RECENT OHIO FORECLOSURE CASES: LENDERS BEWARE

By Stephen R. Buchenroth and Gretchen D. Jeffries

Two recent foreclosure cases from the United Stated District Court for the Northern District of Ohio have created a stir among real estate lawyers and the securitization industry. In both instances, the court dismissed complaints to foreclose on mortgages because the plaintiff-lender failed to submit to the court a copy of the assignment of the note and mortgage evidencing the plaintiff's status as holder of the note and mortgagee under the mortgage.

The decisions surprised some lawyers who have apparently grown accustomed to the lax practice of a number of courts of allowing attorneys for foreclosing mortgagees to obtain a judgment decree of foreclosure without requiring proof of their standing in the form of an endorsed note and recorded assignment of the mortgage. While it may create some logistical problems for foreclosing lenders who have taken assignment without requiring all the formal procedures to be satisfied, the decisions should come as no surprise to anyone familiar with foreclosure law in the State of Ohio. In fact, the courts' decisions are merely a restatement of Ohio Foreclosure Law 101 – to obtain judgment on a promissory note, the plaintiff must be able to provide evidence that it is the holder of the note, and to obtain a decree in foreclosure the plaintiff must prove that it is the mortgagee of record. There are no shortcuts to those requirements.

***In re Foreclosure Cases*, 2007 WL 3232430 (N.D.Ohio, Oct. 31, 2007)**

In a somewhat colorful opinion, Judge Christopher A. Boyko dismissed fourteen foreclosure actions based on plaintiff-lender's inability to establish standing for the actions at the time of filing of the complaint. Judge Boyko stated that the notes/mortgages attached to the complaint identified the mortgagee and promisee as the original lending institution, not the plaintiff-lender, and no reference to the plaintiff-lender could be located in the chain of title. Further, Judge Boyko noted that later-proffered assignments of the notes/mortgages did not show the plaintiff-lender to be the owner of the notes/mortgages as of the date of the complaint; rather the assignments expressed a present intent to convey all rights in the notes/mortgages to the plaintiff-lender upon receipt of sufficient consideration on the date such assignments were signed and notarized.

Judge Boyko dismissed plaintiff-lender's argument that it is the "real party in interest" (Fed.R.Civ.P. 17), as not apropos to the foreclosure complaints. Judge Boyko cited the commentary to Fed.R.Civ.P. 17 which states, "[t]he provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made.... It is, in cases of this sort, intended to insure against forfeiture and injustice…." Judge Boyko found that the plaintiff-lender neither alleged mistake nor that a party could not be identified and that the plaintiff-lender would not suffer injustice by the dismissal of the complaints other than on the merits.

Judge Boyko went on to admonish that "[t]his Court acknowledges the right of banks, holding valid mortgages, to receive timely payments. And, if they do not receive timely payments, banks have the right to properly file actions on the defaulted notes-seeking foreclosure on the property securing the notes. Yet, this Court possesses the independent obligations to preserve the judicial integrity of the federal court and to jealously guard federal jurisdiction. Neither the fluidity of the secondary mortgage market, nor monetary or economic considerations of the parties, nor the convenience of the litigants supersede those obligations."

In one of the more colorful footnotes to a decision, Judge Boyko expressed his disdain for plaintiff-lenders skirting the formal requirements for establishing jurisdiction and standing: "[u]nlike the focus of financial institutions, the federal courts must act as gatekeepers, assuring that only those who meet diversity and standing requirements are allowed to pass through. Counsel for the institutions are not without legal argument to support their position, but their arguments fall woefully short of justifying their premature filings, and utterly fail to satisfy their standing and jurisdictional burdens. The institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal arguments compel the Court to stop them at the gate. The Court will illustrate in simple terms its decision:

> 'Fluidity of the market'-'X' dollars,
> 'contractual arrangements between institutions and counsel'-'X' dollars,
> 'purchasing mortgages in bulk and securitizing'-'X' dollars,
> 'rush to file, slow to record after judgment'-'X' dollars,
> 'the jurisdictional integrity of United States District Court'-'Priceless.'"

A recent decision from the United Stated District Court for the Southern District of Ohio paid homage to Judge Boyko's flair for certain pop culture references, as well as his holding in this case by finding "with regard [to] the enforcement of standing and other jurisdictional requirements pertaining to foreclosure actions, this Court is in full agreement with Judge Christopher A. Boyko of the United States District Court for the Northern District of Ohio who recently stressed that the judicial integrity of the United Stated District Court is 'Priceless'". *In re Foreclosure Cases*, 2007 WL 4056586 (S.D. Ohio, Nov. 15, 2007).

***In re Foreclosure Actions*, 2007 WL 4034554 (N.D.Ohio, Nov. 14, 2007)**

Two weeks after Judge Boyko's decision, Judge Kathleen McDonald O'Malley followed Judge Boyko's lead by dismissing thirty-two foreclosure actions for lack of standing. In a less colorful, but tightly reasoned case, Judge O'Malley acknowledged that "a foreclosure plaintiff…especially one who is not identified on the note and/or mortgage at issue, must attach to its complaint documentation demonstrating that it is the owner and holder of the note and mortgage upon which suit was filed. In other words, a foreclosure plaintiff must provide documentation that it is the owner and holder of the

note and mortgage as of the date the foreclosure action is filed." Judge O'Malley further set forth that an affidavit alone, in which the affiant simply attests that the plaintiff is the owner and holder of the note and mortgage, is insufficient and that the appropriate documentation includes assignment documents executed before the foreclosue action was commenced.

These Ohio decisions have further stoked an already hot debate among real estate lawyers regarding the status of MERS (Mortgage Electronic Registration Systems) and its ability to foreclose on mortgages. In its ordinary course of business, MERS transfers ownership of mortgages electronically between MERS members without paper assignments and without any indication to county clerks' or county recorders' offices where the subject properties are located. Recent case law around the nation and even within states is varied on whether MERS has standing to foreclose on a mortgage.

On the one hand, pundits argue that MERS has standing to foreclose on a mortgage because MERS is the legal holder of the note (and the mortgage which transfers as an incident of the note), despite the fact MERS has no beneficial ownership.

A recent decision in New York held that MERS had standing to foreclose on a mortgage when the record showed that the note was endorsed by the originating bank to a subsequent bank and ultimately transferred and tendered to MERS. *Mortgage Electronic Registration Systems, Inc. v. Coakley,* 41 A.D.3d 674 (N.Y.A.D. 2d Dept., 2007). The Court concluded that at the time of the commencement of the action, MERS was the lawful holder of the promissory note and of the mortgage, and accordingly, had standing to bring the action. The Court also found support for its position in the terms of the mortgage instrument in which the defendant had expressly agreed without qualification that MERS had the right to foreclose upon the premises in the event of default.

A recent Florida case also found that a nominee in possession of a note has standing to foreclose on the mortgage, even though the nominee is not the beneficial owner of the note and mortgage. *Mortgage Electronic Registration Systems, Inc. v. Azize*, 965 So.2d 151 (Fla. App. 2d, 2007). While the Court remanded the case to determine whether MERS had possession of the note, the Court found that MERS is a collection agent for the purposes of enforcing mortgage notes and MERS would have standing to file foreclosures if MERS could show itself to be the owner or holder of the note.

On the other hand, some courts are reticent to establish that MERS has standing to pursue a foreclosure action, because MERS does not hold the beneficial interest in the note/mortgage. Such deference for the beneficial owner of the note/mortgage is evidenced in a 2006 case out of New York. *LaSalle Bank National Association v. Lamy*, 12 Misc.3d 1191(A) (N.Y.Supp. 2006). The court held that LaSalle Bank, as assignee of MERS, had no ownership in the mortgage and as such, no cognizable claim for foreclosure. The Court stated that "it is axiomatic that to be effective, an assignment of a note and mortgage given as security therefor must be made by the owner of such note and mortgage and that an assignments made by entities having no ownership interest in the

note and mortgage pass no title therein to the assignee." The court then stated that a nominee of the owner of a note and mortgage may not effectively assign the note and mortgage to another for want of an ownership interest in said note and mortgage by the nominee.

Although the ability of MERS to pursue foreclosure actions will continue to be fleshed out in the courts, the Ohio decisions serve as a warning to all lenders and their counsel that the courts will no longer be asleep behind the wheel while the formal procedural requirements regarding assignment of notes and mortgages are ignored.

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Stephen R. Buchenroth is a partner in the Columbus office of Vorys, Sater, Seymour and Pease LLP and a former head of the firm's real estate and commercial practice group. He is a former Chairman of the Real Property Section of the Ohio State Bar Association and a member of the American College of Real Estate Lawyers. Gretchen Jeffries is an associate in the Columbus office of Vorys, Sater, Seymour and Pease LLP and a member of its commercial and real estate group. Ms. Jeffries is a graduate of The Ohio State University and The University of Texas School of Law.

The Legal Reality of Virtual Real Property

By Nancy Grekin

Virtual real property took on actual life in the case of *Bragg v. Linden Research, Inc.*, No. CIV.AO6 4925 (E.D.P.A., May 30, 2007). The plaintiff, a lawyer, sued Linden Research, Inc. (the "Company") the creator of a virtual reality Web site called "Second Life", alleging that it had improperly confiscated his virtual property and denied him access to its virtual community. He also joined the President and CEO of the Company for having made personal representations which led him to participate in Second Life. The case covered a variety of procedural issues which resulted in the determination that a Federal District Court in the State of the plaintiff's residence had personal jurisdiction over the CEO, and that its on-line terms of service ("TOS") contract was unconscionable. Because the contract between the user and the Web site was unconscionable, the arbitration clause which users were required to accept in order to participate would not be enforced. The case provides lessons on how to prepare a TOS for acceptance on the Internet, and a warning that the operator of a Web site and its principals may be sued virtually anywhere.

Plaintiff signed up and paid defendant to participate in the Second Life virtual world. Participants use the site by creating "avatars", which are virtual depictions of themselves, and which interact with other participants in the Second Life virtual communities. Second Life agreed to recognize the intellectual property rights of the digital content created by participants, permitting them to buy, own and sell virtual goods and property, including land. The owners of virtual land could exclude others, improve it, and rent it and sell it to other avatars for a profit. Plaintiff purchased numerous parcels of virtual land, paid defendant real money as property tax, and created a digital business of selling fireworks for a profit to other avatars. He also acquired other virtual items from other avatars. In order to participate, the plaintiff was required to agree to defendant's on-line TOS. The TOS required, among other provisions, that any dispute between the company and the user be decided by arbitration in California where the Company is located.

The dispute arose because the plaintiff acquired a parcel of virtual land for $300 but the defendant informed him that he had improperly purchased the land through an "exploit." The defendant then froze the plaintiff's account, and confiscated all of the virtual property and currency that he maintained at Second Life. The Plaintiff sued the Company and its President and CEO, Philip Rosedale. Rosedale moved to dismiss for lack of personal jurisdiction, and the Company moved to compel arbitration.

Motion (of Rosedale) to Dismiss for Lack of Personal Jurisdiction

Personal jurisdiction can be established either by "specific jurisdiction" when the basis of the plaintiff's claim is related to or arises out of the defendant's contacts with the forum, or by "general jurisdiction" which need not relate to the defendant's contacts with the forum in connection with the underlying cause of action, but will be established if the contacts were "continuous and systematic." The plaintiff maintained that Rosedale's representations made in national media supported personal jurisdiction.

To establish personal jurisdiction it must be shown that the defendant had sufficient contacts with the forum to have anticipated that he could be sued there. The plaintiff alleged that Rosedale

personally made statements in the media to a national audience regarding Second Life, and that those representations induced the plaintiff to participate. Further Rosedale hosted “town meetings” at Second Life at which he made various statements about the purchase of virtual land. The Court held that these personal representations made to induce participation in Second Life and the purchase of virtual land, were sufficient contacts to support personal jurisdiction.

Further, the Court ruled that the exercise of personal jurisdiction would not offend due process because there was no undue burden on Rosedale to defend in Pennsylvania, and because Pennsylvania has a substantial interest in protecting its citizens from misleading representations that would induce them to purchase virtual property.

Rosedale argued that because he made the representations in his capacity as chief executive officer of Linden Research, Inc. that he could not be subject to personal jurisdiction in his individual capacity, the so-called “fiduciary shield” doctrine. Although the Court was uncertain as to the law of Pennsylvania and the Third Circuit on this doctrine, it held that it did not apply because if a defendant had (1) a major role in the corporate structure, (2) the quality of his contacts with the State were significant, and (3) his participation in tortious contact was extensive, the doctrine would not apply. Because of his title as President and CEO and his participation in Company management, and because his statements were made on national media and he personally participated in the dissemination of the representations, he met the tests for determining that the doctrine did not apply and therefore did not preclude personal jurisdiction.

Motion to Compel Arbitration

Participants in Second Life are required to accept the on-line TOS by clicking an acceptance box. The Second Life TOS included a California choice of laws provision and an arbitration provision requiring disposition of disputes in San Francisco. The plaintiff alleged that the arbitration provision was procedurally and substantively unconscionable.

Procedural Unconscionability

The Court held that the TOS was a contract of adhesion because the other party had no opportunity for meaningful negotiation, and it was therefore procedurally unconscionable. Further the Court held that the Company clearly had superior bargaining strength which also established unconscionability. Apparently Second Life was the first virtual community on the Internet to offer its participants the right to purchase virtual land, so the Court held that there were no other reasonable market alternatives, further supporting that the TOS was a contract of adhesion. Finally, the Court noted that there was an element of “surprise” in the arbitration provision, another element of procedural unconscionability, because the provision was particularly inconspicuous and was buried in a paragraph with the heading “GENERAL PROVISIONS.”

Substantive Unconscionability

Even if a contract is procedurally unconscionable it will be enforced if the substantive terms are reasonable. A substantively unconscionable contract is one which is “one-sided.”

The Court held that the TOS was substantively unconscionable because it was entirely one-sided. It permitted the Company to suspend or terminate a user's account and to refuse use of Second Life without notice, the Company had the sole discretion to determine if the participant had breached, and it had the right to retain any equity the participant had acquired based on a mere "suspicion" of fraud. In addition, the Company could amend the agreement at any time in its sole discretion by posting the amendment to its Web site. Thus the Company had a variety of remedies for breach, while the users had only one: they were required to arbitrate.

The Court analyzed various other provisions of the TOS and concluded that the lack of mutuality, the forum selection clause, and a confidentiality provision unilaterally imposed by the Company demonstrated that the arbitration clause was not designed to provide users with an effective means of resolving disputes. Therefore it was substantively unconscionable. Because the TOS was held to be substantively unconscionable, the Court held that the arbitration clause would not be enforced.

Lessons of the Case

All Web sites are made available nationally (and internationally) so a provider such as the Company can probably be sued virtually anywhere in the county. A CEO or other corporate representative who personally participates in hyping the company's products nationally is at risk of personal liability for false or misleading statements.

The on-line TOS that Web sites require users to accept may not always be contracts of adhesion, but they certainly offer no opportunity to negotiate, are always one-sided, and are presented to users as "take it or leave it" – if a user doesn't accept it, the user cannot participate. Many TOS contracts may be substantively, if not procedurally, unconscionable based upon the theories of this case. A company seeking to enforce a provision such as an arbitration clause included in a TOS should be very careful to make the provision obvious, and not to include other onerous one-sided provisions.

In the new world of virtual reality a company which advertises nationally and which promotes its business on the Internet must be prepared to operate in the real world of the law of contracts or risk serious legal sanctions!

BEHIND ALL THE SMOKE: ARE LAWS RESTRICTING THE RIGHT TO SMOKE IN CONDOMINIUMS, TOWNHOMES AND APARTMENTS REALLY NECESSARY?

By Nancy Le

Smoking bans are heating up across the nation. A reaction to concerns over second-hand smoke, the issue has become a topic in national news stories.[1] Once limited to only public spaces, state and local municipalities are now seeking to ban smoking in private condominiums and multi-residential townhomes and apartment complexes. Developers, building owners and owners' associations are attempting to ban smoking by use of covenants. A review of state condominium/common interest development and landlord-tenants laws show that these current regulations have long been used by nonsmoking residents to protect their right to live in a smoke-free environment. Therefore, is an additional layer of governmental control over smoking in private dwellings really necessary?

Three cities in California have pioneered the way for stretching smoking bans from the park down the street into people's homes. In May of this year, the Southern California city of Temecula passed ordinances banning smoking in public areas and required apartment buildings to make at least 25 percent of their units smoke-free. In October of this year, the Northern California city of Belmont approved a law which prohibits smoking in condominiums, townhomes, and apartments. Further down the California coast, in the city of Calabasas, where smoking in public places has been illegal for over a year, the city is also considering the approval of an ordinance that would restrict smoking in multi-unit residential complexes.

Common Interest Developments

A common interest development ("CID") is a descriptive term used to describe multi-unit residential housing where the owners share common areas and facilities within the development. CID's generally include, among many other forms of multi-unit housing, condominiums, town homes, and multi-story residential high-rises. Most typical state CID laws provide that each development be self-governed through an association of the homeowners living within the CID.[2]

A homeowner's association of a CID is run similarly to a corporation. Bylaws are created and governing documents called the declaration of the covenants, conditions and restrictions ("CC&Rs") are adopted, which outline the rules for the operation of the association. Membership within a homeowner's association occurs automatically when an individual purchases a home within the common interest development. In addition to the CC&Rs, it is not uncommon for most homeowner associations to adopt and enforce a set of association rules that outline among other things what activities are and are not

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[1] "A New Arena in the Fight Over Smoking: The Home", The New York Times (Nov. 5, 2007).

[2] See e.g. California Civil Code Section 1352 ("a common interest development is created whenever a separate interest coupled with an interest in the common area or membership in the association is, or has been, conveyed").

permitted within the development. For example, association rules may dictate whether or not a unit owner can have a pet, post signs in windows, lease a unit, and even more, emit noxious odors. A ban on the emission of secondhand smoke is an additional restriction that may simply be incorporated into the association rules. Without additional governmental laws, the decision to allow smoking within any CID is left to the homeowner's association

Additionally it is not uncommon for CC&Rs to include a clause prohibiting activities which may amount to a "nuisance" to other homeowners or which may interfere with other homeowners' quiet enjoyment of their properties. If the CC&Rs do not include a "nuisance" clause, a plaintiff could probably turn to the state's private nuisance statute. For example, in California, a private nuisance is defined as one that is "injurious to health…offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property…."[3] In the state of Utah, secondhand smoke is a expressly classified as a nuisance if "any tobacco smoke…drifts into any residential unit a person rents, leases…more than once in each of two or more consecutive day periods."[4] The Utah nuisance statute further provides residents of condominiums and apartments with injunctive relief or damage if exposed to nuisance tobacco smoke.[5]

If the homeowner association rules or CC&Rs are silent on the issue of smoking, an aggrieved nonsmoking member of the association may still have several legal remedies against the smoking member who is causing him or her harm. In California, the association or an owner living within a CID may sue to enforce the terms of the CC&Rs (assuming they contain a "nuisance" clause). However, California law requires that the parties first attempt to resolve the dispute by an alternative dispute resolution process prior to filing a lawsuit.[6] If the dispute resolution process is not successful, common claims brought by an aggrieved nonsmoking association member include: breach of the CC&Rs, private nuisance, intentional infliction of emotional distress, trespass, and battery.

Aside from the state of Utah, most states perform a case by case analysis of nuisance claims brought as a result of involuntary exposure to secondhand smoke in private dwellings. A review of case law on these particular types of nuisance claims shows a trend requiring plaintiffs to demonstrate a high level of exposure and injury from the secondhand smoke in order to prevail. Claims of discomfort or "annoyance" caused by involuntary exposure to secondhand smoke do not seem to be sufficient to convince a court to award damages or enjoin the conduct of the smoker.

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[3] California Civil Code Section 3479.
[4] Utah Code Unnanotated §78-38-1(3).

[5] Id.

[6] California Civil Code Section 1369.520.

For example, in the case of Lipsman v McPherson,[7] the plaintiff, a nonsmoking tenant, sued the defendant for negligence and nuisance due to plaintiff's exposure to defendant's secondhand smoke that regularly seeped into plaintiff's apartment. The plaintiff alleged that secondhand smoke resulting from the defendant's three to six cigarettes a day caused plaintiff discomfort and "annoyance." The court entered judgment in favor of the defendant, finding that plaintiff's "annoyance" caused by the defendant's secondhand smoke was "not substantial and would not affect an ordinary person" and that "an injury to one who has specially sensitive characteristics does not constitute a nuisance."

However, in the Florida case of Merrill v. Bosser, [8] the plaintiff, a nonsmoking condominium owner, sued the defendant who lived one unit above the plaintiff. The defendant smoked about one pack of cigarettes a day, and also had a tenant who smoked. Despite the fact that the plaintiff's problems with the defendant's secondhand smoke stopped after the defendant's tenant was asked to move out, the plaintiff still brought a cause of action against the defendant for trespass, common law nuisance, and breach of the covenant of quiet enjoyment. The parties' condominium agreement had contained a covenant of quiet enjoyment. The plaintiff was awarded $1000 in damages for medical expenses, loss of use, and remedial expenses, and additional $275 for costs. In awarding the plaintiff damages, the court reasoned that the "unique facts" evidenced that the plaintiff was exposed to "excessive secondhand smoke" which amounted to a "disturbance of possession."

Apartments

In any state, a landlord or owner of multi-residential leasehold property has the authority to determine whether or not he or she wants to permit smoking on the leasehold premises. Landlords in general may prohibit any activity on the leasehold premises as long as the prohibition does not violate state or federal law. A restriction on smoking would be no different than a restriction on the number of pets, overnight guests, or parking spaces a tenant is entitled to have. These types of restrictions are generally outlined in the lease agreement between the landlord and tenant.

In the event a landlord does not want to expressly restrict smoking in the lease agreement, there are common law objections that non-smoking tenants may assert to protect their right to live in a healthy and smoke-free environment. In addition to the remedies already mentioned in this article, non-smoking tenants living within multi-unit residential leasehold properties have the common law protections pursuant to the implied covenants of habitability and quiet enjoyment.

Each state generally recognizes the implied covenant of habitability and quiet enjoyment that applies to every residential lease agreement. In California, the covenant of quiet enjoyment typically provides each tenant with the right to quiet enjoyment of his or her

[7] No. 191918 (Superior Court of Massachusetts, Middlesex 1991) reprinted in 12 Tobacco Products Liability Reporter 2.345 (1991)
[8] County Court of the 17th Judicial Circuit, Broward County, FL 2005.

residential apartment without a direct or indirect interference by the landlord.[9] Under the implied warranty of habitability, a landlord in a state such as California covenants that the premises shall remain in a habitable state for the duration of the lease.[10]

Under both covenants, a non-smoking tenant adversely affected by secondhand smoke could attempt to seek injunctive relief, or surrender the premises before the termination of the lease under the claim of constructive eviction. In the Oregon case of Fox Point Apt. v. Kippes,[11] the plaintiff sued the landlord for breach of the covenant of habitability and quiet enjoyment when the plaintiff began to suffer respiratory problems caused by secondhand tobacco smoked that was allowed to enter her apartment. The jury unanimously found a breach of the warranty of habitability and awarded the plaintiff a 50% reduction in rent and damages for plaintiff's medical expenses.

In the Ohio case of Dworkin v. Paley, the plaintiff, a nonsmoking tenant, prematurely terminated the lease agreement because the secondhand smoke emanating through the heating and cooling systems caused the plaintiff physical discomfort and annoyance. After terminating the lease, the plaintiff sued the landlord for breach of the covenant of quiet enjoyment. In reversing the dismissal in favor of the defendant, the appellate court held that there were "general issues of material fact concerning the amount of smoke or noxious odors being transmitted into appellant's rental unit."

Conclusion

There are not many reported decisions addressing claims related to secondhand smoke within private residential dwellings. However, both the reported and unreported decisions on this issue demonstrate that private disputes concerning the detrimental effects of secondhand smoke are being resolved through alternative dispute resolution or before an impartial tribunal. Without any governmental regulation on this issue, private property owners and associations maintain the authority to decide what legal activities, although potentially harmful to others, may be permitted on the premises. This begs the question: Is additional governmental regulation on smoking in private dwellings therefore really necessary?

Nancy Le is a real estate and corporate associate with the law firm of Kirkpatrick & Lockhart Preston Gates Ellis LLP. Nancy may be contacted at nancy.le@klgates.com.

[9] Petroleum Collections Inc. v. Swords. 48 Cal. App. 3d 841 , 848 (1975).

[10] Knight et. al v. Hallstham-Mar et. al, 29 Cal.3d 46, 51 (1981).

[11] No. 92-6924 (Lackamas County Oregon District Court 1991).

Multijurisdictional Real Estate Practice and Implementation of ABA Model Rules 5.5 and 8.5

James Geoffrey Durham
University of Dayton School of Law
300 College Park
Dayton, OH 45469-2772

These materials are substantially drawn from materials prepared for a March 20, 2004, program of the American College of Real Estate Lawyers entitled "Crossing Borders: The Evolving Obstacles to Following Your Client Across State Lines" by: Kathleen M. Martin, Malkerson Gilliland Martin LLP, 220 South Sixth Street, Suite 1750, Minneapolis, MN 55402; and Mark F. Mehlman, Sonnenschein Nath & Rosenthal, 233 South Wacker Drive, Suite 8000, Chicago, IL 60606.

Multijurisdictional Real Estate Practice
and Implementation of ABA Model Rules 5.5 and 8.5

A. BRIEF HISTORY OF THE MULTIJURISDICTIONAL DEBATE

1. In the early 1900s, states began enacting "unauthorized practice of law" ("UPL") legislation that prohibited persons (lawyers and non-lawyers) not licensed in a state from practicing law within that state. The most widely stated purpose of the UPL laws was to ensure that a state's citizens were represented by qualified legal practitioners. A state's UPL restrictions also operate to protect the livelihood of lawyers practicing within the state. Historically, the UPL laws had little impact on an attorney's conduct; the lawyer typically represented only clients that lived or were organized in his or her state and the clients' needs were limited to application of the laws of the lawyer's home state.

2. As clients' business needs expanded nationally and internationally during the twentieth century, however, clients increasingly sought advice from their attorneys in regard to transactions that crossed the borders of the lawyers' home states. With technological advances, changes in our transportation systems and the expansion of our economy, this cross-border, or multijurisdictional, practice led lawyers to travel to other states to negotiate or close transactions, to negotiate documents governed by the laws of other states and to sometimes render advice with respect to the application of other states' laws to the client's business dealings.

3. As lawyers more frequently crossed state lines (literally and figuratively) in service to their clients, the UPL laws were invoked not only by the states to prohibit lawyers licensed in another jurisdiction (but not licensed in the host state) from practicing in the host state, but also by clients in fee disputes with their attorneys. A key question that arose from many of these UPL cases was: under what circumstances is a lawyer licensed in one state practicing "in" another state when the transaction involves parties, laws, contract rights or other property situated in or governed by the laws of more than one jurisdiction? (An excellent survey of UPL decisions appears in William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501 (2001), which is available for review at http://www.abanet.org/cpr/mjp/biblio.pdf.)

4. Perhaps the most significant case giving rise to the recent study of the American Bar Association ("ABA") *Model Rules of Professional Conduct* applicable to multijurisdictional practice was the California Supreme Court's decision in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998). In *Birbrower*, New York licensed lawyers were sued by their client for legal malpractice and related claims; the New York firm counterclaimed for attorneys' fees for work it had performed in both California and New York. The *Birbrower* court found that the New York lawyers had practiced law (without a license) "in" California and were not permitted to collect fees for services constituting the practice of law in California, by virtue of the following facts: the New York law firm, which had represented the client on matters of New York law for a number of years, consulted with the client, in New York, in regard to a contract governed by the laws of California; the New York lawyers traveled to California (where the other party maintained its principal place of business) on more than one occasion to meet with the other party and to negotiate resolution of the dispute; and the New York attorneys commenced arbitration with a California office of the American Arbitration Association.

5. In response to the *Birbrower* decision and similar developments in other states, ABA President Martha Barnett appointed the Commission on Multijurisdictional Practice (the "Commission") in July 2000 to, *inter alia*, "study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law" and to "make policy recommendations to govern the multijurisdictional practice of law that serve the public interest." American Bar Association, *Report of the Commission on Multijurisdictional Practice* (Aug. 2002) ("*MJP Report"*), at 1, available at http://www.abanet.org/cpr/mjp/home.html.

6. After numerous hearings, much study and extended debate, the Commission issued its final recommendations in June 2002, which were adopted by the ABA House of Delegates on August 12, 2002. *See MJP Report, supra*.

7. Among the recommendations approved by the ABA House of Delegates were amendments to Model Rule 5.5 that relax previously existing constraints on cross-border practices (MR 5.5 is available at http://www.abanet.org/cpr/mrpc/rule_5_5.html, and the comments are available at http://www.abanet.org/cpr/mrpc/rule_5_5_comm.html), amendments to Model

Rule 8.5 that subject lawyers providing legal services in a state to the disciplinary authority of that state regardless of the attorney's state of licensure, and a Model Rule for Temporary Practice by Foreign Lawyers that allows foreign counsel to provide legal services on a temporary basis in the United States in certain circumstances that closely parallel the permitted cross-border practices authorized by Model Rule 5.5. Additionally, the ABA House of Delegates approved a number of other Model Rule revisions and new Model Rules intended to relax the UPL restrictions that exist in various jurisdictions, including amended Model Rule 6A and proposed Model Rule 22 (promoting reciprocal disciplinary enforcement by a state in which the attorney has practiced and the state in which the attorney is licensed), a Model Rule on "Pro Hac Vice Admission" with respect to practice before courts and tribunals of other states, a Model Rule on "Admission by Motion" under which an attorney can pursue permanent admission to another jurisdiction's bar without taking its bar examination, and promotion of the states' adoption of a Model Rule for the "Licensing of Legal Consultants" that permits a counselor outside the United States to advise American clients about the laws of the counselor's home nation. For a detailed description of the Commission's recommendations, *see MJP Report*, *supra.*

8. At the ABA Midyear Meeting, February 12, 2007, the House of Delegates responded to the calls to allow lawyers displaced by major disasters to temporarily move their practices to other jurisdictions and to allow lawyers from outside the major disaster area to provide *pro bono* legal services within the major disaster area. New language was added to Comment 14 of Model Rule 5.5 and the newly adopted rule was entitled "Model Court Rule on Provision of Legal Services Following Determination of Major Disaster," *see* pages 11-14, *infra.*

B. ABA MODEL RULE 5.5, AS AMENDED IN 2002, AFFIRMATIVELY PERMITS CERTAIN CROSS-BORDER PRACTICES PERFORMED ON A TEMPORARY BASIS

1. The focus of these materials is the effect of Amended Model Rule 5.5 (now titled "Unauthorized Practice of Law; Multijurisdictional Practice," available at http://www.abanet.org/cpr/mrpc/rule_5_5.html) on outside legal counsel providing legal services to clients engaged in cross-border business. The model rule is written from the perspective of the state in which the practitioner is not admitted to practice, and the model rule uniformly requires, as a condition to any

permitted multijurisdictional conduct, that the lawyer not be suspended from practice or disbarred in any other jurisdiction.

2. Amended Model Rule 5.5 clarifies that certain actions remain prohibited:

   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." *Model Rule 5.5(a).*

   b. "A lawyer who is not admitted to practice in this jurisdiction shall not:
      (1) . . . 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." *Model Rule 5.5(b).*

3. Amended Model Rule 5.5(c) affirmatively authorizes certain multijurisdictional practices conducted on a <u>temporary basis</u>:

   (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. *Model Rule 5.5(c).*

Comment 5 to Model Rule 5.5, however, states that these four areas of permitted, temporary practice are intended to be examples of authorized cross-border practice: "[t]he fact that conduct is not so identified does not imply that the conduct is or is not authorized."

4. Additionally, Model Rule 5.5(d)(2) permits in-house counsel, if licensed in one United States jurisdiction and not suspended or disbarred from practice in any jurisdiction, to perform legal services in the state to the "lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission."

5. Moreover, Model Rule 5.5(d)(2) states that an attorney licensed in another jurisdiction (and not disbarred or suspended from practice elsewhere) may provide services in the state that the lawyer is "authorized to provide by federal law or other law of this jurisdiction."

C. WHAT CONSTITUTES RENDERING LEGAL SERVICES ON A TEMPORARY BASIS THAT REASONABLY RELATE TO THE LAWYER'S PRACTICE IN THE JURISDICTION IN WHICH THE LAWYER IS ADMITTED TO PRACTICE?

1. The Commission's greatest departure from common law and existing UPL restrictions affecting transactional lawyers lies in Subsection (c)(4) of Model Rule 5.5, which permits a practitioner licensed in one state to provide legal services, on a temporary basis, in other states 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." An earlier version of subsection (c)(4) proposed by the Commission in its November 2001 interim report had limited cross-border transactional practice to non-litigation work ancillary to the lawyer's representation of a client in the jurisdiction in which the lawyer was licensed to practice law. After significant testimony by transactional lawyers (represented by ACREL, the ABA Business Law Section, the ABA Real Property, Probate and Trust Law Section, and other organizations), the Commission ultimately recognized that permitted cross-border

practices should not be dependent upon the lawyer's prior representation of the client in the lawyer's state of licensure.

2. In its report, the Commission did not state, explicitly, what constitutes a reasonable relationship to the lawyer's practice in his or her state of licensure. Rather, the Commission stated, in Comment 14 to Model Rule 5.5, that a "variety of factors evidence such a relationship," citing as examples that the client may have previously engaged the lawyer in question, the client may be a resident of or have substantial contacts in the lawyer's home state, the matter at issue may have "significant connection" with the lawyer's home state or "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."

3. Comment 5 to Model Rule 5.5 states that "continuous presence" in a jurisdiction "may be systematic and continuous even if the lawyer is not physically present" in the state, and a lawyer not licensed in the state "must not hold out to the public or otherwise represent that the lawyer is admitted to practice law" in the host jurisdiction.

4. Comment 6 further states that there "is no single test to determine whether a lawyer's services are provided on a 'temporary basis,'" given that professional advice 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."

D. PRACTICE TIPS FOR THE REAL ESTATE ATTORNEY ENGAGED IN CROSS-BORDER PRACTICE

1. Practitioners must be mindful that Model Rule 5.5., as amended, only applies in those United States jurisdictions that have adopted the amended rule, although that is getting easier because the District of Columbia and most states have adopted some form of Model Rule 5.5 (*see* paragraph 2, *infra*). The Commission affirmed in its report its belief that “the principle of the regulation of the practice of law by the state judicial branch of government, which includes jurisdictional limits on the legal practice, should be preserved. . . .” *MJP Report,* at 13.

2. As of October, 2007, the ABA reported that that the revision of Model Rule 5.5 on multijurisdictional practice, and the related amendments to Model Rule 8.5 on disciplinary authority in cases involving cross-border practice, have been adopted and are effective in form identical to or substantially similar to the 2002 Model Rule Revisions in the highest courts of the District of Columbia and 34 states: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Washington, and Wyoming. Three states have adopted one but not the other: Montana, and Wisconsin have adopted Model Rule 8.5 but the adoption Model Rule 5.5 is still pending in Montana, while in Wisconsin it has been recommended for adoption; and Alabama has adopted Model Rule 5.5 but is still studying Model Rule 8.5. Recommendations to adopt the model rule revisions in form identical or substantially similar to the 2002 Model Rule Revisions are pending in the highest courts of six states: Illinois, Kentucky, Maine, Michigan, New York, and Virginia. MJP Study Committees in two other states have recommended adoption of rules identical or similar to the 2002 Model Rules: Alaska and Vermont. Five other jurisdictions have created study committees to consider the 2002 Model Rules revisions: Hawaii, Mississippi, Tennessee, Texas, and West Virginia. For a summary of the status of implementation of revised Model Rule 5.5 in the various United States jurisdictions as of October 16, 2007, *see* the ABA table available at http://www.abanet.org/cpr/mjp/quick-guide-5.5.pdf (adoption of Model Rule 5.5 is still listed as pending in Connecticut). For a more detailed statement of the status of the various jurisdictions' implementation of Model Rule 5.5, Model Rule 8.5 and Model Rule for Temporary Practice by Foreign Lawyers, as of October 15, 2007, *see* the ABA table available at http://www.abanet.org/cpr/mjp/impl-mjp-rules07.pdf (which includes state specific websites). For a summary description of the implementation of Model Rule 8.5, *see* the ABA table available at http://www.abanet.org/cpr/mjp/8_5_quick_guide.pdf. Each of these summary tables is regularly updated and posted to the Commission's website, http://www.abanet.org/cpr/mjp/home.html.

3. Because the separate jurisdictions' review and implementation processes for revised Model Rule 5.5, and the corresponding revisions to Model Rule 8.5, are

ongoing, the real estate practitioner, before providing advice with respect to a transaction that involves the laws of, parties related to or property in another state, should consult the current status of such other state's implementation of the Model Rule revisions. The ABA tables included in these materials are an excellent source of information.

4. Furthermore, as noted by the Commission, "restrictions on unauthorized practice of law are also embodied in laws and rules that differ from state to state," such that care must be exercised by the practitioner venturing across state borders to ensure that appropriate legislative reform has been coupled with adoption of the Model Rules. *MJP Report*, at 23. The ABA maintains a summary chart that provides some guidance in this area: http://www.abanet.org/cpr/mjp/impl-mjp-rules07.pdf.

5. Commentators on the Commission's Model Rule revisions have noted that revisions to Model Rule 8.5 (which subjects the cross-border lawyer to the disciplinary authority of both the lawyer's home state and the state in which the lawyer provides legal advice and includes choice of law provisions governing the issue of which state's disciplinary rules apply) appear to be the "price that lawyers must pay for the opportunity for limited interstate practice." ABA/BNA Lawyers' Manual on Professional Conduct, *Conference Report*, August 14, 2002. (Note that, even in-house lawyers, under revised Model Rule 8.5, would be subject to the disciplinary authority of the host state, and in-house counsel must be mindful that they may still be subject to the host state's licensing and registration requirements. *Model Rule 5.5, comment 17).* A complete compilation of amended Model Rule 8.5, and the Comments thereto, are set forth in Appendix C to the *MJP Report.*

6. As the Commission cautions, "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." *MJP Report,* at 29.

7. Real estate lawyers must remain mindful of a separate ethical standard, set forth in Model Rule 1.1 (and adopted in most, if not all, states), which mandates that a "lawyer shall provide competent representation to a client. Competent

representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation." As noted in Raymond J. Werner, *Licensed in One State, But Practicing in Another: Multijurisdictional Practice,* PROBATE AND PROPERTY (March/April 2003) 6, at 9:

> If the lawyer knows or is concerned that a certain legal issue may be treated differently under the law of a state that governs a transaction, the lawyer is duty bound to investigate that issue and react accordingly. Acquiring knowledge of relevant law and using it are merely aspects of the professionalism that sophisticated clients expect and to which all clients are entitled. Moreover, the lawyer has an obligation to explain matters to the client so as to enable the client to make an informed decision regarding matters that are the subject of the representation. *Model Rule 1.4(b).* If the lawyer believes that there are limits on the lawyer's ability to represent the client, the lawyer must so inform the client so the client can decide how to proceed.

The prudence of informing the client that the lawyer is not licensed in a particular jurisdiction was reinforced by the Commission in Comment 20 to amended Model Rule 5.5: "In some circumstances, a lawyer who practices law in this jurisdiction . . .may have to inform the client that the lawyer is not licensed . . .in this jurisdiction. For example, that may be required when the representation occurs primarily in the jurisdiction and requires knowledge of the laws of this jurisdiction. See Rule 1.4(b)."

8. Engaging local counsel, while recognized in Model Rule 5.5.(c)(1) as a legitimate safe harbor, still requires that local counsel "actively participate in and share responsibility for the representation of the client." *Model Rule 5.5, Comment 8.*

9. An out-of-state lawyer engaging in a representation involving litigation or arbitration is, of course, treated differently by Model Rule 5.5. While it often is relatively easy for an out-of-state lawyer engaged to represent a client in a court proceeding to be admitted *pro hac vice,* the states have had a great deal of difficulty in determining how to handle out-of-state lawyers representing clients in arbitrations. For example, Rule 1-3.11 of the Rules Regulating The Florida Bar requires out-of-state lawyers to file a statement with The Florida Bar in all

domestic arbitration proceedings, pay a $250 fee, and only engage in domestic arbitration proceedings in Florida no more than three times in a 365 day period.

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
February 12, 2007

RECOMMENDATION

RESOLVED, That the American Bar Association adopts the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*, dated February 2007.

FURTHER RESOLVED, That the American Bar Association amends Comment [14] to Rule 5.5 of the *Model Rules of Professional Conduct*.

Model Court Rule on Provision of Legal Services Following Determination of Major Disaster
(February 2007)

Rule ___. Provision of Legal Services Following Determination of Major Disaster

(a) Determination of existence of major disaster. Solely for purposes of this Rule, this Court shall determine when an emergency affecting the justice system, as a result of a natural or other major disaster, has occurred in:

(1) this jurisdiction and whether the emergency caused by the major disaster affects the entirety or only a part of this jurisdiction, or

(2) another jurisdiction but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction. The authority to engage in the temporary practice of law in this jurisdiction pursuant to paragraph (c) shall extend only to lawyers who principally practice in the area of such other jurisdiction determined to have suffered a major disaster causing an emergency affecting the justice system and the provision of legal services.

(b) Temporary practice in this jurisdiction following major disaster. Following the determination of an emergency affecting the justice system in this jurisdiction pursuant to paragraph (a) of this Rule, or a determination that persons displaced by a major disaster in another jurisdiction and residing in this jurisdiction are in need of pro bono services and the assistance of lawyers from outside of this jurisdiction is required to help provide such assistance, a lawyer authorized to practice law in another United States jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Such legal services must be provided on a pro bono basis without compensation, expectation of compensation or other direct or indirect pecuniary gain to the lawyer. Such legal services shall be assigned and supervised through an established not-for-profit bar association, pro bono program or legal services program or through such organization(s) specifically designated by this Court.

(c) Temporary practice in this jurisdiction following major disaster in another jurisdiction. Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.

(d) Duration of authority for temporary practice. The authority to practice law in this jurisdiction granted by paragraph (b) of this Rule shall end when this Court determines that the conditions caused by the major disaster in this jurisdiction have ended except that a lawyer then representing clients in this jurisdiction pursuant to paragraph (b) is authorized to continue the provision of legal services for such time as is reasonably necessary to complete the representation, but the lawyer shall not thereafter accept new clients. The authority to practice law in this jurisdiction granted by paragraph (c) of this Rule shall end [60] days after this Court declares that the conditions caused by the major disaster in the affected jurisdiction have ended.

(e) Court appearances. The authority granted by this Rule does not include appearances in court except:

(1) pursuant to that court's pro hac vice admission rule and, if such authority is granted, any fees for such admission shall be waived; or

(2) if this Court, in any determination made under paragraph (a), grants blanket permission to appear in all or designated courts of this jurisdiction to lawyers providing legal services pursuant to paragraph (b). If such an authorization is included, any pro hac vice admission fees shall be waived.

(f) Disciplinary authority and registration requirement. Lawyers providing legal services in this jurisdiction pursuant to paragraphs (b) or (c) are subject to this Court's disciplinary authority and the Rules of Professional Conduct of this jurisdiction as provided in Rule 8.5 of the Rules of Professional Conduct. Lawyers providing legal services in this jurisdiction under paragraphs (b) or (c) shall, within 30 days from the commencement of the provision of legal services, file a registration statement with the Clerk of this Court. The registration statement shall be in a form prescribed by this Court. Any lawyer who provides legal services pursuant to this Rule shall not be considered to be engaged in the unlawful practice of law in this jurisdiction.

(g) Notification to clients. Lawyers authorized to practice law in another United States jurisdiction who provide legal services pursuant to this Rule shall inform clients in this jurisdiction of the jurisdiction in which they are authorized to practice law, any limits of that authorization, and that they are not authorized to practice law in this jurisdiction except as permitted by this Rule. They shall not state or imply to any person that they are otherwise authorized to practice law in this jurisdiction.

Comment

[1] A major disaster in this or another jurisdiction may cause an emergency affecting the justice system with respect to the provision of legal services for a sustained period of time interfering with the ability of lawyers admitted and practicing in the affected jurisdiction to continue to represent clients until the disaster has ended. When this happens, lawyers from the affected jurisdiction may need to provide legal services to their clients, on a temporary basis, from an office outside their home jurisdiction. In addition, lawyers in an unaffected jurisdiction may be willing to serve residents of the affected jurisdiction who have unmet legal needs as a result of the disaster or, though independent of the disaster, whose legal needs temporarily are unmet because of disruption to the practices of local lawyers. Lawyers from unaffected jurisdictions may offer to provide these legal services either by traveling to the affected jurisdiction or from their own offices or both, provided the legal services are provided on a pro bono basis through an authorized not-for-profit entity or such other organization(s) specifically designated by this Court. A major disaster includes, for example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event caused by terrorists or acts of war.

[2] Under paragraph (a)(1), this Court shall determine whether a major disaster causing an emergency affecting the justice system has occurred in this jurisdiction, or in a part of this jurisdiction, for purposes of triggering paragraph (b) of this Rule. This Court may, for example, determine that the entirety of this jurisdiction has suffered a disruption in the provision of legal services or that only certain areas have suffered such an event. The authority granted by paragraph (b) shall extend only to lawyers authorized to practice law and not disbarred, suspended from practice or otherwise restricted from practice in any other manner in any other jurisdiction.

[3] Paragraph (b) permits lawyers authorized to practice law in an unaffected jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, to provide pro bono legal services to residents of the affected jurisdiction following determination of an emergency caused by a major disaster; notwithstanding that they are not otherwise authorized to practice law in the affected jurisdiction. Other restrictions on a lawyer's license to practice law that would prohibit that lawyer from providing legal services pursuant to this Rule include, but are not limited to, probation, inactive status, disability inactive status or a non-disciplinary administrative suspension for failure to complete continuing legal education or other requirements. Lawyers on probation may be subject to monitoring and specific limitations on their practices. Lawyers on inactive status, despite being characterized in many jurisdictions as being "in good standing," and lawyers on disability inactive status are not permitted to practice law. Public protection warrants exclusion of these lawyers from the authority to provide legal services as defined in this Rule. Lawyers permitted to provide legal services pursuant to this Rule must do so without fee or other compensation, or expectation thereof. Their service must be provided through an established not-for-profit organization that is authorized to provide legal services either in its own name or that provides representation of clients through employed or cooperating lawyers. Alternatively, this court may instead designate other specific organization(s) through which these legal services may be rendered. Under paragraph (b), an emeritus lawyer from another United State jurisdiction may provide pro bono legal services on a temporary basis in this jurisdiction provided that the

emeritus lawyer is authorized to provide pro bono legal services in that jurisdiction pursuant to that jurisdiction's emeritus or pro bono practice rule. Lawyers may also be authorized to provide legal services in this jurisdiction on a temporary basis under Rule 5.5(c) of the Rules of Professional Conduct.

[4] Lawyers authorized to practice law in another jurisdiction, who principally practice in the area of such other jurisdiction determined by this Court to have suffered a major disaster, and whose practices are disrupted by a major disaster there, and who are not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, are authorized under paragraph (c) to provide legal services on a temporary basis in this jurisdiction. Those legal services must arise out of and be reasonably related to the lawyer's practice of law in the affected jurisdiction. For purposes of this Rule, the determination of a major disaster in another jurisdiction should first be made by the highest court of appellate jurisdiction in that jurisdiction. For the meaning of "arise out of and reasonably related to," see Rule 5.5 Comment [14], Rules of Professional Conduct.

[5] Emergency conditions created by major disasters end, and when they do, the authority created by paragraphs (b) and (c) also ends with appropriate notice to enable lawyers to plan and to complete pending legal matters. Under paragraph (d), this Court determines when those conditions end only for purposes of this Rule. The authority granted under paragraph (b) shall end upon such determination except that lawyers assisting residents of this jurisdiction under paragraph (b) may continue to do so for such longer period as is reasonably necessary to complete the representation. The authority created by paragraph (c) will end [60] days after this Court makes such a determination with regard to an affected jurisdiction.

[6] Paragraphs (b) and (c) do not authorize lawyers to appear in the courts of this jurisdiction. Court appearances are subject to the pro hac vice admission rules of the particular court. This Court may, in a determination made under paragraph (e)(2), include authorization for lawyers who provide legal services in this jurisdiction under paragraph (b) to appear in all or designated courts of this jurisdiction without need for such pro hac vice admission. If such an authorization is included, any pro hac vice admission fees shall be waived. A lawyer who has appeared in the courts of this jurisdiction pursuant to paragraph (e) may continue to appear in any such matter notwithstanding a declaration under paragraph (d) that the conditions created by major disaster have ended. Furthermore, withdrawal from a court appearance is subject to Rule 1.16 of the Rules of Professional Conduct.

[7] Authorization to practice law as a foreign legal consultant or in-house counsel in a United States jurisdiction offers lawyers a limited scope of permitted practice and may therefore restrict that person's ability to provide legal services under this Rule.

[8] The ABA National Lawyer Regulatory Data Bank is available to help determine whether any lawyer seeking to practice in this jurisdiction pursuant to paragraphs (b) or (c) of this Rule is disbarred, suspended from practice or otherwise subject to a public disciplinary sanction that would restrict the lawyer's ability to practice law in any other jurisdiction.