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Multijurisdictional Practice for a Multijurisdictional Profession

I. INTRODUCTION

The issue of multijurisdictional practice ("MJP") concerns whether, and to what extent, lawyers can practice law in states in which they are not licensed.¹ Under current law in Nebraska and almost every other state, it may be a violation of both the ethics rules and state law for a lawyer not licensed in that state to engage in activity that constitutes the practice of law, even on a temporary basis.² This is law that is no longer practical or necessary and Nebraska should now consider modifying it.

Passing the bar in one state means that one is only licensed to practice law in that state. Disciplinary Rule 3-101(B) of the Nebraska Code of Professional Responsibility states, "A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."³ Former Model Rule of Professional Conduct 5.5 states a similar prohibition.⁴ Clearly, it is a violation of the regulations of the profession to practice law in Nebraska without passing the bar exam or being admitted on motion.⁵

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1. A.B.A. CENTER FOR PROFESSIONAL RESPONSIBILITY, CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 4 (Aug. 12, 2002), http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf [hereinafter MJP REPORT].
2. *Id.* at 8; *see also*, William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501, 1505 (2001) ("Literally read, the law in most jurisdictions is highly restrictive, with no real allowance for multi-state matters except the possibility of admission pro hac vice in litigation matters.").
3. *But see*, NEB. CODE OF PROF'L RESPONSIBILITY EC 3-9 (1996); *infra* text accompanying note 41.
4. *See* MODEL RULE OF PROF'L CONDUCT R. 5.5 (2000) (amended 2002).
5. The other way in which nonlawyers may practice in Nebraska is if they are third-year law students supervised by a lawyer admitted to the Nebraska Bar. *See* NEB. REV. STAT. § 7-101.01 (Reissue 1997).

In addition to being a violation of the ethics rules, it is also a class III misdemeanor to practice law in Nebraska without a license.⁶ Most states make the unauthorized practice of law ("UPL") a misdemeanor, although some, like South Carolina, make it a felony punishable by a \$5,000.00 fine and/or five years in jail.⁷

In 2000, the President of the American Bar Association ("ABA") appointed the Commission on Multijurisdictional Practice ("MJP Commission") to study multijurisdictional practice and to make policy recommendations to the ABA. In August 2002, the ABA adopted revised Model Rule 5.5. This revised Model Rule significantly changes the prior version of the Model Rule by explicitly permitting lawyers to practice law on a temporary basis in states in which they are not licensed.

II. CURRENT LAW & REGULATION OF MJP

Under current rules, if you are licensed to practice only in Nebraska, it might be unethical and illegal to meet with a Nebraska client in Denver in order to prepare for a trial there, even if you anticipate *pro hac vice* admission.⁸ The cases indicate that an Iowa lawyer might run into trouble if she went to Nebraska to advise a corporate client with businesses in both states on a matter of Nebraska tax law, but might be safe if she only advised that client on federal taxes,⁹ or discussed Nebraska law only on the phone from her office in Des Moines¹⁰.

6. See *id.* ("[N]o person shall practice as an attorney or counselor at law . . . unless he has been previously admitted to the bar by order of the Supreme Court of this state.").

7. See S.C. CODE. ANN. § 40-5-310 (Law. Co-op. 2002). For a chart of state UPL provisions, see <http://www.crossingthebar.com/upl-quickreference.htm>.

8. *Koscove v. Bolte*, 30 P.3d 784 (Colo. Ct. App. 2001).

9. See, e.g., *In re Peterson*, 163 B.R. 665 (Bankr. D. Conn. 1994) (holding that it is permissible for an out-of-state lawyer to advise clients on federal bankruptcy law, but not state bankruptcy law); *Cowen v. Calabrese*, 41 Cal. Rptr. 441 (Ct. App. 1964) (holding that it is not the unauthorized practice of law for an out-of-state lawyer to assist a client on matters of federal bankruptcy law). In *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963), the Supreme Court held that nonlawyers licensed by the Federal Patent Office could not be prosecuted for the unauthorized practice of law in Florida. This would apply to lawyers practicing patent law as well. See Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 713 n.25 (1995). The rule that lawyers practicing purely federal law cannot be prosecuted or disciplined for unauthorized practice was given a narrow reading in *Attorney Grievance Comm'n of Maryland v. Harris-Smith*, 737 A.2d 567 (Md. 1999), which held that "triaging" cases in order to determine if there were federal bankruptcy issues might be the unauthorized practice of law if it involved determining if there were state claims involved, even if the lawyer did not subsequently represent the client on those state claims.

10. See *Fought & Co., Inc. v. Steel Eng'g & Erection, Inc.*, 951 P.2d 487 (Haw. 1998).

The reason that many lawyers do not consider it risky to engage in some or all of this conduct is that the rules prohibiting multijurisdictional practice are not well defined and are almost entirely unenforced. State disciplinary counsel simply have more important things to do than run around trying to catch lawyers taking illicit depositions.¹¹ One commentator referred to this as the “don’t ask, don’t tell” policy for multijurisdictional practice,¹² while another calls it “sneaking around.”¹³ Nevertheless, the threat of enforcement of both the ethical rules and the laws prohibiting the unauthorized practice of law exists.¹⁴ More importantly, even if the threat is so small that it can safely be ignored, lawyers must acknowledge the fact that, as the MJP Commission put it, “keeping antiquated laws on the books breeds public disrespect for the law,” and that this is “especially so where the laws relate to the conduct of lawyers, for whom there is a professional imperative to uphold the law.”¹⁵

Although state disciplinary counsel tend not to be interested in enforcing these rules, clients occasionally find them useful. In 1998, in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*,¹⁶ lawyers from a New York firm that represented sister corporations in New York and California spent a lot of time in California preparing for a California arbitration. After the case settled, the client sued the attorneys for malpractice. When the lawyers countersued for their fees, which were in excess of one million dollars, the clients argued that the fees should be forfeited because the lawyers violated California’s Unauthorized Practice of Law statute by practicing in a state where they were not licensed.¹⁷ The clients won, the court forfeited the fees, and it sent shock waves through the legal community. Other courts around the country have reached similar conclusions.¹⁸ The concern that these cases raised prompted the ABA in 2000 to form the MJP Commission.

11. See Barker, *supra* note 2, at 1506.

12. Scott Brede, *Small Hope Remains for UPL Change in Connecticut*, CONN. L. TRIB., Aug. 8, 2002, available at <http://www.law.com>.

13. Wolfram, *supra* note 9, at 665.

14. See MJP REPORT, *supra* note 1, at 12 (“Irrespective of the low risk of enforcement, lawyers and law firms take jurisdictional restrictions seriously.”).

15. *Id.*

16. 949 P.2d 1 (Cal. 1998).

17. In a recent case before the Supreme Court of Virginia, a notice of appeal from a six million dollar judgment was held invalid under court rules because it was signed by a lawyer admitted *pro hac vice*, but not a member of the Virginia Bar. A Virginia lawyer subsequently signed an amended notice of appeal, which was also rejected because “an amendment presupposes a valid instrument as its object. Because the . . . notice of appeal was invalid, there was nothing to amend.” *Wellmore Coal Corp. v. Harman Mining Corp.*, 568 S.E.2d 671, 673 (Va. 2002).

18. See generally, Pamela A. McManus, *Have Law License; Will Travel*, 15 GEO. J. LEGAL ETHICS 527, 528 (2002); Barker, *supra* note 2.

III. POLICY CONSIDERATIONS

In order to decide what should be the parameters of ethical practice in a state where a lawyer is not licensed, we have to consider some very basic issues about the nature of law practice in the twenty-first century.

Historically, the state supreme courts have regulated the lawyers in their states.¹⁹ This was originally a function of local courts needing to ensure the competence of lawyers who practice before them.²⁰ Yet, these rules apply to all lawyers, including transactional lawyers who never appear in court. Many states also write their own portion of the bar exam, thereby determining what lawyers should know in that state. For these lawyers, state regulation is valuable insofar as it tends to promote familiarity with state law. Membership in a state bar also encourages participation in local bar organizations, which in turn fosters attention to law reform and *pro bono* activity.²¹

States not only regulate their own lawyers, they also set the criteria for admission to the bar, which most states take very seriously.²² The MJP Commission found that “[i]n general, states have greater confidence in their own admissions processes than in that of sister states.”²³ In New Jersey, passing the bar is not even enough—there is also the “bona fide office rule.” In order to practice law in New Jersey, the lawyer has to maintain what is called a “bona fide office” in the state.²⁴

As part of the admissions process, state supreme courts have the final say in the character and fitness aspect of bar admission, and the standards for character and fitness vary somewhat from case to case and from state to state. In Texas, scrutiny of future bar applicants begins in the first year of law school, when students are required to

19. State regulation of lawyers has existed for more than two centuries. MJP REPORT, *supra* note 1, at 6.

20. *See id.*

21. Approximately two-thirds of the states require that lawyers be members of the state bar in order to practice law in that state (this is known as having an integrated or mandatory bar). *See* DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 63 (3d ed. 2001). Nebraska is among those states requiring bar membership. *See In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937).

22. *See, e.g., Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 171 (2d Cir. 1966) (en banc) (stating that “[t]he disparity in requirements for admission to the bar gives a state maintaining high qualification standards some interest in seeing that its residents do not take action even on a federal right solely on the advice of a lawyer from another state”).

23. MJP REPORT, *supra* note 1, at 15.

24. New Jersey Court Rule 1:21-1(a) requires that New Jersey lawyers maintain a bona fide office for the practice of law in New Jersey regardless of where they are domiciled. This rule is currently under review by the New Jersey Supreme Court.

give the Board of Law Examiners access to all of the records deemed relevant to their moral character and fitness.²⁵ Yet, despite the state-by-state determination of character and fitness to practice law, states tend to evaluate the character and fitness of bar applicants in similar ways. For example, the types of conduct that the Nebraska Supreme Court has viewed as indicating inadequate character and fitness for law practice is fairly typical and reflected in cases from other states. In its most recent cases, the Nebraska Supreme Court upheld a denial of admission to applicants who exhibited behavior ranging from "inappropriate"²⁶ to criminal²⁷ while in law school. Failure to disclose information on a bar application is also grounds for denial of admission in Nebraska.²⁸ Other states have cited similar grounds for denying admission on the basis of the applicant's character and fitness.²⁹ Thus, there is no reason to think that if Nebraska allowed out-of-state lawyers to practice temporarily in Nebraska, the people of Nebraska would be put at risk of falling victim to lawyers of lesser moral character.

In contrast to the way in which lawyers are regulated, the reality now is that most lawyers do not limit their practices to one state and to the laws of one state. Advances in communication and mobility have made interstate, and even global, practice much more common and necessary. If a client's business spans more than one state, then it is obvious that the advice that client will need will involve the laws of more than one state.³⁰ It is expensive, time-consuming, impractical, and inefficient to hire local counsel every time a client needs services out of state.³¹ Although lawyers routinely hire local counsel, it is a waste of resources if the out-of-state lawyer is competently doing all of the work. If the local counsel is required to supervise out-of-state lawyers and participate in the legal matter, there is substantial time and effort involved in bringing a local lawyer up to speed on an ongoing matter. If, on the contrary, hiring local counsel is a mere formality, then the expense is not justifiable as being in the client's best interest. Moreover, because the current rules are ill-defined, lawyers

25. See McManus, *supra* note 18, at 530-31.

26. *In re Converse*, 258 Neb. 159, 602 N.W.2d 500 (1999).

27. See *In re Majorek*, 244 Neb. 595, 508 N.W.2d 275 (1993).

28. See *id.* at 604 (citing cases from many states that hold that "false, misleading, or evasive answers to bar application questions may be grounds for a finding of lack of requisite character and fitness").

29. See, e.g., *In re Hanus*, 627 N.W.2d 223 (Iowa 2001) (denying admission in Iowa to an applicant who had previously been denied admission in Nebraska for lack of character and fitness); *In re Widdison*, 539 N.W.2d 671 (S.D. 1995) (denying applicant admission because of plagiarism and honor code violations during law school).

30. See Wolfram, *supra* note 9, at 677-78 ("the practice of law has mimicked the increasingly multijurisdictional nature of the business of . . . clients").

31. See *id.*; MJP REPORT, *supra* note 1.

do not know when it is necessary to hire local counsel, as the *Birbrower* case demonstrates.³² Thus, even if the bench and bar of Nebraska believe that local counsel should be hired for certain types of legal tasks performed by attorneys licensed out of state, such as litigation, those tasks must be more clearly defined so that lawyers and clients have notice of when local counsel is required.

Not only is it increasingly necessary to advise clients on the laws of many states, it is also easier to do so than it has ever been. One can look up the laws and cases of every state and many countries just by sitting in front of a computer. Federal law has expanded to the point that many lawyers specialize in one federal statutory scheme, like bankruptcy or ERISA, and their knowledge is equally useful and applicable in every state.³³ Even lawyers who only serve in-state clients are often required to become experts in the federal and administrative law aspects of their practices.³⁴ This specialized knowledge in turn offers the opportunity to expand one's law practice, and it makes lawyers more attractive to out-of-state clients. The advent of legal advertising, particularly on the internet, has also increased demand for interstate practice as clients easily learn about out-of-state lawyers and their areas of expertise.³⁵

IV. UPL VS. MJP

If the first commitment of lawyers is to serve their clients competently and ethically, and if one of the main purposes of regulating lawyers is likewise to prevent clients and potential clients from becoming victims of incompetent and unethical conduct, then we must consider whether it is in the interest of clients to prohibit interstate legal practice. In considering that question, it is important to distinguish and treat separately two issues that tend to get conflated. First, there is the MJP question: should lawyers admitted in one jurisdiction be permitted to practice law in another? The prohibition on MJP prevents licensed, practicing lawyers who have passed the bar in one state from

32. See *supra* note 16 and accompanying text.

33. See Attorney Grievance Comm'n of Maryland v. Harris-Smith, 737 A.2d 567 (Md. 1999) (bankruptcy attorney may practice bankruptcy law exclusively before the federal court in the state in Maryland where she was not licensed, but lawyer engaged in the unauthorized practice of law by considering state law when she prescreened bankruptcy clients in Maryland to determine if their cases involved only federal bankruptcy law).

34. See Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 342 (1994).

35. See *id.* at 343; David A. Gerregano, Annotation, *What Constitutes "Unauthorized Practice of Law" by Out-of-State Counsel*, 83 A.L.R.5th 497 (2000); Illinois State Bar Ass'n, Advisory Op. on Prof'l Conduct 94-02 (1994) (solicitation of personal injury clients by letter by out-of-state attorney constitutes the unauthorized practice of law).

practicing law in other states.³⁶ Second, there is the UPL question: should nonlawyers be permitted to practice law, or to do tasks that would, if performed by a lawyer, be considered legal tasks?

It may seem obvious that these are different issues, yet there is considerable overlap in application of both provisions. The UPL statutes generally prohibit practicing law without a license. "Without a license" can mean without any license, or without a license to practice in that particular state. In Nebraska, for example, the UPL statute states that "no person shall practice as an attorney or counselor at law . . . unless he has been previously admitted to the bar by order of the Supreme Court of this state."³⁷ Former Model Rule 5.5 and Nebraska Code DR 3-101(B) prohibit practicing law in violation of the regulation of the profession, which has been taken to make reference to the UPL statutes prohibiting practicing law without a state license.³⁸ Thus, the UPL statutes, which are intended to prevent nonlawyers from practicing law, are referenced in the ethics codes in such a way as to prohibit multijurisdictional practice by licensed lawyers. But this overlap between the ethics rules and the UPL laws masks the considerable difference, from a policy perspective, between nonlawyers practicing law, and lawyers practicing law in states in which they are not licensed.

Statutes prohibiting the unauthorized practice of law are primarily intended to protect the public by preventing nonlawyers from holding themselves out as lawyers.³⁹ Although reasonable people can disagree about the motivation behind laws that make it a crime for a competent paralegal to write a simple will, most people will agree that, in general, the UPL laws help to protect the public from charlatans, incompetents, and over-eager, first-year law students. Ethics rules reinforce this policy by prohibiting lawyers from aiding nonlawyers in the practice of law.⁴⁰ The Ethical Considerations for Canon 3 of the Nebraska Code of Professional Responsibility clearly indicate that the main concern of the Canon is to prevent nonlawyers from practicing law in Nebraska, not to prevent out-of-state lawyers from practicing in Nebraska. Eight of the nine Ethical Considerations address the issue

36. The rule is an outgrowth of the tradition of local practice by, and local discipline of, lawyers: "It is a matter of law, not of ethics, as to where an individual may practice law. Each state has its own rules." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 316 (1967).

37. NEB. REV. STAT. § 7-101 (Reissue 1997).

38. See discussion of *Birbrower*, *supra* note 16 and accompanying text.

39. See NEB. REV. STAT. § 7-101 (Reissue 1997); *Waite v. Carpenter*, 1 Neb. Ct. App. 321, 496 N.W.2d 1 (1992); *Nebraska ex rel. Wright v. Barlow*, 131 Neb. 294, 302, 268 N.W. 95, 98-99 (1936).

40. See NEB. CODE OF PROF'L RESPONSIBILITY DR 3-101(A) (1996); MODEL RULES OF PROF'L CONDUCT R. 5.5(b) (2002); see also Russell G. Donaldson, Annotation, *Disciplinary Action Against Attorney for Aiding or Assisting Another Person in Unauthorized Practice of Law*, 41 A.L.R.4th 361 (1985).

of nonlawyers practicing law. Only EC 3-9 addresses multijurisdictional practice, and it recognizes that it is in the public interest to allow lawyers to cross state lines:

Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he or she is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his or her client or upon the opportunity of a client to obtain the services of a lawyer of the client's choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.⁴¹

Thus, the Nebraska Code already acknowledges that the public policy benefits of prohibiting multijurisdictional practice are minimal and much less significant than prohibiting the practice of law by nonlawyers.

New and proposed regulations in some states make the distinction between nonlawyers practicing law, on the one hand, and lawyers engaged in multijurisdictional practice, on the other. In Michigan,⁴² Rhode Island,⁴³ and Virginia,⁴⁴ out-of-state lawyers practicing temporarily are not subject to the UPL laws. In California, a bill was recently passed that enhances the penalties for UPL by nonlawyers.⁴⁵ In a similar vein, Illinois is toughening its UPL laws against nonlawyers while it considers amending its Rule 5.5 to allow multijurisdictional practice by lawyers.⁴⁶

In 2002, ABA President Alfred P. Carleton recommended the appointment of a Task Force on the Model Definition of the Practice of Law. This Task Force was created in response to an increase in nonlawyers doing what might be considered legal tasks, and the associated risks that this poses to clients. The Task Force's report makes a clear distinction between those risks, and the risks associated with multijurisdictional practice.⁴⁷

41. NEB. CODE OF PROF'L RESPONSIBILITY EC 3-9 (1996).

42. See MICH. COMP. LAWS. ANN. § 600.916 (West 2002); see also, MJP REPORT, *supra* note 1, at 10.

43. See R.I. GEN. LAWS § 11-27-13 (2002) (discussing unlawful practice of law).

44. See VIRGINIA STATE BAR ASS'N, 2002 PROFESSIONAL GUIDELINES, UNAUTHORIZED PRACTICE RULES 157 (2002), available at www.vsb.org/profguides/upr.pdf (last visited Mar. 19, 2003).

45. S.B. 1459, 2002 Leg., Reg. Sess. (Cal. 2002).

46. See STANDING COMM. OF LEGAL EDUCATION, ADMISSION, AND COMPETENCE, COMMENTARY IN SUPPORT OF PROPOSED CHANGES TO RULE 5.5 OF THE ILLINOIS RULES OF PROF'L CONDUCT, www.illinoisbar.org/mjp2.html (last visited Mar. 19, 2003).

47. The Task Force noted that "the adoption of a definition of the practice of law is a necessary step in protecting the public from unqualified service providers and in eliminating qualified providers' uncertainty about the propriety of their conduct in

On the issue of multijurisdictional practice, the ABA recently adopted revised Model Rule 5.5. This rule is part of a package of new rules that together bring common sense and uniformity to the issues surrounding multijurisdictional practice. The package includes not only rules about when lawyers licensed in one state may temporarily practice in another, but also rules about reciprocal discipline⁴⁸ and admission on motion,⁴⁹ as well as recommendations concerning disciplinary enforcement.⁵⁰

V. REVISED MODEL RULE 5.5

Model Rule 5.5 would permit lawyers to practice law temporarily in a state in which they are not licensed under certain circumstances. The Model Rule as revised by the ABA in 2002 is as follows:

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
 - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

any particular jurisdiction." A.B.A. TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW ET AL., REPORT TO THE HOUSE OF DELEGATES 13, http://www.abanet.org/cpr/model-def/taskforce_rpt_429.pdf (last visited June 17, 2003) (emphasis added). The Task Force initially proposed a model definition of the practice of law, but later decided to recommend that every jurisdiction adopt its own definition with the ABA providing only a framework. Among the principles included in that framework was a charge to the states to consider whether lawyers licensed in other jurisdictions should be regulated separately from nonlawyers. *Id.* The Nebraska Code of Professional Responsibility contains the following definition: "Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer." NEB. CODE OF PROF'L RESPONSIBILITY EC 3-5 (1996). Professional judgment is defined as lawyers' "educated ability to relate the general body and philosophy of law to a specific legal problem of a client." *Id.* The Nebraska Supreme Court has stated that it alone has the power to define the practice of law. *See State ex rel. Hunter v. Kirk*, 33 Neb. 625, 627-28, 276 N.W. 380, 382 (1937).

48. The ABA adopted amendments to Rules 6 and 22 of the *Model Rules of Lawyer Disciplinary Enforcement* to ensure reciprocal discipline. *See* MJP REPORT, *supra* note 1, at 36. The stated purposes of the Committee in making this recommendation was as follows: "Effective discipline . . . requires that, when a lawyer engages in misconduct outside the jurisdiction in which the lawyer is licensed, the lawyer be sanctioned appropriately in the jurisdiction in which the lawyer is licensed to practice law." *Id.* at 38.

49. *See id.* at 49.

50. *See id.* at 39.

(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.⁵¹

Under Rule 5.5(c)(1), an out-of-state lawyer can practice law if the practice is temporary and in association with an admitted lawyer. Under 5.5(c)(2), temporary practice is allowed if the lawyer has been admitted *pro hac vice*, or anticipates *pro hac vice* admission. Rule 5.5(c)(3) allows temporary multijurisdictional practice if it relates to a matter that is in some form of alternative dispute resolution and is reasonably related to the lawyer's practice. Rule 5.5(c)(4) is very broad and only requires that the temporary practice arise out of or be reasonably related to the lawyer's practice in his home state. Finally, Rule 5.5(d) deals with the special cases of corporate counsel, government lawyers and services that the lawyer is authorized by federal law to provide.

The MJP Commission, in support of its rule, explained that they:

sought for the proper balance between the interests of a state in protecting its residents and justice system, on the one hand; and the interests of clients in a national and international economy in the ability to employ or retain counsel of choice efficiently and economically.⁵²

Revised Rule 5.5 passed with little debate or controversy in the ABA House of Delegates, and was, prior to its adoption, endorsed by the Conference of State Supreme Court Chief Justices.⁵³

51. *Id.* at 18.

52. *Id.* at 4.

53. See MULTIJURISDICTIONAL L. PRAC. NEWS, Aug. 2002, available at www.cros-singthebar.com/news802.htm (last visited Mar. 19, 2003).

It is instructive to compare this rule with the *Restatement (Third) of the Law Governing Lawyers'* approach to multijurisdictional practice. The *Restatement* takes a simpler approach under section 3(3), allowing multijurisdictional practice "to the extent that the lawyer's activities arise out of or are otherwise reasonably related" to the lawyer's practice in the state in which he is licensed, or to the lawyer's federal practice. Like the Model Rule, the *Restatement* makes it clear that it is treating multijurisdictional practice as completely separate from the issue of unauthorized practice by nonlawyers, which it treats under a different section.⁵⁴

As Nebraska and other states consider this new Model Rule, there are two phrases that will likely provoke the most controversy. The first is Rule 5.5(c)(4), which is drawn from the *Restatement* and allows any type of temporary practice that *arises out of* or is *reasonably related* to the lawyer's practice in the lawyer's home state. Some guidance, but no definition, is provided in the comments to the Model Rule and the *Restatement* for the phrase "reasonably related." Comment 14 to Model Rule 5.5 indicates that a matter can be "reasonably related" to the lawyer's practice by virtue of who the client is, the nature of the particular legal matter, or the nature of the lawyer's expertise:

Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be a resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.⁵⁵

The breadth and ambiguity of the phrase "reasonably related," nestled within provisions dealing with more specific types of multijurisdictional practice, indicates that the drafters did not intend to retain the general prohibition against multijurisdictional practice while providing a few safe harbors, but rather intended a wholesale relaxation of MJP prohibitions. The "reasonably related" language in subpara-

54. See RESTATEMENT OF THE LAW GOVERNING LAWYERS § 3 cmt. a (2000); *see also id.* § 4 ("A person not admitted to practice as a lawyer . . . may not engage in the unauthorized practice of law, and a lawyer may not assist a person to do so.").

55. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 14 (2002).

graphs (c)(2)-(4) could potentially allow lawyers to do most everything except open up an office in a state in which they are not licensed.⁵⁶

If the “reasonably related” language imposes few limits on the nature of, or reasons for, out-of-state practice, then we must look elsewhere for limits. This leads to the second potentially controversial provision in the new Model Rule 5.5—the requirement that the out-of-state practice be “on a temporary basis.”⁵⁷ The definition of “temporary” is addressed by comment 6 to Rule 5.5, which states:

There is no single test to determine whether a lawyer’s services are provided on a “temporary basis” in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be “temporary” even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.⁵⁸

Like the “reasonably related” language, the requirement that multijurisdictional practice be “on a temporary basis” is defined broadly, and the language of comment 6 seems to allow everything short of permanence. Like the “reasonably related” provision, this provision seems to prohibit the establishment of a permanent office in a state in which a lawyer is not licensed and from which the lawyer holds herself out as licensed in that state (conduct that is specifically prohibited by 5.5(b)(1) and (2)). How close to that prohibited conduct a lawyer may approach is left purposefully vague.⁵⁹

The vagueness of this language should not be fatal to the rule, even for those who view these provisions as too broad. Nebraska could choose to make the language more precise and less open-ended. Even if this Model Rule were adopted as written, this language would be interpreted and limited through the opinions of ethics committees and rulings of the state supreme court. Nevertheless, it is likely that this ambiguous language will be, and should be, at the center of the debate about adopting Rule 5.5.

VI. RECIPROCITY

One unusual aspect of a rule about multidisciplinary practice, as opposed to most other ethics rules, is that it is not addressed directly to the lawyers admitted in the state in which it is adopted. A state

56. *See id.* R. 5.5(b)(1).

57. The exception to the requirement that the practice be temporary is when the practice falls specifically under section (d) which deals with corporate counsel, government lawyers and lawyers practicing purely federal law.

58. MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 6 (2002).

59. North Carolina recently revised its Rule 5.5 so that it is substantially similar to Model Rule 5.5, except it deleted the word “temporary” from the rule and placed it in the comment accompanying the rule. N.C. RULES OF PROF’L CONDUCT R. 5.5, cmt. 6 (2003), available at http://www.ncbar.com/home/line_rules.asp (last visited Mar. 19, 2003).

that adopts a rule permitting multijurisdictional practice benefits lawyers from every other state but its own. If Nebraska adopts revised Rule 5.5, lawyers from other states can practice in Nebraska, but those other states are not thereby required to allow Nebraska lawyers to practice there. Some may question why Nebraska should grant privileges to out-of-state lawyers, who have the potential to economically disadvantage Nebraska lawyers, without receiving similar treatment in return.

One way to address this issue is for Nebraska to opt to do nothing and hope to position itself as the free-rider when other states adopt Rule 5.5. This would allow Nebraska lawyers to practice elsewhere, but prohibit out-of-state lawyers from practicing in Nebraska. In this way, Nebraska lawyers could obtain a double advantage by being free to practice in other states while protecting their practice monopoly at home. The more productive way to address this concern, however, is through reciprocity rules.

All indications are that this question of reciprocity will be an important issue as Nebraska considers this rule. If the bar recommends adoption of this rule, it may feel strongly that any state whose lawyers we allow to practice here should reciprocate in kind and allow Nebraska lawyers to practice in their states under the same terms. The Nebraska Special Committee on Multiple Jurisdictional Practice, which was formed in response to the ABA's request for comments from the states as it studied Model Rule 5.5, recommended adding a provision to a new revised Model Rule 5.5 that stated that the rule would apply "only when the lawyer who seeks to avail himself or herself of its protection is admitted to practice in a jurisdiction that has adopted a rule that is the same or substantially similar."⁶⁰

The ABA anticipated this issue and has tried to encourage uniform adoption of revised Rule 5.5 and minimize this free-rider problem with a series of related rules. Two of these rules deserve mention. First, revised Model Rule 8.5 provides that a lawyer practicing in a jurisdiction in which she is not admitted is subject to that jurisdiction's disciplinary rules, as well as the rules of the jurisdiction in which the lawyer is licensed.⁶¹ The problem with this rule is that there is not much that the disciplinary system in one state can do to a lawyer who is not licensed there, apart from prohibiting that lawyer from practicing there again or becoming a member of its bar.

For that reason, the ABA also supports a system of reciprocal discipline, whereby a lawyer who is disciplined by one state must alert the

60. Memorandum to NSBA Ethics Comm. from Special Comm. on Multiple Jurisdictional Practice, May 11, 2001 (on file with author).

61. See *supra* note 46 and accompanying text. The Nebraska Code of Professional Responsibility, because it is based on the *Model Code*, does not contain this provision.

state in which the lawyer is licensed. The lawyer then has the opportunity to show cause why she should not be disciplined by the home state.⁶² Many states already exercise reciprocal discipline, aided by the National Lawyer Regulatory Data Bank, which collects data on lawyer discipline.⁶³ These provisions together may make states more willing to allow out-of-state lawyers to practice law because they provide some assurance that those lawyers will be subject to the disciplinary authority in their home state for unethical conduct anywhere.

VII. ALTERNATIVE APPROACHES TO MJP

The ABA has come up with an approach to multijurisdictional practice that is both sensible and in the public interest. Many states are currently considering adopting revised Model Rule 5.5.⁶⁴ If the lawyers of Nebraska feel that this rule is too radical, there are other ways to deal with this issue. One way is through a compact with certain states. For example, Oregon, Idaho, and Washington have created a compact whereby lawyers admitted in one of those jurisdictions can be admitted on motion to the other states if they have three prior years of practice.⁶⁵ The Vermont Supreme Court and the New Hampshire Supreme Court recently adopted less rigorous admission on motion rules specifically for each other's lawyers.⁶⁶ Thus, one possible approach that Nebraska could take would be to create such a compact with neighboring states, perhaps Iowa, Minnesota, South Dakota, Colorado, Kansas, and Missouri.

The problem with such compacts is that they are defined by geography while law practice is not. Moreover, admission on motion, no matter how easy, still takes time and effort. In many states, the requirements for getting and maintaining admission on motion are burdensome and time consuming because they often include extra fees,⁶⁷

62. See MODEL RULES OF LAWYER DISCIPLINARY ENFORCEMENT R. 22. (2002). The Model Rule on Admission by Motion is intended to create uniformity in this practice. See *supra* note 47 and accompanying text.

63. See MJP REPORT, *supra* note 1, at 7-8.

64. See generally ETHICS 2000 AND MJP REVIEW STATUS CHART, http://www.abanet.org/cpr/jclr/jclr_home.html (last visited Mar. 19, 2003). Colorado, Nevada, and North Carolina have already adopted rules that allow out-of-state lawyers to practice in their jurisdictions. *Id.*

65. See OR. S. CT. R. 15.05 (2002).

66. See VT. S. CT. R. 7 (2002), available at <http://www.crosingthebar.com/news103.htm> (last visited Mar. 19, 2003); see also N.H. S. CT. ORDER AMENDING N.H. S. CT. R. 42, <http://www.state.nh.us/judiciary/supreme/orders/20021011.htm>, app. U (last visited Mar. 19, 2003).

67. Fees for admission on motion range from \$200.00 (Wyoming) to \$1500.00 (Alaska, Oklahoma, and Virginia). See BAR ADMISSION FEES, www.abanet.org/legaled/publications/compguide/chart11.pdf (last visited Mar. 19, 2003).

continuing legal education ("CLE") requirements,⁶⁸ and even the requirement that the member maintain an office in the state.⁶⁹ Nebraska has a very simple admission-on-motion process, no CLE requirements, and no state office requirements.⁷⁰ Yet the problem remains that a lawyer practicing in another state may not be able to predict whether a current or future client is going to need that lawyer to travel to Nebraska to do legal work. By the time the lawyer finds out, it may be too late, and still expensive, to seek admission on motion for the purpose of serving that client.⁷¹

What states should be most concerned with is not what is best for lawyers, but what is best for clients, which is to prevent incompetent and unethical conduct by in-state and out-of-state lawyers alike. Some have suggested permitting multijurisdictional practice, but requiring out-of-state lawyers to register with the office of the counsel for discipline. Ohio allows full-time corporate counsel to obtain a Certificate of Registration in lieu of becoming a fully licensed member of the Ohio bar.⁷² In Nevada, which has already adopted an MJP rule that is similar to revised Model Rule 5.5, the supreme court requires that, in some circumstances, out-of-state lawyers practicing in Nevada file a yearly report and pay a \$150 registration fee.⁷³ Oregon requires that all members of the bar carry malpractice insurance.⁷⁴ This kind of oversight of out-of-state lawyers provides a good method for keeping track of lawyers who are not licensed in the state, with the corresponding incentive for those lawyers to conduct themselves appropriately.

If the Nebraska Supreme Court adopts Model Rule 5.5, the court and the bar would then need to persuade the Unicameral to change Nebraska's UPL statute to exclude out-of-state lawyers practicing temporarily and in accordance with Rule 5.5. Common sense dictates that the law regulate the unauthorized practice of law by nonlawyers separately.

68. Forty states, of which Nebraska is not one, currently have CLE requirements. See <http://westlegaledcenter.com>. Some of these states require CLE for admission on motion. See FLA. STAT. ANN. BAR R. 6-5.3 (West 2002); OHIO S. Ct. R. 10 (2002).

69. New Jersey, Virginia, and Michigan all require that members of their state bar maintain an office in the state. See www.vbbe.state.va.us/motionlist.html (last visited Mar. 19, 2003) (Virginia); www.courts.Michigan.gov/supremecourt/Bdoflawexaminers/courtrules.htm#Rule5 (last visited Mar. 19, 2003) (Michigan).

70. See NEB. S. Ct. R. 5. (2001).

71. The fee in Nebraska for admission on motion ranges from \$ 650.00 to \$ 900.00.

72. See ED RODRIGUEZ, CORPORATE COUNSEL STATE BAR ADMISSION REQUIREMENTS ANALYSIS, <http://www.acca.com/practice/mjp.php> (May 28, 2002); see also VA. S. Ct. R. 1A:5 (Proposed Rule 2002) (proposing a registration requirement for unlicensed corporate counsel).

73. See NEV. S. Ct. R. 189.1 (2002)

74. See OR. REV. STAT. § 9.080(2) (2002).

It is important to keep in mind that there is no concrete evidence that restricting multijurisdictional practice is a way to protect the public. Multijurisdictional practice is in no way an invitation to incompetence. A lawyer practicing in a "foreign" state would be under the same duty to serve her client competently as a lawyer licensed in that state would be. It is true that a lawyer from California who does some work in Nebraska for the Nebraska subsidiary of its California corporate client may not be as familiar with the local court rules and procedures. It is also true, however, that a person who moves across the river from Omaha to Council Bluffs should be permitted, if she wants, to ask the Nebraska lawyer who previously drafted a will, to draft a codicil. Under both of these circumstances, the duty of competence would require that the lawyer become familiar with the relevant law, which is (often) fairly easy to do with a computer and minimal research skills.⁷⁵ If it is not so easy for the lawyer to familiarize herself with local law, and the lawyer does not act accordingly by either declining the representation or advising the client of the limits on representation, that lawyer could be subject to discipline and potentially liable for malpractice.⁷⁶

It is the legal profession itself that defines the lawyer-client relationship as involving a strong bond of trust between lawyer and client, based on the fiduciary duty owed by an agent. It is a duty that involves "(n)ot honesty alone, but the punctilio of an honor the most sensitive."⁷⁷ Because of the strength of that bond and the lengths to which the profession goes to protect it (in the form of rules about confidentiality and conflicts of interest, for example), clients are encouraged to develop strong relationships through the revelation of confidential information and in-depth discussion of the client's legal, and sometimes personal, matters. It is a strange thing to say that this bond can be broken against both the client's and lawyer's wishes, and for no articulable public policy rationale, by the mere fact that the client decided to move across the river. What we do know is that if a lawyer is representing a client outside of the jurisdiction in which the lawyer is licensed, it is because the client wants it. That must be the starting point for determining the circumstances under which, despite the client's desires, the state is willing to say that engaging that lawyer may not be in the client's best interests.

Some lawyers view any change in the current law as a very slippery slope. There is a fear that this is the first step towards national licensing of attorneys. Although this may in fact turn out to be a first

75. In fact, state rules and procedures are becoming more and more uniform, in part because of the influence of federal rules, as Nebraska's recent adoption of notice pleading illustrates. See NEB. REV. STAT. § 25-801.01 (Cum. Supp. 2002).

76. See Wolfram, *supra* note 9, at 698.

77. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.).

step, it does not appear to be the ABA's intention. It is noteworthy that, at the same meeting where revised Model Rule 5.5 was adopted, the ABA House of Delegates purposefully retained its Model Rule on Admission on Motion, which requires that, in order to be admitted on motion, a lawyer must have been practicing for five of the previous seven years, and must have attended an ABA accredited school.⁷⁸ So, the ABA is by no means abandoning state licensing of lawyers, or suggesting that once a lawyer is admitted to any state bar, she can roam freely offering her services.⁷⁹

In fact, the new Model Rule 5.5 is very careful to state in its opening provisions that lawyers cannot set up an office in a state in which they are not licensed or in any way hold themselves out as members of the bar. This prevents the "race to the bottom," where someone travels to a state to take a bar examination that is considered easy, and then, for example, opens an office in San Francisco.⁸⁰ On the other hand, given the mobility of lawyers and clients alike and the way in which it is changing professional practice,⁸¹ it may eventually be in everyone's interest to have a system of national licensing. But that is a question for a later date.

VIII. CONCLUSION

It is really past time to deal with this issue. The fact is that lawyers are traveling all over the country practicing law, many either ignorant of, or simply in disregard of, the prohibition against this

78. See MJP REPORT, *supra* note 1, at 49 (Recommendation 7, Admission on Motion).

79. The MJP Commission acknowledged some of the potential problems with a broader rule that entirely eliminated jurisdictional boundaries to law practice. These include:

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

Id. at 16.

80. The proposed Rule on Admission on Motion, however, does open up this possibility. It would allow a lawyer who has practiced for five to seven years in one state to waive into any other state. This could lead lawyers to join every state bar after the initial five to seven year period. Of course, this is expensive and the states could offer their own disincentives to that strategy, such as stringent CLE requirements, the "bona-fide office rule" which exists in New Jersey, *pro bono* obligations, and so forth.

81. See Duncan T. O'Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 SETON HALL L. REV. 678 (1986).

conduct. To be anti-competitive about this will probably be useless, since modern technology and mobility are going to continue to foster multijurisdictional practice. It is likely that the reason that revised Model Rule 5.5 passed so easily in the ABA House of Delegates is that the delegates realized that the new rule accurately reflects what is already going on across the country, and that the quality of representation does not appear to be affected by it. As Charles Wolfram put it in 1995, "[f]or a growing percentage of practitioners, . . . law practice has become a career consisting of collecting frequent-traveler awards as lawyers criss-cross the country and globe to serve their clients' legal needs."⁸² Protectionism, even for those who think it is a good thing, is no longer a viable option because multijurisdictional practice has already arrived. Wayne Positan, the chair of the ABA's MJP Commission, put it well in talking about lawyers in New Jersey, his home state. New Jersey is perhaps the most protectionist of all the states because of what New Jersey lawyers perceive to be the barbarians at its gates—New York and Philadelphia lawyers. As Mr. Positan said, "If our lawyers are worried that [those lawyers] are going to come in and eat our lunch, guess what? They already ate it."⁸³

The multijurisdictional practice question is one that highlights the broader issue of whether Nebraska should adopt the *Model Rules of Professional Conduct*. One of the goals of the *Model Rules*, including its latest revisions, is to promote uniformity in the ethics rules of the fifty states.⁸⁴ The existence of multijurisdictional practice, and the recognition that multijurisdictional practice is here to stay, reinforces the need for such uniformity. Because lawyers now move among the states practicing law, uniformity in the ethics rules of the states enhances the ability of lawyers to learn and follow the rules, while it also promotes effective and equal enforcement of those rules.

82. Wolfram, *supra* note 9, at 669.

83. Jill P. Capuzzo, *Lawyers Want Their Day in Court*, N.Y. TIMES, Sept. 1, 2002, at NJ14.

84. See A.B.A. CENTER FOR PROFESSIONAL RESPONSIBILITY, REPORT OF THE COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT, at xi (Nov. 2000).