to our society and profession in a world of continually evolving technological change. Our process was always open. From the outset, we sought the contributions and comments from all segments of our profession, held hearings and open roundtable discussions over a period of sixteen months both before and after the issuance of our November 2001 Interim Report, and participated in many programs, teleconferences, and other communications on our study. As a result, over seventy entities provided testimony to us, ranging from city and state bar associations to ABA sections, ABA affiliated organizations, foreign bar associations and other concerned entities and individuals.

We asked for the broadest possible range of input. We are gratified to have received it. In response to the many comments and additional testimony we received following the issuance of our Interim Report, we incorporated a variety of substantive changes into our final Report and Recommendations.

We came as Commissioners and Liaisons from different substantive areas and styles of practices—from solo practices, small, medium and large firms, law schools, corporate law departments, and the Supreme Court of Indiana; and from different and diversified bar experiences, with many Commissioners having significant involvement with state bar associations, ABA sections and committees, and various affiliated organizations such as the American Corporate Counsel Association, the National Organization of Bar Counsel, and the Association of Professional Responsibility Lawyers. The debates were vigorous, the viewpoints varied. From the cauldron of debate was ultimately forged a broad consensus and respect for each other, for the process we had engaged in, and for the Report and Recommendations we have

proposed. It has been said that life is a series of compromises. In this sense, it was more a thoroughly considered evolution of ideas being shaped with due regard to tradition, the interests of the public, our clients, our system of justice, the divergences in legal practice, and the realities of modern life, all of which form the dynamic environment in which our profession must exist.

As lawyers, it is essential that our ethical and professional rules and guidelines reflect the core values of our profession and the system of justice, and that they serve the public interest as it exists today. Our work was accomplished with a genuine spirit of collegiality, respect for the views and practical problems of the practitioners in areas other than our own; unflinching commitment to the public interest and the common good, and always with an eye to preserving the core values of our great system of justice. It has been an honor to serve with my colleagues, all of whom devoted countless hours of hard work, good will, commitment, and levity to our work. It is my sincere hope that our work will be of benefit to the legal profession, the American public, and our system of justice, and will serve as a guiding beacon as we move forward into the realities of a century of dynamic change.

Respectfully submitted,

Wayne J. Positan, Chair  
August 2002

## APPENDIX A

### Commission Member Biographies

#### Chair:

**Wayne J. Positan** is Managing Director of Lum, Danzis, Drasco, Positan & Kleinberg, LLC, a thirty-lawyer firm in Roseland, New Jersey. He specializes in the practice of labor and employment law/litigation. He recently served a three-year term on the American Bar Association Section of Litigation Council, and is presently Co-Director of Divisions Designate and a member of the Special Projects Committees on Fair Measure and Expansion of Legal Services Training. He has previously served as Chair of the Section Council Committee on Multijurisdictional Practice, Co-Chair of the Section Annual Meeting, Co-Chair of the Task Force on the Merit Selection of Judges, as a member of the Council Committee on MDP, as a member of the Task Force on State Justice Initiatives, and as Section delegate to the Symposium on MJP at Fordham University. Mr. Positan is a member of the Executive Committee of the New Jersey State Bar Association, presently serving as Treasurer (2002-2003), having previously served on the Board of Trustees (1998-2002) and as Chair of the NJSBA Committee on MJP and the Labor and Employment Section. He is Editor-in-Chief of the New Jersey ICLE book "New Jersey Labor and Employment Law" and chairs the ICLE Annual Labor Law Forum/Bench Bar Conference. He was selected to the inaugural class of Fellows of the College of Labor and Employment Lawyers and to The Best Lawyers in America. He is a graduate of Boston University with a B.A. in Government, magna cum laude, and obtained his J.D. from NYU School of Law.

#### Members:

**Alan T. Dimond** is a partner at the firm of Greenberg Traurig in Miami, FL. The firm employs 750 lawyers in eighteen offices in thirteen jurisdictions. Mr. Dimond concentrates his practice on commercial and development related litigation. He is a former President of The Florida Bar and has served in the American Bar Association House of Delegates and on several Association committees.

**Peter D. Ehrenhaft** is a member of Miller & Chevalier in Washington, DC, engaged in a practice concentrating on transnational transactions and international trade matters. He was an officer or member of the Council of the ABA Section of International Law and Practice for more than 20 years and presently serves as Vice Chair of its Transnational Practice Committee. He is currently the ABA's representative to the U.S. Trade Representative/Department of Commerce Industry Sector Advisory Committee on Trade in Services as the sole member from the legal services sector. He is also active as a member of the Consultative Committee of the American Law Institute's Project on Transnational Rules of Civil Procedure and the Corporate Counsel Committee of the American Arbitration Association.

**Joanne M. Garvey** is a partner at the multi-national, 450-lawyer firm of Heller Ehrman White and McAuliffe in San Francisco, CA. She concentrates her practice in the area of state and local tax law. Ms. Garvey is a former member of the American Bar Association Board of Governors and a former Chair of the Standing Committee on Legal Aid and Indigent Defendants and the Consortium on the Delivery of Legal Services. She is currently a member of the American Bar

Association House of Delegates. Ms Garvey is a former Vice-President of the State Bar of California and President of the Bar Association of San Francisco.

**Stephen Gillers** is the Vice Dean and Professor of Law at New York University School of Law where he has taught since 1978. His courses include regulation of lawyers, evidence, and law and literature. Professor Gillers has written widely on legal and judicial ethics, including in law reviews and the legal and popular press. He has taught legal ethics as a visitor at Harvard Law School and at Cardozo Law School and has spoken on lawyer regulatory issues at federal and state judicial conferences, ABA meetings, state bar meetings nationwide, before Congress, and in law school lectureships. Professor Gillers is the author of *Regulation of Lawyers: Problems of Law and Ethics*, a widely-used law school casebook whose sixth edition was published in 2002. Following a clerkship with Chief Judge Gus J. Solomon in Federal District Court in Portland, Oregon, Professor Gillers practiced law for nine years in New York City before joining the NYU faculty.

**W. Anthony Jenkins** is a partner with the 175-member law firm of Dickinson and Wright in Detroit, MI. He concentrates his practice in the areas of real estate and corporate law. Mr. Jenkins is the State Delegate for Michigan to the American Bar Association House of Delegates. He is a former President of the Detroit Metropolitan Bar Association, and presently a member of the Board of Commissioners of the State Bar of Michigan.

**Charles E. McCallum** is a partner with the 175-member firm of Warner Norcross & Judd LLP in Grand Rapids, MI. He concentrates his practice in corporate, business and transnational law. Mr. McCallum is a Council Member and committee chair of the American Bar Association Section of Business Law. He is a past Chair of the Business Law Section of the State Bar of Michigan.

**Cheryl I. Niro** is a partner in the Chicago commercial litigation firm of Quinlan & Carroll, and President of Judicial Dispute Resolution, Inc. She has a state and federal practice as a neutral, and has negotiated and facilitated the resolution of complex cases. Ms. Niro is the Immediate Past President of the Illinois State Bar Association. Currently, she is serving on the American Bar Association Standing Committee on Bar Activities and Services, a member of the Council of the Section of Dispute Resolution, the Caucus of State Bars, and a Fellow of the American Bar Foundation. Ms. Niro has been a member of the American Bar Association House of Delegates and House Drafting Committee.

**Hon. Larry Ramirez** is a District Court Judge in Las Cruces, NM. He was previously a sole practitioner in Las Cruces, NM. He is a former Chair of the American Bar Association Section of General Practice, Solo and Small Firms and he served on the Commission on Opportunities for Minorities in the Profession. Judge Ramirez is the former Chair of the Disciplinary Board of the Supreme Court of the State of New Mexico.

**Hon. Randall T. Shepard** is the Chief Justice of the Indiana Supreme Court. Chief Justice Shepard is also the Chair of the Conference of Chief Justices' Committee on Multijurisdictional Practice.

**Marna S. Tucker** is a senior partner in the Washington, D.C. firm of Feldesman, Tucker, Leifer, Fidell & Bank LLP. She has practiced law in the domestic relations field for almost thirty years, having become a nationwide expert in complex divorces, domestic violence and prenuptial matters. The Washingtonian Magazine has recognized Ms. Tucker as one of the "Top Fifty"

lawyers in Washington, D.C., as well as one of the outstanding divorce practitioners. She is a Fellow of the American College of Trial Lawyers and a Fellow of the American Academy of Matrimonial Lawyers. Ms. Tucker has gained prominence for her leadership in the legal community, having been elected the first woman President of the 43,000 member District of Columbia Bar in 1984, and the first woman to be elected President of the National Conference of Bar Presidents, a nationwide organization of state and local bar presidents. She has recognized expertise in professional ethics and lawyer discipline, having chaired the ABA Standing Committee on Professional Discipline for three years, and having served for six years as a member of the District of Columbia Board on Professional Responsibility, the body responsible for disciplining attorneys for misconduct. She currently serves on the ABA Standing Committee on the Independence of the Judiciary and on the Commission on Judicial Selection Standards. In the community, Ms. Tucker has chaired the Mayor's Commission on Violence Against Women for the past four years. She was appointed by the Chief Judge of the District of Columbia Court of Appeals to serve on the Court Task Force on Gender Bias. She is a founding member of the Board of Trustees of the National Women's Law Center, where she has served for almost twenty years. Ms. Tucker has served as a member of the Board of Regents of Georgetown University, a member of the Board of Visitors of Georgetown Law Center, a member of the Board of Trustees of the Public Defender Service of the District of Columbia, and the Lawyers' Committee for Civil Rights Under Law.

**Diane C. Yu** is currently the Deputy Director of the University Presidential Transition Office for New York University, after which she will become an NYU Vice President beginning in May 2002. She was previously Associate General Counsel at Monsanto Company in St. Louis, MO and Chief Legal Strategist. She was Chief Counsel to the Agriculture Business and from 1997-1999 was Monsanto's Managing Counsel, responsible for all operations and management. She is Chair of the American Bar Association Section of Legal Education and Admissions to the Bar (the first Asian American ever to chair an American Bar Association Section or Division), in the House of Delegates, and on the Board of Directors of the American Corporate Counsel Association (ACCA). Previously, she was General Counsel for the State Bar of California, where she argued bar discipline and admissions cases before the United States and California Supreme Courts. She has expertise on the unauthorized practice of law, was Chair of the California Committee of Bar Examiners, and served on both the Multistate Bar Examination Committee and the Multistate Professional Responsibility Committee of the National Conference of Bar Examiners. In addition, she was a White House Fellow, Superior Court Commissioner, and in private practice.

**Reporter:**

**Bruce A. Green** is the Louis Stein Professor at Fordham Law School, where he directs the Louis Stein Center for Law and Ethics. He chairs the professional ethics committee of the New York State Bar Association (NYSBA) and the ABA Litigation Section's Committee on Law Schools. Professor Green is a member of the New York City Conflicts of Interest Board, the NYSBA Special Committee on Standards of Attorney Conduct, and the Departmental Disciplinary Committee of the New York State Supreme Court, Appellate Division, First Department. He is past chair of the Joint Committee on the Legal Referral Service of New York City, of the AALS Section on Professional Responsibility, and of the American Bar Association Litigation Section's committees on Ethics and Professionalism and Amicus Curiae Briefs. Professor Green writes extensively in the areas of legal ethics and criminal procedure. Prior to joining the Fordham

faculty in 1987, he served as a law clerk to Judge James L. Oakes and Justice Thurgood Marshall and as an Assistant U.S. Attorney in the Southern District of New York. He is a graduate of Princeton University and Columbia Law School.

#### **American Bar Association:**

**Jeanne P. Gray** (Director) received her J.D. (cum laude) in 1976 from the New England School of Law. She has served as Regulation Counsel for the American Bar Association and from 1980-1983 served as the Reporter for the ABA Evaluation of Lawyer Discipline Systems. Ms. Gray is a founding member of the Association of Professional Responsibility Lawyers. Prior to service with the ABA, Ms. Gray served as Assistant Bar Counsel of the Supreme Judicial Court of Massachusetts prosecuting lawyer disciplinary matters in the state and federal systems. Ms. Gray has served on numerous committees of the ABA, the Massachusetts Bar Association, and the Chicago Bar Association in the professional responsibility arena. Ms. Gray is the Executive Editor of the ABA/BNA Lawyers' Manual on Professional Conduct, the Annotated Model Rules of Professional Conduct, and the co-author of an article titled Standards for Lawyer Discipline and Disability Proceedings and the Evaluation of Lawyer Discipline Systems, 11 Cap. U. L. Rev. 529 (1982). Ms. Gray has written and lectured extensively on issues relating to legal ethics, professional responsibility, and professional regulation.

**John A. Holtaway** (Client Protection Counsel) B.A., University of Illinois, Champaign-Urbana; J.D., DePaul University College of Law. Mr. Holtaway directs all work to fulfill the Association goal to develop and strengthen client protection mechanisms, including programs to reimburse financial loss caused by lawyers' misappropriation of client funds, programs for lawyer/client fee arbitration and mediation, and issues relating to nonlawyer activity in all jurisdictions. He also served as Staff Counsel to the ABA Commission on Multijurisdictional Practice. Prior to joining the Center, Mr. Holtaway was engaged in the private practice of law with a Chicago law firm where he concentrated his practice in the defense of disciplinary cases involving all licensed professionals. Before entering private practice, he was Senior Counsel with the Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois.

**Charlotte (Becky) Stretch** (Special Counsel and Associate Director for Administration) B.A., University of Hawaii; J.D., Hastings College of the Law. Ms. Stretch most recently served as counsel to the Commission on Evaluation of the Rules of Professional Conduct. She joined the Center in 1989 as counsel to the Commission on Evaluation of Disciplinary Enforcement, which conducted a three-year nationwide study of lawyer disciplinary systems. Ms. Stretch worked with the Joint Subcommittee on Lawyer Regulation in implementing the Commission's recommendations and with the Joint Committee on Judicial Discipline in drafting the Model Rules for Judicial Disciplinary Enforcement. She served as a project consultant for the Conference of Chief Justices' Working Group for a Study and Action Plan to Improve Lawyer Competence and Professionalism, and she is currently working with the Center and the Conference of Chief Justices on a project funded by the Open Society Institute to implement the Action Plan. Before joining the ABA, Ms. Stretch served as Assistant Director of the Hawaii State Ethics Commission and as Counsel to the Ethics Commission of the City and County of Honolulu.

## APPENDIX B

### Redlined version of Rule 5.5 of the ABA *Model Rules of Professional Conduct*

#### **RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW**

(Material added to the new version of Rule 5.5 of the ABA *Model Rules of Professional Conduct* is underlined.  
Deletions are ~~struck through~~.)

(a) A lawyer shall not: ~~(a) practice law in a jurisdiction where doing so violates in violation of the regulation of the legal profession in that jurisdiction;~~ or (b) assist a person who is not a member of the bar another in the performance of activity that constitutes the unauthorized practice of law doing so.

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

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

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

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

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

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

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

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

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

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

(2) are services that the lawyer is authorized to provide by



## federal law or other law of this jurisdiction.

### **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.

~~[4]~~ [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. Paragraph (b) 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] Likewise, it does not prohibit lawyers from providing~~ 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.

[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.

## APPENDIX C

### Redlined version of Rule 8.5 of the ABA *Model Rules of Professional Conduct*

#### RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW

(Material added to the new version of Rule 8.5 of the ABA *Model Rules of Professional Conduct* is underlined.  
Deletions are ~~struck through~~.)

(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 ~~where the lawyer is admitted~~ 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 ~~proceeding in~~ matter pending before a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding) tribunal, the rules ~~to be applied shall be the rules of~~ the jurisdiction in which the ~~court~~ tribunal sits, unless the rules of the ~~court~~ 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

(i) ~~if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and~~

(ii) ~~if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.~~

#### Comment

##### *Disciplinary Authority*

[1] ~~Paragraph (a) restates~~ 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. ~~In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.~~ 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, ~~and~~ (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 ~~in~~ pending before a court before which the lawyer is admitted to practice (either generally or pro ~~hae vice) tribunal,~~ the lawyer shall be subject only to the rules of professional conduct of that ~~court~~ the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, ~~and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply.~~ The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[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.

[5] [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.

~~[6] [7] The choice of law provision is not intended to apply to~~ applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.

## APPENDIX D

### Redlined versions of Rule 6A and Rule 22 of the ABA *Model Rules for Lawyer Disciplinary Enforcement*

(Material added to the new versions of Rule 6A and Rule 22 of the ABA *Model Rules for Lawyer Disciplinary Enforcement* is underlined. Deletions are ~~struck through~~.)

#### **RULE 6. JURISDICTION.**

**A. Lawyers Admitted to Practice.** Any lawyer admitted to practice law in this ~~state~~, jurisdiction, including any formerly admitted lawyer with respect to acts committed prior to resignation, suspension, disbarment, or transfer to inactive status, or with respect to acts subsequent thereto which amount to the practice of law or constitute a violation of these Rules or of the Rules of Professional Conduct [Code of Professional Responsibility] or any Rules or Code subsequently adopted by the court in lieu thereof, and any lawyer specially admitted by a court of this ~~state~~ jurisdiction for a particular proceeding ~~;~~ and any lawyer not admitted in this ~~state~~ jurisdiction who practices law or renders or offers to render any legal services in this ~~state~~ jurisdiction, is subject to the disciplinary jurisdiction of this court and the board.

#### **RULE 22. RECIPROCAL DISCIPLINE AND RECIPROCAL DISABILITY INACTIVE STATUS.**

**A. Disciplinary Counsel Duty to Obtain Order of Discipline or Disability Inactive Status from Other Jurisdiction.** Upon being disciplined or transferred to disability inactive status in another jurisdiction, a lawyer admitted to practice in [~~this state~~ jurisdiction] shall promptly inform disciplinary counsel of the discipline or transfer. Upon notification from any source that a lawyer within the jurisdiction of the agency has been disciplined or transferred to disability inactive status in another jurisdiction, disciplinary counsel shall obtain a certified copy of the disciplinary order and file it with the board and with the court.

**B. Notice Served Upon Respondent.** Upon receipt of a certified copy of an order demonstrating that a lawyer admitted to practice in [~~name of state~~ jurisdiction] has been disciplined or transferred to disability inactive status in another jurisdiction, the court shall forthwith issue a notice directed to the lawyer and to disciplinary counsel containing:

(1) A copy of the order from the other jurisdiction; and

(2) An order directing that the lawyer or disciplinary counsel inform the court, within [~~thirty~~] days from service of the notice, of any claim by the lawyer or disciplinary counsel predicated upon the grounds set forth in paragraph D, that the imposition of the identical discipline or disability inactive status in this ~~state~~ jurisdiction would be unwarranted and the reasons for that claim.

**C. Effect of Stay in Other Jurisdiction.** In the event the discipline or transfer imposed in the other jurisdiction has been stayed there, any reciprocal discipline or transfer imposed in this ~~state~~ jurisdiction shall be deferred until the stay expires.

**D. Discipline to be Imposed.** Upon the expiration of [~~thirty~~] days from service of the notice pursuant to the provisions of paragraph B, this court shall impose the identical discipline or disability inactive status unless disciplinary counsel or the lawyer demonstrates, or this court finds that it clearly appears upon the face of the record from which the discipline is predicated, that:

(1) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or



(2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or

~~(4)~~ (3) The ~~imposition of the same discipline by the court imposed~~ would result in grave injustice ~~or; or be offensive to the public policy of the jurisdiction; or~~

~~(4) The misconduct established warrants substantially different discipline in this state; or~~

~~(5)~~ (4) The reason for the original transfer to disability inactive status no longer exists.

If this court determines that any of those elements exists, this court shall enter such other order as it deems appropriate. The burden is on the party seeking different discipline in this jurisdiction to demonstrate that the imposition of the same discipline is not appropriate.

**E. Conclusiveness of Adjudication in Other Jurisdictions.** In all other aspects, a final adjudication in another jurisdiction that a lawyer, whether or not admitted in that jurisdiction, has been guilty of misconduct or should be transferred to disability inactive status shall establish conclusively the misconduct or the disability for purposes of a disciplinary or disability proceeding in this state.

### Commentary

If a lawyer suspended or disbarred in one jurisdiction is also admitted in another jurisdiction and no action can be taken against the lawyer until a new disciplinary proceeding is instituted, tried, and concluded, the public in the second jurisdiction is left unprotected against a lawyer who has been judicially determined to be unfit. Any procedure which so exposes innocent clients to harm cannot be justified. The spectacle of a lawyer disbarred in one jurisdiction yet permitted to practice elsewhere exposes the profession to criticism and undermines public confidence in the administration of justice.

Disciplinary counsel in the forum jurisdiction should be notified by disciplinary counsel of the jurisdiction where the original discipline or disability inactive status was imposed. Upon receipt of such information, disciplinary counsel should promptly obtain and serve upon the lawyer an order to show cause why identical discipline or disability inactive status should not be imposed in the forum ~~state~~ jurisdiction. The certified copy of the order in the original jurisdiction should be incorporated into the order to show cause.

The imposition of discipline or disability inactive status in one jurisdiction does not mean that every other jurisdiction in which the lawyer is admitted must necessarily impose discipline or disability inactive status. The agency has jurisdiction to recommend reciprocal discipline or disability inactive status on the basis of public discipline or disability inactive status imposed by a ~~state~~ jurisdiction in which the respondent is licensed.

A judicial determination of misconduct or disability by the respondent in another ~~state~~ jurisdiction is conclusive, and not subject to relitigation in the forum ~~state~~ jurisdiction. The court should impose identical discipline or disability inactive status unless it determines, after review limited to the record of the proceedings in the foreign jurisdiction, that one of the grounds specified in paragraph D exists. This Rule applies whether or not the respondent is admitted to practice in that jurisdiction. See also, Model Rule 8.5, Comment [1], Model Rules of Professional Conduct.