

# MULTIJURISDICTIONAL PRACTICE: AN ANALYSIS OF THE ABA'S PROPOSED CHANGES TO RULE 5.5 OF THE RULES OF PROFESSIONAL CONDUCT

*Gene Hammoud\**

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## **I. INTRODUCTION**

In the spring of 1997, prompted by the changing nature of technology and modern business,<sup>1</sup> including the increasingly interstate and international nature of certain client's matters, the American Bar

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\* B.A. Sociology, Montclair State University (1998); J.D. Seton Hall University School of Law (expected May 2002).

<sup>1</sup> Adam A. Shulenburg, *Changing an Outmoded System: Reforming Unauthorized Practice of Law Rules 1* (2001), at <http://www.uiowa.edu/~cyberlaw/elp01/papersff/asff1107.pdf> (last visited April 20, 2002). "Air travel, video conferences, e-mail, facsimile transmissions and the worldwide web have all radically changed the way lawyers provide services to their increasingly sophisticated multi-state (or multi-national) clients." *Id.*

Association (“ABA”) created the “Ethics 2000 Commission.”<sup>2</sup> The primary goal of the Ethics 2000 Commission was to evaluate the current ABA Rules of Professional Conduct in hopes of amending substantive shortcomings and clearing up certain ambiguities that have developed since the time the rules were originally written back in 1983.<sup>3</sup> After three years of careful analysis and review, the advisory panel of 250 members presented its final report to the ABA House of Delegates in November 2000.<sup>4</sup> Among the recommended changes proposed by the Ethics 2000 Commission was an amendment to Rule 5.5, which governs the unauthorized practice of law and multijurisdictional practice (hereinafter “MJP”).<sup>5</sup>

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<sup>2</sup> Margaret Colgate Love, *ABA Ethics 2000 Commission, Final Report- Summary of Recommendations* (2001), available at [http://www.abanet.org/cpr/e2k-mlove\\_article.html](http://www.abanet.org/cpr/e2k-mlove_article.html). (April 21, 2002). The commission was made up of a panel of thirteen experts in the field of legal ethics and a 250-member advisory council. Kenneth J. Wilbur, *Ethics 2000: Potential Implications for New Jersey's Rules of Professional Conduct*, N.J. LAWYER, Feb. 2001, at 56. In addition to frequent deliberations with their advisory council, the commission also reached out to special interest groups for ideas and held public meetings. Love, *supra*.

<sup>3</sup> Love, *supra* note 2. Initially, the commission sought to take a “minimalist” approach, choosing to clarify and refine the rules, only making major changes when “substantively necessary.” *Id.* However over time, the commission found that several more substantive changes would be necessary than originally anticipated. *Id.*

<sup>4</sup> Wilbur, *supra* note 2, at 56. The new proposals preserved the substance of the model rules, while making some significant changes. *Id.*

<sup>5</sup> Love, *supra* note 2, at recommendation 33. The ABA Ethics 2000 commission stated:

The Commission approved significant changes to Rule 5.5 (‘Unauthorized Practice of Law’) and Rule 8.5 (‘Disciplinary Authority: Choice of Law’) that recognize the fact that modern practice crosses jurisdictional boundaries in a variety of ways. Proposed amendments to Rule 5.4 identify four “safe harbors” for a lawyer practicing outside his licensing jurisdiction: 1) where he is preparing for a proceeding in which he expects to be admitted pro hac vice; 2) where he is acting on behalf of a client of which he is an employee; 3) where he is handling a matter that is “reasonably related” to his practice on behalf of a client in a jurisdiction where the lawyer is licensed; and 4) where he is “associated in a particular matter” with a lawyer admitted in the jurisdiction. As to the last mentioned “safe harbor,” the commentary explains that the admitted lawyer may not “serve merely as a conduit” for the out-of-state lawyer. The commentary also notes that in-house counsel must comply with relevant state practice requirements.

The commentary makes clear that the safe harbors are not intended to imply that conduct falling outside them constitutes the unauthorized practice of law. This incremental approach seems an appropriate response to the growing sentiment against blanket “unauthorized practice” restrictions on lawyers, while acknowledging the concerns of those who may have more parochial view.

*Id.*

The issue of MJP and the unauthorized practice of law was once considered to be purely theoretical.<sup>6</sup> However, in 1998, shortly after the ABA had created the Ethics 2000 Commission, the issue of MJP came to the forefront of the legal community due to a highly publicized case concerning the unauthorized practice of law by out-of-state practitioners.<sup>7</sup> In the pivotal California Supreme Court decision, a New York law firm was denied compensation for assisting one of their clients in a San Francisco-based arbitration without a license to practice in California.<sup>8</sup>

In response to the growing concerns regarding the unique issues facing lawyers in MJP, the ABA went a step beyond the Ethics 2000 Commission and created a separate group designed solely to evaluate the unique issues surrounding MJP.<sup>9</sup> The group, called the "Commission on Multijurisdictional Practice of Law," took aim at studying the mass of information being submitted from the various bar associations throughout the United States.<sup>10</sup>

This note will analyze the issue of MJP and the impact that any

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<sup>6</sup> STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 649 (5th ed. 1998). While discussing unauthorized practice of law statutes and the prospect of violations, one author states, "[t]his risk is probably theoretical. I know of no modern case in which an out-of-state lawyer was actually prosecuted for the [unauthorized practice of law]." *Id.*

<sup>7</sup> Jerry Jastrab, *Crossing Licensing Borders: MJP Plan Protecting NJ's Flank is Advanced to ABA*, N.J. LAWYER: THE WEEKLY NEWSPAPER, July 9, 2001, at 1309. The case raised concerns about MJP and Unauthorized Practice of Law statutes, which resulted in the ABA establishing the Commission on Multijurisdictional Practice. *Id.* at ¶ 27.

<sup>8</sup> *Birbrower v. Superior Court of Santa Clara*, 70 Cal. Rptr. 2d 304 (1998). In this case, after the clients filed a malpractice lawsuit, the California Supreme Court held that the defendant, a New York firm was practicing law under the California statutory definition, and since it was not admitted into the state bar, it could not collect fees for any work done in connection with an arbitration hearing. *Id.* at 307. The case raised eyebrows throughout the legal community not only because of the rare enforcement of an Unauthorized Practice of Law statute, but also because the Court denied the defendant over \$1 million in legal fees. Shulenburg, *supra* note 1, at 7.

<sup>9</sup> See Commission on Multijurisdictional Practice of Law, *Mission Statement*, at [http://www.abanet.org/cpr/mjp-mission\\_statement.html](http://www.abanet.org/cpr/mjp-mission_statement.html) (last visited April 21, 2002) (hereinafter "*Mission Statement*"). The commission is chaired by New Jersey attorney Wayne J. Positan. Commission on Multijurisdictional Practice of Law, *Biographies*, at <http://www.abanet.org/cpr/mjp-bios.html> (last visited April 21, 2002) (hereinafter "*Bio*"). Mr. Positan is the managing director of Lum, Danzis, Drasco, Positan & Kleinberg, LLC., in Roseland, NJ. *Id.* He previously served as the chair of the New Jersey State Bar Association's Committee on MJP. *Id.* The Commission is made up of eleven members, ten liaisons and one reporter. *Id.*

<sup>10</sup> Jastrab, *supra* note 7 at ¶ 28-30.

proposed changes to Rule 5.5 might have on practitioners, while specifically focusing on the concerns of New Jersey practitioners. Part II will analyze in detail the current Rule 5.5 and contrast it with the proposed changes set forth by the Ethics 2000 Commission.<sup>11</sup> Part III will address the concerns for New Jersey practitioners.<sup>12</sup> Part IV will analyze the specific responses New Jersey had to the Ethics 2000 Commission proposals, including but not limited to, the preliminary report by the New Jersey State Bar Association Committee on Multijurisdictional Practice.<sup>13</sup> Part V will examine the ABA's Commission on Multijurisdictional Practice's recommendations as well as the nationwide reaction to the proposals.<sup>14</sup> Finally, Part VI will conclude with an analysis of the issues raised and the author's opinion on the future of MJP.<sup>15</sup>

## ***II. ANALYSIS OF THE CURRENT RULE 5.5 AND THE PROPOSED CHANGES***

The current Rule 5.5 unequivocally prohibits lawyers from practicing law in a state where they are not admitted to the bar.<sup>16</sup> It does not provide for any exceptions,<sup>17</sup> nor does it even acknowledge the well-accepted proposition of pro hac vice admission.<sup>18</sup> However, the amended rule proposed by the Ethics 2000 Commission would provide practitioners with four specifically designated and narrowly tailored "safe harbors" in which practitioners could practice without fear of disciplinary action from the jurisdiction they are visiting.<sup>19</sup>

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<sup>11</sup> See *infra* Part II.

<sup>12</sup> See *infra* Part III.

<sup>13</sup> See *infra* Part IV.

<sup>14</sup> See *infra* Part V.

<sup>15</sup> See *infra* Part VI.

<sup>16</sup> MODEL RULES OF PROF'L CONDUCT R. 5.5 (1983). The rule states:

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.

*Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* Through admission pro hac vice, out-of-state attorneys may be allowed to practice in another state for a particular trial, avoiding the other jurisdiction's bar examination and character review process. Gillers, *supra* note 6, at 651.

<sup>19</sup> MODEL RULES OF PROF'L CONDUCT R. 5.5 (draft proposal 2000) (hereinafter "*Model Rules Draft*"):

The first safe harbor is set forth in paragraph (b)(1) of the new proposed rule.<sup>20</sup> It would allow a non-admitted lawyer to begin preparing for an upcoming proceeding in which he or she expects to be admitted on a pro hac vice basis.<sup>21</sup> This safe harbor seeks to meet two important goals, the first of which recognizes the well-settled existence of pro hac vice admission.<sup>22</sup> The second goal is the ABA's recognition that in some instances, practitioners will be authorized to appear before certain tribunals without having to seek pro hac vice admission.<sup>23</sup>

The second safe harbor, set forth in paragraph (b)(2)(i),<sup>24</sup> would allow a corporation's in-house counsel to work in other jurisdictions on behalf of the company's other employees or its commonly owned

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- (a) [unchanged]
- (b) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when:
- (1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized.
  - (2) other than engaging in conduct governed by paragraph (1):
    - (i) a lawyer who is an employee of a client acts on the client's behalf or, in connection with the client's matters, on behalf of the client's commonly owned organizational affiliates;
    - (ii) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice; or
    - (iii) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation.
- (c) A lawyer shall not assist another person in the unauthorized practice of law.

*Id.*

<sup>20</sup> *Id.* ¶ (b)(1).

<sup>21</sup> Judson Hand, *Unlike Others, United States Lawyers Boxed in by State Lines*, THE STAR LEDGER, July 9, 2000, at 2. The new proposal would allow this preparation to take place without fear of violating any unauthorized practice of law statutes. *Id.*

<sup>22</sup> *Model Rule 5.5: Reporter's Explanation of Changes*, at <http://www.abanet.org/cpr/e2k-rule55rem.html> (last visited April 23, 2002) (hereinafter "*Reporter's Explanation*"). "This new paragraph explicitly recognizes...pro hac vice admissions." *Id.*

<sup>23</sup> *Id.* "The paragraph also acknowledges that some lawyers may be authorized by law to appear before certain tribunals without seeking pro hac vice admission in each case." *Id.*

<sup>24</sup> *Model Rules Draft*, *supra* note 19, ¶ (b)(2)(i).

affiliates.<sup>25</sup> This safe harbor acknowledges the multijurisdictional reach of most corporations and their need for in-house counsel to advise them in their business matters.<sup>26</sup> Attorneys for complex entities, such as corporations, perform varied tasks for their employers.<sup>27</sup> These attorneys are often asked to complete these tasks wherever their employer is doing business regardless of where they are licensed to practice.<sup>28</sup> This safe harbor has been deemed reasonable partly because there are no concerns that the client is unaware of the attorney's training and expertise where the attorney is employed directly by the client.<sup>29</sup>

The third safe harbor, set forth in paragraph (b)(2)(ii),<sup>30</sup> would allow a lawyer not admitted in a particular jurisdiction to render legal services for a client on matters that are reasonably related to the lawyer's work for that client within the jurisdiction that the attorney is licensed to practice in.<sup>31</sup> This safe harbor acknowledges that the complexity of certain client matters may require a practitioner to cross state lines to adequately represent a client outside the jurisdiction he or she is licensed to practice in.<sup>32</sup>

Lastly, the fourth safe harbor, set forth in paragraph (b)(2)(iii),<sup>33</sup> protects a non-admitted lawyer who works with another attorney who is

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<sup>25</sup> *Id.*

<sup>26</sup> *Reporter's Explanation, supra* note 22 at ¶ 5. “[S]ome clients (typically organizations) hire a lawyer as an employee in circumstances that may make it impractical for the lawyer to become admitted to practice in the adopting jurisdiction.” *Id.*

<sup>27</sup> C. Evan Stewart, *Beware Corporate Counsel's Unauthorized Practice*, 226 N.Y. LAW J. 41 (2001). “[T]hey practice law, they manage risk, they deal with regulators, they give advice on financial, moral and public relations issues, they manage work performed by outside counsel, they manage their companies' legal costs, etc.” *Id.*

<sup>28</sup> *Id.* “[T]hey have traditionally performed all these roles wherever their companies do business without regard to their state based licenses.” *Id.*

<sup>29</sup> *Reporter's Explanation, supra* note 22 at ¶ 5. “Given that the employer is unlikely to be deceived about the training and expertise of these lawyers, the Commission believes that this is an appropriate category of cases to recognize as a safe harbor for the multijurisdictional practice of law.” *Id.*

<sup>30</sup> Model Rules Draft, *supra* note 19, ¶ (b)(2)(ii).

<sup>31</sup> *Id.* “A non-admitted lawyer could render legal services for a client on matters that arise out of or are otherwise reasonably related to the lawyer's work for the same client in another jurisdiction.” *Hand, supra* note 21 at ¶ 10.

<sup>32</sup> *Reporter's Explanation, supra* note 22 at ¶ 7. For example, a lawyer may be required to interview or consult a person in another state who is associated in some way with their client. *Id.*

<sup>33</sup> Model Rules Draft, *supra* note 19, ¶ (b)(2)(iii).

admitted within the jurisdiction.<sup>34</sup> This safe harbor is aimed at protecting attorneys who wish to acquire expertise and experience in a jurisdiction in which they are not admitted, without violating unauthorized practice of law statutes.<sup>35</sup> It should be noted that the safe harbors are exclusive and would not be available in situations where pro hac vice admission is also available.<sup>36</sup>

### III. RAMIFICATIONS FOR NEW JERSEY

These proposed changes are of particular importance to New Jersey practitioners because of the state's unique geographic situation.<sup>37</sup> The New Jersey bar, due to the state's proximity to the legal markets of both New York City and Philadelphia, has long been fearful of potential client flight and the potential economic impact on the local practice of law.<sup>38</sup> As a result, the New Jersey State Bar Association ("NJSBA") has opted to impose stringent rules and policies in an effort to protect the state's interests.<sup>39</sup> Such rules and policies include the state's refusal to grant reciprocity<sup>40</sup> to out-of-state practitioners, the bona fide office

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<sup>34</sup> *Id.* This last safe harbor would allow a lawyer to work within another jurisdiction as long as the work is done with an associate or partner who is admitted within that jurisdiction. Hand, *supra* note 21. This extra freedom will alleviate concerns within firms where an admitted attorney can now freely seek the help of a non-admitted attorney on any particular issue that would arise. *Id.*

<sup>35</sup> *Reporter's Explanation, supra* note 22 at ¶ 8. The explanation states: Historically... out-of-state lawyers have associated with local counsel both to acquire local expertise and to avoid violating unauthorized practice of law statutes. Out-of-state lawyers who render legal services pursuant to such an association should not be subject to discipline, so long as the association is not pro forma.

*Id.*

<sup>36</sup> *Id.* The explanation states, "the safe harbor provisions of paragraph (b)(2) are limited to situations in which such temporary admission is unavailable." *Id.* at ¶ 4.

<sup>37</sup> Gillers, *supra* note 6, at 628. New Jersey faces aggressive competition from firms in New York City and Philadelphia. *Id.* Chair of the ABA's Commission on MJP, Wayne Positan, also noted that New Jersey has a major stake in how the MJP debate plays out because of the state's geographic proximity to both New York City and Philadelphia and the competition that arises from those metropolitan areas. Jastrab, *supra* note 7.

<sup>38</sup> *Id.*; see also Gillers, *supra* note 6, at 628. Following the decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), which held that state bar associations cannot discriminate against non-residents, several smaller states had reason to fear "client flight" as national or regional firms could now gain admission into their bars. *Id.*

<sup>39</sup> Jastrab, *supra* note 7 at ¶ 9. According to Wayne Positan, Chair of the ABA's Commission on MJP, New Jersey's experience with MJP regulation has put the state bar "ahead of the curve" in dealing with the issue. *Id.*

<sup>40</sup> Gillers, *supra* note 6, at 628. Reciprocity is the practice of admitting an out-of-state

requirement,<sup>41</sup> heavy restrictions on television advertisements<sup>42</sup> and mandatory pro bono work.<sup>43</sup>

The Ethics 2000 Committee's proposals can have a dramatic impact on New Jersey practitioners, and New Jersey attorneys have greeted the proposed changes with some level of caution and skepticism.<sup>44</sup> The NJSBA President, Barry D. Epstein, has expressed concern with the ABA's proposed amendment.<sup>45</sup> However, some scholars within the legal community feel that the proposed changes are a welcome and necessary change.<sup>46</sup> Critics of the current legal landscape feel that these proposed changes may play an instrumental role in coordinating the nationwide rules of ethics so as to make it

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attorney without requiring him or her to take the local state bar examination. *Id.* It is commonly referred to as being admitted "on motion." *Id.* New Jersey does not grant reciprocity to out-of-state lawyers. *Id.*

<sup>41</sup> *Id.* at 629. New Jersey requires that all members of the state bar must maintain a "bona fide office" within the state. *Id.* The term "bona fide office" is defined as "a place where the attorney or a responsible person acting on the attorney's behalf can be reached in person and by telephone during normal business hours." *Id.* An answering service is insufficient to satisfy the requirement. *Id.* The requirement creates extra expenses for out-of-state attorneys that wish to practice in New Jersey and thus discourages out-of-state attorneys from expanding into New Jersey. *See id.*

<sup>42</sup> *Id.* at 928 (citing *In re Felmeister & Isaacs*, 104 N.J. 515 (1986)). The New Jersey Supreme Court held that television advertisements for legal services could not include "drawings, animations, dramatizations, music or lyrics." *Id.*

<sup>43</sup> Mary E. Coogan & Elizabeth Brody, *Message from the Special Editors*, 186 N.J. LAWYER, THE MAGAZINE 5 (July-Aug. 1997). The New Jersey Supreme Court in *Madden v. Township of Delran*, 126 N.J. 591 (1992), held that the state's pro bono requirement was constitutional. *Id.* at 604.

<sup>44</sup> Rocco Cammarere, *Deluge Feared: Caution Urged On MJPs*, N.J. LAWYER, Feb. 19, 2001, at 4. "When it comes to multi-jurisdictional practice, New Jersey attorneys are wary of any change that could open a floodgate to lawyers from large firms in neighboring states to surge into the Garden State." *Id.*

<sup>45</sup> *Id.* Epstein stated that the average New Jersey lawyer is "fearful that the MJP issue will ultimately be resolved in a way that advances the interests of the large firm and not their own." *Id.* Epstein told the ABA's commission studying MJP that New Jersey lawyers do not want to find themselves fighting for clients with larger firms from Philadelphia and New York, who may be "eyeing the multi-jurisdictional . . . issue as a signal for clear sailing." *Id.*

<sup>46</sup> Rocco Cammarere, *Changing Legal Landscape: Practice and Ethics Issues Abound*, 10 N.J. LAWYER 904 (May 7, 2001). Professor Howard Erichson of Seton Hall University, School of Law, notes that New Jersey's ethical rules "ha[ve] strayed . . . far from other jurisdictions." *Id.* at ¶ 41. Susan Hackett, senior vice-president and general counsel for the American Corporate Counsel Association in Washington, D.C., notes, "[i]f you look at other professionals, such as doctors and accountants, all of them have national reciprocity . . . If you're a doctor, there's never any question of whether you can relocate somewhere else." Hand, *supra* note 21 at ¶ 5.



easier for lawyers to practice across state lines without fear of unauthorized practice of law charges and violations.<sup>47</sup>

#### IV. NEW JERSEY'S RESPONSE

In response to the Ethics 2000 Committee's recommended changes, the NJSBA launched its own probe on MJP and Rule 5.5.<sup>48</sup> NJSBA President, Barry D. Epstein appointed the members of the New Jersey State Bar Association Committee on Multijurisdictional Practice in July 2000.<sup>49</sup> This nine-member committee<sup>50</sup> was asked to examine the major issues surrounding MJPs and to suggest an appropriate course of action to the NJSBA Board of Trustees.<sup>51</sup> The committee began their examination by conducting a survey of the various New Jersey County Bar Associations.<sup>52</sup> In addition, the committee considered the various proposals submitted to the ABA's Commission on Multijurisdictional Practice of Law.<sup>53</sup>

##### A. Various Proposals

One of the more drastic proposals is a "driver's license" rule, which would act much like the current national system of driver's

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<sup>47</sup> Hand, *supra* note 21.

<sup>48</sup> *Id.* "Both the American Bar and New Jersey State Bar Associations are preparing reports for their respective leaderships on what route each organization should take." *Id.*

<sup>49</sup> New Jersey State Bar Association, Committee on Multijurisdictional Practice, *Preliminary Report and Recommendations* (hereinafter "*NJMJP Committee*"). In addition to examining the issues surrounding MJPs, the committee monitored the activity of the ABA's Commission on MJP and suggested an appropriate course of action to the NJSBA Board of Trustees. *Id.*

<sup>50</sup> The members are Chair Allen A. Etish, Vice-Chair Marcia Kuttner Werner, Ramon de la Cruz, Honorable Marie Garibaldi, John L. Kraft, James H. Landgraf, Gregory Slyfield, Morris Stern and Cindy Nan Vogelman. *Id.*

<sup>51</sup> *Id.* The general results were summarized:

Many associations and sections favor the development of a rule that would better define the unauthorized practice of law, and provide guidance and safe harbors for certain cross-border activities. There appears to be no support from the organized bar for radical alternatives, such as a national law license, or for the elimination or lowering of bar admission requirements. Only the Bergen County Bar Association favors the status quo; nevertheless, they submitted a detailed proposal for a model rule, part of which is incorporated into the committee's proposed rule.

*Id.* at ¶ 14.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* The ABA's Commission on Multijurisdictional Practice of Law received several proposals from various bar associations and related organizations. *Id.*

licenses, guaranteeing automatic reciprocity to out-of-state practitioners.<sup>54</sup> Another proposal considered was a similar “green card” approach, which would allow out-of-state attorneys to practice in another state after demonstrating that they had been admitted in their home state bar for at least three years and after having presented a certificate of good standing.<sup>55</sup> However, after some analysis, the NJSBA committee deemed both proposals too radical and too far of a leap from the current system.<sup>56</sup>

Other more moderate approaches were considered as well, including a proposal that would permit transactional activity.<sup>57</sup> Under this proposal, a client would have to consent after full disclosure of the risks involved with unlicensed representation.<sup>58</sup> A proposal for a pro hac vice model rule was also examined, which would permit pre-litigation activities.<sup>59</sup> Furthermore, the committee also evaluated a proposal that would permit attorneys to practice within a jurisdiction where they are not admitted so long as the attorney’s activities arise out of or are otherwise reasonably related to the lawyer’s practice in the jurisdiction in which he or she is admitted.<sup>60</sup> Lastly, the committee looked at a proposal that supported the proposed safe harbors in Rule

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<sup>54</sup> Cammarere, *supra* note 46 at ¶ 18. The proposal, submitted by the American Corporate Counsel Association, would allow attorneys who are licensed in one jurisdiction to practice temporarily anywhere throughout the United States. *NJMJP Committee, supra* note 49 at ¶ 18. An attorney would then only have to pass a character and fitness review in order to be admitted permanently in the visiting jurisdiction. *Id.*

<sup>55</sup> Cammarere, *supra* note 46 ¶ 17. The proposal was developed by the Attorney’s Liability Assurance Society. *Id.*

<sup>56</sup> *NJMJP Committee, supra* note 49 at ¶ 24. New Jersey has a legitimate interest in “closely regulating admission to the bar and the activity of lawyers to ensure that consumers receive services from lawyers who are conversant with the law, rules and procedures of New Jersey practice and are readily available to clients and adversaries.” *Id.* The committee strongly opposes any proposal that eliminates or substantially reduces practice barriers. *Id.* They were especially critical of the “driver’s license” and “green card” plans. *See id.*

<sup>57</sup> *Id.*; *see also* Michael Booth, *ABA Meeting Preview: Delegates to Consider Ethics 2000, Including Multijurisdictional Practice*, 165 N.J. LAW J. 408 (2001). This proposal was advanced by the ABA’s Real Property Section. *Id.*

<sup>58</sup> *NJMJP Committee, supra* note 49 at ¶ 20. “The ABA Real Property Section recommends that transactional activity be permitted so long as the client consents after having been informed of the risks involved, and that a lawyer be permitted to perform any services that could be rendered in the jurisdiction by a non-lawyer.” *Id.*

<sup>59</sup> Booth, *see also supra* note 57. The International Association of Defense Lawyers recommended this approach. *Id.* The proposal would permit investigative and other pre-litigation activities. *NJMJP Committee, supra* note 49 at ¶ 21.

<sup>60</sup> Booth, *supra* note 57 at ¶ 26. The American Law Institute suggested this proposal. *Id.*

5.5, but would specifically limit the safe harbors to “occasional forays” into other states.<sup>61</sup> The proposal also suggests a provision that would permit any activity related to representing clients in Alternative Dispute Resolution proceedings.<sup>62</sup>

After reviewing all the proposals and the Ethics 2000 Commission’s own proposed Rule 5.5, the NJSBA committee rejected most of the proposals, citing fears that such proposals would harm the traditional role of state bars.<sup>63</sup> Rather, the committee decided to advocate the limited safe harbor notion set forth by the Ethics 2000 Commission’s proposed Rule 5.5, while tightening some of the gaps left by the Ethics 2000 Commission’s proposed safe harbors.<sup>64</sup>

B. *Explanation and Comparison of the NJSBA’s Proposed Rule 5.5 and the Ethics 2000 Commission’s Rule 5.5*

The Committee drafted its own version of Rule 5.5, which contains more detail and specificity than the Ethics 2000 Commission’s version, especially in the area of transactional practice.<sup>65</sup> Paragraph (b)(1)<sup>66</sup> of

<sup>61</sup> *Id.* at ¶ 29 The ABA Section of Business Law proposed this modification. *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *NJMJP Committee, supra* note 49 at ¶ 26. In a scramble to chase clients across borders, “traditional notions of service to the courts and community would be an afterthought, as would participation in the organized bar.” *Id.*

<sup>64</sup> *Id.* at ¶ 27.

<sup>65</sup> N.J. RULES OF PROF’L CONDUCT R. 5.5 (NJSBA draft proposal 2001) (hereinafter “*NJSBA draft*”). The rule states:

(a) [unchanged]

(b) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when the lawyer acts within one of the following “safeharbors”:

(1) the lawyer is authorized to appear before a tribunal in this jurisdiction by law or order of the tribunal or is preparing for a proceeding in which the lawyer reasonably expects to be so authorized and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or

(2) other than making appearances before a tribunal with authority to admit the lawyer to practice pro hac vice:

(i) a lawyer who is an employee of the client acts on the client’s behalf or, in connection with the client’s matters, on behalf of the client’s other employees or its commonly owned organizational affiliates, provided the lawyer does not provide to others, including other employees of the employer, legal services not directly related to the legal matters of the employer;

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- (ii) a lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;
  - (iii) a lawyer engages in representation of a party to a dispute by participating in an arbitration, mediation, or other alternative non-judicial dispute resolution proceeding, in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;
  - (iv) a lawyer investigates, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding that originates in a jurisdiction in which the lawyer is admitted to practice;
  - (v) a lawyer practices in circumstances other than (i) through (iv) above, 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; or
  - (vi) a lawyer is associated on an occasional basis with a lawyer admitted to practice in this jurisdiction who is in compliance with court rules governing the practice of law and who assumes overall responsibility for representation of the client in this jurisdiction.
- (c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to sub-paragraph (b)(2) above shall:
- (i) be licensed and in good standing in the jurisdiction in which the lawyer permanently practices law or is domiciled, and not be subject to a current or pending license suspension or disbarment in any jurisdiction;
  - (ii) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;
  - (iii) consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction; and
  - (iv) not hold himself or herself out as being admitted to practice in this jurisdiction.
- (d) A lawyer shall not assist another person in the unauthorized practice of law.

*Id.*

the NJSBA's proposed rule governs pre-litigation activity.<sup>67</sup> The NJSBA committee is in agreement with the Ethics 2000 Commission's proposal that recognizes and protects attorneys who are expecting to be admitted *pro hac vice*.<sup>68</sup> However, the NJSBA committee also feels that such attorneys must be accountable to clients, thus the rule imposes an additional requirement that the visiting attorney associate with local counsel.<sup>69</sup> Paragraph (b)(2)(i)<sup>70</sup> addresses the in-house counsel safe harbor and is also similar to the Ethics 2000 Commission version.<sup>71</sup> However, the paragraph clarifies that the attorney can only receive payment from the employer and cannot provide legal services to any others.<sup>72</sup>

Paragraph (b)(2)(ii)<sup>73</sup> of the Ethics 2000 Commission's proposal, which provides a safe harbor for transactional work in other jurisdictions, has been expanded and broken down by the NJSBA commission into four separate paragraphs, (b)(2)(ii)-(v).<sup>74</sup> It was expanded because the NJSBA committee felt the Ethics 2000 Commission's version was too open-ended and could potentially lead to abuse on the part of crafty lawyers looking to take advantage of the general language.<sup>75</sup> Thus, paragraph (b)(2)(ii)<sup>76</sup> of the NJSBA rule would permit transactional negotiation only when done for an existing client in a jurisdiction where the attorney is admitted.<sup>77</sup>

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<sup>66</sup> *Id.* ¶ (b)(1)

<sup>67</sup> *NJMJP Committee, supra* note 49 at Rule Summary 1.

<sup>68</sup> *Id.* Despite the NJSBA Commission's apparent protective stance for attorneys anticipating admission *pro hac vice*, the Commission does not feel that a uniform *pro hac vice* rule is necessary. *Id.* The Commission feels that the current system seems fine and there is no overriding need to replace it with a uniform one. *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *NJSBA Draft, supra* note 65, ¶ (b)(2)(i).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* "Any safe-harbor rule must state clearly that the lawyer's entire compensation comes from their employer and, that while working in a jurisdiction in which they are not licensed, they cannot perform legal work for anyone else." Booth, *supra* note 57.

<sup>73</sup> *NJSBA Draft, supra* note 65, ¶ (b)(2)(ii).

<sup>74</sup> *NJMJP Committee, supra* note 49 at Rule Summary 3.

<sup>75</sup> *See id.* "The term 'reasonably related' is capable of many interpretations and may potentially be used by creative lawyers to justify inappropriate regular cross-border practice." *Id.*

<sup>76</sup> *NJSBA Draft, supra* note 65, ¶ (b)(2)(ii).

<sup>77</sup> *Id.* For example, a Wisconsin lawyer would be permitted to negotiate the terms of a purchase of goods for a Wisconsin distributor. *Id.*

Paragraph (b)(2)(iii)<sup>78</sup> of the NJSBA Rule 5.5 creates a safe harbor for attorneys engaging in some sort of alternative dispute resolution process in another state.<sup>79</sup> Like paragraph (b)(2)(ii),<sup>80</sup> the representation must arise from a pre-existing client in the jurisdiction in which the attorney is licensed to practice.<sup>81</sup> Furthermore, the dispute must have originated in or be related to the lawyer's home jurisdiction.<sup>82</sup>

Next, paragraph (b)(2)(iv)<sup>83</sup> permits a practitioner to move across state lines to prepare for a proceeding that is scheduled to take place in a jurisdiction where the practitioner is admitted to practice.<sup>84</sup> This is an area of practice that the NJSBA wished to touch upon because the Ethics 2000 Commission's Rule 5.5 did not specifically address it.<sup>85</sup>

Moreover, paragraph (b)(2)(v)<sup>86</sup> of the NJSBA's Rule 5.5 is designed to act as a catch-all provision for situations that may arise apart from those covered in paragraphs (i) through (v).<sup>87</sup> Like the prior provisions, the representation must stem from a pre-existing client in the attorney's home state and will only apply in situations where the representation is "occasional" and attorney withdrawal would create "inefficiency, impracticality or detriment to the client."<sup>88</sup>

Finally, paragraph (b)(2)(vi)<sup>89</sup> modifies the Ethics 2000 Commission's safe harbor for out-of-state attorneys that associate with local counsel by requiring that such relationships occur merely on an occasional basis and that the local counsel assume overall responsibility for the representation.<sup>90</sup> Recognizing the need to protect attorneys who

<sup>78</sup> *Id.* ¶ (b)(2)(iii).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* ¶ (b)(2)(ii).

<sup>81</sup> *Id.*

<sup>82</sup> *NJSBA Draft, supra* note 65, ¶ (b)(2)(ii). For example, a Wisconsin lawyer could come to New Jersey for an arbitration involving Wisconsin clients and Wisconsin-related contracts, which specify a New Jersey venue for arbitration. Booth, *supra* note 57 at ¶ 42.

<sup>83</sup> *NJSBA Draft, supra* note 65, ¶ (b)(2)(iv).

<sup>84</sup> *NJMJP Committee, supra* note 49 at Rule Summary 3. For example, a Wisconsin lawyer would be allowed entrance in New Jersey to interview potential witnesses for a trial later to be held in Wisconsin. *Id.*

<sup>85</sup> See generally *Model Rules Draft, supra* note 19.

<sup>86</sup> *NJSBA Draft, supra* note 65, ¶ (b)(2)(v).

<sup>87</sup> *Id.* ¶¶ (b)(2)(i)-(v); *NJMJP Committee, supra* note 49.

<sup>88</sup> *Id.* The Committee is confident that their recommendations create reasonable safe harbors that would prevent abuses that may ensue from the Ethics 2000 Commission's more broadly worded rule. *Id.*

<sup>89</sup> *NJSBA Draft, supra* note 65, ¶ (b)(2)(vi).

<sup>90</sup> *NJMJP Committee, supra* note 49 at Rule Summary 4. The Committee recognizes

wish to strengthen their representation with outside counsel or attorneys who seek to gain expertise in a foreign jurisdiction, the committee felt that the extra conditions balance out the competing interests of attorneys and clients while also minimizing the opportunity for abuse.<sup>91</sup>

The NJSBA committee, concerned with client protection and lawyer's obligations to visiting states, added some additional provisions in paragraphs (c)(i)-(vi).<sup>92</sup> The additional rules are mostly procedural and do not place any substantive burdens on visiting attorneys.<sup>93</sup>

In addition to these rules, the NJSBA committee debated whether out-of-state lawyers should be subject to some type of registration requirement.<sup>94</sup> After some vigorous debate, the committee opted to not include such a requirement, deeming it inappropriate at the time.<sup>95</sup>

In response to another related issue considered by the ABA's MJP commission, the NJSBA committee determined that rather than having New Jersey adopt a full faith and credit clause<sup>96</sup> for disciplinary decisions reached in other states, the state should instead adopt a reciprocal discipline rule, similar to the one already in place in New Jersey.<sup>97</sup> The underlying rationale for such a rule would be to allow the

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that lawyers often associate with out-of-state counsel for purposes of strengthening the representation provided in a local matter. *Id.*

<sup>91</sup> *Id.* "The committee recognizes the need to protect such relationships. However, such relationships should not be pro forma." *Id.*

<sup>92</sup> *NJSBA Draft, supra* note 65, ¶¶ (c)(i)-(vi).

<sup>93</sup> *NJMJP Committee, supra* note 49 at Rule Summaries 5-7. These extra requirements are designed to increase accountability and ensure the lawyer's obligations to the visiting state's supreme court. *Id.* The additional rules require that an attorney be in good standing in all jurisdictions of admission, agree to be subject to the Rules and highest court governing the visiting jurisdiction, consent to the appointment to the clerk of the court as agent for service of process, and not hold he or she out as being formally admitted to practice within the visiting jurisdiction. *Id.*

<sup>94</sup> *Id.* Those supporting such requirements argued that it would facilitate access to the lawyer if any problems arose, while those opposed felt that it would be a meaningless exercise and would simply overburden both the courts and lawyers. *Id.*

<sup>95</sup> *Id.* "The consensus view of the committee is that registration or certification is not an appropriate requirement at this time." *Id.*

<sup>96</sup> Full faith and credit is the requirement that all states heed the judgments of all other states. U.S. CONST. Art. IV, § 1. Article IV, § 1, of the United States Constitution contains a full faith and credit clause regarding public acts and judicial proceedings of other states. *Id.* The article states, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." *Id.* Article IV, § 1, however, does not apply to non-judicial disciplinary hearings for attorneys. *See id.*

<sup>97</sup> *NJMJP Committee, supra* note 49. at Rule Summary 7 "Where a New Jersey lawyer has been subject to discipline in another state, the rule requires generally the imposition of identical discipline, but permits the lawyer to respond to the charges and leaves the final

final decision-making ability to reside within the Supreme Court of New Jersey.<sup>98</sup> Finally, the NJSBA committee saw no reason for a uniform pro hac vice rule, feeling that there is no overriding need to replace the current system, which is governed by individual state statutes.<sup>99</sup>

In addition to the NJSBA committee, in February of 2001, the Supreme Court of New Jersey also created an advisory board called the "Commission on Professional Conduct."<sup>100</sup> The Supreme Court's Commission has yet to release their findings.<sup>101</sup>

### ***V. REVIEW OF THE INTERIM REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE***

In addition to the above-mentioned proposals by the ABA<sup>102</sup> and NJSBA,<sup>103</sup> the ABA also created a special committee,<sup>104</sup> which was designed solely to address and analyze the issue of MJP's, called the Commission on Multijurisdictional Practice ("MJP Commission").<sup>105</sup> In November of 2001, the MJP Commission released their interim report,<sup>106</sup> featuring a new proposed Rule 5.5,<sup>107</sup> along with other

determination to the Supreme Court." *Id.*

<sup>98</sup> *Id.* The Committee stated, "We believe it appropriate that a state's high court be the final arbiter, and not have its discretion eliminated." *Id.*

<sup>99</sup> *Id.* Despite slight differences from state to state, the Committee found no reason to change the current system at that time. *Id.*

<sup>100</sup> Cammarere, *supra* note 46 at ¶ 4.

<sup>101</sup> *Id.*

<sup>102</sup> *See supra* part II.

<sup>103</sup> *See supra* part IV.

<sup>104</sup> *See Bio, supra* note 9.

<sup>105</sup> *Mission Statement, supra* note 9. The statement provides:

RESOLVED that the American Bar Association establish the Commission on the Multijurisdictional Practice to research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law. The Commission shall analyze the impact of those rules on the practices of in-house counsel, transactional lawyers, litigators and arbitrators and on lawyers and law firms maintaining offices and practicing in multiple state and federal jurisdictions. The Commission shall make policy recommendations to govern the multijurisdictional practice of law that serve the public interest and take any other action as may be necessary to carry out its jurisdictional mandate. The Commission shall also review international issues related to multijurisdictional practice in the United States.

*Id.*

<sup>106</sup> Anthony E. Davis, *Professional Responsibility: MJP (Multijurisdictional Practice) – Down to the Wire*, N.Y. LAW J., Jan. 7, 2002, at 3.



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<sup>107</sup> MODEL RULES OF PROF'L CONDUCT R. 5.5 (draft proposal November 2001) (hereinafter "*Nov. 2001 Draft*"). The rule states:

- (a) [unchanged]
- (b) A lawyer admitted in another United States jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law when the lawyer represents a client on a temporary basis in this jurisdiction if the lawyer's services do not create an unreasonable risk to the interests of the lawyer's client, the public, or the courts.
- (c) Services for a client that are within paragraph (b), if performed on a temporary basis by a lawyer admitted and in good standing in another United States jurisdiction, include services that:
  - (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the representation;
  - (2) may be performed by a person who is not a lawyer without a law license or other authorization from a state or local governmental body;
  - (3) are in or reasonably related to a pending or potential proceeding before a tribunal or administrative agency held or to be held in this or another jurisdiction, if the lawyer is authorized by law or court or agency order to appear in such proceeding or reasonably expects to be so authorized;
  - (4) are in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding held or to be held in this or another jurisdiction;
  - (5) are not within paragraph (c)(3) or (c)(4) and:
    - (i) are performed for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice, or
    - (ii) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is admitted to practice; or
  - (6) are governed primarily by federal law, international law, the law of a foreign nation, or the law of a jurisdiction in which the lawyer is admitted to practice.
- (d) A lawyer admitted to practice in another jurisdiction but not in this jurisdiction does not engage in the unauthorized practice of law in this jurisdiction:
  - (1) if the lawyer is an employee of a client and acts on behalf of the client or its commonly owned organizational affiliates except for work for which pro hac vice admission is required; or
  - (2) when the lawyer renders services in this jurisdiction pursuant to other authority granted by federal law or the law or a court rule of this jurisdiction.
- (e) Except as authorized by these rules or other law, a lawyer who is not admitted to practice in this jurisdiction shall not (i) establish an office or other permanent presence in this jurisdiction for the practice of law; or (ii) represent or hold out to the public that the lawyer is admitted to practice law in this jurisdiction.

*Id.*

recommendations.<sup>108</sup> While more expansive than the Ethic Commission's proposal, the MJP Commission's proposal follows the "safe harbor" approach of its predecessor.<sup>109</sup> Thus, the MJP Commission is seeking to maintain the current regulatory framework that prohibits practicing across state lines unless the activity falls within the narrowly tailored exceptions.<sup>110</sup>

#### A. *Discussion of Additional Safe Harbors*

Paragraph (c) of the MJP Commission's proposal<sup>111</sup> sets out safe harbors in six areas of professional work.<sup>112</sup> The safe harbors are similar to those recommended by the Ethics 2000 Commission, clarifying some and adding others.<sup>113</sup> The most noteworthy additions are the alternative dispute resolution exception and the federal, international and foreign nation exceptions.<sup>114</sup>

<sup>108</sup> See ABA, *Interim Report of the Commission on Multijurisdictional Practice* (Nov. 2001) (hereinafter "*Interim Report*").

<sup>109</sup> *Id.* Recommendation 3 states:

The ABA should adopt proposed Model Rule 5.5(c)-(e) to identify 'safe harbors' that embody specific applications of the general principle stated in Recommendation 2; to identify other appropriate 'safe harbors'; and to make clear that, except where authorized by law or rule, a lawyer may not establish an office, maintain a continuous presence, or hold himself or herself out as authorized to practice law in a jurisdiction where the lawyer is not licensed to practice law.

*Id.*

<sup>110</sup> Davis, *supra* note 106 at 3. The author discusses how the MJP Commission took a "narrow and legalistic approach to reform," despite the fact that the Association of Corporate Counsel of America has been lobbying for radical reform to the current MJP rules. *Id.*

<sup>111</sup> *Nov. 2001 Draft, supra* note 107, ¶ (c).

<sup>112</sup> Davis, *supra* note 106 at 3. The six areas of professional work are:

(1) work as co-counsel with a lawyer admitted to practice law in the jurisdiction; (2) services that a non-lawyer is legally permitted to render in the jurisdiction; (3) work ancillary to pending or prospective litigation; (4) representation of clients in, or ancillary to, an alternative dispute resolution ("ADR") setting, such as arbitration and mediation; (5) non-litigation work ancillary to the lawyer's representation of a client in the lawyer's 'home state' (i.e., the jurisdiction in which the lawyer is licensed to practice law) or ancillary to the lawyer's work on a matter that is in the lawyer's home state; and (6) services involving primarily federal law, international law, the law of a foreign jurisdiction or the law of the lawyer's home state.

*Id.*

<sup>113</sup> See *Interim Report, supra* note 108, at recommendation 3.

<sup>114</sup> *Id.*

In addition to the safe harbors set out in paragraph (c),<sup>115</sup> the MJP Commission established an in-house counsel exception in paragraph (d).<sup>116</sup> The MJP Commission also created an exception for attorneys who are authorized to appear in a jurisdiction by either state or federal law.<sup>117</sup>

The MJP Commission also proposed that the ABA endorse a model pro hac vice rule.<sup>118</sup> Despite the general adequacy of current pro hac vice rules, the MJP Commission, with the support of the International Association of Defense Counsel, the ABA Section of Litigation and the ABA Section of Torts and Insurance Practice,<sup>119</sup> felt it preferable to adopt a more uniform rule to replace the current differences among states.<sup>120</sup> In addition to the model pro hac vice rule, the MJP Commission also recommended that the ABA help eliminate current barriers that require state bar membership to practice before United States district courts within any particular state.<sup>121</sup>

### B. *Local and Nationwide Reactions*

While most of these proposals were modest and predictable, the MJP Commission surprised many in the legal community<sup>122</sup> by

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<sup>115</sup> *Nov. 2001 Draft, supra* note 107, ¶ (c).

<sup>116</sup> *Interim Report, supra* note 108, at recommendation 3. This exception relates to “work by a lawyer who is an employee of a client or its commonly owned organizational affiliates.” *Id.*

<sup>117</sup> *Id.* “The second of these ‘safe harbors’ recognizes that a lawyer who is legally authorized to appear in the jurisdiction for a particular purpose does not violate otherwise applicable jurisdictional restrictions on law practice by out-of state lawyers.” *Id.*

<sup>118</sup> *Interim Report, supra* note 108, at recommendation 6.

<sup>119</sup> *Id.* “[R]epresentatives of the ABA Section of Litigation, the IADC, and the ABA Section of Torts and Insurance Practice have been collaborating to refine the initial proposal.” *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Interim Report, supra* note 108, at recommendation 6.1. “[G]iven the global nature of contemporary law practice, restricting the privilege to practice before a U.S. District Court to lawyers who are admitted to the state bar in which the district is located was unduly burdensome.” *Id.*

<sup>122</sup> Robert G. Seidenstein, *MJP Plan: NJSBA Mulls Reaction ‘Admission on Motion’ Sore Point?*, 10 N.J. LAWYER: THE WEEKLY NEWSPAPER 2324 (Dec. 10, 1999). The author discusses how the “admission on appeal” proposal surprised attorneys in New Jersey and the NJSBA. *Id.* A staffer to the NJSBA’s committee on MJP stated, “[w]e didn’t think the commission was even looking at that.” *Id.* “The bombshell in the report was a recommendation that the ABA endorse a model ‘admission on motion’ rule to make it easier for a lawyer to become licensed in another state if the lawyer has been an active practitioner.” Robert G. Seidenstein, *2001 in Review: Verniero, Best Practices Top Stories*,

proposing a rather liberal “admission on motion” rule.<sup>123</sup> This rule would effectively allow practicing attorneys to gain entrance into other state bars without having to take the local state bar exam.<sup>124</sup> The MJP Commission advanced this proposal because it found that it is an unnecessary and burdensome hurdle to require fully practicing and experienced attorneys to take a bar exam to practice in a different state.<sup>125</sup> The MJP Commission however was careful to point out that the admission on motion rule is not intended to act as an alternative to the proposed “safe harbors,” but rather it is aimed at aiding lawyers who are planning on relocating their practices or expect to practice within two distinct jurisdictions simultaneously.<sup>126</sup>

The New Jersey Bar, which has traditionally opposed admission on motion because of the competition from New York and Philadelphia bars,<sup>127</sup> has voiced concern over the proposal.<sup>128</sup> Such a rule would be a radical departure from the current rule and the position taken by the Ethics 2000 Commission and NJSBA Commission.<sup>129</sup>

10 N.J. LAWYER: THE WEEKLY NEWSPAPER 2443 (Dec. 31, 2001).

<sup>123</sup> *Interim Report, supra* note 108, at recommendation 4. “The ABA should endorse a model ‘admission on motion’ rule consistent with the one proposed by the ABA section of Legal Education and Admissions to the Bar to facilitate the licensing of a lawyer by a host state if the lawyer has been engaged in active law practice in other United States Jurisdictions for a significant period of time.” *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* Looking at states that already utilize admission on motion, the MJP Commission noted:

The admission on motion processes in these states recognize the reality that lawyers who have been admitted to another state’s bar and have practiced actively for a significant period of time without disciplinary sanction are qualified to establish a law practice in the new state, and that, for experienced lawyers, the bar examination therefore serves as an unnecessary obstacle to establishing a practice in the new state. This is particularly true because, with the advent of multistate bar examinations, most bar examinations have become increasingly less distinctive and less focused on the idiosyncrasies of individual states’ law. There is nothing to suggest that in states with admission on motion, particular regulatory problems are disproportionately presented by lawyers who gain admission by this process.

*Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Robert G. Seidenstein, *MJP Plan: NJSBA Mulls Reaction ‘Admission on Motion’ Sore Point?*, 10 N.J. LAWYER: THE WEEKLY NEWSPAPER 2324 (Dec. 10, 1999).

<sup>128</sup> *Id.* New Jersey State Bar President, Daniel M. Waldman, said “the NJSBA will carefully scrutinize the report of the ABA commission because some of its recommendations, such as admission on motion, go beyond what we have endorsed.” *Id.*

<sup>129</sup> *NJSBA Draft, supra* note 65.

While some practitioners in New Jersey think that the MJP Commission's proposals might be too radical, other groups think that they do not go far enough in settling the issues surrounding MJP.<sup>130</sup> These groups have formed a coalition and collectively offered an alternative to the MJP Commission's "safe harbor" approach.<sup>131</sup> The coalition's proposal, called "A Common Sense Proposal for Multijurisdictional Practice," is geared towards restructuring the current system and eliminating some jurisdictional elements.<sup>132</sup> The coalition has been very vocal in their criticism of the MJP Commission's "safe

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<sup>130</sup> Davis, *supra* note 106 at 3. The author illustrates how a vast array of attorney groups has joined together to voice their collective opinion against the proposals, feeling they are too restrictive and not realistic. *Id.* Among the named groups are the National Organization of Bar Counsel, the Association of Professional Responsibility Lawyers, the Association of Corporate Counsel of America and the Colorado Bar Association. *Id.* Also included are the Association of the Bar of the City of New York, the Federal Communications Bar Association, the Environment Energy & Resources Section of the American Bar Association, the International Law & Practice Section of the American Bar Association, and the Law Practice Management Section of the American Bar Association. American Corporate Counsel Association, *A Common Sense Proposal for Multijurisdictional Practice*, at <http://www.acca.com/advocacy/mjp/commonsenseproposal.html> (last visited April 21, 2002) (hereinafter "ACCA").

<sup>131</sup> Davis, *supra* note 106; ACCA, *supra* note 130 at ¶ 1.

<sup>132</sup> The American Corporate Counsel's *Common Sense Proposal Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law* states:

- (a) Unauthorized Practice of Law. A lawyer shall not:
  1. practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;
  2. assist another person in the unauthorized practice of law.
- (b) Multijurisdictional Practice of Law. A lawyer admitted to practice and in good standing in another jurisdiction, but not admitted in this jurisdiction, may engage in the practice of law in this jurisdiction when:
  1. the lawyer is authorized by law or order to appear before a tribunal or administrative agency or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or
  2. other than engaging in conduct governed by paragraph (b)(1):
    - i. the lawyer is an employee of a client and acts on the client's behalf or on behalf of the client's organizational affiliates; or
    - ii. the lawyer performs services for a client in this jurisdiction on a temporary basis, does not establish a systematic and continuous presence in this jurisdiction for the practice of law and does not hold out to the public that the lawyer is licensed to practice law in this jurisdiction.

harbor” proposals.<sup>133</sup> The coalition would prefer a system that would favor attorneys’ free movement,<sup>134</sup> while avoiding instances in which attorneys violate host state regulations or harm clients.<sup>135</sup>

While receiving much nationwide support, the coalition’s common sense proposal for MJP has also been criticized.<sup>136</sup> A website, entitled “Crossingthebar.com” (“CTBC”), which is dedicated to reporting news and information on MJP, recently offered a critique of the coalition’s common sense proposal.<sup>137</sup> CTBC is very critical of the coalition’s proposal and suggests that rather than revamping the current system, the coalition should focus on helping the MJP Commission develop a workable plan that can gain widespread support.<sup>138</sup> CTBC is also critical of the expansive and non-specific language contained in the coalition’s common sense proposal.<sup>139</sup> Furthermore, CTBC stresses the

<sup>133</sup> Davis, *supra* note 106 at 3. The author responded to the MJP Commission’s “safe harbor” approach:

To create ‘safe harbors’ suggests that it is possible to exercise control over ‘non-safe harbor’ areas. This is not the case now, and no matter how much money and additional resources are dedicated to the attempt it will not be the case in the future. There is no way to identify in advance the transactional activities of nonadmitted lawyers in any jurisdiction unless they cease to be occasional and become, in effect, permanent residents or unless their conduct results in some harm to the public or their client.

*Id.*

<sup>134</sup> *Id.* “‘Safe harbors’ constitute a good-sounding bad idea that should be rejected in favor of open temporary and infrequent multijurisdictional practice.” *Id.*

<sup>135</sup> *Id.* “The rules should positively contemplate and regulate the practice of all lawyers engaged in multijurisdictional practice, carving out only those exceptions which are not condoned (rather than prohibiting the practice and then carving out confusing and numerous exceptions of practice which are allowed).” *Id.*

<sup>136</sup> See *CTBC Critique of Coalition Proposal*, at <http://crossingthebar.com/critiqueofcommonsenseproposal.htm> (last visited April 21, 2002) (hereinafter “*CTBC Critique*”).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* The CrossingtheBar website states:

CrossingtheBar.Com . . . believes the fact that the coalition has yet to stick with a single ‘Common Sense Proposal’ supports its view that the coalition should drop proposing any alternatives to the final recommendations of the ABA MJP commission and instead help the commission craft consensus recommendations that the coalition and most other major groups concerned with the issue can support.

*Id.* at ¶ 3.

<sup>139</sup> *Id.* at *Critique of “Common Sense Proposal”*. Focusing primarily on the terms “temporary” and “systematic and continuous presence,” the CTBC critique states, “the ‘Common Sense Proposal’ contains terminology that is not clear. *Id.* Simple is good, but not at the expense of clarity and enforceability. These terms are not self-executing.

importance of giving the MJP Commission full support, as these proposals need not only be adopted by the ABA House of Delegates, but also will require the approval of the legislatures, various state bar associations and state supreme courts.<sup>140</sup>

In addition to critiquing the coalition's common sense proposals, CTBC also analyzed the MJP Commission's proposals as well.<sup>141</sup> While supporting the "safe harbor" approach, CTBC is critical of the number of "safe harbors" proposed by the MJP Commission.<sup>142</sup> Specifically, CTBC does not feel paragraph (c)(2)<sup>143</sup> of the MJP Commission's proposed rule, which allows lawyers to engage in professional services that a non-lawyer can perform, is necessary, as it does nothing to actually clarify what conduct is permitted.<sup>144</sup>

CTBC is also critical of the ambiguous language in virtually all of the "safe harbor" provisions.<sup>145</sup> Moreover, CTBC thinks that paragraph (c)(1),<sup>146</sup> which allows attorneys to work with local co-counsel, does not provide guidance as to how much, if any, supervision is required by the local co-counsel.<sup>147</sup> CTBC also feels the MJP's paragraphs (c)(3),<sup>148</sup> (c)(5),<sup>149</sup> and (c)(6) are too ambiguous.<sup>150</sup> Finally, CTBC believes that

Lawyers and regulators must know what they are intended to mean." *Id.*

<sup>140</sup> *Id.* "The heavy lifting is not over when the ABA House of Delegates approves what the commission recommends. The ABA, the coalition and other supportive groups and individuals must then persuade the supreme courts, legislatures and bar associations of the various states, territories and possessions of the United States to adopt them." *Id.*

<sup>141</sup> See *CTBC Critique of MJPC Interim Report* (2002), at <http://www.crossingthebar.com/critiqueofinterimreport.htm> (last visited April 21, 2002) (hereinafter "*CTBC Interim Critique*").

<sup>142</sup> *Id.* CTBC feels the numerous exceptions will eventually lead to a situation where the exceptions end up swallowing the rule. *Id.* CTBC instead recommends reducing the number of "safe harbors." *Id.* This more cautious approach seems like an easier rule to implement and enforce. *Id.*

<sup>143</sup> *Nov. 2001 Draft, supra* note 107, ¶ (c)(2).

<sup>144</sup> *CTBC Interim Critique, supra* note 141, at recommendation 3.2.

<sup>145</sup> *Id.* CTBC supports a number of the "safe harbor" exceptions, but feels too many of them contain ambiguous language and will thus be unenforceable. *Id.*

<sup>146</sup> *Nov. 2001 Draft, supra* note 107, ¶ (c)(1).

<sup>147</sup> *CTBC Interim Critique, supra* note 141, at recommendation 3.1.

<sup>148</sup> *Nov. 2001 Draft, supra* note 107, ¶ (c)(3). This "safe harbor" would allow lawyers to perform work ancillary to pending or prospective litigation. See *id.* However, the proposal does nothing to clarify what is considered to be "ancillary to pending litigation." *CTBC Interim Critique, supra* note 141, at recommendation 3.3. CTBC notes that while the rule sounds logical and reasonable, more guidance is needed because not all lawyers are logical and reasonable. *Id.* However, CTBC acknowledges the difficulty in drafting clear disciplinary rules. *Id.*

<sup>149</sup> This paragraph allows a lawyer to perform transactional and other non-litigation work

the latter “safe harbor” is not only ambiguous, but may be entirely unnecessary as its content is covered by other proposed “safe harbors.”<sup>151</sup>

In a somewhat unexpected turn, given its moderate approach to MJP reform, CTBC expressed its approval of the MJP’s “admission on motion” proposal.<sup>152</sup> It did, however, recommend that the active practice requirement be no more than three years, rather than the five to seven years proposed by the MJP Commission.<sup>153</sup>

In addition, CTBC expressed its full support for the uniform pro hac vice admission proposal,<sup>154</sup> but with respect to the federal district court pro hac vice admission proposal, CTBC expressed some reservations.<sup>155</sup> Specifically, CTBC is concerned with the possibility that a lawyer from one jurisdiction would be able to permanently relocate to another state and practice solely within the federal district court system within the new jurisdiction under this proposal.<sup>156</sup> CTBC recognizes that this concern may be answered by MJP Commission recommendation 3.9.<sup>157</sup> However, CTBC is troubled by the somewhat contradictory MJP Commission recommendation 3.8, which would allow an attorney to perform legal services when authorized to do so by

that “is reasonably related to work that is performed in and has a close connection to the lawyer’s home state.” *Nov. 2001 Draft, supra* note 107. As with the other proposed “safe harbors,” this paragraph does little to explain what exactly constitutes “reasonably related,” and therefore encourages attorneys to push the line while not giving proper guidance to attorneys seeking to abide by the rules. *CTBC Interim Critique, supra* note 141, at recommendation 3.5.

<sup>150</sup> *CTBC Interim Critique, supra* note 141, at recommendation 3.6; *Nov. 2001 Draft, supra* note 107, ¶ (c)(6). This paragraph allows lawyers to provide services involving “primarily federal law, international law, the law of a foreign nation or the law of the lawyer’s home state.” *Nov. 2001 Draft, supra* note 107.

<sup>151</sup> *CTBC Interim Critique, supra* note 141, at recommendation 3.6.

<sup>152</sup> *Id.* at recommendation 4.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at recommendation 6. CTBC fully supports this proposal and stated “[t]here really is no good reason for substantial variance in the pro hac vice requirements of the states and territories of the United States.” *Id.*

<sup>155</sup> *Id.* at recommendation 6.1.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* Recommendation 3.9 states:

The ABA should adopt proposed Model Rule 5.5(e) to prohibit a lawyer from establishing an office, maintaining a continuous presence, or holding himself or herself out as authorized to practice law in a jurisdiction in which the lawyer is not admitted, unless permitted to do so by law or this rule.

*Interim Report, supra* note 108 at Recommendation 3.9.



federal law.<sup>158</sup> Therefore, CTBC suggests that the MJP Commission more clearly state its purpose and intent with regard to this proposed rule.<sup>159</sup>

Still, CTBC supports the disciplinary enforcement and reciprocal discipline recommendations made by the MJP Commission.<sup>160</sup> CTBC fully supports the MJP Commission's proposal to establish a Coordinating Committee on MJP.<sup>161</sup> CTBC also recognizes that MJP issues will continue to arise in the future, and therefore it is imperative to monitor and evaluate new MJP issues.<sup>162</sup>

## VI. CONCLUSION

When the issue of MJPs began to garner national attention, many bar associations and attorney groups reacted with overbroad and misguided solutions that failed to address the real issues at hand. Proposals such as the "driver's license" plan, while certainly simple and free of burdens and confusion, could change the landscape of law practice in this country. For example, such a plan could create fertile ground for large national firms to monopolize the market and lead to the eventual extinction of small local firms. Additionally, such proposals could affect attorney competence, as more and more lawyers will be practicing in multiple jurisdictions, without any true local ties or expertise. Supporters of such proposals dismiss those concerns by reasoning that the practice of law does not and cannot vary much from state to state. However, a New Jersey practitioner need only cross the Hudson River and enter the legal world governed by New York's CPLR<sup>163</sup> to understand just how different the practice of law can be.

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<sup>158</sup> *CTBC Interim Critique*, *supra* note 141, at recommendation 6.1. MJP Commission recommendation 3.8 states: "The ABA should adopt proposed Model Rule 5.5(d)(2) to provide that a lawyer may perform legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal law or by the law or a court rule of the jurisdiction." *Interim Report*, *supra* note 108 at Recommendation 3.8.

<sup>159</sup> *CTBC Interim Critique*, *supra* note 141, at recommendation 6.1.

<sup>160</sup> *Id.* at recommendation 7. CTBC recognizes the importance of all the states and territories coordinating their efforts to establish a smooth disciplinary process for situations where an attorney is practicing outside of their own home state. *Id.*

<sup>161</sup> *Id.* at recommendation 8. MJP Commission's recommendation 8 states, "[t]he ABA should establish a Coordinating Committee on Multijurisdictional Practice to monitor changes in law practice and the impact of regulatory reform, and to identify additional reform that may be needed." *Interim Report*, *supra* note 108 at Recommendation 8.

<sup>162</sup> *CTBC Interim Critique*, *supra* note 141, at recommendation 8.

<sup>163</sup> The CPLR is New York State's Civil Practice and Law Rules. *New York State Bar*

Simply put, an out-of-state attorney lacks the experience and knowledge about local practices and legal doctrines to adequately represent clients. The legal profession has long prided itself on accountability, and such proposals would undermine the credibility and professionalism involved with bar admission.

The ABA Ethics 2000 Commission carefully analyzed the issues, listening to a broad spectrum of suggestions and proposals, along with fears and concerns. In doing so, the ABA avoided the pitfalls of a knee-jerk reaction. The safe harbors, while not the final answer, are a step in the right direction of solving the issues that face transactional attorneys and in-house counsel in the modern legal landscape.

Having been at the forefront of MJP regulation, New Jersey's experience and knowledge can help lead the ABA further toward the right direction. The additional safe harbors proposed by the NJSBA's Committee on MJP maintain the full spirit and intent of the Ethics 2000 Commission's original four safe harbors, while also addressing the ambiguities and shortcomings of the original proposal to avoid any confusion or abuse in the future. The clarification of exactly when a transactional attorney may practice in another jurisdiction is a necessary revision to the ABA's more generic rule. Also, the NJSBA's restrictions effectively preclude attorneys from repeatedly and continuously utilizing the safe harbors and, as a result, becoming de facto permanent visitors in the state. These restrictions are yet another step in the right direction of addressing the issues concerning MJP while also protecting both local attorney and client interests.

The MJP Committee's proposal was predictable and conservative, in the sense that they followed the "safe harbor" approach first established by the Ethics 2000 Commission. However, the number of "safe harbors," as well as the "admission on motion" proposals were a significant deviation from the Ethics 2000 Commission's earlier, more moderate proposal.

These proposals were unexpected and have left the future of the MJP debate a bit hazy. The next few months will be a pivotal period, as the MJP Commission is scheduled to submit their final recommendations to the ABA House of Delegates. Those final proposals may be modified, expanded, or reduced. Yet, whatever path the MJP Commission takes, it will only be the first step. As CTBC

noted,<sup>164</sup> the real work will come afterwards in trying to convince the various state governing bodies to adopt the ABA's proposals. For this reason, the ABA would be well advised to proceed with caution with its proposals and take into account all fears and criticisms. A hasty and extreme proposal will solve little, as it will only increase the likelihood that some of the state governing bodies will not adopt the proposals. This result will only cause more confusion in the long run and will not alleviate the problems currently faced by the legal community.

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<sup>164</sup> *CTBC Critique*, *supra* note 136 at Conclusion.