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## Have License, Will Travel: An Analysis of the New ABA Multijurisdictional Practice Rules

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# HAVE LICENSE, WILL TRAVEL: AN ANALYSIS OF THE NEW ABA MULTIJURISDICTIONAL PRACTICE RULES

CYNTHIA L. FOUNTAINE\*

## I. INTRODUCTION

Suppose you are a lawyer who is licensed to practice in New York. What happens when your New York client has a dispute with a business competitor in California? May you go to California to interview witnesses and advise your client? May you go to California to negotiate a settlement designed to avoid litigation? If your settlement efforts fail, may you initiate arbitration or file suit in California? What ethical rules are you bound to follow while you are in California—New York’s? California’s? Neither? Both?<sup>1</sup> It might surprise you to know that merely by calling your client in California and giving legal advice over the telephone, you might violate California’s unauthorized-practice-of-law statute, which could make you subject to criminal sanctions or keep you from being able to recover fees for your work.<sup>2</sup>

Multijurisdictional practice (“MJP”)—that is, law practice in a host state by an out-of-state lawyer who is licensed in a different home state—raises two primary issues: (1) is the out-of-state lawyer violating the host state’s unauthorized practice of law (“UPL”) regulations; and (2) if the lawyer is permitted to practice in the host state, what ethical rules must the lawyer follow while carrying out the work in the host state? These issues are even more complicated by issues of whether or not litigation is pending, and if so, whether it is pending in state or federal court.

States have a recognized interest in limiting MJP and in strictly regulating lawyers practicing within their jurisdictions.<sup>3</sup> This interest is

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1. See *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 911 F. Supp. 148 (D.N.J. 1995) (deciding which of several states’ ethical rules apply to plaintiffs’ lawyers’ ex parte communication with defendant’s past and present employees).

2. See *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998) (holding that New York lawyers were not entitled to recover fees for work done in California on behalf of a client under California’s Professional Code).

3. States’ power to regulate law practice stems from a combination of recognition of state courts’ inherent power to regulate the practice of law before them and state constitutional power to exercise this power. See, e.g., *In re Nolo Press/Folk Law, Inc.*, 991 S.W.2d 768, 769 (Tex. 1999) (“The Supreme Court of Texas has inherent power to regulate the practice of law in Texas . . . . The Court’s

based primarily on the state's interests in protecting its citizens from incompetence and protecting the state's judicial system.<sup>4</sup> By requiring state licensure as a prerequisite to practice, the state protects its ability to enforce ethical and professional standards.

However, lawyers have an increasing need to fully represent their clients' cross-border interests and are increasingly able to competently provide these services.<sup>5</sup> Lawyers' increased need to engage in MJP stems from changes in the national and international economies that increase clients' cross-border interests and, consequently, their need for cross-border legal services. Lawyers' increased competence in MJP arises out of technological innovations that improve access to other states' laws<sup>6</sup> and changes in communication technology that facilitate a lawyer's ability to "virtually" represent clients' interests in other states.<sup>7</sup> Thus, MJP rules should represent a balance of the states' regulatory interests and lawyers' increasing need and ability to engage in MJP.<sup>8</sup>

ABA Model Rules of Professional Conduct ("Model Rules") 5.5 and 8.5 are designed to regulate MJP.<sup>9</sup> Recognizing important deficiencies in these rules, the ABA recently adopted significant amendments.<sup>10</sup> The primary goals of the amendments are formally to recognize the cross-border nature of modern law practice and to promote uniform rules that

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inherent power is derived in part from Article II, Section 1 of the Texas Constitution, which divides State governmental power among three departments. The authority conveyed to the Supreme Court by this constitutional provision includes the regulation of judicial affairs and the direction of the administration of justice in the judicial department. Within this authority is the power to govern the practice of law. The Court's inherent power under Article II, Section 1 to regulate Texas law practice is assisted by statute, primarily the State Bar Act.").

4. See, e.g., *Nolo Press*, 991 S.W.2d at 769 (Tex. 1999) ("The Supreme Court of Texas has inherent power to regulate the practice of law in Texas for the benefit and protection of the justice system and the people as a whole.").

5. H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 82-83 (1997) [hereinafter Moulton].

6. For example, Westlaw, Lexis, and various Internet legal research sites provide easy access to the law of all the states.

7. Ann L. MacNaughton & Gary A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold?*, 47 LOY. L. REV. 665, 669 (2001).

8. Wayne J. Positon, *Report of the Commission on Multijurisdictional Practice*, American Bar Association Center for Professional Responsibility at 5 (Aug. 2002), available at [http://www.aba.net.org/cpr/mjp/final\\_mjp\\_rpt\\_5-17.pdf](http://www.aba.net.org/cpr/mjp/final_mjp_rpt_5-17.pdf) [hereinafter MJP Comm'n Final Report]; see also Mary M. Johnston, *Multi-Jurisdictional Practice: Emerging Issues from a Delaware Perspective*, 5 DEL. L. REV. 57, 85-86 (2002).

9. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (2003); MODEL RULES OF PROF'L CONDUCT R. 8.5 (2003).

10. Many of the amendments reflect current formal and informal MJP rules and customs heretofore unrecognized by the ABA and by many states.

will enable lawyers to accurately predict the limits of their authority to represent their clients' cross-border interests.<sup>11</sup>

First, this Article will describe some of the shortcomings of the old Model Rules in regulating MJP. Second, the Article will introduce and explain the new rules governing MJP. The Article will conclude that the amendments succeed in recognizing the realities of modern cross-border law practice and in providing a more effective model framework for MJP regulation, but the amendments do not fully achieve the ABA's central goal of creating uniform rules that will ensure predictability in MJP.

## II. REGULATION OF MJP: MODEL RULE 5.5

Old Model Rule of Professional Conduct 5.5 subjects a lawyer to UPL regulation for practicing law in a state other than the state in which the lawyer is licensed. Old Rule 5.5, which is currently the law in most jurisdictions, provides that “[a] lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”<sup>12</sup> This rule leaves the precise contours of UPL regulation to a host state's law.<sup>13</sup> Notwithstanding the absence of a uniform definition of law practice, old Model Rule 5.5 is quite strict on its face. However, several exceptions are commonly recognized, including affiliation with local counsel<sup>14</sup> and *pro hac vice* admission for limited purposes in connection with particular pending litigation.<sup>15</sup> Other narrow exceptions exist,<sup>16</sup> but none of these exceptions effectively recognize or deal with the increase in cross-border law practice.

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11. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (2003); MODEL RULES OF PROF'L CONDUCT R. 8.5 (2003).

12. MODEL RULES OF PROF'L CONDUCT R. 5.5 (1983) (amended 2003).

13. See MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 2 (2003) (“The definition of the practice of law is established by law and varies from one jurisdiction to another.”). *But cf.* MODEL CODE OF PROF'L RESPONSIBILITY EC 3-5 (1980) (defining the “practice of law” as relating “to the rendition of services for others that call for the professional judgment of a lawyer”). See also Cynthia L. Fountaine, *When is a Computer a Lawyer?: Interactive Legal Software, Unlicensed Practice of Law, and the First Amendment*, 71 U. CIN. L. REV. 1, 147, 150-51 (2002) (describing various definitions of law practice).

14. DEBORAH L. RHODE & GEOFFREY C. HAZARD, JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 179 (2002) [hereinafter RHODE & HAZARD].

15. Although every state permits *pro hac vice* admission, the standards and processes for *pro hac vice* admission differ from state to state. See MJP Comm'n Final Report, *supra* note 8, at 44.

16. For example, some states allow in-house lawyers to provide out-of-state legal services on behalf of their employer if they register with the local bar's regulatory authority, and some states allow out-of-state lawyers to be licensed for limited practice as legal consultants. See RHODE & HAZARD, *supra* note 14, at 180.

In particular, there is a glaring lack of uniformity of approach to this issue in various jurisdictions, leaving a lawyer unsure at the time of accepting a representation whether the lawyer can fully represent the client's interests in all places they might be impacted.<sup>17</sup> In addition, the narrow, litigation-oriented exceptions to old Model Rule 5.5's general prohibition against MJP do not provide lawyers with the flexibility they need to represent their clients' pre- and non-litigation interests in other states.

The problems with old Model Rule 5.5 are illustrated by *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, a California Supreme Court case.<sup>18</sup> This case is significant not only because it demonstrates the problems and dangers that arise when a lawyer represents a client with interests outside the state in which the lawyer is licensed, but also because the opinion led to the formation of the ABA Commission on Multijurisdictional Practice ("MJP Commission") to address the very serious issues involved in the increasingly cross-border character of American law practice.<sup>19</sup>

The facts of *Birbrower* are straightforward. New York lawyers represented a corporation with offices in New York and California in a contract dispute against a California software corporation.<sup>20</sup> In connection with the representation, the New York lawyers made several trips to California to meet with the client's corporate officers, negotiate with the software company, and initiate arbitration proceedings.<sup>21</sup> No lawsuit was pending and the dispute settled before arbitration was initiated.<sup>22</sup> The client, unhappy with the results of the settlement, filed suit against the New York lawyers in California state court,<sup>23</sup> alleging legal malpractice and related claims.<sup>24</sup> The New York lawyers counterclaimed against the client for attorney fees.<sup>25</sup>

The issue before the California Supreme Court was whether the New York lawyers had violated California's UPL statute in the course of

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17. Moulton, *supra* note 5, at 91-98.

18. 949 P.2d 1 (Cal. 1998).

19. The results of this Commission were the proposed amendments to Model Rules 5.5 and 8.5, which the ABA adopted in December 2002.

20. 949 P.2d at 3.

21. *Id.*

22. *Id.* at 5.

23. The defendants removed the case to federal court, but the case was remanded to the California superior court. *Id.* at 4.

24. *Id.*

25. *Id.*

representing their client.<sup>26</sup> California's UPL statute provided, "No person shall practice law in California unless the person is an active member of the State Bar."<sup>27</sup> The statute left the definition of "practice law" to the courts.<sup>28</sup> The California Supreme Court held that law practice was defined as "the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure."<sup>29</sup> This included, according to the court, "legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation."<sup>30</sup>

According to the court, the New York lawyers' mere representational activities, if undertaken within the state of California, were sufficient to subject them to California's UPL statute.<sup>31</sup> It was irrelevant that the subject matter of the representation did not involve pending litigation.

The court next addressed the meaning of "in California," for purposes of the statute.<sup>32</sup> In defining "in California," the court assessed the quantity and nature of the lawyers' activities in the state.<sup>33</sup> In language remarkably reminiscent of the personal jurisdiction doctrine that defines presence within a state for due process purposes, the California Supreme Court found that "[m]ere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California.' The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state or created a continuing relationship with the California client that included legal duties and obligations."<sup>34</sup>

The court did not require physical presence in the state but indicated that physical presence would be a factor to consider.<sup>35</sup> For example, the court noted that "advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means" would suffice to establish the contact with California needed to satisfy the "in California" requirement of the

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26. *Id.* at 5.

27. CAL. BUS. & PROF. CODE § 6125 (West 2003). Remedies for violation of the statute included criminal misdemeanor penalties and denial of fees for services performed in violation of the statute. CAL. BUS. & PROF. CODE § 6126 (West 2003); 949 P.2d at 5.

28. *See* 949 P.2d at 5.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* *Cf.* *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 298-99 (1980) (holding that marginal and attenuated benefits were insufficient to justify an exercise of in personam jurisdiction).

35. 949 P.2d at 5.

UPL statute.<sup>36</sup> Conversely, the court found, the UPL statute would not apply to the services the New York lawyers rendered entirely in New York, even though the services constituted legal advice to a California client about a California matter.<sup>37</sup>

The court evaluated the lawyers' contacts with California, which consisted of entering a fee agreement with a California client providing that California law would govern all matters in the representation and visiting California several times to meet with the client and others, make recommendations, give legal advice, negotiate on behalf of the client, and interview potential arbitrators.<sup>38</sup> The California Supreme Court concluded that these activities constituted the practice of law in California.<sup>39</sup> Consequently, because the New York lawyers were not licensed in California, these activities violated the UPL statute.<sup>40</sup> Based on its conclusion that the defendants had practiced law in California without a license, the court held that the defendants were not entitled to recover any fees for the unauthorized legal services performed in California.<sup>41</sup>

The *Birbrower* court acknowledged the increasingly heavy burden of territorial limitations on a lawyer engaged in representing business clients in a mobile society and recognized the client's interest in being able to secure full representation of its interests that cross territorial borders.<sup>42</sup> However, pointing to the UPL statute's goal of assuring the competence of lawyers practicing law in California and the defendants' "extensive activities within California," the court resisted formulating a more lenient

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36. *Id.* at 6.

37. *Id.* at 2.

38. *Id.* at 3.

39. *Id.* at 7.

40. *Id.*

41. *Id.* at 10. However, the court held that the defendants may be able to recover for the portion of the legal services performed in New York. *Id.* Thus, it is the place a lawyer practices, not the law the lawyer practices, that determines whether the lawyer's work violates MJP rules. *See Servidone Constr. Corp. v. St. Paul Fire & Marine Ins. Co.*, 911 F. Supp. 560, 567 (N.D.N.Y. 1995). So, presumably, the New York lawyers in *Birbrower* were authorized to advise their California client on California law as long as both the lawyers and the client were in New York.

However, this conclusion does not promote the goal of assuring competence, a goal that is often touted as the rationale for strict limitations on MJP. *See Birbrower*, 949 P.2d at 8; *see also supra* text accompanying note 4. If the *Birbrower* court's purpose for not allowing the New York lawyers to practice in California is to assure that their California client, which had rights or obligations under California law, receive legal services only from lawyers who are presumptively knowledgeable about California law, then the practice limitations should focus on promoting that goal by limiting the New York lawyers' practice of California law, not on their practice of law *in* California. Allowing the New York lawyers to recover for advising their client on California law in New York is inconsistent with the court's purported concern with competence.

42. 949 P.2d at 6.

rule that would have permitted the New York lawyers to fully represent their client's interests in California.<sup>43</sup>

The court recognized a narrow exception to the UPL statute's reach. Under this exception, a lawyer who is a member in good standing of the bar of another state may appear before a California court if the lawyer obtains the permission of the California court before which the matter is pending and associates with local counsel.<sup>44</sup> This exception did not help the New York lawyers who were the defendants in *Birbrower* since no litigation was pending at the time of the representation.<sup>45</sup> The court refused to recognize an arbitration exception to the reach of the UPL statute, noting that it would have been inapplicable in this case (since arbitration proceedings had not yet been initiated when the case settled) and that whether to recognize such an exception is a matter better left to the legislature in any event.<sup>46</sup>

The *Birbrower* opinion was widely criticized for taking such an expansive view of unlicensed practice in California<sup>47</sup> and created a great deal of uncertainty for non-California lawyers representing clients who had interests in California.<sup>48</sup> As a result, the opinion provided the impetus for change by underscoring the need for rules that reflect the multijurisdictional nature of modern law practice.

The ABA appointed the MJP Commission to study the issue and propose changes to the ABA Model Rules.<sup>49</sup> The MJP Commission recognized that because of the increasingly national character of their clients' interests, lawyers commonly engage in MJP.<sup>50</sup> In addition, the MJP Commission concluded that this increasing need for lawyers to be able to "cross state borders to afford clients competent representation" has

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43. *Id.* at 8, 10.

44. *Id.* at 6. Although the court recognized additional narrow exceptions, they were not applicable in the factual context presented in *Birbrower*.

45. *Id.* at 3.

46. *Id.* at 8–9. The California Legislature responded to this invitation by enacting a statutory exception to UPL regulation for arbitration proceedings. *See* CAL. CIV. PROC. CODE § 1282.4 (West 2002) (sunsetting on Jan. 1, 2006). In addition, the California Supreme Court subsequently adopted a professional conduct rule providing an arbitration exception. *See* CAL. CT. R. 983.4 (sunsetting on Jan. 1, 2006).

47. *See, e.g.*, Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 686–90 (2002).

48. *Id.* at 689; *see also* William T. Barker, *Extrajudicial Practice by Lawyers*, 56 BUS. LAW. 1501 (2002) (discussing cases applying UPL provisions to out-of-state lawyers).

49. Stephen Gillers, *It's an MJP World*, A.B.A. J., Dec. 2002, at 51 [hereinafter Gillers].

50. MJP Comm'n Final Report, *supra* note 8, at 10–12.



been fueled by technology as well as by the growing complexity of law practice.<sup>51</sup>

Yet, the MJP Commission recognized, even in the relatively predictable context of state court litigation, that the problems of MJP are exacerbated by “the lack of uniformity among the *pro hac vice* provisions of different states, unpredictability about how some of the provisions will be applied by the courts in individual cases, and, in some cases, the provisions’ excessive restrictiveness.”<sup>52</sup> Moreover, “of even greater concern [to the MJP Commission was] that, outside the context of litigation, the reach of the jurisdictional restrictions is vastly uncertain, as well as, potentially, far too restrictive.”<sup>53</sup> Indeed, the *Birbrower* case, discussed above, illustrates the problems associated with non-litigation representation by an out-of-state lawyer.<sup>54</sup> Consequently, the MJP Commission concluded, “lawyers . . . turn down clients or take other steps to avoid or reduce the risk of having to defend against UPL charges or of appearing to violate rules of professional conduct.”<sup>55</sup> As a result of this cautious behavior by lawyers, the overall quality of client representation suffers.<sup>56</sup>

Against this backdrop, the MJP Commission made specific recommendations for amendments to the ABA Model Rules of Professional Conduct, and the ABA House of Delegates approved all of the proposed amendments.<sup>57</sup> While the old version of Model Rule 5.5 prohibited a lawyer from practicing law in a jurisdiction where doing so violated the regulation of the legal profession in that jurisdiction,<sup>58</sup> the new version of Rule 5.5 sets forth particular circumstances under which a lawyer, licensed and in good standing in another state, may represent clients in the host state.<sup>59</sup> The goal of the Model Rule 5.5 amendment is to

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51. *Id.*

52. *Id.*

53. *Id.*

54. See *Birbrower*, 949 P.2d 1; see also *supra* text accompanying notes 18-46.

55. MJP Comm’n Final Report, *supra* note 8, at 24.

56. *Id.*

57. See Gillers, *supra* note 49 (describing the approval by the ABA House of Delegates of the MJP Commission’s proposals). See also Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441 (2002) (summarizing all of the recent amendments to the Model Rules); <http://www.aba.net.org/cpr/ethics2K.html> (full text of the ABA Model Rules of Professional Conduct and recent revisions).

58. MODEL RULES OF PROF’L CONDUCT R. 5.5 (1993).

59. MODEL RULES OF PROF’L CONDUCT R. 5.5 (2003). The full text of new Rule 5.5 is as follows:

(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.

permit temporary practice in a host state while maintaining a general prohibition on systematic and continuous law practice in that state.<sup>60</sup> With this new rule, the MJP Commission sought to enable out-of-state lawyers to protect their clients' cross-border interests.<sup>61</sup> If, as hoped, the new rule is adopted by many jurisdictions, it will provide a uniform model that will eliminate a great deal of the confusion that resulted from the more general old Rule 5.5.<sup>62</sup> Indeed, the creation of a uniform approach to MJP—which would eliminate much of the confusion and unpredictability that interfered with effective client representation—was one of the driving goals of the MJP Commission.<sup>63</sup> Moreover, the MJP Commission attempted to protect the states' regulatory interests by authorizing MJP only in situations that do not pose unacceptable risks to the public interests at stake and by including provisions that, to the extent possible, protect the client and the state's disciplinary authority.<sup>64</sup>

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- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction.
- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
  - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
  - (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or
  - (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.
- (d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
- (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or
  - (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

*Id.*

60. See Gillers, *supra* note 49, at 52.

61. See MJP Comm'n Final Report, *supra* note 8, at 20-21.

62. See *id.*

63. See *supra* text accompanying notes 52-56.

64. MJP Comm'n Final Report, *supra* note 8, at 26.

New Model Rule 5.5(a) amends old Rule 5.5 in form only. The basic provision remains the same. Subsection (a) prohibits a lawyer from engaging in the practice of law in a jurisdiction where doing so violates the professional conduct rules in that jurisdiction, and makes clear that a lawyer may not assist a lawyer or non-lawyer in the unauthorized practice of law.<sup>65</sup>

Old Rule 5.5 began and ended with that provision. However, new Rule 5.5 contains three additional sections, each with provisions that are crucial to the MJP Commission's goals to relax barriers to MJP when there is only a minimal risk that the host states' regulatory interests will be undermined and to reinforce host states' control over lawyers practicing within their borders.<sup>66</sup> The first of these new sections is Rule 5.5(b), which prohibits an out-of-state lawyer from establishing an unauthorized long-term presence in the host state.<sup>67</sup> In particular, Rule 5.5(b) prohibits an out-of-state lawyer from establishing a law office or other continuous and systematic law practice in the host state.<sup>68</sup> In addition, Rule 5.5(b) prohibits an out-of-state lawyer from representing to prospective clients and others that the lawyer is admitted to practice law in the host state.<sup>69</sup>

The MJP Commission made, and the ABA adopted, a separate recommendation regarding "admission on motion," designed to compliment Rule 5.5(b)'s prohibition on setting up an ongoing unlicensed practice within a host state by easing the bar admission process for lawyers who want to permanently relocate their practices.<sup>70</sup> Modeled after similar provisions already in effect in many states, the recommendation for admission on motion provides that a lawyer who is admitted to practice and in good professional standing in another state and has been engaged in active practice for five of the seven years immediately before the motion for admission is made, may be admitted without a bar examination as long as the lawyer passes the character and fitness component of the new state's bar admission process.<sup>71</sup> This recommendation represents a recognition that the process set up for licensing new law school graduates is unnecessarily onerous when applied to lawyers who are already licensed and in good standing in other states and have been practicing for a

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65. MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (2003).

66. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2003).

67. MODEL RULES OF PROF'L CONDUCT R. 5.5(b) (2003).

68. MODEL RULES OF PROF'L CONDUCT R. 5.5(b)(1) (2003).

69. MODEL RULES OF PROF'L CONDUCT R. 5.5(b)(2) (2003).

70. See MJP Comm'n Final Report, *supra* note 8, at 47 (Recommendation 7).

71. MJP Comm'n Final Report, *supra* note 8, at 47; see also MJP Comm'n Final Report, *supra* note 8, at 71 n.51 (citing many states' rules providing for admission on motion).

significant number of years.<sup>72</sup> In particular, the MJP Commission found that “[j]urisdictional restrictions [on admission of licensed lawyers] impede national mobility, because in many cases the process for admitting lawyers to practice law in a new jurisdiction is lengthy, expensive, and burdensome.”<sup>73</sup>

Taken together, new Rule 5.5(b) and the admission on motion recommendation tell out-of-state lawyers that if they want to permanently relocate their practices to the host state, they must seek admission to the state’s bar; the purpose of Rule 5.5 is to protect temporary—not permanent—MJP. In addition, the message to states is that they ought to permit temporary practice by licensed lawyers endeavoring to provide competent and complete legal services to their clients, and that states ought to facilitate lawyer mobility by relaxing their bar admission procedures for experienced lawyers who are already licensed and in good standing in other states.

New Rule 5.5(c) contains provisions that will permit a lawyer, licensed and in good standing in another state, to practice law on a temporary basis in the host state under any of the following four circumstances: (1) when the out-of-state lawyer affiliates with a lawyer who is licensed in the host state and who actively participates in the representation; (2) when the out-of-state lawyer is preparing for pending or potential litigation in the host state or another state, and the out-of-state lawyer is admitted to appear in the proceedings or reasonably expects to appear in the proceedings; (3) when the out-of-state lawyer’s work in the host state is related to a pending or potential arbitration, mediation, or other alternative dispute resolution (“ADR”) proceeding in the host state, and the services reasonably relate to the out-of-state lawyer’s home state practice; and (4) when the work in the host state arises out of the out-of-state lawyer’s home state practice, including, for example, work on a matter with a significant connection to the home state, work in the lawyer’s practice concentration, or work for an in-house lawyer’s employer.<sup>74</sup>

In particular, Rule 5.5(c)(1) provides that an out-of-state lawyer may, on a temporary basis, provide legal services that “are undertaken in association with a lawyer who is admitted to practice in [the host] jurisdiction and who actively participates in the matter.”<sup>75</sup> This provision

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72. See MJP Comm’n Final Report, *supra* note 8, at 50.

73. *Id.*

74. RHODE & HAZARD, *supra* note 14, at 182; MODEL RULES OF PROF’L CONDUCT R. 5.5(c) (2003). See also Gillers, *supra* note 49, at 52.

75. MODEL RULES OF PROF’L CONDUCT R. 5.5(c)(1) (2003).

requires that the local counsel share actual responsibility for the representation; pro forma involvement is insufficient to shield the out-of-state lawyer from UPL regulation under this provision.<sup>76</sup> The reason for requiring active participation by the local lawyer is to protect the host state's interests in ensuring competent representation and protecting the judicial system.<sup>77</sup> The local counsel's active participation provides sufficient assurance that the state's interests are protected because the local lawyer can supervise the out-of-state lawyer's performance and is answerable to the state disciplinary authority.<sup>78</sup>

This provision facilitates more effective client representation in several ways. First, it enables a client who has already retained local counsel to engage expert counsel who might not be admitted in the host state. Thus, local counsel and the client can benefit from the consultation with an expert on a particular legal issue without concerns about the expert lawyer's participation being thwarted by the host state's strict UPL restrictions. Second, this provision enables a client who has an existing relationship with an out-of-state lawyer to obtain the expertise of local counsel without having to lose the benefit of ongoing consultation with the out-of-state lawyer. The out-of-state lawyer may remain involved with the client's representation and provide advice regarding the quality of the local representation. In addition, this provision removes MJP barriers for lawyers in firms that have offices in multiple states. For example, suppose a lawyer who is licensed in Texas works for a law firm with offices in Texas and New York. The Texas lawyer could temporarily<sup>79</sup> practice in the New York office as long as one of the firm's New York lawyers is actively involved in the representation.<sup>80</sup>

Model Rule 5.5(c)(2) provides that an out-of-state lawyer may, on a temporary basis, provide legal services that "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

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76. See MJP Comm'n Final Report, *supra* note 8, at 22.

77. *Id.*

78. *Id.*

79. The Rule is not intended to authorize out-of-state lawyers being "rotated" through a firm's offices located in different states. Similarly, a lawyer who "moves" permanently to the firm's office in another state is not protected by this rule during the period the lawyer is awaiting bar results or other aspects of the bar admission procedures to become finalized. See MJP Comm'n Final Report, *supra* note 8, at 23, 69 n.36. Separate state UPL rules might, however, permit such activities. See, e.g., *Dietrich Corp. v. King Resources Co.*, 596 F.2d 422, 426 (10th Cir. 1979); *Shapiro v. Steinberg*, 440 N.W.2d 9, 11 (Mich. App. Ct. 1989); *In re Jackman*, 761 A.2d 1103, 1107 (N.J. 2000); New York County Lawyers' Association Committee on Professional Ethics, Opinion 682 (1990).

80. See MJP Comm'n Final Report, *supra* note 8, at 22.

by law or order to appear in such proceeding or reasonably expects to be so authorized.”<sup>81</sup> This provision does not replace local *pro hac vice* admission requirements for appearing before a court, but it allows the out-of-state lawyer to provide services that are ancillary to pending or prospective litigation.<sup>82</sup>

This subsection permits temporary practice in a host state under two circumstances. First, it authorizes an out-of-state lawyer’s services in the host state that are in anticipation of litigation that the lawyer expects to be filed in the lawyer’s home state. For example, prior to filing suit, the lawyer might need to go into other states to investigate, gather evidence, interview witnesses, review documents, or negotiate.

Second, subsection 5.5(c)(2) permits legal services that are ancillary to litigation that is already pending either in the lawyer’s home state or in a state where the lawyer has been or reasonably expects to be admitted *pro hac vice* to participate in the litigation. Thus, a lawyer who is properly representing a client in litigation may travel outside the state where litigation is pending in order to gather evidence, take or defend depositions, or conduct settlement negotiations.

Subsection 5.5(c)(2) provides the flexibility necessary for the lawyer to do all legal work necessary—wherever that work arises—to fully represent the client’s interests in pending or prospective litigation. This subsection strikes an appropriate balance between the host states’ interests and the needs of lawyers to have the flexibility necessary to fully and efficiently represent their clients’ interests in litigation. It would be expensive and inefficient to require lawyers to hire local counsel every time they had to travel across state lines to do work ancillary to litigation.<sup>83</sup> This is especially true in the context of preliminary work done in anticipation of litigation that has not yet been filed.<sup>84</sup> Moreover, the host state’s regulatory interest is not seriously threatened by permitting cross-border legal work that is ancillary to pending litigation because the court in which the litigation is pending is empowered to regulate the conduct of the lawyers appearing in proceedings before it.<sup>85</sup> Nor is the host state’s regulatory

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81. MODEL RULES OF PROF’L CONDUCT R. 5.5(c)(2) (2003).

82. MJP Comm’n Final Report, *supra* note 8, at 25.

83. *See id.*

84. *Id.*

85. *See* Model Rule on *Pro Hac Vice* Admission (2002), *reprinted in* MJP Comm’n Final Report, *supra* note 8, at 39 (requiring that an out-of-state lawyer seeking *pro hac vice* admission submit to the authority of the state disciplinary authority for all conduct related to the proceeding); MODEL RULES OF PROF’L CONDUCT R. 8.5 (2003) (enhancing the power of the court in which litigation is pending to supervise and regulate the professional conduct of the lawyers appearing).

interest seriously threatened by permitting cross-border work that is ancillary to anticipated litigation. Under Rule 8.5, the licensing state retains power to discipline a lawyer who goes out of state to do work in anticipation of litigation.<sup>86</sup> In addition, under amended Rule 8.5, the host state has regulatory power over an out-of-state lawyer performing legal services in that state in anticipation of litigation.<sup>87</sup> Thus, even if a suit ultimately is not filed, the host state's regulatory interests are still protected.

To compliment new Rule 5.5(c)(2), the ABA also adopted a Model Rule on *pro hac vice* admission.<sup>88</sup> The purpose of this Rule is to create formality, uniformity, and predictability in both the procedures and the standards for *pro hac vice* admission, and to promote the policy that clients should generally be able to have counsel of their choice.<sup>89</sup> Typically, courts freely grant *pro hac vice* admission.<sup>90</sup> However, few jurisdictions have concrete procedural rules for applying for or challenging applications for *pro hac vice* admission, or for revoking *pro hac vice* admission once granted, or formal substantive standards to guide a court or agency in exercising its discretion to grant or deny an application.<sup>91</sup> The ABA MJP Commission concluded that lawyers and clients would benefit from increased uniformity and predictability in both the procedures and standards for *pro hac vice* admission.<sup>92</sup>

Moreover, the MJP Commission concluded that clients are best served by rules that encourage liberal *pro hac vice* admission.<sup>93</sup> This enables a client to establish an ongoing relationship with a lawyer whom the client trusts, and it also enables a client to select a lawyer who has a particular expertise irrespective of the lawyer's home state. This is particularly

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86. See MODEL RULES OF PROF'L CONDUCT R. 8.5 (2003) (providing that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs").

87. See MODEL RULES OF PROF'L CONDUCT R. 8.5 (2003) (providing that "[a] lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction").

88. See Model Rule on *Pro Hac Vice* Admission, reprinted in MJP Comm'n Final Report, *supra* note 8, at 39.

89. MJP Comm'n Final Report, *supra* note 8, at 44.

90. *Id.*

91. See *id.* Indeed, the ABA Section of Litigation reported that "generally the *pro hac vice* procedure is an adequate method for oversight of attorneys who appear and render legal services in pending litigation outside the states where licensed," but that "[a] more uniform *pro hac vice* procedure . . . would be strongly preferable to the disparate requirements now in place." *Id.* (quoting ABA Section of Litigation, *Preliminary Position Statement on Multi-jurisdictional Practice*, 35 (June 2001), at [http://www.abanet.org/cpr/mjp-comm\\_sl.html](http://www.abanet.org/cpr/mjp-comm_sl.html)).

92. MJP Comm'n Final Report, *supra* note 8, at 44.

93. *Id.*

appropriate when the litigation is pending in federal court and involves federal law that does not implicate state law peculiarities. However, in drafting the Rule, the MJP Commission was mindful that the policy favoring liberal *pro hac vice* admission must be balanced against the host state's regulatory interests: protection of the client and the judicial system.<sup>94</sup>

The Model Rule on *pro hac vice* admission accomplishes this balance through four important provisions. First, the Rule sets out specific procedures for seeking or objecting to *pro hac vice* admission.<sup>95</sup> Second, the Rule encourages liberal *pro hac vice* admission by providing that a court or agency should, in its discretion, grant admission unless the admission might be detrimental to the prompt, fair, and efficient administration of justice or to the legitimate interests of the parties other than the client, the client is at risk of inadequate representation and is unable to appreciate the risk, or the out-of-state lawyer seeking admission *pro hac vice* has practiced in the host state so frequently as to constitute regular practice in the state.<sup>96</sup> Third, the Rule formally establishes the host state's regulatory power over the out-of-state lawyer by providing that, by applying for *pro hac vice* admission, the out-of-state lawyer submits to the host state's disciplinary authority.<sup>97</sup> Fourth, the Rule seeks to protect the client from the out-of-state lawyer's incompetence by requiring that an in-state lawyer serve as counsel of record and actively participate in the representation.<sup>98</sup>

Taken together, Rule 5.5(c)(2) and the Model Rule on *pro hac vice* admission enable a lawyer to fully represent a client's litigation interests, even when those interests require litigation to be commenced or defended in another state, and ensure that the state's regulatory interests are protected.

Model Rule 5.5(c)(3) permits an out-of-state lawyer to temporarily provide legal services that fit within the following category:

[The services] are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in [the host state] or another [state], if the services arise out of or are reasonably related to the lawyer's practice in a

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94. *Id.* at 44-45.

95. *Id.* at 39-43.

96. *Id.* at 40.

97. *Id.* at 41.

98. *Id.* at 45.



jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission.<sup>99</sup>

This provision is designed to enable an out-of-state lawyer to participate freely in ADR proceedings that are related to the lawyer's home state practice except when the particular ADR proceeding requires *pro hac vice* admission.<sup>100</sup> This broad authority to engage in ADR proceedings recognizes that the location of ADR proceedings frequently is based on convenience and is unrelated to the applicable law.<sup>101</sup> Clients are not at risk of receiving incompetent representation from out-of-state lawyers resulting from their lack of expertise in the host state's law and procedure since such expertise is usually not necessary in ADR proceedings.<sup>102</sup> Thus, allowing broad participation in ADR proceedings by out-of-state lawyers does not implicate the host state's regulatory interests. Moreover, since effective ADR requires client cooperation, clients have a significant interest in being represented by counsel of their choice in ADR proceedings.<sup>103</sup> This means unnecessary restrictions on lawyers' ability to represent their clients in ADR proceedings should be eliminated. In those relatively rare circumstances where local law expertise is required, *pro hac vice* admission ought to be required to prevent the representation without adequate client safeguards, such as requiring local counsel.

Model Rule 5.5(c)(4) authorizes an out-of-state lawyer to provide temporary legal services in the host state that "arise out of or are reasonably related to the lawyer's practice in" the lawyer's home state.<sup>104</sup> This provision is intended to permit "legal services provided by the lawyer *outside* the lawyer's state of admission that are related to the lawyer's practice *in* the home state," including "transactional representation, counseling, and other non-litigation work."<sup>105</sup> The MJP Commission's final report stated:

[F]or this provision to apply, the lawyer's work in the host state must arise out of or be reasonably related to the lawyer's practice in the home state, so that as a matter of efficiency or for other reasons,

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99. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2003).

100. Of course, the lawyer could seek *pro hac vice* admission pursuant to the Model Rule on *Pro Hac Vice* Admission (or the procedure in place in the location or tribunal in which the ADR proceeding is pending). See Model Rule on *Pro Hac Vice* Admission, *reprinted in* MJP Comm'n Final Report, *supra* note 8, at 44.

101. MJP Comm'n Final Report, *supra* note 8, at 24.

102. *Id.*

103. *Id.*

104. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2003).

105. MJP Comm'n Final Report, *supra* note 8, at 25.

the client's interest in retaining the lawyer should be respected. For example, if a corporate client is seeking legal advice about its environmental liability or about its employment relations in each of the twenty states in which it has plants, it is likely to be unnecessarily costly and inefficient for the client to retain twenty different lawyers. Likewise, if a corporate client is seeking to open a retail store in each of twenty states, the client may be best served by retaining a single lawyer to assist it in coordinating its efforts. On the other hand, work for an out-of-state client with whom the lawyer has no prior professional relationship and for whom the lawyer is performing no other work ordinarily will not have the requisite relationship to the lawyer's practice where the matter involves a body of law in which the lawyer does not have special expertise. In the context of determining whether work performed outside the lawyer's home state is reasonably related to the lawyer's practice in the home state, as is true in the many other legal contexts in which a "reasonableness" standard is employed, some judgment must be exercised.<sup>106</sup>

This provision applies in three specific contexts. First, the provision permits legal services that are ancillary to a particular matter in the lawyer's home state.<sup>107</sup> This enables a lawyer to travel temporarily into another state, for example, to negotiate on behalf of a home state-client.<sup>108</sup> Second, this provision permits a lawyer to work on an out-of-state matter when it is related to an in-state matter that the lawyer is working on for the same client.<sup>109</sup> This recognizes the client's interest in being able to retain one lawyer or law firm to provide complete legal representation of all the client's interests, wherever implicated.<sup>110</sup> In other words, this provision facilitates long-term lawyer-client relationships.

Third, subsection 5.5(c)(4) allows a lawyer to provide, on a temporary basis, out-of-state legal services in matters within the lawyer's special expertise.<sup>111</sup> This provision is in response to comments the MJP Commission received from various constituencies supporting rules that would permit free cross-border practice by lawyers with particular expertise to enable these lawyers to provide more complete client

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106. *Id.* at 26.

107. *Id.* at 25.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

representation.<sup>112</sup> For example, a client might want to retain a particular lawyer because of that lawyer's expertise in federal tax law or antitrust law. Rule 5.5(c)(4) enables the client to do this without regard to where the lawyer is licensed.<sup>113</sup> This is particularly appropriate for lawyers practicing federal law.<sup>114</sup> Indeed, the MJP Commission recognized that "many lawyers who specialize in federal law currently practice nationally, without regard to jurisdictional restrictions, which are unenforced."<sup>115</sup> Thus, Rule 5.5(c)(4) brings the Model Rules in line with the reality of current practice.

Allowing MJP in accordance with Rule 5.5(c)(4) does not pose a significant threat to the state's regulatory interests because the Rule requires that the practice in the host state be temporary and that the representation be related to either an on-going relationship with a client or a representation of a client in another state. The state's regulatory interests are protected because the lawyer has an interest in maintaining client confidence by providing competent legal services, and the home state retains disciplinary authority over the lawyer.<sup>116</sup>

The next new section, Model Rule 5.5(d), contains two specific provisions. First, subsection 5.5(d)(1) permits an out-of-state lawyer to provide legal services that "are provided to the lawyer's employer or its organizational affiliates and are not services for which the [host state] requires *pro hac vice* admission."<sup>117</sup> This provision enables in-house counsel and government lawyers to provide legal services outside the state in which they are licensed except when the particular services require *pro hac vice* admission, such as in the context of litigation.<sup>118</sup> Unlike Model Rule 5.5(c), Rule 5.5(d) does not limit the MJP authorization to temporary

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112. *See id.* at 26, 69 n.41 & 42. For example, the ABA Section of Intellectual Property Law stated that "our expertise in intellectual property law and in the subject matter, often combined with knowledge of a client's business, is the overriding reason our clients retain us . . . [O]ur clients . . . place a greater value on our expertise than on our location. . . . Such clients are seeking uniform, well-informed and efficiently rendered advice regardless of state lines, and they do not want to hire multiple lawyers for multiple states." *Id.* at 26, 69 n.41 (quoting ABA Section of Intellectual Property Law, Memorandum to the ABA Commission on Multijurisdictional Practice 2 (Feb. 2, 2001), at [http://www.abanet.org/cpr/mjp-comm\\_silp.html](http://www.abanet.org/cpr/mjp-comm_silp.html)).

113. *See* MJP Comm'n Final Report, *supra* note 8, at 25–26.

114. *Id.* at 26, 70 n.42 (citing various comments supporting "a provision allowing lawyers to practice federal law in jurisdictions where they are not licensed"). The MJP Commission noted, however, that this provision would also permit a client to retain an expert in the home state law if that state's law governs the matter in the host state. *Id.* at 26.

115. *Id.* at 26.

116. *Id.* at 25.

117. MODEL RULES OF PROF'L CONDUCT R. 5.5(d)(1) (2003).

118. *See* MJP Comm'n Final Report, *supra* note 8, at 27.

work in the host state. Indeed, the MJP Commission stated that this “provision would allow an out-of-state lawyer to work permanently from the office of a corporate, government or other organizational employer and that “[t]his [broad MJP authorization] is consistent with the explicit understanding in many jurisdictions.”<sup>119</sup>

This provision advances the interests of corporations that seek to employ in-house lawyers to represent the corporation on all legal matters, wherever they might arise.<sup>120</sup> In addition, the state’s regulatory interests are not seriously threatened by allowing broad in-house MJP practice because, as the MJP Commission observed, “an in-house lawyer is ‘under the constant scrutiny of his or her employer.’”<sup>121</sup>

Second, subsection 5.5(d)(2) permits an out-of-state lawyer to provide legal services that are authorized by federal law or the law of the host jurisdiction.<sup>122</sup> This provision makes clear that federal prosecutors, federal patent attorneys, and others may practice in states where they are not licensed because they are authorized to do so by federal law.<sup>123</sup> In addition, some states permit foreign lawyers to serve as consultants, and these lawyers would be covered by subsection 5.5(d)(2) as well.<sup>124</sup> Presumably, the law which provides the authorization to practice in the host states, and which implicates Rule 5.5(d)(2), reflects the proper balance between the host state’s regulatory interests and the need to permit MJP. Thus, Rule 5.5(d)(2) imposes no additional burden on the host state’s regulatory interests than that which has already resulted from law authorizing the out-of-state lawyer to practice in the host state.

### III. CHOICE OF LAW IN MJP: MODEL RULE 8.5

The second issue that arises when an out-of-state lawyer practices in a host jurisdiction is the question of what ethical rules the out-of-state lawyer is bound to follow while carrying out the work in the host jurisdiction. Model Rule 8.5 is designed to address this issue.<sup>125</sup> Along

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119. *Id.*

120. *See id.* at 27 (“The organization’s interest in being provided legal assistance in an efficient, cost-effective and competent manner by a lawyer in whom it reposes confidence is furthered by permitting an organization to employ a lawyer to assist it with recurring matters.”).

121. *See id.* at 27 (quoting California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations 28 (Jan. 7, 2002), at [http://www.abanet.org/cpr/mjp/comm2\\_csca.pdf](http://www.abanet.org/cpr/mjp/comm2_csca.pdf)).

122. MODEL RULES OF PROF’L CONDUCT R. 5.5(d)(2) (2003).

123. MJP Comm’n Final Report, *supra* note 8, at 27.

124. *Id.*

125. *See* MODEL RULES OF PROF’L CONDUCT R. 8.5 (2003).

with Rule 5.5, Rule 8.5 was amended in accordance with the MJP Commission's recommendations to strengthen the ability of host states to discipline out-of-state lawyers practicing there under new Rule 5.5.<sup>126</sup>

Old Rule 8.5(a), still the law in most jurisdictions, provides that “[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.”<sup>127</sup> Thus, old Rule 8.5(a) merely established the home state’s authority to discipline its own lawyers. In addition, old Rule 8.5(b) set out choice-of-law principles to be applied in deciding what jurisdiction’s professional conduct rules to apply.<sup>128</sup> Despite the seemingly straightforward provisions of old Rule 8.5, considerable confusion existed over whether lawyers practicing away from their home state might be subject to the conflicting obligations of multiple jurisdictions’ ethical rules.<sup>129</sup>

This issue is particularly complicated when the out-of-state lawyer is practicing in the federal courts because the state ethical rules do not bind federal courts.<sup>130</sup> Instead, each federal court adopts local rules defining

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126. *Id.*

127. MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (1993).

128. MODEL RULES OF PROF'S CONDUCT R. 8.5 (1993). The full text of old Model Rule 8.5 provides:

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

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

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

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

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

129. *See, e.g.*, 42 PA. CONS. STAT. ANN., RULES OF PROF'L CONDUCT, RULE 8.5 (West 2003) (recognizing that lawyers are “potentially subject to more than one set of rules of professional conduct which impose different obligations”).

130. *In re Snyder*, 472 U.S. 634, 645 n.6 (1985). At least one court has expressly held that the *Erie* doctrine does not compel the federal courts to permit particular action by an attorney that would

what ethical rules are to be followed by lawyers practicing in that court.<sup>131</sup> Although some federal courts have local rules providing that the ethical rules of the state in which the federal court sits will be binding on lawyers practicing before that court, others have local rules establishing different ethical standards than those in effect in the state in which the federal court sits.<sup>132</sup> As a result, there is often considerable confusion about what ethical rules are applicable to regulate an out-of-state lawyer's conduct when practicing in a federal court.

The problem of regulating an out-of-state lawyer practicing in a federal court is illustrated by a 1995 case from the United States District Court for the District of New Jersey: *In re Prudential Insurance Company of America Sales Practices Litigation*.<sup>133</sup> In *Prudential*, various plaintiffs, as individuals and on behalf of purported classes, sued Prudential Insurance in various federal courts across the country.<sup>134</sup> The Judicial Panel on Multidistrict Litigation centralized the cases for consolidated pretrial proceedings<sup>135</sup> in the United States District Court for the District of New

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be allowed by the state courts. *Unified Sewerage v. Jelco*, 646 F.2d 1339 (9th Cir. 1981). Other federal courts have implicitly reached this same conclusion by simply applying, even in diversity actions, their own ethical rules that diverge from the state ethical rules. *See, e.g., Figueroa-Olmo v. Westinghouse Electric Corp.*, 616 F. Supp. 1445, 1449-50 (D.P.R. 1985).

131. A 1995 study by the Subcommittee on Rules of Attorney Conduct determined that 50 federal districts had adopted state rules based on, but not identical to, the ABA's Model Rules of Professional Conduct or Model Code of Professional Responsibility; 11 districts had not adopted any rule; ten districts had adopted both the ABA Model Rules and the state's rules; two of California's four federal districts had adopted the California Rules of Professional Conduct and the other two had adopted both the state rules and the ABA Model Code; and the Northern District of Illinois adopted its own version of the ABA Model Rules, which is distinct from both the ABA Model Rules and the Illinois rules. Daniel R. Coquillette, Report on Local Rules Regulating Attorney Conduct in the Federal Courts (July 5, 1995), *reprinted in* Working Papers of the Committee on the Rules of Practice and Procedure, Special Studies of Federal Rules Governing Attorney Conduct 3-6 (1997).

132. *See id.* *See also* Polycast Tech. Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 624 (S.D.N.Y. 1990) (noting that some judges in the Southern and Eastern Districts of New York have adopted the Model Rules even if they conflict with New York's ethical rules); *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 108 (N.D.N.C. 1993) (“[E]ven when a federal court utilizes state ethics rules, it cannot abdicate to the state's view of what constitutes professional conduct, even in diversity cases.”).

133. 911 F. Supp. 148 (D.N.J. 1995).

134. The various claims related to allegations by customers that Prudential had defrauded them by misrepresenting the nature and potential cost of various insurance products, and by former Prudential sales agents that Prudential wrongfully terminated their employment when they refused to participate in Prudential's allegedly fraudulent practices. *Prudential*, 911 F. Supp. at 150.

135. Consolidation was made pursuant to 28 U.S.C. § 1407. Thus, under Rule 1.4 of the Judicial Panel on Multidistrict Litigation, the parties' original attorneys were permitted to continue representing their clients without obtaining local counsel or *pro hac vice* admission. Rule 1.4 provides as follows: “Every member in good standing of the Bar of any district court of the United States is entitled without condition to practice before the Judicial Panel on Multidistrict Litigation. Any attorney of record in any action transferred under [28 U.S.C. § 1407] may continue to represent his client in any district court of the United States to which such action is transferred. Parties to any action

Jersey. Prudential sought to limit the plaintiffs' lawyers' ex parte contact with its present and former employees.<sup>136</sup> The question before the district court was which ethical rules would be applied to determine the permissible limits of plaintiffs' lawyers' contact with Prudential's past and present employees.<sup>137</sup>

The district court had adopted a local rule providing that parties practicing before it must comply with the New Jersey Rules of Professional Conduct.<sup>138</sup> The lawyers representing the plaintiffs and purported class members contended that this local rule required that their professional conduct was subject to regulation solely by the New Jersey Rules of Professional Conduct, as interpreted by the New Jersey courts.<sup>139</sup> However, Prudential argued that, under the local rule, each attorney involved in the case was subject to the ethical rules in effect in multiple jurisdictions, including the jurisdiction where the district court sat (New Jersey), the jurisdiction where the lawyer's law firm's main office was located, each jurisdiction where the lawyer principally practiced (and, presumably, was licensed), each jurisdiction where the lawyer conducted an interview, and any jurisdiction where the case for which the interview was conducted ultimately may be tried.<sup>140</sup> Had the district court adopted this argument, a single interview could be subject to the ethical rules of at least five jurisdictions. For example, the district court noted, "an attorney from [a New York firm's] California office could conduct an interview in Maryland related to a case which might ultimately be tried in Tennessee. For purposes of that interview alone, that attorney would be subject to the rules of New Jersey, New York, California, . . . Maryland, and Tennessee."<sup>141</sup> The district court concluded that "[s]uch a result is highly impractical and virtually unenforceable in a litigation of national scope such as this one."<sup>142</sup>

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transferred under [28 U.S.C. § 1407] are not required to obtain local counsel in the district to which such action is transferred." J.P.M.L. R. 4.1.

136. 911 F. Supp. at 150.

137. *Id.* at 150-51.

138. Specifically, the local rule provided as follows: "The Rules of Professional Conduct of the American Bar Association as revised by the New Jersey Supreme Court shall govern the conduct of the members of the bar admitted to practice in this Court, subject to such modifications as may be required or permitted by federal statute, regulation, court rule or decision of law." D. N.J. GEN. R. 6A.

139. One group of plaintiffs argued that the district court reject General Rule 6A entirely as being inconsistent with the Federal Rules of Civil Procedure's broad discovery provisions. The district court rejected this argument without much discussion, finding that the situation presented was not sufficiently "extraordinary to justify disregarding the rule entirely." *Prudential*, 911 F. Supp. at 151.

140. 911 F. Supp. at 150-51.

141. *Id.* at 151 n.3.

142. *Id.*

Although the court recognized that the anomalous result of Prudential's proposed rule would be improperly unwieldy, the court was left without firm guidance from New Jersey's rules. At the time the motion was before the district court, New Jersey's version of Model Rule 8.5 provided that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere."<sup>143</sup> Obviously, this rule did not answer the question about which ethical rules governed an out-of-state lawyer who was engaged in practice in New Jersey, and no New Jersey court had yet spoken on the issue.<sup>144</sup> The focus of the New Jersey rule was on maintaining disciplinary control over New Jersey lawyers, wherever they might be practicing, rather than on exerting disciplinary control over non-New Jersey lawyers who might be found practicing in New Jersey.

At the time the motion was pending before the district court (in 1995), however, the ABA had recently adopted its 1993 amendment to Model Rule 8.5.<sup>145</sup> Amended Model Rule 8.5(b)(1) provided as follows:

In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise. . . .<sup>146</sup>

This amended Rule 8.5 provided sufficient guidance to enable the district court to resolve the issue without the unwieldy result Prudential urged.

However, New Jersey had not yet considered and adopted or rejected the ABA amendment, and the district court's local rule required it to follow New Jersey law.<sup>147</sup> Nevertheless, the district court decided to adopt and apply amended Rule 8.5, reasoning that it had the power, under its local rule, to predict what New Jersey would do.<sup>148</sup> Accordingly, the district court predicted, without discussion, that New Jersey would adopt

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143. *Id.* at 151.

144. *Id.*

145. Thus, this case illustrates the litigation-inducing confusion that results from the ABA's approval of amendments before the states have had an opportunity to consider and either accept or reject them.

146. MODEL RULES OF PROF'L CONDUCT R. 8.5 (1993).

147. 911 F. Supp. at 151.

148. 911 F. Supp. at 151 (citing D.N.J. GEN. R. 6A).



the amended Rule.<sup>149</sup> Applying this Rule, the district court concluded that it would apply New Jersey's ethical rules—and only New Jersey's ethical rules—to regulate the conduct of all the attorneys participating in the case.<sup>150</sup> The court noted, however, that another jurisdiction could “exercise concurrent control over the members of its bar.”<sup>151</sup> Thus, the potential for a lawyer to be subject to the ethical rules of multiple jurisdictions persisted.

Seeking to enhance predictability and uniformity and to strengthen Rule 8.5 so host states could more effectively regulate out-of-state lawyers, the MJP Commission proposed an amendment to Rule 8.5 that accomplished two things.<sup>152</sup> First, the amendment gives the host state disciplinary authority over any lawyer who performs or offers to perform services in the host state.<sup>153</sup> Specifically, the amendment to Rule 8.5(a) adds the following provision: “A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.”<sup>154</sup> In addition, although under the old version of the rule, the lawyer had to be present within the host state to be disciplined,<sup>155</sup> under the new rule, the host state may discipline lawyers who are outside the jurisdiction.<sup>156</sup> This provision establishes the power of the host state to discipline out-of-state lawyers practicing pursuant to Rule 5.5 or a complementary provision.<sup>157</sup>

Second, the amendment to Rule 8.5(b) is designed to resolve conflicts about which jurisdiction's rules of professional conduct are applicable to avoid subjecting a lawyer to multiple jurisdictions' rules that might impose conflicting obligations.<sup>158</sup> Significantly, under the amended Rule 8.5(b), a lawyer's conduct is subject to regulation under only one set of rules.<sup>159</sup> The provision clarifies that the ethical rules of the state in which a tribunal sits will apply to conduct relating to matters pending before that tribunal.<sup>160</sup> For work unrelated to a matter pending before a tribunal, the

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149. *Id.*

150. *Id.*

151. *Id.*

152. Gillers, *supra* note 49, at 52.

153. MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (2003).

154. *Id.*

155. MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (1993).

156. MODEL RULES OF PROF'L CONDUCT R. 8.5(a) (2003) & cmt. 1 (2003).

157. *Id.*

158. MODEL RULES OF PROF'L CONDUCT R. 8.5(b) & cmt. 3 (2003).

159. *Id.*

160. Amended Model Rule 8.5(b)(1) (2003) provides as follows: “In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be . . . (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in

amendment makes the lawyer subject to the rules of the jurisdiction in which the conduct occurred or in which the conduct had its predominant effect.<sup>161</sup> In addition, the amended rule contains a provision that protects lawyers whose “conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.”<sup>162</sup> This provision is intended to protect a lawyer whose practice under Rule 5.5 and the complementary provisions results in significant contacts with multiple states.<sup>163</sup>

In addition, to compliment the provisions of Rule 8.5, an amendment to the reciprocal discipline rules eliminates the opportunity for a lawyer to evade discipline by leaving the host state.<sup>164</sup> Although some exceptions exist, generally, the lawyer’s home state is required, under the amendment, to honor the sanction issued by the host state’s disciplinary proceeding.<sup>165</sup>

Taken together, amended Rule 8.5 and reciprocal discipline rules establish the disciplinary authority of the host state, thus providing sufficient protection of the host state’s regulatory interests in light of the more liberal MJP authorization provided in Rule 5.5 and the rules that compliment it.

#### IV. THE PERSISTENT PROBLEM OF DISUNIFORMITY

The ABA’s new MJP provisions recognize the realities of modern MJP and establish clear rules for when an out-of-state lawyer may practice in a host state. In so doing, the new rules accommodate the competing interests of lawyers to fully represent their clients’ interests and of the state to

which the tribunal sits, unless the rules of the tribunal provide otherwise.” MODEL RULES OF PROF’L CONDUCT R. 8.5(b)(1) (2003).

161. Amended Model Rule 8.5(b)(2) (2003) provides as follows:

In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be . . . (2) for [conduct not in connection with a matter pending before a tribunal], the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

MODEL RULES OF PROF’L CONDUCT R. 8.5(b)(2) (2003).

162. MODEL RULES OF PROF’L CONDUCT R. 8.5(b)(2) (2003).

163. MODEL RULES OF PROF’L CONDUCT R. 8.5, cmt. 5 (2003).

164. ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 22, Reciprocal Discipline and Reciprocal Disability Inactive Status (2002), *referenced in* MJP Comm’n Final Report, *supra* note 8, at 35.

165. *Id.*

protect clients and the judicial system from out-of-state lawyers' unethical conduct.

However, the MJP Commission did not achieve one of its central goals in amending the Model Rules: uniformity to enhance predictability.<sup>166</sup> The problem with the great state-to-state variation in MJP regulation and enforcement that exists under the current Rules is that a lawyer is unable effectively to predict the extent to which he or she will be able to fully represent the client's multi-state interests at the time of accepting a representation. This unpredictability leads to two possible problematic results: either the lawyer rejects full representation out of an abundance of caution, or the lawyer accepts the representation in the face of potential violation of UPL regulations. Both of these results are unacceptable because both pose risks to full, vigorous representation of the client's interests.

In order to protect and promote full representation of clients' interests, it is crucial that lawyers be able to predict the limits of their lawful practice. This predictability may only be achieved if MJP rules are roughly uniform from one state to another. This is because, at the time of accepting a representation, a lawyer is often unable to predict with absolute certainty where the representation will require the lawyer to practice. At the time of accepting a representation, a lawyer might not even know who all the adverse-interest holders will be, much less in which states they will be found. In addition, during the course of a representation thought to be limited to one state, the lawyer might find that the client's interests are impacted in another state. Thus, uniformity of MJP regulation is crucial to enhance predictability for lawyers attempting to comply with the rules while fully representing their clients.

However, disuniformity persists under the ABA's new MJP regulatory scheme because of the lack of a uniform, national approach. The ABA's amendments were premised on the MJP Commission's recommendation that states continue to maintain independent regulatory control over the practice of law.<sup>167</sup> However, this premise ensures disuniformity and impairs predictability. Alternatives to amended Rules 5.5 and 8.5 are under consideration and have been and will continue to be adopted in

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166. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (2003); see also Patricia Manson, ABA Rejects National Law License, 147 Chicago Daily Law Bulletin (Aug. 13, 2002) [hereinafter Manson].

167. See MJP Comm'n Final Report, *supra* note 8, at 13. The MJP Commission's first recommendation, as adopted by the ABA, is that "[t]he American Bar Association affirms its support for the principle of state judicial regulation of the practice of law." *Id.*

some states.<sup>168</sup> For example, the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS permits legal work that “arise[s] out of or [is] otherwise related to” the lawyer’s home state practice.<sup>169</sup> Disuniformity will remain to the extent that numerous states adopt versions of the Model Rules that vary from the precise ABA provisions. Without a uniform, national approach to the problem of MJP, uniformity and predictability will not be achieved, and, consequently, client representation will suffer.

The concept of uniformity of ethical standards has most often been considered from a vertical-parity perspective in consideration of the hardships faced by federal prosecutors<sup>170</sup> who are licensed by the state and thus obligated to follow state ethical standards, but who practice in the federal courts, which might have adopted different standards from those in effect in the state where the federal court sits.<sup>171</sup>

The case for a horizontally and vertically uniform system of MJP regulation is even more compelling than is the case for vertically uniform regulation of federal prosecutors. Significantly, federal prosecutors work within two discrete systems—one state system and one federal system—requiring them to comply with and resolve conflicts between these two systems.<sup>172</sup> However, in the broader MJP context, a lawyer might not even

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168. See Robert Schuwerk & Lillian B. Hardwick, 48 TEX. PRAC., TEX. LAWYER & JUD. ETHICS § 10.05 (2002 ed.); Melissa Nann, *Proposed Pennsylvania Rule Would Permit Multijurisdictional Practice*, 174 N.J.L.J. 751 (2003).

169. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (2000). See also Larry E. Ripstein, *Ethical Rules, Law Firm Structure and Choice of Law*, 69 U. CIN. L. REV. 1161 (2001) (arguing that law firms engaged in MJP should get to choose which set of ethical rules its entire law firm must follow regardless of the geographic location of each branch of the law firm). Utah’s legislature recently enacted a statute defining “law practice” as “appearing as an advocate in any criminal proceeding or before any court of record in this state in a representative capacity on behalf of another person,” and limiting UPL restrictions to those engaged in law practice thus defined. This narrow definition was intended to make non-representational legal services available to a much broader economic segment of Utah citizens by allowing non-lawyers to perform out-of-court services that, in many states, would require bar membership. Stephanie F. Cahill, *What is Law Practice? Utah Defines a Lawyer’s Job to Meet Middle-Class Legal Needs*, A.B.A. J. E-REPORT, Mar. 28, 2003, at <http://www.abanet.org/journal/ereport/m28upl.html>. Although this very narrow definition of law practice and the correspondingly broad MJP authorization implicitly created would not lead to the same problems that an out-of-state lawyer would face if law practice were broadly defined and MJP authorization were narrowed (*i.e.*, because an out-of-state lawyer would not face unpredicted MJP restrictions), it illustrates the differences likely to result as each state considers variations on the ABA’s MJP scheme.

170. See Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 VAND. L. REV. 381 (2002).

171. Federal prosecutors must comply with the ethical rules of the state in which they are licensed and the federal court before which they are practicing. 28 U.S.C. § 530B(a) (2002).

172. Complying with both federal and state rules is not necessarily simple, however. Federal and state ethical rules are frequently inconsistent and do not provide adequate guidance for resolving conflicts. See *supra* notes 129–132 and accompanying text.

know which states' ethical rules will be implicated in a given representation at the outset of the representation. Moreover, a particular client's interests might be implicated in two or more states.<sup>173</sup>

The need for MJP uniformity does not create a corresponding need for uniformity of all ethical rules. Once a lawyer is practicing in a host state pursuant to amended Rules 5.5 and 8.5, the lawyer will be able to determine the applicable ethical rules and conform thereto. Thus, the central goal of predictability will have been realized.

Various approaches have been advocated as a means of achieving uniformity. For example, the "driver's license" approach posits that a law license ought to be treated like a driver's license; once licensed, a lawyer may practice temporarily in any state, just as a driver who is properly licensed in one state may drive temporarily in any state.<sup>174</sup> Similarly, other proposals to "federalize" ethical rules in general and MJP rules in particular have been suggested.<sup>175</sup> However, it is unlikely that uniformity will be achieved by any of these methods in light of the traditional role of the states in regulating lawyers' ethical conduct and the ABA's stated position favoring continued state control of ethical regulation of lawyers.<sup>176</sup>

Thus, the best opportunity to achieve uniformity is for states cooperatively to adopt the ABA's new MJP rules with as few substantive variations as possible.<sup>177</sup> The ABA has carefully balanced competing interests and promulgated a regulatory scheme that accommodates states' interests in regulating lawyers within their borders, while recognizing the realities of client representation in the twenty-first century.

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173. See *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 911 F. Supp. 148 (D.N.J. 1995) (addressing the issue of which of several states' ethical rules should be applied to regulate plaintiffs' lawyers' ex parte communication with defendant's past and present employees).

174. See Ronald C. Minkoff, *One License for Life: A Paradigm for Multijurisdictional Practice*, PROF. LAW, Vol. 11, No. 3, at 1 (Spring 2000).

175. See, e.g., Moulton, *supra* note 5.

176. See Manson, *supra* note 166. See also MODEL RULES OF PROF'L CONDUCT R. 5.5 (2003).

177. For example, the state bars in Arizona, Arkansas, California, Florida, Georgia, Louisiana, Minnesota, New Jersey, New York, and South Dakota have endorsed amendments to their states' rules that are similar to the ABA MJP Rule 5.5 and 8.5 amendments. Final adoption of the amendments in these states requires action by state supreme courts or state legislatures. See 72 U.S.L.W. 2037 for a summary of various states' recent MJP amendments. See also 71 U.S.L.W. 2106, 2739.