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The Changing Landscape for In-House Counsel: Multijurisdictional Practice Considerations for Corporate Law Departments

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**THE CHANGING LANDSCAPE FOR IN-HOUSE COUNSEL:
MULTIJURISDICTIONAL PRACTICE CONSIDERATIONS
FOR CORPORATE LAW DEPARTMENTS**

*Carol A. Needham*¹

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I. INTRODUCTION

Disaster can strike without warning. A law department can be left scrambling to adjust to unanticipated circumstances, like a destructive fire or the flooding in New Orleans following Hurricane Katrina, that force the long-term evacuation of a workplace. The ability of in-house counsel to move to a new location in another state and continue providing legal services will depend in part on an analysis of the scope of multijurisdictional practice (MJP) permitted in the new state. Whether the need to hire or move an attorney in the law department from one state to another arises from flooding, an attorney’s unexpected death in a car accident, a major corporate restructuring, or from less dramatic circumstances, MJP issues always must be considered. Regulations governing MJP are also relevant whenever a lawyer travels

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to represent a client in a state in which he or she is not licensed. This article contains an overview of areas to consider² regarding the ability of in-house attorneys licensed in one or more jurisdictions in the United States to continue providing legal services when in a new location. The focus in this article is on matters relevant for attorneys engaged in transactional work, rather than those who are interested in representing their clients in courtrooms, administrative tribunals, and similar forums.

A. *Gather Licensing Information*

Designating a single person within the company to collect information regarding the jurisdiction in which each attorney is currently licensed will bring any licensing issues to light. Centralizing that information ahead of time will speed the decision-making process in the event the decision to move a lawyer to an office in a new state must be made quickly. Periodically checking that attorneys in the legal department hold the necessary licenses and registrations can also bring to light irregular situations so that any deficiencies can be corrected in a timely manner, avoiding the difficulties experienced when it was discovered that in-house attorneys at Gucci America, Inc., North Broward Hospital District, and other entities did not hold the licenses necessary to engage in the active practice of law.

B. *Understand MJP and UPL Doctrine*

1. Sources of Authority

It is essential to evaluate the scope of legal services allowed under the relevant multijurisdictional practice regulations and the application of the doctrine of the unauthorized practice of law (UPL) in each jurisdiction in which the law department's attorneys represent the corporation. The analysis of both issues must be considered for each jurisdiction in the United States relevant to your circumstances. The discussion in this article of selected aspects of the analysis, written for a

2. These and related issues have been more extensively discussed elsewhere. See, e.g., Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685 (2002); Carol A. Needham, *Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 2003 U. ILL. L. REV. 1331 (2003) [hereinafter *MJP Regulations Governing Transactional Practice*]. Quintin Johnstone, *An Overview of the Legal Profession in the United States, How That Profession Recently Has Been Changing and Its Future Prospects*, 26 QUINNIPIAC LAW REVIEW 737 (2008); Sara J. Lewis, *Charting the "Middle" Way: Liberalizing MJP Rules for Lawyers Representing Sophisticated Clients*, 22 GEO. J. LEGAL ETHICS 631 (2009).

national audience, highlights some of the significant features of the evaluation. The analysis of a specific situation, of course, would have to include a more particularized consideration of all relevant facts and law.

Determining a jurisdiction's definition of the practice of law and what is considered to be UPL can be more difficult than one might anticipate.³ Controlling statutes have been enacted by some state legislatures, but in a greater number of jurisdictions the issue is governed by a regulation.⁴ Such regulations are typically promulgated by the state's highest court, but in some states they are issued by agencies regulating lawyers' admission to practice. Along with judicial opinions, the opinions issued by various authorities including ethics committees, UPL committees, and other sources also must be considered. Note that a complete analysis will include every state to which an attorney travels to give legal advice as well as those states in which his office is located. Like the evaluation of the application of blue sky laws in securities transactions, the UPL and MJP analysis must be performed on a state by state basis. The starting point for analysis is that only a person licensed as a lawyer in a jurisdiction, or otherwise allowed to practice by that state's admissions authority, is authorized to provide legal advice to a client there.⁵ The UPL provisions adopted to protect clients from non-lawyers who are not licensed anywhere also operate to restrict practice by out-of-state lawyers.⁶ Some states actively police UPL while in others enforcement is more sporadic.⁷ Opposing counsel litigating a

3. See, e.g., Diane L. Babb, *Take Caution When Representing Clients across State Lines: The Services Provided May Constitute the Unauthorized Practice of Law*, 50 ALA. L. REV. 535 (1999) (including an in-depth analysis about how different states define the practice of law); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) (classic article analyzing unauthorized practice of law restrictions).

4. Fred C. Zacharias, *Limited Performance Agreements: Should Clients Get What They Pay For?*, 11 GEO. J. LEGAL ETHICS 915, 951 n.186 (1998) (noting that courts ordinarily determine what constitutes the unauthorized practice of law, although many legislatures have provided governing statutes).

5. See MODEL RULES OF PROF'L CONDUCT R. 5.5(b) (2009); Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665 (1995) (symposium issue including additional useful articles) [hereinafter *Sneaking Around*]; Carol A. Needham, *Negotiating Multi-State Transactions: Reflections on Prohibiting the Unauthorized Practice of Law*, 12 ST. LOUIS U. PUB. L. REV. 113 (1993) [hereinafter *Negotiating Multi-State Transactions*].

6. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (2009); Paul R. Tremblay, *Shadow Lawyering: Nonlawyer Practice within Law Firms*, 85 IND. L.J. 653 (2010) (supervision of non-lawyers and UPL); Wolfram, *Sneaking Around*, *supra* note 5; Needham, *Negotiating Multi-State Transactions*, *supra* note 5.

7. ABA Standing Comm. on Client Protection, 2009 Survey of Unlicensed Practice of Law Committees (2009), available at <http://www.abanet.org/cpr/clientpro/09-upl-survey.pdf>.

deal gone awry have been known to assert that the attorney-client privilege does not apply when the client sought legal advice from a lawyer licensed elsewhere but not in the jurisdiction in which the advice was sought.⁸ Their theory is that the person cannot “act as a lawyer” in a state in which he is not qualified to practice law.⁹ A similar argument—that the attorney-client privilege does not protect communications with an attorney who holds only an inactive status license—was made in *Gucci America, Inc. v. Guess?*¹⁰ After Jonathan Moss’ lack of an active license came to light in the litigation, he lost his job with Gucci.¹¹

2. Other Avenues Permitting Practice

Lawyers who want to be authorized to provide legal services in a state do have options other than passing another bar exam in the host state and fulfilling all the other requirements for admission there. It is important to note that in many jurisdictions out-of-state lawyers can avoid UPL prosecution in other ways, such as by associating with a locally licensed lawyer who actively participates in the representation, by a court’s granting of *pro hac vice* admission or by obtaining admission by motion, sometimes referred to as reciprocal admission.¹² Some states are now taking steps that will restrict the use of *pro hac vice* admission.¹³ Changes along these lines include raising the fees charged

8. See, e.g., *In re Non-Member of the State Bar of Ariz.*, Van Dox, 152 P.3d 1183, 1188 (Ariz. 2007); *State ex rel. Ind. State Bar Ass’n v. Diaz*, 838 N.E.2d 433, 445-46 (Ind. 2005).

9. See *Diaz*, 838 N.E.2d at 445-46.

10. *Gucci America, Inc. v. Guess? Inc.*, 2010 WL 1416896 (S.D.N.Y. Apr. 8, 2010). Jonathan Moss had held an active California license for several years, then changed his license to inactive status during the thirteen years he was working in-house for Gucci. *Id.*

11. According to *Gucci America, Inc.*, the company terminated Moss for cause after Moss admitted that he had not been forthcoming with company management and had not communicated the fact that his license in California was on inactive status. Memorandum of Law in Support of Plaintiff *Gucci America, Inc.*’s Motion for a Protective Order Against the Disclosure of the Privileged Communications of Plaintiff’s In-House Legal Counsel Jonathan Moss, *Gucci America, Inc.*, 2010 WL 1416896 (S.D.N.Y. Apr. 8, 2010) available at <http://www.nylj.com/nylawyer/adgifs/decisions/040810memorandum.pdf> (last visited Apr. 28, 2010). See also Sue Reisinger, *He’s Been Sacked! Gucci Fires In-House Counsel Over Bar License*, LAW.COM, Apr. 7, 2010, available at http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202447607039&Hes_Been_Sacked_Gucci_Fires_InHouse_Counsel_Over_Bar_License=&src=EMC-Email&et=editorial&bu=Law.com&pt=Law.com%20Newswire%20Update&cn=LAWCOM_NewswireUpdate_20100407&kw=Gucci%20Fires%20In-House%20Counsel%20Over%20Bar%20License (last visited Apr. 28, 2010).

12. Ted Schneyer, *Introduction: The Future Structure and Regulation of Law Practice*, 44 ARIZ. L. REV. 521, 531 (2002).

13. See, e.g., *Alabama State Bar – Pro Hac Vice*, <http://www.alabar.org/members/vice.cfm> (last visited Mar. 12, 2010) (noting that the pro hac vice fee increased to \$300 for applications filed after Jan. 1, 2008).

for each application for *pro hac vice* status, more vigilantly taking notice of a lawyer's propensity to frequently seek *pro hac vice* admission in the state, or capping the maximum number of such admissions at a small number, such as three per year.¹⁴ Developments in admission by motion include the emergence of clusters of states which grant such admission more easily to lawyers licensed in other members of the group than to those licensed elsewhere. Vermont and New Hampshire are members of such a group in New England,¹⁵ and a cluster in the Pacific Northwest¹⁶ includes Oregon, Idaho, Washington, and Utah. Even in situations in which associating with local counsel, *pro hac vice* admission, or admission by motion are not applicable, however, MJP regulations make available to in-house counsel additional routes to the authorized practice of law.¹⁷

3. Recent Trends

There has been a trend away from the older approach in which a state would interpret its UPL provision as allowing an in-house counsel licensed elsewhere to work out of an office in the state by declaring that the legal work performed by that lawyer was not included within the practice of law as the term was defined in that state.¹⁸ This way of handling the issue presented problems for in-house lawyers. First, it raised the question of whether the attorney-client privilege was available in connection with their legal work for the corporation.¹⁹ Also, in-house lawyers working under that interpretation who later sought admission on

14. See, e.g., sunEthics, Changes to Pro Hac Vice Admission to Florida Courts and Arbitrations Are Summarized by Brian Burgoon, http://www.sunethics.com/news_item_34.htm (last visited Mar. 12, 2010).

15. See Admission to the NH Bar, <http://www.courts.state.nh.us/nhbar/index.htm> (last visited Mar. 12, 2010) (discussing special eligibility requirements for attorneys licensed in Maine and Vermont); Admission by Motion Rules, http://www.abanet.org/cpr/mjp/admission_motion_rules.pdf (last visited Mar. 12, 2010).

16. See Oregon Rules for Admission of Attorneys, http://www.osbar.org/_docs/rulesregs/admissions.pdf (last visited Mar. 12, 2010); Admission by Motion Rules, http://www.abanet.org/cpr/mjp/admission_motion_rules.pdf (last visited Mar. 12, 2010).

17. See, e.g., N.J. R. CT. 1:27-2, available at <http://www.judiciary.state.nj.us/rules/r1-27.htm> (last visited Mar. 12, 2010).

18. See 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, 1079-83, 1085-87 (1995) [hereinafter *New Rules*].

19. See Carol A. Needham, *When is an Attorney Acting as an Attorney: The Scope of Attorney-Client Privilege as Applied in Corporate Negotiations*, 38 S. TEX. L. REV. 681, 690 (exploring the scope of attorney-client privilege when an attorney is acting in capacities other than as an attorney).

motion in a third state were told they were not eligible to do so because the state's failure to include in-house work within the definition of the practice of law created a gap in their active practice of law.²⁰ The problem hinges on a technical interpretation of the requirements for admission on motion. The licensing authorities in those states reasoned that such in-house counsel were not eligible for admission based on the active practice of law for five of the previous seven years because the practice of law had to take place in a jurisdiction in which the lawyer was licensed and in good standing.²¹ Because the in-house work had been defined as excluded from the practice of law, the attorney's work in the second state could not be the basis for their admission on motion in the third state.²²

Another development is that the authorization of in-house legal practice is increasingly handled by promulgating a regulation identified as relating to MJP rather than by issuing an opinion interpreting the state's UPL provisions. There are two important categories of regulations: (1) those which address in-house counsel work in MJP regulations that also apply to work performed by outside counsel and (2) separate regulations focusing exclusively on practice by in-house counsel.²³ In evaluating the application of any MJP regulation to your situation, it is necessary to also distinguish between provisions that apply to lawyers who will be working in the state on an on-going basis and those provisions that apply to lawyers who have only a temporary presence in the state. A lawyer who relocates to an office in the state, or establishes a second office there would typically be viewed as having to comply with the requirements for those with a permanent presence in the state.²⁴ In contrast, a lawyer who travels to a single day-long meeting in a state would be considered to have a temporary presence in the state.²⁵ As yet, there is very little authority to assist in confidently predicting precisely when a lawyer's presence in a host jurisdiction is no longer temporary.²⁶ We will return to this issue later in this article.

20. Needham, *MJP Regulations Governing Transactional Practice*, *supra* note 2, at 1346-47.

21. *See id.*

22. For more details on this point, see Needham, *New Rules*, *supra* note 18.

23. *See* Christine R. Davis, *Approaching Reform: The Future Of Multijurisdictional Practice In Today's Legal*, 29 FLA. ST. U. L. REV. 1339, 1353-54 (2002).

24. *See* Needham, *MJP Regulations Governing Transactional Practice*, *supra* note 2, at 1349 (analyzing MICH. COMP. LAWS § 600.916(1) (1996)).

25. *See id.*

26. *See, e.g.,* Gould v. Harkness, 470 F. Supp. 2d 1357, 1363 n.4 (S.D. Fla. 2006). Plaintiff argued that "[t]here is no single test to determine whether a lawyer's services are provided on a 'temporary basis' . . ." *Id.*

4. MJP Regulations

a. Revised ABA Model Rule 5.5

A number of states have adopted an MJP regulation based on the substantial revision of ABA Model Rule 5.5 adopted in 2002 by the ABA House of Delegates. Two aspects of the Model Rule relevant here are 5.5(d)(1), which authorizes practice by in-house counsel in the host state, and 5.5(c)(4) which authorizes both in-house and outside counsel to practice law on a temporary basis in the host state.²⁷ The sixteen states in which regulations identical to the Model Rule have been adopted now allow lawyers licensed elsewhere in the United States to provide legal services as in-house counsel in the host state, pursuant to Model Rule 5.5 (d) (1).²⁸ As of this writing, Alaska,²⁹ Arkansas,³⁰ Indiana,³¹ Iowa,³² Maine,³³ Maryland,³⁴ Massachusetts,³⁵ Nebraska,³⁶ New Hampshire,³⁷ Rhode Island,³⁸ South Carolina,³⁹ South Dakota,⁴⁰

27. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(4), (d)(1) (2009).

28. See In-House Corporate Counsel Rules, http://www.abanet.org/cpr/mjp/in-house_rules.pdf (last visited Mar. 12, 2010).

29. ALASKA RULES OF PROF'L CONDUCT R. 5.5, available at <http://www.courts.alaska.gov/prof.htm#5.5> (last visited May 6, 2010).

30. ARK. RULES OF PROF'L CONDUCT R. 5.5, available at http://courts.arkansas.gov/rules/current_ark_prof_conduct/law_firms/profcond5_5.cfm (last visited May 6, 2010).

31. IND. RULES OF PROF'L CONDUCT R. 5.5, available at http://www.in.gov/judiciary/rules/prof_conduct/index.html#_Toc244572277 (last visited May 6, 2010).

32. IOWA RULES OF PROF'L CONDUCT R. 32:5.5, available at <http://www.iowacourts.gov/wfdata/frame2395-1066/File1.pdf> (last visited May 6, 2010).

33. ME. RULES OF PROF'L CONDUCT R. 5.5, available at http://www.courts.state.me.us/rules_forms_fees/rules/MRProfCond2-26-09.pdf (last visited Mar. 14, 2010).

34. MD. LAWYERS' RULES OF PROF'L CONDUCT R. 5.5, available at <http://michie.lexisnexis.com/maryland/lpext.dll?f=templates&fn=main-h.htm&cp=> (last visited Mar. 14, 2010). The easiest way to reach that page is by following the steps indicated on the state's Attorney Grievance Commission webpage, <http://www.courts.state.md.us/attygrievance/rules.html> (last visited May 6, 2010).

35. SUP. JUD. CT. R. 3:07, MASS. RULES OF PROF'L CONDUCT R. 5.5, available at <http://www.mass.gov/obcbbbo/rpc5.htm#Rule%205.5> (last visited May 6, 2010).

36. NEB. SUP. CT. RULES OF PROF'L CONDUCT R. 5.5 is available at <http://www.supremecourt.ne.gov/rules/pdf/Ch3Art5.pdf> (last visited May 6, 2010).

37. N.H. RULES OF PROF'L CONDUCT R. 5.5, available at http://www.courts.state.nh.us/rules/pcon/pcon-5_5.htm (last visited May 6, 2010).

38. R.I. SUP. CT. RULES OF PROF'L CONDUCT, Art. V, R. 5.5, available at http://courts.ri.gov/supreme/pdf-files/Rules_Of_Professional_Conduct.pdf (last visited May 6, 2010).

39. S.C. JUD. DEPT. R. 407, S.C. RULES OF PROF'L CONDUCT R. 5.5, available at <http://www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=407.0&subRuleID=RULE%205.5&ruleType=APP> (last visited May 6, 2010).

40. S.D. RULES OF PROF'L CONDUCT R. 5.5, available at <http://www.sdbar.org/Rules/rules.shtm> (last visited May 6, 2010).

Utah,⁴¹ Vermont,⁴² Washington,⁴³ and Wyoming⁴⁴ are included in that group.⁴⁵ In these states, the relevant section of their MJP regulation reads:

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.⁴⁶

A few notable aspects of the scope of the permission to practice included within Model Rule 5.5(d)(1) deserve attention. First, in-house lawyers providing legal services in states which have adopted this language are not restricted to doing so on a temporary basis.⁴⁷ This section of the rule allows in-house lawyers to work from an office in the host state or to travel there so frequently that they would be regarded under host state law as having established a permanent presence there.⁴⁸ Such lawyers will not have to take the bar exam in the host state, but they will have to comply with whatever other requirements the host state may impose, such as mandatory CLE and annual registration fees.⁴⁹ In-house lawyers are also allowed to provide legal services while temporarily in a state which has adopted the language in Model Rule 5.5(d)(1).⁵⁰ However, under this subsection, legal services can be

41. UTAH RULES OF PROF'L CONDUCT R. 5.5, available at http://www.utcourts.gov/resources/rules/ucja/ch13/5_5.htm (last visited May 6, 2010).

42. VT. RULES OF PROF'L CONDUCT R. 5.5 available at <http://www.vermontjudiciary.org/lc/statutes%20and%20rules/promulgated-jun1709-vrpc.pdf> (last visited May 6, 2010).

43. Washington's Rule 5.5 is available at http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=garpc5.5&pdf=1 (last visited May 6, 2010).

44. WYO. RULES OF PROF'L CONDUCT R. 5.5, available at http://www.courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=AttorneysConduct.xml (last visited May 6, 2010).

45. This listing reflects a fifty state survey completed on March 14, 2010 during which the language for each jurisdiction was analyzed. Additional information can be obtained through reference to the periodically updated listings on the Center for Professional Responsibility section of the ABA's website. See State Implementation of ABA Model Rule 5.5 (Multijurisdictional Practice of Law), http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf (last visited Mar. 12, 2010).

46. MODEL RULES OF PROF'L CONDUCT R. 5.5(d)(1) (2009). Note that although the officially adopted regulation in each of the host states discussed in this section would be the governing standard in that state, to streamline the discussion we will refer here to the language in the Model Rules, because the language in each of these jurisdictions is identical to that in Model Rule 5.5(d)(1).

47. See *id.*

48. See *id.*

49. See *id.*; MODEL RULES OF PROF'L CONDUCT R. 8.5 (2009).

50. See MODEL RULES OF PROF'L CONDUCT R. 5.5(d)(1) (2009).

provided only to the employer and affiliated entities.⁵¹ Legal advice to executives, managers or any other constituents of the corporation is not included under the language of Model Rule 5.5(d)(1).⁵² This would preclude joint representation of an executive along with the entity as a multiple-client representation. This rule also would not authorize participation in pro bono work, since the lawyer would be providing legal advice to clients other than the corporation.⁵³ A few jurisdictions have considered allowing out-of-state lawyers to engage in unsupervised pro bono work, but adoption of such language is not yet widespread. However, New Jersey, Missouri, and other states have clarified that although in-house counsel licensed elsewhere cannot represent pro bono clients in court, they are encouraged to volunteer for non-courtroom pro bono work through Legal Services offices or other approved organizations.⁵⁴

b. Variations Related to Model Rule 5.5(d)(1).

A number of states have adopted MJP provisions which do not precisely track the language of the Model Rule.⁵⁵ The variations from Model Rule 5.5 in some of those states allow in-house counsel greater freedom, or are likely to have little impact on in-house practice. For example, some states allow in-house lawyers to advise executives and other employees of the corporation, while the Model Rule does not.⁵⁶ Oklahoma specifically includes extra language not found in the Model Rule clarifying that the in-house lawyer's legal services must be provided "in connection with the employer's matters" and adds an exclusion for employers who render legal services to third persons.⁵⁷ Arizona,⁵⁸ Kentucky,⁵⁹ and Pennsylvania⁶⁰ are states which have added

51. *Id.*

52. *See id.*

53. *See id.*

54. *See, e.g.,* In-House Counsel Licensure, http://www.njbarexams.org/incounsel_supplemental.htm (last visited Mar. 12, 2010).

55. Periodically updated information about regulations in all fifty states and the District of Columbia can be obtained on the ABA Center for Professional Responsibility web page in a chart titled: State Implementation of ABA Model Rule 5.5 (Multijurisdictional Practice of Law), available at http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf (last visited Mar. 12, 2010) [hereinafter *State Implementation*].

56. Ronald C. Minkoff, *Do You UPL? Unauthorized Practice by In-House Attorneys*, 107 PLI/NY 341, 349-50 (2001).

57. 5 OKLA. ST. CHAP. 1, APPX. 3-A R. 5.5, available at <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=448989> (last visited on Mar. 14, 2010).

58. The regulation adopted in Arizona includes language in 5.5(g) stating, "Any attorney who engages in the multijurisdictional practice of law in Arizona, whether authorized in accordance with

language making clear that all out-of-state attorneys practicing in the jurisdiction are subject to attorney discipline in the host jurisdiction as well as in their home jurisdictions.⁶¹ Georgia's rule tracks the substance of Model Rule 5.5(d)(1), but it uses a new term, "Domestic Lawyer," which is defined elsewhere in its Rules of Professional Conduct.⁶² The addition of language regarding discipline does not have any effect on the scope of practice allowed under the rule, but as a result of the additional language, the regulations in these states are no longer identical with Model Rule 5.5(d)(1). Regulations which vary from Model Rule 5.5 in adding required notification of clients that the out-of-state lawyers are not licensed in the host state similarly should not present any obstacles

these Rules or not, shall be subject to the Rules of Professional Conduct and the Rules of the Supreme Court regarding attorney discipline in the State of Arizona." ARIZ. RULES OF PROF'L CONDUCT R. 5.5, available at <http://www.myazbar.org/ethics/ruleview.cfm?id=51> (last visited Mar. 14, 2010).

59. Kentucky's rule includes 5.5(e), which states:

A lawyer authorized to provide legal services under this Rule shall be subject to the Kentucky Rules of Professional Conduct and shall comply with SCR 3.030(2) or, if such legal services do not require compliance with that Rule, the lawyer must actively participate in, and assume responsibility for, the representation of the client.

KY. SUP. CT. R. 5.5(e), available at [http://www.kybar.org/documents/scr/scr3/scr_3.130_\(5.5\).pdf](http://www.kybar.org/documents/scr/scr3/scr_3.130_(5.5).pdf) (last visited on Mar. 14, 2010). The pertinent section of the referenced Kentucky Supreme Court Rule SCR 3.030(2) provides:

A person admitted to practice in another state, but not in this state, shall be permitted to practice a case in this state only if that attorney subjects himself or herself to the jurisdiction and rules of the court governing professional conduct, pays a per case fee of \$100.00 to the Kentucky Bar Association and engages a member of the association as co-counsel, whose presence shall be necessary at all trials and at other times when required by the court.

60. Pennsylvania's Rule 5.5(d) includes a reference to Pennsylvania B.A.R. 302, which is its in-house counsel registration rule. Section (G) of Rule 302 subjects an attorney registering under that rule to "all duties and obligations of active members of the Pennsylvania bar including, but not limited to the Rules of Professional Conduct, the Rules of Disciplinary Enforcement and the Rules of Continuing Legal Education." PA. RULES OF PROF'L CONDUCT R. 5.5. The text of Rule 302 is available at http://www.pabarexam.org/bar_admission_rules/302.htm (last visited Mar. 14, 2010).

61. See MD. RULES OF PROF'L CONDUCT R. 8.5(a)(2) (2009); N.J. RULES OF PROF'L CONDUCT R. 8.5(a) (2009); ARIZ. RULES OF PROF'L CONDUCT R. 5.5(g) (2009).

62. The Terminology section of the Georgia Rules of Professional Conduct provides:

"Domestic Lawyer" denotes a person authorized to practice law by the duly constituted and authorized governmental body of any State of Territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the state of Georgia.

GA. RULES OF PROF'L CONDUCT HANDBOOK (available at http://www.gabar.org/handbook/part_iv_after_january_1_2001-georgia_rules_of_professional_conduct/terminology (last visited Mar. 14, 2010)). The state defines the term "foreign lawyer" as meaning "a person authorized to practice law by the duly constituted and authorized governmental body of any foreign nation but not authorized by the Supreme Court of Georgia or its Rules to practice law in the state of Georgia." *Id.*

for in-house counsel. North Dakota and Oregon require registration even for temporary practice in those states by in-house counsel licensed elsewhere. Wisconsin added a phrase so that a lawyer who has been disbarred or suspended from practice either for “medical incapacity” or for disciplinary reasons will be ineligible to provide legal services in Wisconsin. Most of these variations are likely to have a relatively minor impact on the practice of in-house counsel in these states because the additions to the Model Rule do not fundamentally change the scope of practice allowed there under Model Rule 5.5(d)(1). A few states have in place regulations which track Model Rule 5.5, including permission for in-house counsel to practice in the host state, while also providing a registration category for in-house counsel. They are Indiana,⁶³ Maryland,⁶⁴ Massachusetts,⁶⁵ Rhode Island,⁶⁶ South Carolina,⁶⁷ and Utah.⁶⁸

The MJP provisions adopted in some other states, however, contain language changes which can have a significant impact on in-house counsel. At least ten states have adopted regulations which in many other respects largely track Model Rule 5.5, but which alter Model Rule 5.5(d)(1) and thus differ in their treatment of MJP for in-house counsel. In these states, lawyers licensed in other jurisdictions must comply with the host state’s special registration protocol for in-house counsel in order to become eligible to practice in that host state. These states, which include Arizona,⁶⁹ Connecticut,⁷⁰ Delaware,⁷¹ Florida,⁷² Kentucky,⁷³

63. See IND. RULES OF PROF’L. CONDUCT R. 5.5; IND. RULES OF COURT RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS R. 6(2). See Donald R. Lundberg, *In-House Counsel and Unauthorized Practice of Law*, 8 RES GESTAE 35 (2010) (providing useful information for in-house counsel licensed elsewhere who are interested in practicing in Indiana).

64. See MD. LAWYERS’ RULES OF PROF’L. CONDUCT RULE 5.5; MD. BUS. OCC. AND PROFESSIONS CODE 10-206(d).

65. See MASS. SUP. JUD. CT. RULE 3:07; MASS. RULES OF PROF’L CONDUCT R. 5.5; MASS. SUP. JUD. CT. RULE 4:02(9).

66. R.I. SUP. CT. ART V, RULE 5.5; R.I. SUP. CT., Art. II, R. 9(b) (in-house counsel registration).

67. S.C. APP. CT. RULES R. 407; S.C. RULES OF PROF’L CONDUCT R. 5.5 (following Model Rule 5.5); S.C. APP. CT. RULES R. 405 (providing for registration of in-house counsel).

68. UTAH RULES OF PROF’L. CONDUCT R. 5.5; UTAH RULES OF JUD. ADMIN. R. 14-720 (registration).

69. ARIZ. SUP. CT. R. 38(a) (requiring registration).

70. The lawyer must become an authorized house counsel in compliance with Connecticut Practice Book Section 2-15A.

71. DEL. SUP. CT. R. 55.1(a)(1) (providing rules for compliance).

72. FLA. BAR REG. R. 17-1.3 (2009) (requiring in-house counsel to register).

73. KY. SUP. CT. R. 2.111 (providing requirements to obtain a Limited Certificate of Admission to Practice Law).

Louisiana,⁷⁴ Minnesota,⁷⁵ Missouri,⁷⁶ Ohio,⁷⁷ and Pennsylvania,⁷⁸ have adopted regulations which require that an in-house lawyer licensed in another jurisdiction must obtain the host state's limited license for out-of-state in-house counsel in order to be eligible to establish an office within that host state.⁷⁹ When the in-house counsel language in Model Rule 5.5(d)(1) was omitted from the MJP rule ultimately adopted in these states, one view was that the limited admission rules providing for registration by in-house counsel adequately addressed the needs of house counsel who want authorization to provide legal services in that host state on a continuous and systematic basis. These changes to the Rule 5.5(d)(1) language mean that a MJP regulation in other ways based on Model Rule 5.5 in these states no longer offers the broader protection found in Model Rule 5.5(d)(1). In addition to the registration requirement, Connecticut's rule also differs from the Model Rule in that the state deleted the proviso that the legal services "are not services for which the forum requires *pro hac vice* admission."⁸⁰

A handful of states have added language to their versions of Rule 5.5 which does significantly expand the pool of in-house counsel eligible to provide legal services in the host state. Arizona, Connecticut, Delaware, Florida, Virginia, and Wisconsin all have adopted rules which allow lawyers licensed in countries outside the United States to provide legal services as in-house counsel in the host jurisdiction.⁸¹ Arizona adds the phrase "or a lawyer admitted in a jurisdiction outside the United States" to the initial language in its Rule 5.5(d)(1).⁸² Effective Jan. 1, 2009, Connecticut amended its authorized house counsel provision in Connecticut Practice Book section 2-15A to include non-U.S. lawyers as eligible for that status on the same basis as U.S. licensed lawyers. Delaware and Wisconsin accomplish this by adding the phrase "or in a foreign jurisdiction" to the initial language in their versions of Rule

74. LA. SUP. CT. R. XVII, § 14 (2009), available at <http://www.lasc.org/rules/orders/2005/RuleXVII14inhouse.pdf> (last visited Mar. 14, 2010) (establishing registration for in-house counsel).

75. See MINN. RULES FOR ADMIS. TO BAR 9 (2009) (Temporary House Counsel License to work in Minnesota for up to one year); MINN. RULES FOR ADMIS. TO BAR 10 (Permanent House Counsel License for longer than twelve months in the state).

76. See MO. SUP. CT. R. 8.105 (2009).

77. Registration in compliance with Gov. R. VI, Section 3 is required in Ohio.

78. Pa. B.A.R. 302 sets out requirements for a limited in-house corporate counsel license.

79. See *State Implementation*, supra note 55.

80. CONN. RULES OF PROF'L CONDUCT R. 5.5.

81. See *State Implementation*, supra note 55 (providing links to each state's regulations).

82. See ARIZ. RULES OF PROF'L CONDUCT R. 5.5, available at <http://www.myazbar.org/ethics/ruleview.cfm?id=51>.

5.5(d)(1). In Virginia, a person admitted to practice law only in a country other than the United States who is subject to effective regulation and discipline in that lawyer's home jurisdiction is eligible for registration as a corporate counsel under Part II of Virginia's Corporate Counsel Rule 1A:5. Florida adopted language in its Rule 4-5.5(d) authorizing temporary practice by a lawyer admitted only in a non-United States jurisdiction where lawyers are subject to effective regulation and discipline by a duly constituted professional body or a public authority in five circumstances: (1) in association with local counsel, (2) reasonably related to a pending or potential proceeding before a tribunal outside the United States, (3) related to an arbitration, mediation, or other ADR proceeding "(A) if the services are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is admitted to practice or (B) the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted," or (4) the services "are not within (d)(2) or (d)(3) and (A) 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 (B) 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 in which the lawyer is a member."⁸³

c. Limited Admission for In-House Counsel

It is important to remember that some states still have in effect rules which do not permit multijurisdictional practice. In some of those states, in-house attorneys have special eligibility to practice after they register as in-house counsel in the host state. States including Kansas,⁸⁴ Kentucky,⁸⁵ and Tennessee⁸⁶ allow in-house attorneys to register for a

83. FLA. RULES OF PROF'L CONDUCT R. 4-5.5, *available at* <http://www.floridabar.org/divexe/rtfb.nsf/FV/B0807903C28C5E7485256BBC00530531>.

84. Kansas Rule 5.5 is based on the language of Model Rule 5.5 prior to the 2002 amendment, but the state has adopted KANSAS SUP. CT. Rule 706, which allows in-house counsel to obtain a limited license.

85. Kentucky SCR Rule 5.5 is also based on the language of Model Rule 5.5 prior to the 2002 amendment. The state has adopted a limited certificate of admission for in-house counsel under Kentucky SCR Rule 2.111.

86. Tennessee's Supreme Court Rules have also been amended to allow in-house counsel to obtain a limited license. *See* In re: Petition for the Adoption of the Rules Governing the Multijurisdictional Practice of Law, Oct. 23, 2009, *available at* <http://www.tsc.state.tn.us/OPINIONS/TSC/RULES/2009/Order%20Amending%20TSC>

limited license and to practice in the host state as long as they meet the requirements to continue the license, usually including demonstrating compliance with CLE requirements imposed in the host state and often including annual registration for the in-house counsel license.

Even in those jurisdictions in which limited admission is available, however, it presents some hurdles for in-house counsel. In every application for registration under the limited admission rule, assembling the information for the state's evaluation of character and fitness required for registration is likely to prove time-consuming, especially as contrasted with the ease of practicing in states with language tracking Model Rule 5.5(d)(1). In addition, the initial cost for the registration can be quite high. It is \$1300 in Florida,⁸⁷ and \$1,000 in both Kansas and Kentucky. In California the initial cost is over \$950,⁸⁸ and becoming registered costs hundreds of dollars in many of the other jurisdictions which have instituted limited admission.⁸⁹ In contrast, in-house counsel licensed in another state who move to a host state which has adopted the language in Model Rule 5.5(d)(1) can establish an office and work in the host state without paying any registration fee at all. It is more than a little surprising that at a time when many states are granting favorable tax treatment and other incentives in the competition to attract solid businesses, the comparative effect of restrictions on legal practice by in-house counsel has received so little attention.

Furthermore, the governing rules often include additional elements that may prove problematic in certain situations. A particular lawyer's circumstances may put registration out of reach for that lawyer, even when numerous other in-house counsel could qualify in the host state. For example, Missouri Supreme Court Rule 8.105(a)(2) states that the admission category is only available for in-house counsel who graduated from a law school which had ABA approval at the time the lawyer graduated.⁹⁰ And, the full-time employment required by most limited

Rs%207%208%209%2025%2047.pdf (last visited Mar. 14, 2010).

87. RULES REGULATING THE FLA. BAR R. 17-1.3. Updated information about registration requirements in all fifty states is available on the ABA Center for Professional Responsibility website, *available at*: In-House Corporate Counsel Rules, http://www.abanet.org/cpr/mjp/in-house_rules.pdf (last visited April 29, 2010) [hereinafter *In-House Corporate Counsel Rules*].

88. To become a Registered In-House Counsel in California, the current fees for the initial application and moral character determination are \$981 and the annual State Bar fee for the registration status is \$390. CALIF. SUP. CT. R. 965. Application instructions for lawyers who want to register for the Out-of-State Registered In-House Counsel Program are available at http://calbar.ca.gov/calbar/pdfs/certification/2007_MJP_In-House_Instruct.pdf (last visited May 6, 2010).

89. *See In-House Corporate Counsel Rules*, supra note 87.

90. MO. SUP. CT. R. 8.105(a)(2) (2009).

admission rules excludes part-time lawyers and most lawyers employed through a temporary staffing agency. These requirements may not come into play often, but they can have a major impact in light of the facts in a particular attorney's situation. However, some states which in the past had excluded part-time lawyers have more recently amended their standards to allow such lawyers to qualify for admission under the in-house counsel rule. For example, the New Jersey Supreme Court has issued a series of Supplemental Administrative Determinations regarding eligibility for admission under New Jersey Supreme Court Rule 1:27-2.⁹¹ After earlier deciding that in-house lawyers working only part-time or temporarily for their employer would not be eligible under Supreme Court Rule 1:27-2, the court reversed course and decided that lawyers with less than full-time employment with a company as in-house counsel would now become eligible for admission under that rule, as long as the lawyer worked only for a single employer.⁹²

It is already clear that in some states the spotlight focusing attention on MJP has also occasioned renewed interest in the limited licensing of in-house counsel. A handful of states, including Illinois⁹³ and Virginia,⁹⁴ adopted rules allowing the limited admission of house counsel even before the state amended its MJP provision. At this time, recommended changes related to MJP are said to be pending in Michigan and possible changes in the regulation of MJP remain under consideration in other states, including Mississippi, New York and Texas.⁹⁵ One indication of the likelihood of continuing developments in New York is Opinion 835 issued by the New York State Bar Association Professional Ethics Committee on Dec. 24, 2009, which urged the appellate division and the legislature to provide further guidance regarding the extent to which out-of-state lawyers are authorized to practice in the state. It may take some time before all states complete their review of the issue. Some states, such as Missouri, have reaffirmed a long-standing policy of permitting registration for eligible in-house attorneys without requiring them to

91. Notice to the Bar: Amendments to Supreme Court Supplemental Administrative Determinations Regarding In-House Counsel Licensure Pursuant to Rule 1:27-2 (June 3, 2009), <http://www.judiciary.state.nj.us/notices/2009/n090608a.pdf> (last visited on May 6, 2010).

92. *Id.*

93. ILL. SUP. CT. R. 716 (2009), available at http://www.state.il.us/court/SupremeCourt/Rules/Art_VII/artVII.htm#Rule716 (last visited Mar. 12, 2010) (governing the limited admission of house counsel).

94. See VA. SUP. CT. R. 1A:5 (2009).

95. An excellent resource for obtaining current information on the progress of state implementation of initiatives related to MJP is maintained by the Center for Professional Responsibility. See *State Implementation*, *supra* note 55.

pass the state's bar exam.⁹⁶ Other states, such as California,⁹⁷ Florida,⁹⁸ and Illinois,⁹⁹ have been prompted to adopt regulations governing registration by in-house counsel for the first time following the 2002 vote by the ABA's House of Delegates approving the changes to Model Rule 5.5 permitting MJJ.

Most of the limited admission regulations do not allow out-of-state in-house counsel to appear in court or before other tribunals in the state unless the tribunal's rules permit the appearance. And, these regulations commonly provide that the attorney's legal services must be limited to transactional practice.¹⁰⁰ Illinois Rule 716, for example, states that the lawyer's legal services are limited to "(a) advising the directors, officers, employees and agents of the employer regarding its business and affairs and (b) negotiating, documenting and consummating transactions to which the employer is a party."¹⁰¹

New Jersey has gone further than have most states in articulating its expectations regarding which in-house attorneys will be required to obtain a New Jersey limited license. No matter where the attorneys are physically located, all in-house attorneys providing New Jersey legal services to an entity must obtain a New Jersey limited license.¹⁰² In an interpretation that may surprise some attorneys, the New Jersey Supreme Court has stated that "[i]n-house counsel who have offices in other jurisdictions but who work with outside legal counsel for the business entity in New Jersey also fall within the scope of the Rule and must obtain a limited in-house counsel license."¹⁰³ An in-house counsel whose primary office is in another state may still have to obtain a New Jersey limited license if he or she has "substantial contacts with the business entity in New Jersey."¹⁰⁴ Having an office in New Jersey or "regularly spending several weeks out of the year in New Jersey are indicia that would require licensing under the Rule."¹⁰⁵ The court added the caveat that the New Jersey license would not be required if the in-

96. See MO. SUP. CT. R. 8.105(a)(2) (2009).

97. CAL. CT. R. 9.46 (2009).

98. FLA. BAR REG. R. 17 (2009).

99. ILL. SUP. CT. R. 716 (2009).

100. See, e.g., MO. SUP. CT. R. 8.105(a)(1) (2009).

101. ILL. SUP. CT. R. 716 (2009).

102. Notice to the Bar: Amendments to Supreme Court Supplemental Administrative Determinations Regarding In-House Counsel Licensure Pursuant to Rule 1:27-2 (June 3, 2009), <http://www.judiciary.state.nj.us/notices/2009/n090608a.pdf> (last visited on May 6, 2010).

103. *Id.*

104. *Id.*

105. *Id.*

house lawyer located in another state had “only occasional and irregular contact with the New Jersey office.”¹⁰⁶

In the dwindling number of states which have neither enacted a rule permitting MJP following Rule 5.5(d)(1), nor authorized registration for in-house attorneys, in-house counsel moving to those states from other jurisdictions will still be required to take the bar exam or qualify for admission on some other basis than their house counsel status.

C. *Separate Analysis Is Needed When Traveling to Other States*

1. Model Rule 5.5

In-house lawyers who represent their clients in states other than those in which they are licensed or otherwise permitted to practice must become aware of the MJP and UPL provisions in each state to which they travel. If a lawyer travels to a jurisdiction in which the protection for in-house counsel in Model Rule 5.5(d)(1) was deleted from the language ultimately adopted, a key question will be whether the lawyer is temporarily in the jurisdiction. This is the case because the provisions of Model Rule 5.5(c) will apply to in-house lawyers as well as to outside counsel, and in most states the wording of the regulation in the jurisdiction based on Model Rule 5.5(c) and the standards articulated in the state’s case law allow practice only by lawyers admitted elsewhere in the United States who have not been disbarred or suspended from practice in any jurisdiction and who are providing legal services in the adopting jurisdiction on a temporary basis.¹⁰⁷ A lawyer not admitted to practice in the host jurisdiction cannot establish an office “or other systematic and continuous presence”¹⁰⁸ in that jurisdiction for the practice of law. Comment 4 to the Model Rule, adopted verbatim in many states, clarifies: “Presence may be systematic and continuous even if the lawyer is not physically present” in the jurisdiction.¹⁰⁹ Conversely, “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.”¹¹⁰ In many situations it will be difficult to determine prospectively whether the lawyer’s work in the jurisdiction

106. *Id.*

107. MODEL RULES OF PROF’L CONDUCT R. 5.5(c) (2009).

108. MODEL RULES OF PROF’L CONDUCT R. 5.5(b)(1) (2009). *See also* MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 4 (2009).

109. *Id.*

110. MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 6 (2009).

will be considered to be temporary practice or systematic and continuous presence.

If the lawyer's presence is considered to be temporary, the work she is doing in the jurisdiction can fall within the scope of practice allowed under Model Rule 5.5(c)(4), which provides:

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: ... 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.¹¹¹

The language of 5.5(c)(4) applies to all lawyers, whether in-house or outside counsel.¹¹² Work performed under Model Rule 5.5(c)(4) has some limitations. It must "arise out of or [be] reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted."¹¹³ This requirement will ordinarily be easily met by an in-house lawyer who is advising her employer on issues within her usual practice area. On the other hand, the analysis is less clear if a lawyer is picking up an entirely unrelated practice area for the first time in the work he is doing in the new jurisdiction. The argument could be made that the situation does not meet the standard if a lawyer travels to a different state to give legal advice on a securities offering, for example, while ordinarily his practice in the jurisdiction in which he is licensed involves only OSHA compliance. However, since most in-house counsel have a fairly broad set of responsibilities within their usual practice area, it is unlikely that a problem in this area will be encountered. And, an in-house lawyer could also make the argument that the language should be read more broadly when applied to in-house counsel and any situation in which he is representing the company should be considered to be related enough to his practice for his employer in his home jurisdiction.

2. State Variations in Adoption of Language Similar to Model Rule 5.5(c)(4).

In a number of states the language adopted departs substantially from that of Model Rule 5.5(c)(4). Under the California regulation, a "material aspect" of the matter handled in California must take place in a

111. MODEL RULE OF PROF'L CONDUCT R. 5.5(c)(4) (2009).

112. *See id.*

113. *Id.*

jurisdiction other than California where the lawyer is licensed.¹¹⁴ Many states including Idaho¹¹⁵ and North Carolina¹¹⁶ require that the out-of-state lawyer's work in the host state must have a greater nexus with the lawyer's home state than is required under Model Rule 5.5(c)(4). In these states, it is typically necessary that the matter "arise out of" or be "reasonably related to the lawyer's representation of a client" in a jurisdiction in which the lawyer is licensed.¹¹⁷

Nevada's language adds the requirement that the lawyer must be "acting with respect to a matter that is incident to work being performed in a jurisdiction in which the lawyer is admitted, provided that the lawyer is acting in this jurisdiction on an occasional basis and not as a regular or repetitive course of business in this jurisdiction."¹¹⁸ When handling transactions involving issues of New Mexico law, the regulation there requires the lawyer temporarily practicing in New Mexico to associate with local counsel.¹¹⁹ The language adopted in New Jersey is substantially narrower in that it allows the out-of-state lawyer to act:

with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.¹²⁰

Alterations such as the South Dakota requirement that the out-of-state lawyer present in the state on a temporary basis "obtain[] a South Dakota sales tax license and tender[] the applicable taxes pursuant to Chapter 10-4545," are part of the analysis in that state, even when they seem an imperfect fit with the work of in-house counsel.¹²¹ This section highlights some of the variations in the scope of practice permitted under MJP regulations. It is important to remember to evaluate the facts of a particular lawyer's situation in light of the precise language of the rule in each relevant state.

114. CAL. CT. R. 9.48(c)(1) (2009).

115. IDAHO RULES OF PROF'L CONDUCT R. 5.5(b)(2)(ii) (2009).

116. N.C. RULES OF PROF'L CONDUCT R. 5.5(c)(2)(B) (2009).

117. *Id.*; IDAHO RULES OF PROF'L CONDUCT R. 5.5(b)(2)(ii) (2009).

118. NEV. RULES OF PROF'L CONDUCT R. 5.5(b)(4) (2009).

119. N.M. RULES OF PROF'L CONDUCT R. 24-106 (2009).

120. N.J. RULES OF PROF'L CONDUCT R. 5.5(b)(3)(iv) (2009).

121. *See* S.D. RULES OF PROF'L CONDUCT R. 5.5(c)(5) (2009).

D. *Delay is Dangerous*

Take prompt action to ensure that each attorney in the law department is licensed, registered, or otherwise eligible to practice in a state before giving legal advice there. When a new attorney joins the law department, or a lawyer transfers to an office in a state in which he is not yet licensed, take steps to get the attorney licensed in the new state before he moves there.

A cautionary tale is told in the Wisconsin case of *In the Matter of the Bar Admission of Samuel Mostkoff*.¹²² The in-house counsel in that case had practiced law for almost thirty years.¹²³ He applied for admission on motion under Wisconsin Supreme Court Rule 40.05(1) under which competence is demonstrated by active practice of law for three of the five years prior to filing the application for admission.¹²⁴ He was licensed in Michigan, living and practicing as an in-house lawyer there for over fifteen years.¹²⁵ After spending about eighteen months living in Ohio and working as in-house counsel for a Wisconsin company, he moved to Wisconsin and worked for the same company.¹²⁶ If he had applied at the time he moved to the state, he would have been eligible for admission.¹²⁷ But, perhaps pressed for time, he put aside the issue and did not apply promptly.¹²⁸ Four years later he filed his application.¹²⁹ The court denied it, on the basis that to be considered the active practice of law, the legal work must either be conducted in a state where the applicant was admitted to practice law (here, Michigan) or be “the kind of work generally engaged in by attorneys who are ‘primarily engaged in the active practice of law in the courts’ of another jurisdiction.”¹³⁰ The court decided that supervising local counsel in litigation does not qualify as the required courtroom advocacy.¹³¹ Finally, the applicant did not demonstrate the good cause needed for a waiver of the time limit.¹³² One judge dissented and two more filed a concurrence strongly criticizing the rules and lamenting the formalistic

122. *In re Bar Admission of Mostkoff*, 693 N.W.2d 748 (Wis. 2005).

123. *Id.* at 749.

124. *Id.* at 750 (citing WIS. SUP. CT. R. 40.05).

125. *Id.* at 749.

126. *Id.*

127. The court notes that three months or so after Mostkoff moved to the state he did request an application for admission to the Wisconsin State Bar. *Mostkoff*, 693 N.W.2d at 749.

128. *Id.*

129. *Id.*

130. *Mostkoff*, 693 N.W.2d at 752.

131. *See id.* at 753.

132. *Id.* at 753.

enforcement of mechanical time limits.¹³³ The lawyer in that case spent nineteen months litigating the denial of the application, and at the end of the proceeding he was told that he could be admitted if he passed the state's bar exam.¹³⁴ Other out-of-state in-house lawyers have encountered similar difficulties when their failure to properly become recognized as authorized to practice in a new jurisdiction came to light.

The window for prompt registration in many states is quite short. Arizona, Iowa, and Kansas require that in-house lawyers register within ninety days of beginning practice in the host state.¹³⁵ In New Jersey and Wisconsin lawyers must register within sixty days.¹³⁶ And in Idaho the time frame is even earlier: the attorney is required to register sixty days *prior* to starting to work as an in-house lawyer.¹³⁷ It is possible that in some situations admissions personnel may permit a lawyer to register even if the lawyer applies after the specified deadline. But why hope that someone will show mercy and bend the rules? When an attorney is contemplating a move to a new jurisdiction which has instituted a limited admission status, the best approach is to register for that status as soon as the attorney moves to the new state.

Put reminder systems in place to be certain that annual dues for law license renewals and registrations are paid promptly. Immediately follow up on any past due notices. If you need motivation, recall the discussion of licensing problems in connection with high-profile judicial nominations. While Thomas Griffith's nomination to the U.S. Circuit Court of Appeals for the District of Columbia was bogged down in a protracted confirmation process, his critics repeatedly highlighted two licensing problems. While practicing law in the District of Columbia, his D.C. license was suspended for failure to pay his annual bar membership dues.¹³⁸ And, he had not been licensed in Utah during the five years he had practiced in-house in that state as general counsel for Brigham Young University.¹³⁹ According to press reports, Judge Griffith had concluded that a Utah license was not required as long as he associated with locally licensed attorneys.¹⁴⁰ Even if this reading of the

133. *Id.* at 754-56.

134. *See id.* at 756.

135. *See State Implementation*, supra note 55 (providing links to each state's Rule 5.5).

136. *Id.*

137. *Id.*

138. *See, e.g.*, Christopher Smith, *BYU Counsel Likely D.C. Court Nominee*, SALT LAKE TRIB., Jan. 25, 2005.

139. *See* Robert Gehrke, *Griffith's Nomination to Court of Appeals Advances*, SALT LAKE TRIB., April 15, 2005.

140. *See, e.g., id.*

Utah admission requirements was technically correct, his critics would not drop the issue. Senator Patrick Leahy was quoted as saying, “I think he has not honored the rule of law by practicing law in Utah for five years without ever bothering to fulfill his obligation to become a member of the Utah bar.”¹⁴¹ And, Harriet Miers was hounded about the three-week suspension of her Texas license in 1989 and the less than two-month long suspension of her D.C. license in 2004.¹⁴² Licensing issues did not derail Judge Griffith’s nomination, and they were not central to Ms. Miers’ decision to withdraw from consideration, but non-compliance with the regulatory requirements of our profession can create problems for even the most meticulous lawyer. Even if you don’t anticipate being under the harsh scrutiny given a judicial nominee, practicing without the correct license is an avoidable lapse which can expose you to criticism.

E. *Maintaining Inactive Status*

When hiring new attorneys or transferring the company’s attorneys to new locations, consider the value of maintaining the lawyers’ inactive status in the other states in which they have been licensed. If there is ever a need to move the attorney back to that state, reactivating the original license will be much easier than starting over to again meet the requirements for a new license. Consider that some of the New Orleans companies that relocated to Texas, Georgia, and other states in the wake of Hurricane Katrina did so on the basis of the chief executive officer’s relationships in the other states or the first available location with adequate operations infrastructure, rather than following an established plan. In the event of a large-scale disaster, displaced lawyers would benefit from locating in host states which have adopted rules similar to the ABA’s 2007 Model Court Rule on Provision of Legal Services Following Determination of Major Disaster,¹⁴³ which allows a lawyer who principally practices in a jurisdiction that has experienced an event which the host state’s court views as a major disaster to provide legal

141. *Id.* The *New York Times* referred to the issue months after his confirmation in an Oct. 11, 2005 editorial, *A Confirmation Debate in Reverse*.

142. See, e.g., Charles Babington & Amy Goldstein, *Miers Is Asked about Role in '98 Campaign*, WASH. POST, Oct. 22, 2005, at A-10; David D. Kirkpatrick, *Senators Rebuke Nominee for 'Inadequate' Responses*, INT’L. HERALD TRIB., October 21, 2005; Richard Wolfe & Daniel Klaidman, *How Katrina Hurt Harriet—And What’s Next for the Embattled High-Court Nominee*, NEWSWEEK, Oct. 31, 2005.

143. See Model Court Rule on Provision of Legal Services Following Determination of Major Disaster, available at <http://www.abanet.org/cpr/clientpro/home.html> (last visited Apr. 29, 2010).

services in the host state on a temporary basis.¹⁴⁴ These rules are likely to be quite helpful to lawyers who encounter an event which has a wide-spread impact. However, there are many situations in which the need to transfer to a new jurisdiction arises from events which do not qualify as major disasters. Maintaining law licenses in all states in which the lawyer has been admitted gives the lawyer, and the company, the largest set of options for future relocation.

II. CONCLUSION

Even excellent attorneys can become so busy working on behalf of their clients that they do not give enough attention to determining whether they are properly permitted to engage in their legal work. Unanticipated circumstances can force a law department to reassign attorneys and otherwise quickly adjust to changes caused by natural disasters or unexpected resignations. Whenever in-house attorneys travel to represent the client in a new state, move to a new office, or bring a new hire into the law department, multijurisdictional practice issues are a necessary consideration. There are a variety of avenues available to ensure that an in-house attorney is eligible to give legal advice to the corporation or other entity client. Even with the fast pace of contemporary legal practice, in-house lawyers must take the time to fully analyze their ability to practice in every jurisdiction in which they advise their clients.

144. See Sheryl B. Shapiro, *American Bar Association's Response to Unauthorized Practice Problems Following Hurricane Katrina: Optimal or Merely Adequate?*, 20 GEO. J. LEGAL ETHICS 905 (2007); Sandra S. Varnado and Dane S. Ciolino, *Reconsidering Lawyers' Ethical Obligations in the Wake of a Disaster*, 4 PROF. LAWYER 8 (2009).

