MULTIJURISDICTIONAL PRACTICE REGULATIONS GOVERNING ATTORNEYS CONDUCTING A TRANSACTIONAL PRACTICE

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Multijurisdictional practice has become the norm, rather than the exception. Professor Needham analyzes how the increase in multijurisdictional practice is affected by various legal regulations and how these regulations need to be changed to provide for greater ease in multijurisdictional practice. Noting that other professions allow "consultants" to work throughout the United States without geographic restrictions, Professor Needham comments on how the proposals initiated by the American Bar Association's (ABA's) Multijurisdictional Practice Commission and the ABA Ethics 2000 Commission present an opportunity for change. While wholesale changes are just beginning to occur, many states have begun to follow the trend to regularize, acknowledge, and permit multijurisdictional practice.

I. INTRODUCTION

There are a variety of vantage points from which to view attorney licensing regulations. Choosing the perspective from which to view those provisions goes a long way toward predicting which issues stand out in high relief, and which recede in importance. From the perspective of the licensing authorities in each state,[1] there is a certain logic in insisting that

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In addition to valuable comments received from the participants during the symposium at the University of Illinois, the author also acknowledges with thanks comments during the March 2000 conference at the Louis Stein Center for Law and Ethics at Fordham University School of Law cosponsored by the American Bar Association Center for Professional Responsibility, the Attorneys Liability Assurance Society, and the American Corporate Counsel Association at which an earlier version of Part III of this paper was presented. The exceptional work by my research assistants, Steve Schaeffer and Abby Risner, has been invaluable.

1. The term "state" as used herein in connection with admission to practice law includes American Samoa, the District of Columbia, Guam, the Northern Mariana Islands, Palau, Puerto Rico, and the U.S. Virgin Islands, in addition to the fifty states within the United States.

each person who wants to give legal advice in that jurisdiction should present their credentials to the bar examiners and make some demonstration of their competence and good moral character before being allowed to practice in that state.[2]

From the perspective of a practicing lawyer whose clients ask for legal advice in a number of jurisdictions, however, the current admission system operates as a significant impediment to practice. If a lawyer primarily practiced in two states, for example, but became admitted in fifteen additional jurisdictions within the United States in order to occasionally give legal advice to clients there, then the requirements for maintaining those admissions could prove to be quite burdensome. The annual registration fees to maintain active status alone easily total more than $4000,[3] while meeting each state's continuing legal education requirements, accepting of court-appointed representations and similar issues would require a substantial investment of the attorney's time, along with the administrative time needed to track the requirements in the various states and to demonstrate compliance with each state's system.

Add in the understandable inclination of bar counsel and the courts to prefer a definition of the practice of law which is wide enough to allow the prosecution of those deemed to be preying upon clients in that state,[4] and we have created a system in which competent lawyers chosen by their clients for their expertise in a particular field must question whether they are violating unauthorized practice of law provisions as they perform even the most routine legal work. This article examines the developments in this area as applied to a lawyer conducting a transactional practice, whether they are doing so as outside counsel or as in-house counsel employed by a corporation.

Part II of this article discusses the work of the Ethics 2000 Commission[5] and the Commission on Multijurisdictional Practice (MJP Commission) in connection with multijurisdictional practice, tracing some of the developments that led to the adoption of the amendments to the American Bar Association (ABA) Model Rules of Professional Conduct

2. *See* Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685 (2002).

3. For example, the annual registration fee under Nevada's regulation permitting occasional practice is $350 per year. NEV. SUP. CT. R. 42. If the annual fee for each of the fifteen states in which the attorney occasionally practices is around $275, he would be paying $4,275 each year in addition to the registration fees for the two states in which he conducts the majority of his practice.

4. Articulating a clear definition of the practice of law is important for the consistent enforcement of a state's prohibition of the unauthorized practice of law (UPL). The definition proposed in September 2002 by the American Bar Association's (ABA's) Task Force on the Model Definition of the Practice of Law declares that it is "the application of legal principles and judgement with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law." TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, AM. BAR ASS'N, DEFINITION OF THE PRACTICE OF LAW (Draft Sept. 2002), *available at* http://www.abanet.org/cpr/model_def_definition.html (last visited Oct. 25, 2003).

5. Although the official title of that group was the Commission on Evaluation of the Rules of Professional Conduct, it will be referred to herein as the "Ethics 2000 Commission."

(Model Rules or Rules) 5.5 and 8.5, which were approved by the ABA House of Delegates in August 2002. Part III discusses the context in which multijurisdictional practice issues arise for in-house counsel with a nonlitigation legal practice in states that have not enacted the amendments. Part IV evaluates the changes that would be brought about if the states' regulations are modified along the lines of the proposed amendments. Part IV also considers the degree to which adoption of the new provisions will ameliorate the difficulties that in-house counsel encounter. Part V provides a discussion of areas in which additional change related to multijurisdictional practice can be expected.

II. AMENDMENT OF MODEL RULES 5.5 AND 8.5

The Ethics 2000 Commission was created to conduct a comprehensive evaluation of the ABA Model Rules of Professional Conduct and to recommend changes.[6] Although the Standing Committee on Ethics and Professional Responsibility is the ABA entity charged with proposing modifications for the Model Rules, the Ethics 2000 Commission was created because it was thought that the Standing Committee's primary responsibilities, including issuing ethics opinions interpreting the Rules, were already keeping the Standing Committee fully occupied.[7] The Ethics 2000 Commission began its work in the spring of 1997 and continued until the ABA House of Delegates voted on the proposed changes at its meetings in August 2001 and February 2002.[8] The Ethics 2000 Commission met for fifty-one full days, held more than a dozen public hearings, and evaluated hundreds of comments and proposals.[9]

Testimony at public hearings of the ABA Ethics 2000 Commission had raised the issue of amending Model Rule 5.5 to accommodate multijurisdictional practice,[10] but the revision of Model Rules 5.5 and 8.5, although on the agenda, was not a topic that drew as much interest as other rule revisions considered by the Ethics 2000 Commission. The Ethics 2000 Commission considered amendments to the confidentiality provisions in Model Rule 1.6, numerous changes in the rules governing conflicts of interest, and proposals to revise the language of all but a handful of the other rules and their comments. Modifications of the language in

6. The Ethics 2000 Chair's Introduction and Executive Summary of Changes are available at http://www.abanet.org/cpr/e2k-intro_and_summary_changes.html (last visited Oct. 2, 2003).

7. *ABA Starts "Ethics 2000" Project for Sweeping Review of Rules*, 13 LAW. MANUAL PROF. CONDUCT 140 (1997).

8. *See* Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 441–43 (2002).

9. *See id.* at 443.

10. At the Ethics 2000 hearing held in connection with the ABA Center for Professional Responsibility Conference in May 1998 in Montreal, Canada, the author provided testimony regarding the need for revisions to Model Rules 5.5 and 8.5 to permit at least some forms of multijurisdictional practice. Carol A. Needham, Testimony at the Ethics 2000 Commission Montreal Public Hearing (May 29, 1998) (notes on file with author).

Model Rules 5.5 and 8.5 clearly fell within the scope of the work to be done by the Ethics 2000 Commission. The Ethics 2000 Commission considered possible revisions to Rule 5.5 at its meetings in August and December of 1999.[11] The Commission considered establishing four "safe harbors," in which lawyers would be free to act in jurisdictions other than those in which they are licensed. The four safe harbors that Ethics 2000 proposed tracked the four categories Geoffrey Hazard set out in a *National Law Journal* article,[12] in which he suggested that lawyers admitted in a country outside the United States or in another state in the United States be allowed to practice: (1) before a tribunal with pro hac vice admission; (2) with local counsel;[13] (3) as in-house counsel;[14] or (4) performing work on a specific matter for a client "resident or headquartered outside the state" when that client had engaged the lawyer in connection with that particular matter.[15]

The Ethics 2000 proposal added a new paragraph (b) to the existing language in Model Rule 5.5. The new paragraph listed four situations in which lawyers providing legal services in states in which they were not admitted would have a safe harbor from unauthorized practice of law (UPL) prosecution.[16] Under the language proposed for paragraph (b), an out-of-state lawyer would not be engaged in UPL when: (1) appearing pro hac vice or preparing for a proceeding before a tribunal in which the lawyer reasonably expects to be so admitted;[17] (2)(i) an in-house counsel acting "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;[18] (2)(ii) "the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's practice on behalf of a client in a jurisdiction in which the lawyer is

11. American Bar Association, Ethics 2000 Commission, Minutes (Aug. 6–8, 1999), *available at* http://www.abanet.org/cpr/080699mtg.html (last visited Oct. 2, 2003); American Bar Association, Ethics 2000 Commission, Minutes (Dec. 10–12, 1999), *available at* http://www.abanet.org/cpr/121099mtg.html (last visited Oct. 2, 2003).

12. Geoffrey C. Hazard, Jr., *Interstate Practice Danger*, NAT'L L.J., June 14, 1999, at A23.

13. Professor Hazard's wording is, "when associated in the matter with a lawyer admitted in this state." *Id.*

14. The full description states, "[W]hen the lawyer is an employee of the client, with respect to matters, other than appearance in court, on behalf of the client, its other employees or its commonly owned organizational affiliates." *Id.*

15. The exception allowed "consulting with employees or other people associated with the client concerning a specific matter for a client." *Id.* The lawyer was to "describe the matter in a report to the disciplinary authority" in the state if the lawyer gave consultations under this provision more often than three times in any twelve month period. *Id.*

16. MODEL RULES OF PROF'L CONDUCT R. 5.5 (Proposed Rule 5.5, Public Discussion Draft Apr. 18, 2000) (on file with the University of Illinois Law Review).

17. The language in the proposal stated, "[T]he 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." *Id.*

18. The proposed amendment used the phrase "a lawyer who is an employee of the client." *Id.* The proposal organized this and the following two categories into a second group involving actions "other than making appearances before a tribunal with authority to admit the lawyer to practice pro hac vice." *Id.*

admitted to practice;"[19] or (2)(iii) the lawyer is associated with local counsel.[20]

Among the comments on the April 18, 2000, draft of Model Rule 5.5 considered by the Ethics 2000 Commission was the observation that state statutes in some jurisdictions define the practice of law, and it is beyond the scope of a disciplinary rule to purport to authorize actions which are prohibited by statute. Commentators suggested creating a safe harbor permitting occasional practice, since *pro hac vice* admission is not a reliable method of ensuring permission to provide legal services. It is not available in litigated matters until after a case has been filed with a court,[21] and such admission is not available at all for purely transactional matters.[22] The Business Law Section of the ABA suggested that Model Rule 5.5(b)(ii) language be expanded to include a situation in which the matter is reasonably related to "the practice of the lawyer's firm" in certain circumstances,[23] and that two additional safe harbors be added—one to protect a lawyer who gives advice related to federal law or a jurisdiction in which the lawyer is admitted[24] and the other to exempt from prosecution a lawyer performing services that the jurisdiction would not construe to be UPL.[25] The Ethics 2000 Commission received surprisingly few comments in connection with the amendment of Model Rules 5.5 and 8.5, especially since a 1998 California Supreme Court decision had given the subject of multijurisdictional practice increased prominence.[26] The language in the Ethics 2000 version of the proposed rules remained unchanged through the revised public discussion draft, dated October 2,

19. MODEL RULES OF PROF'L CONDUCT R. 5.5 (Proposed Rule 5.5, Revised Public Discussion on Draft Oct. 2, 2000). This category was the most controversial of the proposed changes to Rule 5.5. *Id*.

20. The proposed language read, "the lawyer is associated in a particular matter with a lawyer admitted to practice in this jurisdiction." *Id*.

21. FUTURE OF THE LEGAL PROFESSION STUDY GROUP, WASH. STATE BAR ASS'N, REPORT TO THE BOARD OF GOVERNORS (July 2001), *available at* http://www.abanet.org/cpr/mjp-comm_washba.doc (last visited Oct. 21, 2003).

22. AM. COLL. OF REAL ESTATE LAWYERS, AM. BAR ASS'N, POSITION STATEMENT TO THE AMERICAN BAR ASSOCIATION COMMISSION MULTIJURISDICTIONAL PRACTICE (June 2001), *available at* http://www.abanet.org/cpr/mjp-comm_acrel.html (last visited Oct. 21, 2003).

23. The section suggested that the rule be modified to permit "the practice of the lawyer's firm in any jurisdiction in which the lawyer's law firm maintains an office staffed by one or more lawyers admitted to practice in *that* jurisdiction, regardless of the fact that neither the lawyer nor any other lawyer in the lawyer's firm is admitted to practice in *this* jurisdiction." BUS. LAW SECTION, AM. BAR ASS'N COMMENTS ON PROPOSED MODEL RULE 5.5 (May 17, 2000) (emphasis added) (on file with the University of Illinois Law Review), *available at* http//www.abanet.org/cpr/scriggins10.html (last visited Nov. 14, 2003).

24. "[A]cts with respect to a matter involving issues of federal law or the law of one or more domestic or foreign jurisdictions." *Id.*

25. "[T]he lawyer performs services as a lawyer that would not constitute the unauthorized practice of law in this jurisdiction if performed by a nonlawyer." *Id.*

26. See *infra* text accompanying notes 121–28.

2000,[27] and the revised final draft of the amendments to Rule 5.5, dated May 1, 2001.[28]

The decision by the Ethics 2000 Commission to isolate the issue of multijurisdictional practice and to allow the MJP Commission to take the leading role in making recommendations regarding the proposed amendments to Model Rules 5.5 and 8.5 was not a forgone conclusion. The members of the Ethics 2000 Commission could have insisted on carrying out their own evaluation of MJP, since the Model Rule language certainly was within their jurisdiction. Although the timing of the actions of the Ethics 2000 Commission indicates that the rules related to multijurisdictional practice remained under discussion, it is clear that it would have been quite difficult for that commission to have devoted the additional time and resources necessary to thoroughly evaluate all of the issues raised by the possible modification of Model Rules 5.5 and 8.5.

Issues related to the amendment of those rules include reciprocal discipline, national registration systems, the treatment of non-U.S. licensed lawyers and its impact on U.S. licensed lawyers practicing in other countries, and long-standing bar admissions controversies, such as the treatment of graduates of non-ABA accredited law schools admitted in California who want to offer their legal services in other states. Permitting an out-of-state lawyer to engage in even limited multijurisdictional practice would require evaluation of the concerns of disciplinary authorities, bar admissions groups, and lawyers licensed in other countries, as well as a conclusion satisfying just about every practice area represented within the ABA and its various sections.

The MJP Commission, inaugurated in the fall of 2000, held numerous hearings, received written comments, and heard testimony from hundreds of organizations and individuals, and conducted many business meetings to navigate through the issues related to multijurisdictional practice.[29] The Task Force on the Definition of the Practice of Law is still in the process of gathering the information that will support its proposal regarding a definition of the practice of law.[30] The sheer number of individuals, bar organizations, and entities that submitted reports, testimony, and comments in connection with multijurisdictional practice is some evidence of the complexity and multifaceted nature of the issues related to the modifications of the restrictions on multijurisdictional practice. The magnitude of the work needed to effectively explore the

27. MODEL RULES OF PROF'L CONDUCT R. 5.5 (Proposed Rule 5.5, Public Discussion Draft Oct. 2, 2000) (on file with the University of Illinois Law Review).

28. MODEL RULES R. 5.5 (Proposed Rule 5.5, Final Draft May 1, 2001) (on file with the University of Illinois Law Review).

29. *See* COMM'N ON MULTIJURISDICTIONAL PRACTICE, AM. BAR ASS'N, CLIENT REPRESENTATION IN THE 21ST CENTURY, *available at* http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf (last visited Oct. 2, 2003).

30. For the current status of this project, see the MJP Commission's website at http://www.abanet.org/cpr/mjp-home.html (last visited Oct. 2, 2003).

issues related to the amendment of Model Rules 5.5 and 8.5 would have made the already complicated process of debating possible changes to all of the other Model Rules, which the Ethics 2000 Commission had undertaken, even more unwieldy.

The creation of the MJP Commission made it more likely that the process of considering alternatives would be thorough enough to arrive at a substantial consensus supporting approval of the amendments to Model Rules 5.5 and 8.5 and related admission on motion and disciplinary jurisdiction proposals. Since the multijurisdictional practice issues had been carved out from the mandate of the Ethics 2000 Commission, the MJP amendments came before the ABA House of Delegates as a completely separate proposal, severed from the Ethics 2000 proposals. It is possible that consideration of changes to the states' rules based upon Model Rule 5.5 will also be handled separately.[31] Whether separation will reduce the likelihood that the changes to Model Rules 5.5 and 8.5 will be promptly instituted is debatable. Arguably, those in each state involved in the process of evaluating whether to enact the changes in the Model Rules approved by the ABA House of Delegates might be more likely to delay consideration of the changes that would permit multijurisdictional practice if the MJP proposals were included in a process that debated each of the Ethics 2000 amendments to the Model Rules.

By handling amendments to their versions of Model Rules 5.5 and 8.5 separately from the amendments to other Model Rules, the state committees—that developed expertise in the evaluation of the issues related to MJP while working up their respective state reports and recommendations to the MJP Commission—might be able to move more quickly to facilitate the adoption of amendments to the provisions related to multijurisdictional practice. In many states, those committees have been reactivated to consider what proposals related to the proposed multijurisdictional practice changes will be presented to their states' highest courts. Perhaps it is more likely that the limited subset of issues can be debated and MJP amendments considered separately from the potentially more controversial amendments to other Model Rules contained in the revisions proposed by Ethics 2000. There may be more interest in permitting multijurisdictional practice, since many lawyers want the ability to regularize their activities in states other than the ones in which they are licensed. The momentum towards implementation might have been endangered if the multijurisdictional practice amendments had been folded in with all of the other changes approved by the House of Delegates in connection with Ethics 2000.

31. Some states, however, may follow the lead of North Carolina, which adopted a set of major changes to its professional responsibility regulations, including new language in its Rule 5.5 and 8.5, effective March 1, 2003. *See* CrossingtheBar.Com, *Multijurisdictional Law Practice News: March 2003*, *at* http://www.crossingthebar.com/news303.htm (last visited Oct. 2, 2003).

Although scholars and leading members of the bar had been advancing calls for change for quite some time, the California Supreme Court's opinion in *Birbrower, Montalbano, Condon & Frank v. Superior Court* in January 1998,[32] gave additional urgency to the discussion. The details of the holding are discussed elsewhere,[33] but one reason that it drew so much attention at the time is that the highest court in a commercially important state declared that an out-of-state lawyer could be found to be "virtually present" in California and thus in violation of the California UPL statute when he provided legal advice to a California client, even if the lawyer never physically entered California.[34] In addition, the *Birbrower* court also commented that out-of-state lawyers advising clients in California could not be certain that they would be protected from a finding that they had engaged in UPL, even if they associated with California-licensed local counsel on the representation.[35] This opinion thus called into question the usual mechanisms out-of-state lawyers working on transactions had used to ensure that they would not be found to have engaged in UPL.

The *Birbrower* decision was the subject of discussion at the ABA Center for Professional Responsibility conference on Professional Responsibility held in La Jolla, California in June 1999.[36] During the summer following the conference, representatives of the Association of Professional Responsibility Lawyers (APRL) and the American Corporate Counsel Association (ACCA) joined the academics and bar counsel interested in the possibility of changing the UPL regulations to allow some multijurisdictional practice. The Louis Stein Center for Ethics at Fordham University School of Law offered to host a conference at which participants would meet in working groups to consider the need for modification of UPL regulations. The conference, cosponsored by the ABA Center for Professional Responsibility, the Attorneys' Liability Assurance Society (ALAS), and ACCA, was held in March 2000.[37] The author prepared a paper for the conference that launched discussions on the difficulties faced by in-house counsel in connection with the provisions of the 1983 wording of Model Rule 5.5 and 8.5 in the then-current regulations; the paper was cited in the MJP Commission's Final Report[38] and in

32. 949 P.2d 1 (Cal. 1998).

33. *See, e.g.,* Gillers, *supra* note 2, at 686–91.

34. *Birbrower*, 949 P.2d at 5–6.

35. *Id.* at 4. The court stated: "Contrary to the trial court's implied assumption, no statutory exception to section 6125 [the UPL statute] allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar." *Id.* at 4 n.3.

36. *See Center Update*, 10(4) PROF. LAW. 10, 20–21 (1999).

37. Symposium on the Multijurisdictional Practice of Law, Fordham University School of Law (Mar. 10–11, 2000). A description of the Symposium is available at http://www.abanet.org/cpr/mjp-symposium.html (last visited Oct. 2, 2003).

38. *See* AM. BAR ASS'N, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 69 n.47 (Aug. 2002), *available at* http://www.abanet.org/cpr/mjp/final_mjp_rpt_6-5.pdf (last visited Oct. 2, 2003).

the footnotes of Final Report 201B submitted by the MJP Commission to the ABA's House of Delegates and adopted on August 12, 2002.[39] That paper, "The Application of Unauthorized Practice of Law Regulations to Attorneys Working in Corporate Law Departments," is made part of the public record in part III of this article.[40]

III. THE APPLICATION OF UNAUTHORIZED PRACTICE OF LAW REGULATIONS TO ATTORNEYS WORKING IN CORPORATE LAW DEPARTMENTS

A. The Current System of Separate Regulation in Each State Addressing Unauthorized Practice

All jurisdictions in the United States currently have in place court rules, legislation, other regulations, and/or opinions interpreting those provisions that prohibit the unauthorized (or unlawful) practice of law, sometimes referred to as UPL.[41] Typically, unless some exception has been adopted in a state, only those persons who have been admitted to that state's bar are permitted to give legal advice in that state.[42]

In addition to prohibiting law practice by persons who have no legal training at all, the UPL regulations also prohibit practice by lawyers holding law licenses in other states.[43] Unless a state has adopted an exception, under the language of Model Rule 5.5 and DR 3-101 of the Model Code all out-of-state lawyers not admitted in the state are considered nonlawyers and thus are subject to the state's UPL regulations.[44]

39. COMM'N ON MULTIJURISDICTIONAL PRACTICE, AM. BAR ASS'N, FINAL REPORT 201B 11 n.15 (as adopted Aug. 12, 2002), *available at* http://www.abanet.org/cpr/mjp/201b.doc (last visited Oct. 2, 2003).

40. *See infra* Part III. The information in the original document has been updated to reflect regulatory changes, but the structure of the argument and the hypothetical fact patterns have been preserved.

41. *See* Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admission for Advice on Federal Law*, 45 U. KAN. L .REV. 453 (1997); Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665 (1995).

42. *See, e.g.,* CAL. BUS. & PROF. CODE § 6125 (West 2003) ("No person shall practice law in California unless the person is an active member of the State Bar."). Michigan has enacted a statute explicitly permitting out-of-state lawyers to give advice to clients while temporarily in the state of Michigan. MICH. COMP. LAWS ANN. § 600.916 (West 2001).

43. Prior to the 2002 amendments, Model Rule 5.5 provided: "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." MODEL RULES OF PROF'L CONDUCT R. 5.5 (2000). The Model Code provides, in DR 3-101(A), "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law" and, in DR 3-101(B), "[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." MODEL CODE OF PROF'L RESPONSIBILITY DR 3-101(A)-(B) (1980).

44. Eighteen jurisdictions have adopted rules or statutes which permit qualifying in-house counsel to give advice in those states in certain circumstances. The regulations in Alabama, Colorado, the District of Columbia, Florida, Idaho, Kansas, Kentucky, Maryland, Minnesota, Missouri, Nevada, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Virginia, and Washington are discussed

The wording of the prohibition varies from state to state, but typically it includes a statement to the effect that it is unlawful to practice law or give legal advice in the state if a person is not a member of that state's bar.[45] The highest court in each state interprets that state's regulations, statutes, court rules, and prior case law to determine whether a specific activity is or is not the practice of law. Not surprisingly, the courts have not agreed on a uniform standard to be applied.

Applying the UPL regulations to in-house counsel who are licensed in states other than the one in which they maintain their office is not necessary to protect the policy goals the regulations are intended to achieve. The general public is protected because the in-house lawyers provide legal advice only to their own employers. Although such attorneys' actions could potentially harm third parties (for example, when the third party relies upon an ill-founded legal opinion) or conceivably interfere with the administration of justice, these threats can be minimized. The host jurisdiction could impose its own character and fitness standards, in addition to the one conducted when the attorney was initially admitted to the home jurisdiction. Third parties may well have a malpractice cause of action.[46] And, of course, the host jurisdiction will have disciplinary authority over the out-of-state attorney. If changes are made to permit lawyer licensing on the national level, or to encourage each state to readily grant reciprocal admission to all out-of-state lawyers, then in-house counsel should of course be eligible. Alternatively, even if reform for attorneys at private law firms is politically unrealistic, out-of-state attorneys working exclusively as in-house counsel should be eligible for a special admission category, or at the very least exempted from the reach of the UPL regulation.

B. In What Specific Situations Are Problems Being Encountered?

1. Nationwide Client Questions and Travel

Lawyer *A* works for *ABC Company*, serving as the expert in consumer credit issues for *ABC*'s nationwide lending operation. Especially in areas requiring sophisticated legal analysis, the attorneys in a legal department are commonly responsible for advising the corporation and its affiliates on a specific area of the law. In this system, Lawyer *A* will handle all legal questions within his assigned topic, regardless of the geographical location in which the issue arises. His office is located in New York and he usually performs most of his work there. Throughout a sin-

later in this paper. *See infra* notes 57–61, 63–65, 67–69, 71–75, 77–78 and accompanying text. In an additional four states—Illinois, Michigan, New Jersey, and Texas—the exemption for in-house counsel is contained in an opinion issued by the state's entity responsible for enforcing its UPL regulation. *See infra* note 62, 66, 70, 76 and accompanying text.

45. *See, e.g.,* CAL. BUS. & PROF. CODE § 6125.

46. *See, e.g.*, Greycas v. Proud, 826 F.2d 1560 (7th Cir. 1987).

gle day, he may answer questions regarding consumer credit regulations in California, Nevada, Pennsylvania, Florida, Illinois, Michigan, and Texas. If he travels to these states to meet with and advise *ABC* managers, then only Michigan currently permits him to give legal advice while he is in the state.[47]

2. International Responsibilities and Travel

Example One

Lawyer *B*, licensed in New York, works for *DEF Company*. She is responsible for developing European and Asian hotel properties. She oversees the negotiation of land acquisition, building construction, operation agreements, and joint ventures with local entities that manage resort properties. None of her work involves the interpretation of U.S. law. Should Lawyer *B* have to take another bar examination if *DEF* moves its headquarters from New York to California?

Example Two

If Lawyer *B* is licensed only in Ohio and maintains her office in Paris, France (where she is properly admitted), should she be required to become a member of the New York bar upon beginning work at *DEF*, even though none of her work involves U.S. law?

3. Reporting to a General Counsel Not Licensed in the State

Lawyer *C*, who is licensed in California, has been working for a California oil company for fifteen years. Six months ago, the company hired a new general counsel, who is not licensed in the state. Since Lawyer *C* reports to someone who is not a member of the California bar, Lawyer *C* is told that he is subject to criminal penalties for aiding and abetting the general counsel's unauthorized practice of law simply by keeping his job.

4. Taking a New Job in a Law Department in Another State

Lawyer *D* has been practicing law for fifteen years. For the first four years, he worked at a law firm in Chicago, Illinois, and holds an Illinois license. He then took a job in the legal department of a large consumer products company and moved to Ohio. After two years there, he was offered a promotion to an Arizona subsidiary. Two years later, the subsidiary moved its executive offices and its law department to Oregon. Four years after that, Lawyer *D* accepted a job as associate general coun-

47. *See* MICH. RULES BD. L. EXAM'RS R. 5; *see also* CAL. BUS. & PROF. CODE § 6125; RULES REG. FLA. BAR R. 17-1.1 to 17-1.8; NEV. SUP. CT. R. 49.10; PA. BAR ADMISSION R. 204; Tex.. Bd. of Law Examiners, *Policy Statement on Lawful Practice*, *available at* http://www.ble.state.tx.us/atty_us/policy.htm (last visited Oct. 2, 2003); Ill. State Bar Ass'n Bd., *Functions that May be Performed by House Counsel in Illinois*, 72 ILL. B.J. 452 (1984).

sel for a Fortune 500 company and moved to that company's Missouri offices. Missouri, Oregon, and Ohio have all adopted a special admission category for in-house counsel, so Lawyer *D* does not have to take a new bar examination in those states.[48] Currently, Arizona requires Lawyer *D* to take the bar examination (and pay for the moral fitness investigation).[49]

5. Rotating Responsibilities

Lawyer *E* works for a company that rotates all new midlevel managers through six-month stints at each of its five divisions. The members of the legal department participate in the rotation program and perform legal work in each of the five states. Does Lawyer *E* have to become a member of each of the five bars?

6. Giving Advice on Business Trips/Maintaining Privilege

Lawyer *F* works for Upstart Rent-a-Car Company. He travels to major airports throughout the United States and negotiates the terms of locating rental counters on airport property. Can he properly give legal advice to the Upstart managers who accompany him during these negotiations? If he confines his work on the road to business advice only, then does Upstart lose the attorney-client privilege for those discussions?

7. Giving Legal Opinions to Third Parties

Lawyer *G*, licensed in New York, is the general counsel for *GHI* Corp., located in Miami, Florida. *GHI* asks Lawyer *G* to give an opinion letter to a bank in connection with a credit agreement. The limited admission rule in Florida specifically prohibits her from giving an opinion letter to be relied upon by any entity other than her employer.[50] However, if she worked for a company located in Missouri or Virginia, then those states would permit her to give an opinion letter to a bank, since the scope of permitted legal practice is broader under the provisions in those states.[51] The scope of legal services permitted under limited admission rules should be broadened to be the same in all states.

Opinions requested on behalf of a client division operating in Illinois, or a state other than the one in which Lawyer *G* is working, present another aspect of this problem. If the opinion would be proper under Illinois law, then should Florida be allowed to bar Lawyer *G* from giving her opinion in Illinois?

48. *See* MO. SUP. CT. R. 8.10.5; OHIO SUP. CT. RULES GOV'T BAR R. VI § 4(A); OR. RULES ADMISSION R. 16.05.

49. *See* ARIZ. SUP. CT. R. 34.

50. *See* RULES REG. FLA. BAR. R. 17-1.3(d).

51. *See* MO. SUP. CT. R. 8.105; VA. SUP. CT. R. Pt. 6, § I(B).

8. Working in a Home Office in a State Other Than the One in Which the Corporation's Offices Are Located

Example One

Lawyer *H* works at the Virginia headquarters of *JKL* Corp. He is licensed to practice in Virginia. He lives in Maryland. By working in his home office on the weekends, Lawyer *H* is arguably violating Maryland's UPL prohibition.[52]

Example Two

JKL Corp. moves its executive offices from Virginia to Texas. Since Lawyer *H* travels so much anyway, and many of the company's operations are more easily reached from the East Coast, *JKL* executives allow Lawyer *G* to continue living in Maryland indefinitely, using his home office as his primary work space.

C. How Should the UPL Regulations Be Changed?

There is a collision between the realities of national and international practice, on the one hand, and the differing requirements imposed by the fifty-one separate licensing authorities, on the other. Many, if not most, in-house lawyers, other than general counsel, concentrate their practices in relatively narrowly defined areas of the law. Their expertise in these areas satisfies the client protection concerns underlying the current UPL regulations. Furthermore, it is more cost-effective for the client to have a single expert handle related legal issues in various states, rather than requiring the company to retain separate counsel in each state and educate each of them regarding the company's unique business concerns. In addition, language in the *Birbrower* opinion indicates that, at least in California, out-of-state lawyers cannot be certain that the retention of local counsel will protect them from UPL violations.[53]

States can consider a variety of different approaches to ameliorate these difficulties. Each approach has its own strengths and weaknesses. A number of states have recently made changes significantly improving their regulations concerning in-house counsel.[54] The issue is receiving additional attention in some of the states that have not yet modified their

52. *See* MD. CODE ANN. BUS. OCC. & PROF. § 10-206 (2000).

53. Birbrower, Montalbano, Condon & Frank v. Sup. Court, 949 P.2d 1, 4 n.3 (Cal. 1998) ("Contrary to the trial court's implied assumption, no statutory exception to section 6125 allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar."). It is possible that, if the case arose, the California Supreme Court might allow in-house counsel to provide some legal services in a matter in which local counsel had been retained. Although it is dicta, the language in footnote three does call into question the protection from UPL prosecution afforded by bringing in local counsel admitted in California. *See id.*

54. Since early 1997, nine states (Alabama, Colorado, the District of Columbia, Idaho, Nevada, North Carolina, Oregon, Virginia, and Washington) have adopted rules that protect in-house counsel from UPL prosecution. Colorado's rule, effective January 1, 2003, is the most recently adopted. *See* CrossingtheBar.Com, *Colorado Single Client Admission Rule*, *available at* http://www.crossingthebar.com/CO-CC.htm (last visited Oct. 2, 2003).

regulations.[55] Until all jurisdictions in the United States change their UPL provisions, in-house lawyers will continue to grapple with the complexities of the current system. Some of the most frequently considered alternatives are discussed below.

1. Specifically Exempt In-House Counsel

A number of states specifically exempt in-house counsel from their UPL regulations. States may either adopt separate regulations granting admission status to in-house counsel or issue opinions through the states' committees charged with enforcing UPL provisions. Typically, states that have adopted a special admission category for in-house counsel require that such lawyers give legal advice only to their employers.[56] Jurisdictions utilizing the special admission category are Alabama,[57] Colorado,[58] the District of Columbia,[59] Florida,[60] Idaho,[61] Illinois,[62] Kansas,[63] Kentucky,[64] Maryland,[65] Michigan,[66] Minnesota,[67] Missouri,[68] Nevada,[69] New Jersey,[70] North Carolina,[71] Ohio,[72] Oklahoma,[73] Oregon,[74] South

55. Now that the ABA House of Delegates has approved the 2002 amendments to Model Rules 5.5 and 8.5, many states whose regulations are based on the Model Rules are engaged in an evaluation of the need for change. *See*, *e.g.*, ARK. BAR ASS'N, PROPOSED CHANGES IN ARKANSAS MODEL RULES OF PROFESSIONAL CONDUCT (Apr. 2003), *available at* http://www.arkbar.com/whats_new/new_model_rules.html (last visited Oct. 2, 2003).

56. *See*, *e.g.*, IDAHO BAR COMM'N R. 220. Some states' regulations, such as those in Missouri, explicitly permit in-house lawyers to engage in pro bono work in addition to work for their employers. *See*, *e.g.*, MO. SUP. CT. R. 8.105(d).

57. Ala. State Bar, Ethics Op. RO-86-52, *available at* http://crossingthebar.com/AL-UPL.htm (last visited Oct. 2, 2003).

58. Colorado Supreme Court Rule 222 allows an out-of-state lawyer domiciled in Colorado to practice for his or her employer upon payment of a $725 fee and certification that the client understands that the lawyer is not licensed in Colorado and that the attorney will be employed only by that client. The permission to practice in Colorado is renewable annually with payment of the regular annual registration fee and demonstrated compliance with the state's CLE requirements. Attorneys practicing under Rule 222 are subject to discipline in Colorado. COLO. SUP. CT. R. 222.

59. RULES D.C. CT. APP. 49(c)(6).

60. RULES REG. FLA. BAR R.17-1.1 to 17-1.8. The status must be renewed annually, with no cap on the maximum number of years it is available. *See In re* Amendments to Rules Regulating the Fla. Bar, 635 So. 2d 968, 973–76 (1994).

61. IDAHO BAR COMM'N R. 220.

62. *See* Ill. State Bar Ass'n Bd., *supra* note 47.

63. KAN. RULES RELATING ADMISSION ATTORNEYS R. 706. The permit to practice in Kansas expires if the attorney terminates his in-house employment, but it is not time limited. *See id.*

64. KY. RULES SUP. CT. 2.111. Attorneys who receive this status are not eligible to appear in court. *See id*.

65. MD. CODE ANN. BUS. OCC. & PROF. § 10-206(d) (2000). Attorneys practicing with this status cannot appear in court. *See id.* § 10-206(d)(2)(ii).

66. MICH. RULES BD. L. EXAM'RS R. 5.

67. MINN. STAT. ADMISSION BAR R. 9 (provides a one-year temporary license).

68. MO. SUP. CT. R. 8.105. The rule now provides that the authorization to practice for the corporate employer can be renewed for successive five year periods. *Id.* R. 8.105(f). The time an in-house lawyer practices under this rule cannot be used to fulfill the conditions for admission without examination under Rule 8.10. *Id.* R. 8.10f(g).

69. NEV. SUP. CT. R. 49.10 (effective Sept. 24, 2002).

70. Committee on the Unauthorized Practice of Law, *Opinion 14: House Counsel*, 98 N.J. L.J. 399 (May 1, 1975).

Carolina,[75] Texas,[76] Virginia,[77] and Washington.[78] Typically, these regulations also apply to lawyers who practice exclusively for associations, governmental entities, and business organizations other than corporations.[79] A few years ago, Utah considered adopting similar specific exemption provisions, but no official action appears to be imminent.[80] For several years, Connecticut had considered adopting a change to permit in-house lawyers licensed in other states to practice in Connecticut. The final language proposed in Connecticut was modeled on Florida's provision, and it also would have allowed in-house counsel to give legal opinions to third parties.[81] In mid-2002, the attempt to implement the proposal ended. The UPL committee in Connecticut issued its opinion interpreting the existing regulation to forbid that conduct.[82] A number of states appear to be considering and adopting a limited admission process for in-house lawyers as an alternative to adopting the language of Model Rule 5.5(d)(1).[83]

That the Restatement of the Law Governing Lawyers approves of such provisions is likely to strengthen the movement towards enactment of similar provisions in even more states. In comment f to section 3, the authors of the Restatement observe, "[s]tates have permitted practice

71. N.C. RULES ADMISSION § .0502; *see also* N.C. RULES OF PROF'L CONDUCT R. 5.5(c) (2003) (as amended, effective Mar. 1, 2003). North Carolina Rule 5.5(c)(2)(A) puts into effect Model Rule 5.5(d)(1) (in-house counsel). *Id*. R. 55(c)(2)(A). North Carolina Rule 5.5(c)(2)(B) substantially tracks model Rule 5.5(c)(4), but it omits the requirement that the services be provided on a temporary basis and adds a limitation that the services be provided in connection with a matter that has a connection to the lawyers representation of a client in a jurisdiction where the lawyer is admitted. *Id*. R. 5(c)(2)(B). North Carolina Rule 5.5(c)(2)(E) allows the lawyer to provide services "limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice," substantially expanding the language of Model Rule 5.5(d)(2). *Id*. R. 5.5(c)(2)(E).

72. OHIO SUP. CT. RULES GOV'T BAR R. VI § 4(A) (renewable two-year terms).

73. OKLA. RULES ADMISSION R. 2 § 5 (allows an in-house lawyer to practice under this exemption for an open-ended period of time).

74. OR. RULES ADMISSION R. 16.05.

75. S.C. APP. CT. R. 405.

76. Tex. Bd. of Law Examiners, *supra* note 47.

77. The definition of the unauthorized practice of law excludes practice by in-house counsel. Va. UPL Op. 178 (1994). A two-tier system is available in Virginia. As an alternative to waiving in and becoming a member of the state bar, an in-house lawyer who works exclusively for her employer can choose to register her name with the state bar. She is subject to discipline by the Virginia State Bar even though she is not formally admitted to practice there. Annual fees for the registry are $50 rather than the $250 paid by active members of the Virginia bar. *See* Jonathan Groner, *A Lobby Win for Corporate Counsel in Va.*, LEGAL TIMES, Jan. 23, 2003, at 1.

78. WASH. ADMISSION TO PRACTICE R. 8(f) (creating an exception for in-house counsel but still requiring that the out-of-state lawyer pass the professional responsibility portion of the state's bar exam).

79. *See*, *e.g.*, NEV. SUP. CT. R. 49.10. The regulations typically include the caveat that the entity must not provide legal services to outside clients. *See, e.g.*, *id*.

80. Conversations with disciplinary authorities and bar leaders Spring 2002 (notes on file with author).

81. The language of the proposal is available from the ACLA chapter in Hartford, Connecticut.

82. William Freivogel & Lucian Peru, *MJP: Rounding up the Hits, Coast-to-Coast*, *at* http://www.ethicsandlawyering.com/Issues/1002.htm (last visited Oct. 21, 2003) (discussing Connecticut opinion).

83. *See infra* text accompanying notes 221–26.

within the jurisdiction by inside legal counsel for a corporation or similar organization, even if the lawyer is not locally admitted and even if the lawyer's work consists entirely of in-state activities, when all of the lawyer's work is for the employer-client . . . and does not involve appearance in court."[84] The Restatement goes on to declare,

> Leniency is appropriate because the only concern is with the client-employer, who is presumably in a good position to assess the quality and fitness of the lawyer's work. In the course of such work, the lawyer may deal with outsiders, such as by negotiating with others in settling litigation or directing the activities of lawyers who do enter an appearance for the organization in litigation.[85]

Additional states will likely favorably consider adding a special admission category for in-house counsel, or at least a specific exemption from UPL prosecution, in light of the Restatement's unqualified endorsement and the 2002 amendments to Model Rule 5.5.

The revisions to Model Rule 5.5 approved by the ABA's House of Delegates in August 2002, explicitly permit out-of-state lawyers working as in-house counsel to provide legal services to "the lawyer's employer or its organizational affiliates" without requiring pro hac vice admission.[86] Professor Geoffrey C. Hazard, a member of the ABA Ethics 2000 Commission, supported the idea that the list of permissible activities should include services rendered by in-house lawyers to their employers, fellow employees, and affiliated entities.[87] Adding the language approved by the House of Delegates to Model Rule 5.5 enhances the likelihood that more states will amend their regulations to permit lawyers licensed in other states to practice as in-house counsel.

The special admission category creates a reliable safe harbor for in-house attorneys. As long as an in-house lawyer complies with the terms of the regulation, he can give legal advice in that state without worrying about UPL prosecution. In addition, these regulations are an improvement over most of the provisions allowing admission on motion. The number of years in practice required by many states' rules governing admission on motion can be problematic for in-house counsel.[88] Consider the following hypothetical:

In-house counsel Lawyer *J*, licensed in another state, has worked in Virginia for the past seven years. Virginia's rule permits her to work as in-house counsel without being admitted in Virginia.[89] Lawyer *J* now

84. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. f (2000).

85. *Id.*

86. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5(d)(1) (2003) (Rule 5.5 as amended in August 2002).

87. Hazard, *supra* note 12.

88. For a discussion of the application of the rules governing admission without examination to in-house counsel, see Carol A. Needham, *The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice*, 36 S. TEX. L. REV. 1075, 1089–90 (1995).

89. *See* VA. SUP. CT. R. Pt. 6, § I(B)(1)–(2).

wants to apply for admission in a third state that requires her to have been engaged in the practice of law for five of the previous seven years. Does her time working in Virginia qualify her for admission in the third state?

Virginia's UPL provision excludes services provided by in-house attorneys.[90] Technically, Virginia's view is that Lawyer *J* is not committing UPL because she is not practicing law while working for her employer in Virginia.[91] This definition does provide Lawyer *J* with absolute protection from UPL prosecution while she is working as in-house counsel in Virginia, but it is problematic. The standard used in the third state typically offers reciprocal admission to Lawyer *J* only if she has spent five of the seven years immediately preceding the application practicing law in a jurisdiction in which she is admitted.[92] Because her time working in Virginia does not meet the requirement, she cannot qualify for admission on motion in the third state. Therefore, in-house counsel prefer a provision structured as a special admission category, such as that adopted in Missouri,[93] rather than an exemption from UPL prosecution modeled on the Virginia regulation.

If the years in practice requirements are intended to protect the public by demonstrating that the out-of-state attorney has practiced adequately elsewhere, then this additional hurdle is not necessary for in-house lawyers. There is less need to protect the public in the case of in-house counsel, since they will be working for only a single client, typically a sophisticated consumer of legal services.[94]

The special admission category approach is not a complete solution for all in-house lawyers. It does not resolve all difficulties facing the in-house lawyer with an active transactional workload. An attorney who travels across the country may run afoul of the UPL prohibitions in states in which he advises his clients while attending meetings, but does not maintain an office. To qualify for the admission category, the attorney must be employed within the state.[95] Therefore, the attorney cannot simultaneously satisfy the requirements of the special admission provision in numerous states. Some in-house counsel have resolved this problem by carefully refraining from providing anything other than business advice while conducting negotiations in states in which they are not licensed. Although structuring their work in this way should protect them

90. *See id*.

91. *See id*.; *see also* Va. UPL Op. 178 (1994) ("[I]t does not constitute the unauthorized practice of law for a non-lawyer to provide legal advice to or prepare legal instructions for his regular corporate employer since the definition of the practice of law does not encompass one who undertakes to provide such services to a regular employer.").

92. This is how the reciprocal admission rule functions in various U.S. jurisdictions. *See*, *e.g.*, COLO. R. CIV. P. 201.3(2)(c); ILL. SUP. CT. R. 705(b).

93. *See* MO. SUP. CT. R. 8.105 ("Limited Admission for In-House Counsel").

94. It bears mention that not all businesses operating as corporations are sophisticated consumers of legal services, while some individuals, such as Warren Buffett, clearly are.

95. *See*, *e.g.*, MO. SUP. CT. R. 8.105(a).

from UPL problems, it can potentially raise problems in maintaining the attorney-client privilege.[96]

Furthermore, the scope of legal work allowed under the special admission varies from state to state. Recall the situation described above, faced by Lawyer *G*, the New York licensed general counsel for a Florida company.[97] Giving a legal opinion to your own company is, of course, permitted. In most states with a special admission category for in-house counsel, the general counsel would be allowed to issue an opinion to a regulatory agency, bank, or other third party. In Florida, however, the regulation exempting in-house counsel from UPL prosecution does not allow Lawyer *G* to issue opinion letters to be relied upon by any entity other than her employer.[98] A regular member of the Florida bar, therefore, must be retained to give an opinion letter to be relied upon by a regulatory body or a lender.

Another problematic aspect of the special admission category approach is that it distinguishes between in-house counsel and lawyers practicing in law firms. Historically, a significant number of in-house counsel have objected to being treated differently. In states such as California, in which in-house counsel refrained from strongly endorsing such separate treatment, the lack of interest stalled efforts to enact a separate admission category.[99]

In those states that require pro bono work, the separate category also presents a practical problem. How can in-house counsel satisfy pro bono requirements if they are supposed to provide legal advice only to their employers? If a state allows lawyers to satisfy the requirement by paying a set dollar amount to legal aid agencies, then the lawyers can simply pay. The question remains whether this amounts to a tax on those lawyers who are prevented from providing the advice themselves. Other states, such as Missouri, explicitly allow in-house counsel to provide pro bono legal services.[100]

Finally, by satisfying the needs of in-house lawyers who move from another state permanently, such regulations divert support away from

96. Some courts have been all too willing to deny the privilege to in-house counsel who are involved in negotiations, even those who are advising their client's executives of the legal ramifications of various proposals under discussion. *See, e.g.,* Georgia-Pacific Corp. v. GAF Roofing Mfg. Corp., 93 CIV. 5125, 1996 WL 499522 (S.D.N.Y. Sept. 4, 1996); *see also* Carol A. Needham, *When is an Attorney Acting as an Attorney: The Scope of Attorney-Client Privilege as Applied in Corporate Negotiations*, 38 S. TEX. L. REV. 681, 690–91 (1997).

97. *See supra* Part III.B.7.

98. *See* RULES REG. FLA. BAR 17-1.3(a), (c).

99. California Supreme Court Rule 987, proposed in 1987, would have allowed in-house counsel to provide legal services to their employers in connection with transactions and other work not involving court appearances. Some in-house counsel objected to the proposal on the grounds that the limitations on the services they could provide would grant them only second-class status. *Unauthorized Practice: Ethical Implications for In-House Attorneys*, 12(4) AM. CORP. COUNSEL ASS'N DOCKET 58, 63–64 (1994) (transcript of a session during ACCA's November 1993 Annual Meeting).

100. MO. SUP. CT. R. 8.105(d). The lawyer must perform his pro bono work only with an organization which has been approved by the Missouri Bar for this purpose. *Id*.

more complete reforms. A comprehensive approach that applies to all out-of-state lawyers would lead to a more logical set of regulations.

2. Exempt Occasional Practice

A handful of states, led by Michigan[101] and Virginia,[102] have revised their regulations to permit occasional practice by all out-of-state lawyers. Consider the following situation: Lawyer *K*, an in-house lawyer licensed only in New York, travels to Detroit, Michigan, to attend a meeting at the office of one of the corporate divisions. While at the meeting, Lawyer *K* advises the division managers regarding compliance with Michigan state law and federal environmental regulations.

Lawyer *K* would not be prosecuted if he entered Michigan for a limited period of time to advise a client who had employed him before he entered the state.[103] Similarly, a lawyer returning telephone calls and sending e-mail while at an airport in Michigan would not violate the UPL regulation there, since he is only temporarily working within the state.[104] However, if the lawyer took a job that required him to maintain an office in Michigan, then the temporary presence exemption would no longer apply.[105]

To the extent that states adopt the newly amended language of Model Rule 5.5, in-house lawyers will be as protected as outside counsel are by the general grant of exemption from UPL prosecution for lawyers licensed elsewhere who temporarily practice in a state and do not hold out their services in that state.[106] North Carolina is among the first states to make this change in its professional responsibility regulations.[107] Colorado has adopted a new rule that allows out-of-state attorneys (both in-house and outside counsel) to temporarily practice in the state, as long as the attorney does not open an office in the state, solicit or accept Colorado clients, or establish his domicile in the state.[108] In its 2002 revisions to its admissions standards, Nevada specifically provided reassurance for in-house lawyers licensed in other states who occasionally travel to Nevada to provide legal advice; they will not be engaging in UPL provided

101. *See* MICH. COMP. LAWS § 600.916(1) (1996).
102. *See* VA. SUP. CT. R. Pt. 6, § I(C).
103. *See* MICH. COMP. LAWS § 600.916.
104. *See id*.
105. *See id*.
106. Legal services provided on a temporary basis by an out-of-state lawyer not suspended or disbarred in any jurisdiction that "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice" are permitted under Model Rule 5.5. *See* MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(4) (2003).
107. *See* N.C. ST. BAR R. 5.5 (2003). The revisions to North Carolina's version of Rule 5.5 were approved on February 27, 2003. *See* Memorandum from E. Fitzgerald Parnell, III, President of North Carolina State Bar, to the Members of North Carolina State Bar (July 29, 2002), *at* http://www.ncbar.com/home/proposed_rules.asp (last visited Oct. 25, 2003).
108. COLO. R. CIV. P. 220.

that they comply with the provisions of the limited practice rule.[109] In the alternative, as long as the lawyer does not provide such advice on a regular basis, he is protected under Nevada Rule 189(2)(c).[110] On balance, an exemption for occasional practice is better than a complete prohibition. It does not provide, however, adequate protection for lawyers who are transferred to offices or who frequently travel to provide legal services in states in which they are not licensed.

3. Create an Exemption for Advice on Federal Law

A third option would be to allow all out-of-state lawyers to give advice on federal law and on the law of the states in which they are admitted. If a national solution is not available, then action in each state will be needed. The Florida Supreme Court in *Florida Bar v. Savitt*[111] and *Chandris v. Yanakakis*[112] has allowed out-of-state lawyers to give advice regarding federal law when they are temporarily in the state and to give advice regarding non-Florida law. The competing interests involved, and the analysis of the sources of the power to admit attorneys have been discussed in other articles.[113] The concept is mentioned here to indicate one comprehensive solution to the problems facing in-house counsel whose client wants legal advice when the attorney travels throughout the United States

4. Maintain the Status Quo

Keeping the regulations as they are now written is an option.[114] This would maintain the current inequitable treatment of in-house counsel. Lawyers working at law firms are permitted to escape UPL prosecution by associating with another lawyer licensed in the state. Although this approach represents a shallow analysis, which has been discussed elsewhere,[115] in-house counsel licensed out-of-state are still disadvantaged to

109. NEV. SUP. CT. R. 49.10 (2002).

110. NEV. RULES OF PROF'L CONDUCT R. 189(2)(c). Nevada Rule 189 (2)(c) provides that an in-house lawyer licensed in another state does not commit UPL in Nevada when that lawyer provides legal advice in Nevada on "an occasional basis and not as a regular or repetitive course of business." *Id*.

111. 363 So. 2d 559, 561 (Fla. 1978).

112. 668 So. 2d 180, 184 (Fla. 1995).

113. *See* Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 GEO. J. LEGAL ETHICS 473, 475–76 (1995); Needham, *supra* note 41, at 463–91; Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1, 4–7 (1989–90).

114. For additional discussion, see, e.g., Daniel A. Vigil, *Regulating In-House Counsel: A Catholicon or a Nostrum?,* 77 MARQ. L. REV. 307, 319–21 (1994); Ryan J. Talamante, Note, *We Can't All Be Lawyers . . . Or Can We? Regulating the Unauthorized Practice of Law in Arizona*, 34 ARIZ. L. REV. 873, 874–75 (1992).

115. The implausibility of the idea that a first-year lawyer would be vetting the advice given by a major authority in an area of law has been explored by Charles W. Wolfram. *See* Wolfram *supra* note 41, at 678.

the extent that disciplinary authorities will not allow them to escape UPL prosecution by associating with another lawyer in the legal department who is licensed in the state. In addition, as previously mentioned, the California Supreme Court in its opinion in *Birbrower* has cast doubt on the protection available through associating with local counsel.[116]

5. Increase the Availability of Reciprocal Admission

Twenty-six jurisdictions permit both in-house lawyers and those employed in law firms who have worked the required number of years in another jurisdiction to be granted admission on motion. Eleven of those jurisdictions admit on motion lawyers licensed in any jurisdiction.[117] Eighteen other states will only admit lawyers whose licensing jurisdiction provides reciprocal treatment for lawyers licensed in the state considering the application.[118]

6. Enact Federal Legislation

It is conceivable that Congress could be prodded to enact federal legislation that would exempt out-of-state lawyers from prosecution for the unauthorized practice of law. Once in place, the Supremacy Clause would require the states to accept the federal regulation.[119] Congressional action is a possibility; one of its advantages is that those pushing for change could focus their attention only on the House and Senate, rather than mounting fifty separate campaigns lobbying the appropriate decision makers in each of the fifty states.

Federal legislation in this area raises its own set of difficulties. Most importantly, once the regulation of lawyers is in the hands of legislators,

116. *See supra* notes 32–35 and accompanying text.

117. Those jurisdictions are: Indiana, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, North Dakota, Ohio, Tennessee, Vermont, and the District of Columbia. *See* CrossingtheBar.com, *Basic Reciprocity Information by Jurisdiction*, *at* http://www.crossingthebar.com/Reciprocity-Chart.htm (last visited Oct. 2, 2003).

118. The states which require reciprocity are: Alaska, Colorado, Connecticut, Georgia, Illinois, Kentucky, Missouri, New Hampshire, New York, North Carolina, Oklahoma, Pennsylvania, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See id*. Three states, Oregon, Idaho, and Washington (the "northwest coalition"), have recently acted upon a policy under which lawyers licensed in any of the three states can be granted reciprocal admission in the other two without the years in practice requirement typically imposed elsewhere. *See id*. For many experienced in-house lawyers who are moving to a new jurisdiction, availability of reciprocal admission in the new jurisdiction provides significantly wider scope of permitted practice than that available under the special admission category discussed above. To the extent that the jurisdictions which currently have adopted neither admission policy act positively upon the Model Rule on Admission by Motion adopted by the ABA's House of Delegates in August 2002 (which was Part 201G of the MJP Commission's proposal) lawyers who meet the requirements can be admitted without taking the regular bar examination. The candidate must have been primarily engaged in actively practicing law for five of the seven years prior to the application, and meet the usual character and fitness requirements. COMM'N ON MULTIJURISDICTIONAL PRACTICE, AM. BAR ASS'N, FINAL REPORT 201G ¶ 1 (2002), *available at* http://www.abanet.org/cpr/mjp-home.html (last visited Oct. 2, 2003).

119. *See* U.S. CONST. art. VI, § 2.

the vagaries of the political process may well result in an illogical, unworkable provision. In addition, other interested groups might see this as an opportunity to pursue their own agendas at the expense of attorneys.[120]

In addition, practical problems remain. No group is currently committed to organizing constituent pressure on this issue. A significant amount of time and resources would have to be spent to have even a chance at getting federal legislation passed. In addition, few representatives would be interested in taking up the cause and sponsoring the needed legislation.

7. Adopt Provisions Applicable to All Attorneys

One of the most elegant solutions would be to adopt multijurisdictional practice provisions that permit all lawyers engaged in transactional work to provide legal services on a less restricted basis. Regulations applying to all attorneys would allow in-house attorneys to give legal advice, even when they are outside the state in which they maintain their office. Such regulations would also better reflect the policy of protecting clients' choices of counsel than do the more restrictive exemptions specifically for in-house counsel.

D. Changes Indicated by the California Supreme Court

Under the traditional analysis, a lawyer who remained physically located within a jurisdiction in which he is licensed was thought to be able to properly give legal advice, including advice regarding the laws of other jurisdictions. For lawyers who give legal advice regarding California law, however, a new analysis is needed in light of the California Supreme Court's opinion in *Birbrower*.[121]

By indicating that section 6125 of the California Business and Profession Code can be triggered when an out-of-state lawyer gives advice on California law even when he is not physically in the state, the court indicated that a lawyer can violate California's UPL prohibition even if he gives his legal advice while located outside of California.[122] Consider the following hypothetical:

Lawyer *L*, in-house counsel for a company with operations in New York, California, and Texas, is licensed in the District of Columbia, New York, and Connecticut. She participates by conference call in a meeting held in Los Angeles, California. She gives advice regarding California

120. Management at the so-called Big Four professional services organizations (KPMG, PricewaterhouseCoopers, DeLoitte & Touche, and Ernst & Young), for example, might be quite interested in this legislation.

121. Birbrower, Montalbano, Condon & Frank v. Sup. Ct., 949 P.2d 1, 5–8 (Cal. 1998).

122. *Id*.

law, federal tax law and New York law, while sitting in her office in New York.

Prior to *Birbrower*, Lawyer *L* would not have been in danger of prosecution for a UPL violation. After *Birbrower*, she must analyze whether she is giving advice on California law to a California company. The court did not provide explicit guidance on the standard to be used to determine whether an entity is a California company. A company organized under the laws of California and operating in the state would certainly be included.

From the perspective of preventing later problems, it would be prudent to assume that any company with substantial operations in California also might be viewed as a California company, even if it is not organized under the laws of California. If her employer is viewed as a California company, then Lawyer *L* must sort through the *Birbrower* opinion to ensure that her actions do not violate California's UPL provision. Under the *Birbrower* "sufficient contacts" test, an out-of-state attorney is deemed to be practicing law "in California" whenever the attorney engages in "sufficient activities in the state or create[s] a continuing relationship with the California client that include[s] legal duties and obligations."[123] The court states, "one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means."[124] Under the court's opinion, no out-of-state lawyer in that situation will be able to confidently predict whether his actions will violate the UPL prohibition.[125] Declaring that each case must be decided on its individual facts, the court states, "[A]lthough we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person automatically practices law in California whenever that person practices California law anywhere, or virtually enters the state by telephone, fax, e-mail or satellite."[126]

The language of the opinion should not be read to prevent in-house counsel employed by non-California companies from giving legal advice on California law.[127] Lawyers not licensed in California advising California companies must recognize, however, that California courts may find their work violates the *Birbrower* standard.

123. *Id.*
124. *Id.* at 5–6.
125. *Id.* at 6.
126. *Id.*
127. Support for this view can be found in *Estate of Condon,* 76 Cal. Rptr. 2d 922 (Ct. App. 1998) (Colorado lawyer engaged by a Colorado resident to represent him as coexecutor of a California decedent's will allowed to recover his fee). *See also* Fought & Co. v. Steel Eng'g & Erection, Inc., 951 P.2d 487, 494–98 (Haw. 1998) (permitting Oregon lawyers to recover their fee when they had assisted Hawaii counsel in litigation in Hawaii).

If other states adopt this approach and begin to regard advice concerning their states' laws to be practicing law "within the state" even when the lawyer does not provide the advice while located there, then a new category of UPL prosecution will be opened. For example, if Delaware adopted the *Birbrower* approach, then a lawyer giving advice to Delaware corporate executives about Board of Directors meeting procedures would be viewed as interpreting Delaware law. He could be prosecuted for engaging in the unauthorized practice of law, even if he was licensed in the state in which he gave the advice. In the five years since the California Supreme Court issued its opinion, no other state's highest court has adopted the expansive interpretation of "practicing law in the state" that California pioneered in *Birbrower*. Lawyers with a multijurisdictional practice, however, are well advised to take an active interest in developments in this area of law.

In August 2002, the ABA Ethics 2000 Commission and the MJP Commission achieved a noteworthy milestone when the ABA House of Delegates approved major revisions to Model Rules 5.5 and 8.5.[128] States widely adopting the new language will represent a significant enlargement in the scope of practice permitted by licensed lawyers in the United States

IV. EFFECT ON STATES ADOPTING MODEL RULE CHANGES

As amended in 2002, the language of Model Rule 5.5 continues to prohibit a lawyer not admitted in the host jurisdiction from opening "an office or other systematic and continuous presence" in the host state for the practice of law.[129] Model Rule 5.5 also prohibits that lawyer from claiming that he is admitted to practice in the host jurisdiction.[130] When an out-of-state lawyer takes a job as an in-house counsel in a state that has no statutory restrictions on such practice and whose highest court has adopted the amendments to Model Rule 5.5, the out-of-state lawyer can provide legal services to her employer[131] and its organizational affiliates.[132] After this language is adopted in a jurisdiction that does not yet have a special admission category for in-house lawyers, such lawyers will be able to continue to give legal advice to their employers after they move to that state, as long as they provide legal services only for their employers. Comment 16 specifically states that the out-of-state lawyer is

128. *See* Mark Hansen & James Podgers, *House: Thumbs Up to MJP—New Model Rules Would Allow Lawyers Licensed in One State to Practice Temporarily in Another*, 31 ABA J. E-REPORT 1 (2002).

129. MODEL RULES OF PROF'L CONDUCT 5.5(b)(1) (2003). Of course, if the state's rules or other law allows the out-of-state lawyer to engage in those activities, he will be free to do so.

130. *Id*. R. 5.5(b)(2).

131. *Id*. R. 5.5(d)(1). The only limitation is that the in-house lawyer's services cannot include court appearances which would require *pro hac vice* admission in the host state. *Id*.

132. Those affiliates are defined in the comment to Rule 5.5 as "entities that control, are controlled by, or are under common control with the employer." *Id.* R. 5.5 cmt. 16.

not authorized by the language in Rule 5.5(d)(1) to provide personal legal services to the officers or employees of the corporation.[133] Of course, if the in-house lawyer establishes a systematic presence in the host jurisdiction, then the host can require that the in-house lawyer register (on a one-time basis or annually), pay assessments for client protection funds in the host, comply with continuing legal education requirements imposed by the host, and meet other similar requirements.[134]

Of course, in-house lawyers' work for their employers often involves jurisdictions other than the state in which their office is located. When an in-house lawyer is asked to give legal advice to her employer in such additional states, she cannot rely on the protection provided in Model Rule 5.5(d)(1). As long as the work in the host jurisdiction is only temporary, it is permitted if it falls within one of the categories in Model Rule 5.5(c): (1) the out-of-state lawyer associates with local counsel "who actively participates in the matter;"[135] (2) the lawyer is providing services that are related to a proceeding in which the lawyer is authorized to appear;[136] or (3) the lawyer is providing services in an alternative dispute resolution proceeding.[137]

In-house lawyers working on transactions are most likely to find their work included in the fourth section of Model Rule 5.5(c). Modeled on the language in section 3 of the ALI Restatement (Third) of the Law Governing Lawyers,[138] the language in Rule 5.5(c)(4) permits the out-of-state lawyer to provide legal services on a temporary basis that "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[139] This provision can open the door for out-of-state lawyers to conduct significant legal business in a host state. The requirement that the legal services "arise out of" or are "reasonably related" to the lawyer's practice in a jurisdiction in which he is admitted is the most potentially expansive. The comment to Rule 5.5 articulates some of the elements that demonstrate the necessary connec-

133. *Id*.

134. *Id*. R 5.5 cmt. 17.

135. *Id*. R. 5.5(c)(1).

136. *Id.* R. 5.5(c)(2). Such services are those which "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." *Id.*

137. *Id*. R. 5.5(c)(3). Temporary-basis legal service may be provided when the services "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." *Id*.

138. Section 3 of the Restatement provides that a lawyer can provide legal services to a client "at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyers' practice" in the admitting jurisdiction or before a tribunal or administrative agency which authorizes the lawyer to practice before it. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (2000).

139. MODEL RULES R. 5.5(c)(4). This permission is available only for services which do not fall within the scope of section (c)(2) or (c)(3). *Id*.

tion between the legal services and the lawyer's practice where he 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 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.[140]

If read literally, the concept of previous representation would appear to allow an in-house lawyer whose competence and credentials can easily be assessed by the managers and executives of the company to be even stronger evidence of the specified relationship than that of an outside counsel who has occasionally provided legal services. Similarly, an in-house lawyer for a corporation with operations in twenty states would be able to argue that he should be able to provide legal services if he is licensed in any of those twenty states. The more varied the lawyer's practice, the more likely he will be able to argue that the legal services he is providing in the host state meet the requirements of Rule 5.5(c)(4). The comment attempts to contain the expansive reach of the language in the rule itself, with its discussion of "recognized expertise" in matters related to "a particular body of federal [or] nationally-uniform . . . law."[141] The paradigm would be the lawyer whose practice focuses on ERISA, federal securities law, or bankruptcy law. However, the wording of the rule would also support claims by a general business lawyer that the required nexus should be found as long as the legal matter is related to any business law issue, whether it involves contract interpretation, employment law, or any other area of law regarding which he has given advice. It may not be possible to further define the permissible scope of practice contemplated under Rule 5.5(c)(4). Courts, bar counsel, ethics committees, and others will provide additional guidance for out-of-state lawyers regarding the limits of the permission to practice available under Rule 5.5(c)(d).

140. *Id*. R 5.5 cmt. 14.
141. *Id*.

Some interested entities, most notably the Association of Professional Responsibility Lawyers (APRL)[142] and the American Corporate Counsel Association (ACCA),[143] advocated more sweeping reforms, known as the "Common Sense Proposal." If the provisions of the Common Sense Proposal[144] had been adopted, once any U.S. jurisdiction licensed a lawyer, that lawyer would have been free to provide legal advice anywhere within the country. A more restrained reform ultimately was enacted. While the "safe harbor" terminology used in the MJP Commission's Interim Report[145] was explicitly abandoned in the Commission's final report, the final report listed certain permissible activities, along with language indicating that additional activities could be construed to be permissible.[146]

A number of knowledgeable commentators weighed in on the debate over the permissible scope of multijurisdictional practice.[147] Bar committees in some states urged a cautious approach. A committee of the Akron, Ohio, bar, for example, filed comments in response to the

142. *See* THE ASS'N OF PROF'L RESPONSIBILITY LAWYERS, PROPOSAL TO THE AMERICAN BAR ASSOCIATION COMMISSION ON MULTIJURISDICTIONAL PRACTICE (Feb. 2001), *available at* http://www.abanet.org/cpr/mjp-comm_aprl.html (last visited Oct. 25, 2003).

143. *See* AM. CORP. COUNSEL ASS'N, A COMMON SENSE PROPOSAL FOR MULTIJURISDICTIONAL PRACTICE (2001), *available at* http://www.acca.com/public/accapolicy/commonsenseproposal.html (last visited Oct. 25, 2003).

144. According to the Common Sense Proposal, Model Rule 5.5 should be amended to read as follows:

(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 not admitted to practice in this jurisdiction, but admitted to practice in another jurisdiction, and not disbarred or suspended from practice in any 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.

Id.

145. *See* AM. BAR ASS'N, INTERIM REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE (Nov. 2001), *available at* http://www.abanet.org/cpr/mjp-final_interim_report.pdf (last visited Oct. 2, 2003).

146. *See* AM. BAR ASS'N, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE (Aug. 2002), *available at* http://www.abanet.org/cpr/mjp/final_mjp_rpt_6-5.pdf (last visited Oct. 2, 2003).

147. *See*, *e.g.*, Anthony E. Davis, *Multijurisdictional Practice by Transactional Lawyers: Why the Sky Really Is Falling*, 11 PROF. LAW. 1 (2000); Peter R. Jarvis, Where You Stand Depends on Where You Sit: One Litigator's View of Multijurisdictional Practice Issues and Related Policy Questions, Symposium on the Multijurisdictional Practice of Law, Fordham University School of Law (Mar. 10–11, 2000) (unpublished manuscript on file with the University of Illinois Law Review).

MJP Commission's Interim Report in which they emphasized the importance of a vibrant local bar as a positive element in a civic community.[148] The Akron Bar warned that allowing out-of-state lawyers to practice, even on a sporadic basis, could diminish the importance of bar leadership and lessen the personal contacts that have been an important element in mentoring new members of the bar.[149]

Now that Model Rule language has been changed, many states are considering whether to make changes in their own regulations governing the unauthorized practice of law. To assess the likely impact of the changes, one should consider precisely how the situations described in part III would be analyzed differently if the host jurisdiction adopted the amended language of Model Rule 5.5.

A. Lawyers Giving Legal Advice When Traveling to a State

If one of the states Lawyer *A* visits, other than Michigan or Nevada, adopted the language of the 2002 amendments to Model Rule 5.5, then Lawyer *A* would be free to perform legal work for his employer in that state pursuant to the authority granted in Rule 5.5(d)(1). As long as all of the legal questions that he addressed came from managers or other employees at *ABC* Company, or employees of *ABC*'s affiliates, he is free to provide legal advice. Note, however, that if the lawyer addresses questions posed by independent contractors, customers, owners of an *ABC* franchise, or other individuals or entities that are not under common control with *ABC*, then the language of Rule 5.5(d)(1) would not protect Lawyer *A* from the charge that his advice to those persons or entities amounts to UPL.

Assume that Lawyer *A* is licensed only in New York. The analysis of the permissibility of the work in Nevada will be the most straightforward. Nevada was the first state to amend its rules to more broadly permit MJP.[150] As long as Lawyer *A* only provides legal services in Nevada occasionally and does not conduct a regular or repetitive course of business there, Nevada Rule of Professional Conduct 189 allows him to provide legal services when he is acting on behalf of his employer, or "in connection with the client's matters" on behalf of the company's other employees or its commonly owned organizational affiliates in matters "related to the business of the employer."[151] If Lawyer *A* frequently travels to Nevada, however, or gives legal advice there on what Nevada

148. The reports are available at http://www.abanet.org/cpr/mjp-written_comments.html (last visited Oct. 2, 2003).

149. *See* Written Testimony on Behalf of the Akron Bar Association Re: Multijurisdictional Practice (MJP) (Feb. 5, 2001), *available at* http://www.abanet.org/cpr/mjp-comm_akronba.html (last visited Oct. 2, 2003).

150. Nevada Rule 189.1 became effective September 24, 2002. *See* George A. Riemer, *Multijurisdictional Practice: An Update* 2 (Sept. 25, 2002), *at* http://www.crossingthebar.com/MJPUpdate92502.pdf (last visited Oct. 2, 2003).

151. NEV. RULES OF PROF'L CONDUCT R. 189.1 (2002).

terms a "repetitive" basis, then obtaining full admission in Nevada remains the safest course of action. It is not yet clear what pattern of activities would amount to "regular or repetitive course of business" in Nevada. The court might look to decisions in other states interpreting the temporary practice requirement for outside counsel under Model Rule 5.5(c)(1)–(4).

How frequently a lawyer can give advice in a state and still be regarded as having only occasional presence there is likely to be handled differently from one state to another. A mechanical analysis, which would turn on a specific period of time spent in a state, or a specified percentage of the lawyer's hours billed in any given month, would have the virtue of straightforward application. A state could articulate the standard in terms of number of days or partial days during which the lawyer provides legal services in the host state. For example, a state could declare that the services are no longer provided on a temporary basis when the lawyer advises clients in the host state on more than thirty-six days in any calendar year.[152] Counting hours spent in the state, or the work performed there as a percentage of the lawyer's total billable hours has little to do with the policy goals asserted to justify the prohibition of the unauthorized practice of law. This is especially true when the lawyer working in Nevada is an in-house attorney, hired for his expertise by a sophisticated client, which is well aware of the attorney's qualifications and bar admission status.

Colorado Rule of Civil Procedure 222 allows U.S. licensed in-house counsel to live in the state and give legal advice from an office in Colorado.[153] Alternatively, if the lawyer is not domiciled in Colorado, then Colorado Supreme Court Rule 220, effective January 2003, allows both in-house and outside counsel to practice law in Colorado, as long as they do not establish a place in Colorado for the regular practice of law from which they hold themselves out as practicing Colorado law and do not solicit or accept Colorado clients.[154] This rule would allow Lawyer *A* to give legal advice in Colorado, even if his practice for his employer involves frequent travel to Colorado.

If the host state has adopted the 2002 amendments to Model Rule 5.5, then Lawyer *D* would be able to move to that host state and practice there as an in-house lawyer under the authorization in Model Rule 5.5(d)(1). Under that subsection, in-house lawyers are not subject to the requirement that the legal services be provided on only a temporary basis, which would govern the analysis of services provided by outside counsel. Similarly, Lawyer *E*, who is rotated to the office in the host state for a defined period of time, would also be able to practice in the

152. Geoffrey Hazard proposed such a formula in his 1998 *National Law Journal* article. Hazard, *supra* note 12.

153. *See* COLO. R. CIV. P. 222.

154. *See id*. R. 220.

host state without fearing UPL prosecution.[155] Furthermore, an in-house lawyer would be free to travel to the host state to provide legal services there for an open-ended period of time. In-house lawyers advising their employers are not subject to the requirement of Model Rule 5.5(c) that their presence in the state be temporary. There is no restriction on the length of time an in-house lawyer can provide services pursuant to the authority of Model Rule 5.5(d)(1). Lawyer *F*, and other in-house lawyers who frequently travel away from the states where they are licensed, can advise clients in the host state with the assurance that Model Rule 5.5(d)(1) authorizes his practice there. This authorization should make the assertion of attorney-client privilege for the advice rendered in the host state less problematic.

B. International Work

Lawyer *B,* in the second hypothetical, is licensed in New York. She works in Europe and Asia for *DEF* Corp., and none of her work involves the interpretation of U.S. law. If *DEF* moved its headquarters to a U.S. state that has adopted amended Model Rule 5.5, then she would be free to provide legal advice regarding international law and the law of other countries, pursuant to the language of Model Rule 5.5(d). The language of the version of Rule 5.5 adopted in North Carolina[156] gives Lawyer *B* even more explicit permission to advise her client there. Under the terms of North Carolina's Rule 5.5(c)(2)(E), attorneys are explicitly permitted to provide legal services "limited to federal law, international law, the law of a foreign jurisdiction or the law of a jurisdiction in which the lawyer is admitted to practice."[157] Lawyer *B*, therefore, would be certain that her advice to *DEF* regarding those areas of law is authorized by the terms of Rule 5.5, as adopted in North Carolina. The language of North Carolina's Rule 5.5(c)(2)(E) applies to both in-house counsel and outside counsel and does not authorize the establishment of an office in the state, although North Carolina's Rule 5.5(c)(2)(A) does allow in-house counsel to do so.[158]

Of course, legal services are a subject of U.S. Trade Representative negotiations with other countries. If the United States enters into treaties that include commitments regarding the ability to offer legal services, then those treaty terms would alter the ability of lawyers licensed outside a state to give legal services in any host state. Under a Supremacy Clause analysis, the treaty terms would supplant contrary provisions adopted in a state.

155. MODEL RULES OF PROF'L CONDUCT R. 5.5(d)(1) (2003).
156. N.C. RULES OF PROF'L CONDUCT R. 5.5 (2003) (effective Mar. 1, 2003).
157. *Id*. R. 5.5(c)(2)(E).
158. *Id*. R. 5.5(c)(2)(A).

C. Reporting to a General Counsel Not Licensed in the State

As long as the general counsel is admitted and in good standing in another state in the United States, this scenario would not be problematic in the twenty-two states in which in-house counsel have a separate admission category. If the general counsel is eligible to practice in the state, even though he is licensed elsewhere, rather than in the host state, then none of the other attorneys in the legal department would be aiding and abetting UPL as a result of reporting to the general counsel. If the general counsel must become licensed in the host state before being eligible to practice there, then the other lawyers are exposed to UPL prosecution on a rather technical interpretation of the UPL regulation. If the host state amended its professional conduct regulation and statutes to reflect amended Model Rule 5.5, then the out-of-state general counsel would not be engaged in UPL when he gives legal advice to his company. Thus, the lawyers reporting to the general counsel would not be assisting a nonlawyer in the practice of law in violation of the UPL regulation.

D. Working in an Office in the Lawyer's Home

No greater latitude is specified in Model Rule 5.5 for lawyers working in an office in their homes, rather than in an office building. In Colorado, the fact of domicile is relevant to the analysis of the scope and frequency of work permitted to out-of-state lawyers. Under Colorado Rule 222, as long as an in-house lawyer confines his advice to a single client, which can include organizational affiliates, the out-of-state lawyer will be permitted to practice for all purposes as if licensed in Colorado.[159] Other states do not explicitly identify the lawyer's domicile as a factor in the analysis. As long as the lawyer is not meeting clients in his home, it is likely that working in his home will not be found to constitute "establishing an office" in the host state. Typically, the lawyer working at home (or while on vacation or attending a conference) is providing legal services to established clients where the relationship was initiated elsewhere—usually in a state in which the lawyer is licensed.

V. THE FUTURE OF MULTIJURISDICTIONAL PRACTICE

It is still rather early to make predictions about the degree of eventual adoption of amended Model Rules 5.5 and 8.5. A number of states, including Colorado, Delaware, Nevada, New Jersey, and North Carolina, have already adopted new amendments to their versions of Model Rule 5.5 that address the scope of practice permitted for out-of-state lawyers advising clients in those states.[160] The language in effect in Delaware is

159. *See* COLO. R. CIV. P. 222.
160. *See* COLO. R. CIV. P. 220; NEV. SUP. CT. R. 42; N.C. RULES R. 5.51.

identical to that of amended Model Rule 5.5.[161] In all of these states, in-house lawyers licensed in other states are permitted to advise their employers regarding transactions and other work not involving appearances before tribunals in the host state. The provisions applicable to all lawyers may provide additional permission for in-house lawyers to give legal advice, for example, when the in-house lawyer is considering giving advice to an individual constituent employed by his client, or a joint venture or other related entity that does not meet the host state's requirements to be an affiliated organization. Overall, the scope of the multijurisdictional practice allowed for certain categories of legal practitioners in those states extends at least as far as the scope under the Model Rules, with some changes in certain states.

A. Colorado

An out-of-state lawyer, not domiciled in Colorado, who has not established an office for the regular practice of law in Colorado from which he holds himself out as practicing Colorado law or solicits or accepts Colorado clients may practice law in Colorado.[162] This provision is remarkable in its brevity and scope. It presents no qualifications or restrictions on the scope of practice or the length of the lawyer's presence in the state. In-house lawyers can apply to the Colorado Supreme Court for single-client certification under Colorado Rule 222, which allows out-of-state lawyers domiciled in Colorado to represent single clients there, including a business entity or an organization and its organizational affiliates.[163]

B. Nevada

In Nevada, nonresident, out-of-state lawyers conducting discovery and settlement negotiations there who are not "engaged in substantial business, professional, or other activities" in Nevada can apply for permission to appear in a proceeding in that state under Nevada Rule 42.[164] Unless good cause is shown, a firm is limited to no more than five appearances under Rule 42 in any three-year period.[165] As long as the out-of-state lawyer does not solicit clients, hold out that the lawyer is admitted in Nevada, or establish an office for the practice of law there,[166] and

161. The current language of the Delaware Rules of Professional Conduct is available on the website of the Delaware Supreme Court *at* http://courts.state.de.us/supreme/pdf/FinalDLRPCclean.pdf (last visited Oct. 21, 2003).

162. COLO. R. CIV. P. 220. The new language, contained in Rule Change #2002(13), became effective on January 1, 2003. *See* Rule Change #2002(13), *at* http://www.courts.state.co.us/supct/rules/2002/2002(13).doc (last visited Oct. 2, 2003).

163. COLO. R. CIV. P. 222.

164. NEV. SUP. CT. R. 42.

165. *Id*.

166. NEV. RULES OF PROF'L CONDUCT R. 189(4)(b)(1)–(3) (2003).

acts only "on an occasional basis and not as a regular or repetitive course of business," an out-of-state lawyer can act in Nevada "with respect to a matter that is incident to work being performed in a jurisdiction in which the lawyer is admitted"[167] or in "areas governed primarily by federal law, international law, or the law of a foreign nation."[168] Out-of-state lawyers providing services for Nevada clients are required to file an annual report describing "the nature of the client(s) (individual or business entity) for whom the lawyer has provided services that are subject to this rule and the number and general nature of the transactions performed for each client" during the previous year.[169] The lawyer need not disclose the identity of any client or provide any confidential or privileged information.[170]

C. New Jersey

The New Jersey Supreme Court has adopted its version of Rule 5.5, which contains several notable departures from language of ABA Model Rule 5.5. New Jersey's rule omits the "temporary basis" language used in Model Rule 5.5(c). The New Jersey provision limits out-of-state lawyers to working for existing clients in situations where a transaction or dispute in an ADR proceeding "originates in or is otherwise related to" a jurisdiction in which the lawyer is admitted.[171] Occasional practice is permitted under the rule only when the lawyer's continued representation is necessary to avoid "inefficiency, impracticality or detriment to the client."[172] Lawyers who have even spurious disciplinary complaints brought against them are not eligible while the resolution of the complaint is pending.[173] In addition to being required to comply with the Rules of Professional Conduct in New Jersey and subject to the disciplinary authority of the state Supreme Court, out-of-state lawyers are required to submit themselves and their law firms to personal jurisdiction in New Jersey for all lawsuits that may arise out of the lawyers' participation in legal matters there.[174] And, New Jersey has omitted the permission to give advice on federal law available under Model Rule 5.5(d)(2).

167. *Id*. R. 189(2)(d).
168. *Id*. R. 189(2)(f).
169. *Id*. R. 189.1(3)(e).
170. *Id.*
171. N.J. RULES OF PROF'L CONDUCT R. 5.5(b)(3)(i)–(ii) (2003). The language of the new rule is available at http://www.judiciary.state.nj.us/notices/reports/Bar-Admissions-Report-2003.pdf (last visited Oct. 21, 2003).
172. *Id.* R. 5.5(b)(3)(iv).
173. *Id.* R. 5.5(c)(1).
174. *Id.* R. 5.5(c)(2)–(3).

D. North Carolina

The wording of North Carolina's amended Rule 5.5 specifies that an out-of-state lawyer temporarily in the host state may "act with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client" in a state where the lawyer is admitted,[175] rather than the broader Model Rule language omitting the requirement of an on-going client relationship in the lawyer's home state. Under Model Rule 5.5(c)(4), out-of-state lawyers are authorized to provide legal services that "arise out of or are reasonably related to the lawyer's practice" in such a jurisdiction.[176] Under subsection (d)(2) of North Carolina Rule 5.5, however, out-of-state lawyers will be allowed to provide legal services "limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted."[177] When North Carolina is the host state, then, the out-of-state lawyer will now be able to give advice restricted to federal bankruptcy law, federal securities law, and other areas of federal law. This grant goes beyond that of Model Rule 5.5(d)(2), which simply allows those lawyers to provide services that they are "authorized to provide by federal law or other law of this jurisdiction."[178]

As of fall 2003, about half of the states in the United States have moved significantly towards permitting multijurisdictional practice in some form. Michigan and Virginia already allowed multijurisdictional practice, prior to the ABA's approval of changes to its Model Rule 5.5. Five additional states, Colorado, Delaware, Nevada, New Jersey, and North Carolina, adopted new regulations, effective in 2003, that expanded the scope of practice permitted for out-of-state lawyers advising clients in those states.[179] Of these, only Delaware adopted a regulation with wording identical to ABA Model Rule 5.5.[180] In all five states with new regulations, in-house lawyers licensed in other states are permitted to advise their employers regarding transactions and perform other legal work not involving appearances before tribunals in the host state. The provisions applicable to all lawyers may provide additional permission for in-house lawyers to give legal advice. Overall, the scope of the permission to practice allowed in those states for certain categories of lawyers extends important new freedoms in multijurisdictional practice, although the states other than Delaware have included provisions that mark a significant departure from the language of Model Rule 5.5.

175. N.C. RULES R. 5.5(c)(2)(B) (effective Mar. 1, 2003).

176. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(4) (2003).

177. N.C. ST. BAR R. 5.5(d)(2).

178. MODEL RULES R. 5.5(d)(2).

179. *See* COLO. R. CIV. P. 200; DEL. RULES OF PROF'L. CONDUCT R. 5.5; NEV. SUP. CT. R. 42; N.J. RULES OF PROF'L CONDUCT R. 5.5; N.C. RULES R. 5.51.

180. Delaware's Rule 5.5 was effective as of July 1, 2003. The amended Delaware Rules of Professional Conduct are available on the website of the Delaware Supreme Court, at http://courts.state.de.us/supreme/pdf/FinalDLRPCclean.pdf (last visited Oct. 21, 2003).

E. Movement Toward Change in Additional States

A number of state bar committees that had actively participated in the national MJP debate acted quickly on the revision of their own professional responsibility regulations. Aside from the five states that have already adopted new language, state bar associations in nineteen additional states have approved new professional responsibility rules permitting multijurisdictional practice, and the proposals are moving through the process for consideration by the highest courts in those states. Those states are Arizona,[181] Arkansas,[182] California,[183] Connecticut,[184] Florida,[185] Georgia,[186] Idaho,[187] Illinois,[188] Indiana,[189] Louisiana,[190] Maryland,[191] Minnesota,[192] Missouri,[193], New York,[194] North Dakota,[195] Oregon,[196] South Carolina,[197] and South Dakota.[198]

181. The proposal for reform was reportedly embraced by the Arizona Bar. *State Bars Adopt ABA Model for MJP Reform, Permitting Transitory Cross-Border Practice*, 72 U.S. L. WK. 2037 (July 22, 2003).

182. The Arkansas Bar Association's House of Delegates approved its changes at the annual meeting in June 2003. The proposal was submitted to the Arkansas Supreme Court on September 16, 2003 for its consideration. The language of proposed Rule 5.5 is available on the website of the Arkansas Bar Association at http://www.arkbar.com/pdf/RULE5-5X.pdf (last visited Oct. 21, 2003).

183. The proposal under discussion in California is available on the webpage of the California courts, at http://www.courtinfo.ca.gov/invitationstocomment/documents/sp03-04.pdf (last visited Oct. 21, 2003). Its terms were discussed in *States Move to Embrace MJP Reform, Relax Barriers to Interstate Practice*, 71 U.S. L. WK. 2739 (May 27, 2003).

184. The language of the proposal is available in the Report of the Connecticut Bar Association Task Force on Multijurisdictional Practice (Sept, 15, 2003) (copy on file with author). The Task Force recommended the adoption of a rule similar to Model Rule 5.5.

185. The proposed language in Florida is available on the website of the Florida Bar at http://www.flabar.org/ (last visited Oct. 21, 2003).

186. Language identical to that in ABA Model Rule 5.5 was approved by the Georgia Bar on April 5, 2003. The proposal is available at http://www.gabar.org/pdf/MJPFinalReport.pdf (last visited Oct. 21, 2003).

187. The recommendations of the Idaho State Bar's E2K Committee, created by the Board of Commissioners of the Idaho State Bar, will be considered by its membership in the winter of 2003–04. The text is available on Idaho's website at http://www2.state.id.us (last visited Oct. 21, 2003).

188. Language identical to that in Model Rule 5.5 is under consideration in Illinois. The text is available on the Illinois Bar Association website at http://www.isba.org/mjp2.html (last visited Oct. 21, 2003).

189. The language under discussion in Indiana is identical to that of ABA Model Rule 5.5. The proposed text is available at http://www.inbar.org (last visited Oct. 21, 2003). The Indiana State Bar Association House of Delegates is expected to consider the changes at its October 23, 2003, meeting.

190. The Louisiana Bar approved its version of the rule in June 2003. The language is available at http://www.lsba.Org/Bar_Information/Rule_5.5_Redline.pdf (last visited Oct. 21, 2003).

191. It is anticipated that language closely tracking that of ABA Model Rule 5.5 will be submitted by the special committee, appointed by the Court of Appeals of Maryland, to recommend changes in the Maryland Lawyers' Rule of Professional Conduct. The committee will submit its report to the Maryland Court of Appeals during October 2003. E-mail from Prof. Robert Rubinson, reporter to the special committee appointed by the court, to the author (Oct. 2, 2003) (on file with the University of Illinois Law Review). The language of the proposed rule is available at http://www.courts.state.md.us/lawyersropc.pdf (last visited Oct. 21, 2003).

192. PROPOSED MINN. RULES 1.0–8.5 (2003). The language is available at http://www2.mnbar.org/committees/task-force-aba-rules/proposed-adopted6-20-03.pdf (last visited Oct. 21, 2003).

193. Over a year ago, on July 26, 2002, the Missouri Bar Board of Governors endorsed the language of ABA Model Rule 5.5. Points relating to practice by in-house lawyers are currently under

An impressive number of states appear to be ready to adopt the exact language of ABA Model Rule 5.5. The provision adopted in Delaware is identical to the Model Rule, and those under discussion, as of this writing, in Georgia, Indiana, Oregon, and South Carolina are also identical to the Model Rule. Until the provisions are actually put into effect, of course, the language may still be reworked in response to local concerns.

In other states, including Arkansas, Connecticut, Illinois, Louisiana, Maryland, Minnesota, Missouri, and South Dakota, some minor changes will probably be made to the rule language or the comments, but the rules in those jurisdictions are likely to largely mirror the provisions of the Model Rule. The language in this group of states may be described as "substantially identical" to that in the ABA Model Rule. The only change to the language of Rule 5.5 in South Dakota, for example, is the addition of the requirement that all lawyers, aside from in-house counsel, obtain a state sales tax license and pay that tax.[199] The differences are even more minor in states that only change the comments, while preserving the operative language of Model Rule 5.5 itself.

A third group of states, including California, Colorado, Florida, and New Jersey, will probably depart from the Model Rule language in significant ways or have already done so. But even in these states some forms of expanded multijurisdictional practice will be allowed. The provisions proposed in California relating to the scope of practice to be permitted for lawyers temporarily in the state on nonlitigation matters are discussed elsewhere in this article,[200] as is the newly available registration for in-house counsel.[201] The proposal in California includes a requirement in Rule 967(a)(3) that any website or advertisement accessible in California must contain a disclaimer warning that the lawyer is not a

discussion prior to consideration by the Missouri Supreme Court of the proposal. Notes from conversation with Jennifer Gille Bacon, Missouri Bar MJP Committee (Oct. 2, 2003) (on file with author).

194. The language of Proposal DR3-101 is at http://www.nysba.org/Content/ContentGroups/Reports3/MJP_Code_of_ProfRespo_Amendments,_House-Approved_06_21_03/MJPcode_approved06.21.03.pdf (last visited Oct. 21, 2003).

195. The proposal has been forwarded to the North Dakota Supreme Court. The language is available at http://www.sband.org/SBANDNews/view.asp?ID=12 (last visited Oct. 21, 2003).

196. Language similar to ABA Model Rule 5.5 was approved by the House of Delegates of the Oregon State Bar and submitted to the Oregon Supreme Court on September 26, 2003. *See* http://www.crossingthebar.com/news903.htm (last visited Oct. 21, 2003); *see also* http://www.osbar.org/barnews/monthly/disciplinefinal.htm (last visited Oct. 21, 2003).

197. Language identical to that in ABA Model Rule 5.5 was submitted to the South Carolina Supreme Court. *See* http://www.scbar.org (last visited Oct. 21, 2003).

198. PROPOSED S.D. RULE 5.5 (2003). The language is available at http://www.sdbar.org/members/Default.htm (last visited Oct. 21, 2003).

199. Language has been added at S.D. Rule 5.5(c)(5) and S.D. Rule 5.5(d)(2) requiring that lawyers providing legal services in the state "obtain[] a South Dakota sales tax license and tender[] the applicable taxes pursuant to Chapter 10-45." PROPOSED S.D. RULE 5.5(c)(5), (d)(2) (2003). The language is available at http://www.sdbar.org/members/ethics2000/default.pdf (last visited Oct. 21, 2003).

200. *See infra* text accompanying note 220.

201. *See infra* text accompanying notes 225–26.

member of the State Bar of California.[202] This goes beyond the more typical requirement that a lawyer not hold out to the public as admitted to practice in a host jurisdiction and that a lawyer accurately list the jurisdictions in which he or she is admitted in advertising materials. Another unusual feature of the California proposal, Rule 964, provides a three-year registration status for registered public interest attorneys working under the supervision of a member of the state's bar on behalf of a qualifying public interest organization.[203]

In a fourth group of states, action mirroring the operation of Model Rule 5.5 does not appear to be imminent. Perhaps it is more correct to say that these states are still evaluating the advisability of change in this area. The most conservative choice is to refrain from making any change at all, at least for the time being. There may be some merit in waiting to see what happens after changes are put in place elsewhere. These states, after all, can always adopt some new language years later, after a leisurely assessment of its benefits. This course of action is not without dangers, including contributing to the balkanization of the rules under which lawyers practice.

In a handful of these states, including Montana and Utah, state bar MJP committees have put forward proposals, that have been referred to under the umbrella term multijurisdictional practice, that involve expanded admission on motion and reciprocal admission within a small group of neighboring states.[204] In the summer of 2003, the Montana Supreme Court considered the state bar MJP committee's proposal to permit reciprocal admission with lawyers who are admitted in the other states in the Northwest States Reciprocity Agreement.[205] If approved, the states that are members of that agreement will include Idaho, Montana, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

An article by the out-going president of the Utah Bar Association refers to the Utah Supreme Court's adoption of a multijurisdictional practice rule, which is actually a revision and expansion of Utah's Rule 5 Admission on Motion.[206] The provision is again referred to as a multijurisdictional practice rule on the Utah Bar's website.[207] It is important

202. The text of proposed Rule 967 is available by selecting item No. SP03-04 at http://www.courtinfo.ca.gov/invitationstocomment/prevprop.html (last visited Oct. 21, 2003).

203. The text of proposed Rule 964 is available by selecting item No. SP03-04 at http://www.courtinfo.ca.gov/invitationstocomment/prevprop.html (last visited Oct. 21, 2003).

204. An article in the *Montana Lawyer* states, "The proposal for allowing a new system of multijurisdictional practice in Montana has been given to the State Bar of Montana Board of Trustees . . . ." Charles Wood, *Good Debate over Reciprocity Proposal*, 28 MONT. LAW., June–July 2003, at 10.

205. Charles Wood, *Board OKs MJP, Reciprocity Package*, MONT. LAW., Aug. 2003, at 5.

206. John A. Adams, *The Year in Review*, UTAH B.J., June–July 2003, at 6.

207. UTAH STATE BAR, MULTIJURISDICTIONAL PRACTICE RULE, *available at* http://www.utahbar.org/admissions/Frequently_Asked_Questions/Multijurisdictional_Practice_R/multijurisdictional_practice_r.html (last visited Oct. 21, 2003) (referring to Rule for Admission of Lawyers Licensed in Other States or Territories of the United States or the District of Columbia to Practice Law in Utah as a multijurisdictional practice rule).

to distinguish between the two concepts. Admission on motion and reciprocal admission confer upon the applicant full admission to the bar of the host state. Expanding access to such admission should have the effect of enhancing lawyers' abilities to conduct a legal practice across state borders, and proposals for such expansion were part of the work of the ABA's MJP Commission. On the other hand, permission to conduct certain specified types of legal practice in a host jurisdiction without becoming admitted there is what the term MJP has come to mean. Perhaps in the interest of precision, a term should be invented that would denote "occasional practice in a jurisdiction without establishing an office there" and the other types of practice permitted under Model Rule 5.5, to separate that concept from the larger umbrella of all forms of practice that cross jurisdictional boundaries.

F. Issues Emerging in the Adoption Process

Events are still moving forward as of this writing, but we can already see certain categories of concerns emerging as the states consider adopting language permitting multijurisdictional practice.

1. Allowing Attorneys to Provide Services Nonlawyers Can Provide

A few states, including Florida[208] and North Dakota,[209] would allow out-of-state lawyers to perform services that can properly be performed by nonlawyers. Restoring this provision, which was discussed by the ABA's MJP Commission but omitted from the final version of Model Rule 5.5, is a fine idea. Its inclusion broadens the number of situations in which the out-of-state lawyer's activities in the host state will ultimately be found to be proper. The only quibble is that including the provision will slightly differentiate that state's regulation from the terms of the Model Rule.

2. Added Provisions Related to Suspension or Disbarment Proceedings

Three of the states that have already enacted new rules, Nevada, New Jersey, and North Carolina, have added special provisions addressing lawyers facing suspension or disbarment. New Jersey Rule 5.5(c)(1), for example, adds the requirement that the out-of-state lawyer seeking to

208. Florida's proposed rule allows out-of-state lawyers to provide services on a temporary basis which "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." PROPOSED FLA. RULE 5.5(c)(2) (2002). The language is available at http://www.flabar.org (last visited Oct. 21, 2003).

209. The language before the North Dakota Supreme Court allows a lawyer to represent a client in North Dakota on a temporary basis when "the lawyer performs a service that may be performed by a person who is without a license to practice law or other authorization from a federal, state or local governmental body." PROPOSED N.D. RULE 5.5(b)(5) (2002). The language is available at http://www.sband.org/SBANDNews/view.asp?ID=12 (last visited Oct. 21, 2003).

provide legal services in New Jersey pursuant to Rule 5.5(b) cannot be the subject of either any pending disciplinary proceedings or a current or pending license suspension or disbarment.[210] Louisiana is considering adding an extensive new section 5.5(e)(1)–(5), that, among other things, sets out the details needed in the registration form filed before hiring a suspended attorney, defines the practice of law, and mandates that suspended lawyers not handle client funds.[211]

3. Requiring a Connection Between the Client or the Matter and the Lawyer's Home Jurisdiction

The most frequent change the states are making is one that goes to the heart of the scope of transactional and ADR practice available to out-of-state lawyers. A number of states are considering or have enacted language that restricts the situations in which an out-of-state lawyer can provide legal services to a significantly smaller set of circumstances than those in which legal services could properly be provided under the language of Model Rule 5.5.

a. Existing Client Relationship

Some states, such as New Jersey, peg the ability to act to the out-of-state lawyer's relationship with an existing client. The definition of an existing client relationship will doubtless be further clarified as the rules are applied. Certainly the situation where, for example, an Illinois client had initially retained an Illinois lawyer two years ago and has routinely consulted the lawyer in the interim would qualify. The difficulty will come in determining when the relationship is so slight that the person or entity does not qualify as an existing client. For example, what decision will be reached when the parent corporation operates in New Jersey and it has an Illinois subsidiary that has a minor role in a transaction with third parties structured by the parent corporation. Will the out-of-state lawyer succeed in claiming an existing client relationship if the Illinois subsidiary contacts the Illinois lawyer the day before a major stage in the transaction is completed? The determination will necessarily be a case-by-case analysis of the particular facts. Out-of-state lawyers may not be able to predict with confidence whether their situation is one that meets the terms of the New Jersey rule, or the rule of any state that contains a similar "existing client" requirement.

New Jersey added language to its rule to require an existing client relationship in a jurisdiction where the out-of-state lawyer is admitted,

210. N.J. RULES OF PROF'L CONDUCT R. 5.5(c)(1) (2003). The language of the new rule is available at http://www.judiciary.state.nj.us/notices/reports/Bar-Admissions-Report-2003.pdf (last visited Oct. 21, 2003).

211. PROPOSED LA. RULE 5.5(e) (2002). The language is available at http://www.lsba.org (last visited Oct. 21, 2003).

and a relationship between the transaction and that jurisdiction.[212] A parallel requirement is imposed on the out-of-state lawyer's participation in dispute resolution proceedings in New Jersey. Either the out-of-state lawyer's client must be an existing client or the dispute being resolved must originate in or be related to a jurisdiction in which the lawyer is admitted.[213] Interestingly, the limitation that the out-of-state lawyer's practice in New Jersey be only occasional was not imposed in either of the circumstances encompassed by Rule 5.5(b)(3)(i) or (ii).

In situations in which the lawyer's services are rendered other than in the conduct of litigation in a jurisdiction in which the lawyer is admitted and other than as described by Rule 5.5(b)(3)(i) or (ii), the activity falls into Rule 5.5(b)(3)(iv). Under this provision, the lawyer's activity in New Jersey must be only occasional and arise directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted. Furthermore, the activity in New Jersey must be undertaken only when "the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client."[214] It is possible that few situations would actually be screened out by the detriment to the client provision in New Jersey's rule, but evaluation of whether or not the detriment would be substantial in a given situation could certainly become a rather complicated process, in light of the fact-specific nature of the inquiry.

b. Matter Arising Out of a Representation in a Jurisdiction in Which the Lawyer Is Admitted

A variation that is somewhat closer to the language of Model Rule 5.5(c)(4) replaces the concept of the lawyer's practice, used in the Model Rule, with the idea that the legal matter in the host state must arise out of the lawyer's representation in a jurisdiction in which he is admitted. Idaho and North Dakota, for example, are considering such language. Idaho would allow out-of-state lawyers to act "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."[215] The North Dakota rule would allow an out-of-state lawyer to represent a client there on a temporary basis when "the lawyer acts with respect to a matter that arises out of the lawyer's representation of a

212. The lawyer's practice in New Jersey is lawful if "the 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." N.J. RULES OF PROF'L CONDUCT R. 5.5(b)(3)(i) (2003). The language of the new rule is available at http://www.judiciary.state.nj.us/notices/reports/Bar-Admissions-Report-2003.pdf (last visited Oct. 21, 2003).

213. *Id*. R. 5.5(b)(3)(ii).

214. *Id*. R. 5.5(b)(3)(iv).

215. IDAHO RULE 5.5(b)(2)(ii) (2000). The language is available at http://www2.state.id.us/isb/PDF/e2000%20sum%20-%205.pdf (last visited Oct. 21, 2003).

client in a jurisdiction in which the lawyer is admitted to practice."[216] This language eliminates the difficulties of determining when a client comes within the meaning of the phrase "existing client." Requiring that the matter be related to the out-of-state lawyer's representation of a client will permit that lawyer to provide legal services in the host state in a smaller set of circumstances than those in which the work in the host state is reasonably related to the lawyer's practice.

c. Client or Legal Matter Has a Connection with a Jurisdiction Where Lawyer Is Admitted

The language under consideration in Florida confines the scope of the general temporary practice permission only to those situations in which either the client[217] or the legal matter[218] has a connection to any jurisdiction in which the out-of-state lawyer is admitted.[219] The determination of whether the out-of-state lawyer will be able to provide legal services based on the client's connection will rest on an evaluation of where the client's residence or office is located. This determination could be especially problematic when the situation involves a client who maintains residences in several states. Would the client's primary residence be determinative? Or, would the lawyer be allowed to provide legal services as long as any one of the client's residences is located in an appropriate jurisdiction?

d. Requiring That a Substantial Part of a Nonlitigated Matter Take Place in a Jurisdiction in Which the Out-of-State Lawyer Is Admitted

California's proposed Rule 967(b)(1) requires that an out-of-state lawyer can only provide legal advice or assistance on a transaction or other nonlitigation matter when "any substantial part of [the matter] is taking place in a jurisdiction [in which the lawyer is admitted] other than California."[220] The requirement that a substantial part of the matter take

216. PROPOSED N.D. RULE 5.5(b)(2) (2000). The language is available at http://www.sband.org/SBANDNews/view.asp?ID=12 (last visited Oct. 21, 2003).

217. Services for a client that a lawyer may lawfully practice on a temporary basis include those performed when "the client resides or has an office in a jurisdiction in which the lawyer is authorized to practice." PROPOSED FLA. RULE 5.5(c)(5)(i) (2002). The language is available at http://www.flabar.org (last visited Oct. 21, 2003).

218. The legal services provided by the out-of-state lawyer must "arise out of or [be] reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is admitted to practice." *Id.* R. 5.5(c)(5)(ii).

219. The report of Florida's MJP Task Force is available on the website of the Florida Bar, which should be updated to include further action on the proposal. The report is available at http://www.flabar.org (last visited Oct. 21, 2003).

220. Multijurisdictional Practice of Law by Lawyers Not Admitted to the State Bar of California (adopt. Cal. Rules of Court, rules 964–967) is available by scrolling down to Item No. SP03-04 *at* http://www.courtinfo.ca.gov/invitationstocomment/prevprop.html (last visited Oct. 21, 2003).

place outside California directly conflicts with and is more limited than Model Rule 5.5(c)(4).

4. Restricting the Scope of Practice Permitted to In-house Attorneys

Some states, such as Louisiana and Minnesota, are modifying the language of Model Rule 5.5(d)(1) to address differently the situation of in-house lawyers who can receive a limited license to practice in the host jurisdiction. Louisiana, for example, requires that the legal services provided by an in-house lawyer under its Rule 5.5(d)(1) must be provided by an attorney who has received a limited license to practice law in the state.[221] This will have the effect of requiring in-house counsel in Louisiana, whose activities go beyond the scope of temporary practice permitted to all out-of-state lawyers under Louisiana Rule 5.5 (c)(1)–(4), to obtain the limited license available to them in that state, while those in a state that did not add such a proviso will be free to practice without such a license. In a change that will have much the same effect, Minnesota omitted the in-house counsel language from Model Rule 5.5(d)(1), on the theory that Minnesota Supreme Court Rule 9 in its Rules for Admission to the Bar already addresses the situation of in-house counsel licensed elsewhere who seek to provide legal services in Minnesota on other than a temporary basis. The proposal under discussion in North Dakota allows an in-house lawyer to represent his or her employer there on a temporary basis only, in contrast to the language in Model Rule 5.5(d)(1).[222] In-house lawyers who establish an office in North Dakota can give legal advice only after they register in compliance with the terms of Rule 3 of the North Dakota Admission to Practice Rules.[223]

Note that in the course of their evaluations of potential reforms in the area of practice across jurisdictions, some states that have not previously had such a category are for the first time considering enacting a streamlined admission process for in-house counsel. New Jersey, for example, enacted a new provision replacing the permission for in-house counsel that had previously been the subject of Opinion 14 of the state's Committee on the Unauthorized Practice of Law.[224] Proposed Rule 965 in California is another new provision which sets forth requirements under which an out-of-state lawyer residing in California may qualify as a registered in-house counsel able to provide legal services there to his or her employer.[225] Governmental entities are excluded as employers who

221. PROPOSED LA. RULE 5.5(d)(1). The language is available at http://www.lsba.org/Bar_Information/MJP4-11-03.pdf (last visited Oct. 25, 2003).

222. PROPOSED N.D. RULE 5.5(b)(1) (2002), The language is available at http://www.sband.org/SBANDNews/view.asp?ID=12 (last visited Oct. 21, 2003).

223. *Id*. R. 5.5(c)(1).

224. The limited license for in-house counsel appears as New Jersey Rule 1:27-2. This can be found at http://www.judiciary.state.nj.us (last visited Oct. 21, 2003).

225. Proposed Rule 965: Registered In-House Counsel is included within "Multijurisdictional Practice of Law by Lawyers Not Admitted to the State Bar of California (adopt. Cal. Rules of Court,

are qualifying institutions, as are entities that provide legal service to others, have fewer than ten full-time employees in the state or do not also employ a California lawyer.[226]

5. Limitations on Advice on Federal Law

Some states have simply omitted the language in Model Rule 5.5(d) allowing out-of-state lawyers to give advice on federal law issues. In the proposal under discussion in California, instead of being able to directly advise the client on issues of federal law, as under Model Rule 5.5(d)(2), California's Proposed Rule 967(b)(2) specifies that the recipient of the out-of-state lawyer's advice on such law must be a lawyer licensed to practice in California.

6. Omitting the Focus on Temporary Practice

Some states are leaving out the Model Rule 5.5(c) requirement that the out-of-state lawyer's legal services in the host state be provided on a temporary basis. As discussed earlier in this paper, New Jersey has omitted that requirement in its new rule.[227] New York's DR 3-101(c) contains the idea that out-of-state lawyers do not have permission to hold out or establish an office or other systematic and continuous presence in the state, which parallels the terms of Model Rule 5.5(b). In a significant departure from the Model Rule standard, however, New York's proposed language for DR 3-101(D) omits the Model Rule 5.5(c) requirement that out-of-state lawyers only provide legal services in the situations listed in 5.5(c)(1)–(4) on a temporary basis.[228] Therefore, as long as an attorney neither holds out nor establishes an office in New York, he will have greater freedom to practice law than he would under the language of Model Rule 5.5. Dispensing with the need to define the term "temporary" in this context should also allow out-of-state lawyers to provide legal services in New York with greater ability to predict with confidence that their actions conform to the requirements of the state's disciplinary rule.

rules 964–967)," which is available by scrolling down to Item No. SP03-04 at http://www.courtinfo.ca.gov/invitationstocomment/prevprop.html (last visited Oct. 21, 2003).

226. The registration status is renewable annually with no cap, and also allows an attorney practicing under the rule to simultaneously practice law as a registered public interest attorney, if he or she is so qualified. *Id.*

227. *See supra* text accompanying notes 171–74, 212–14.

228. The amendments to the New York Code of Professional Responsibility proposed in the Report and Recommendations of the Special Committee on Multi-jurisdictional Practice are available *at* http://www.nysba.org (last visited Oct. 21, 2003).

G. Considerations as the Debate Moves Forward

In light of the number of states whose bar committees, boards of governors, and influential groups came out strongly in support of the MJP Commission recommendations in its interim report,[229] it is likely that a substantial number of states will adopt provisions that permit a greater scope of practice in the years ahead. In all the discussion and analysis of the risks and benefits of changing the permitted scope of practice in the host jurisdictions, one notable area of consensus that emerged was that the element of client choice of counsel ought to be supported, especially in the case of in-house counsel. So, even if the final wording enacted in a jurisdiction does not permit outside counsel the scope of practice available under the Model Rule language, in-house counsel are likely to be allowed to give advice to their employers.

To the extent that the admission process is closer to a registration with an annual fee than to the initial admission requiring the out-of-state lawyer to pass another bar exam, it could be a way for a state to raise revenue from lawyers located elsewhere. Of course, at some point, if the process requires lawyers to pay initial fees to each state averaging $600, then the opportunity to register even without taking a bar exam is one that would be expensive for out-of-state lawyers. Each lawyer in an in-house legal department that advised a company with national operations would incur $30,600 in initial fees and annual fees totaling over $14,000 for the fifty states plus the District of Columbia. For a company with thirty-six in-house lawyers, that amounts to over $500,000 in annual attorney registration fees. It does not promote the policy goals of preserving client choice or protecting clients to impose these costs on in-house lawyers and their clients.

One of the reasons cited in support of requiring out-of-state lawyers to pay the same annual registration fee as that paid by lawyers regularly admitted to the state is the need for additional disciplinary resources. Perhaps there would be some evidence of need if lawyers were traveling frequently to the state and taking business that otherwise would have been given to the lawyers licensed in that state. At least as likely, however, is the scenario that lawyers will continue to practice in much the same way as they had been prior to the August 2002 amendments. Large corporations have always been able to select in-house counsel from a pool of candidates that extends beyond any single state. If legal practice is conducted largely as it already has been, then there will not be significant increased pressure on disciplinary counsel. Perhaps lawyers who advise individuals as clients should be required to make such payments,

229. *See* COMM'N ON MULTIJURISDICTIONAL PRACTICE, AM. BAR ASS'N, INTERIM REPORT WRITTEN RESPONSES/COMMENTS: MJP COMMENT SUMMARIES, *at* http://www.abanet.org/cpr/mjp/comm_summ2.html (last revised May 15, 2002).

with the justification that their clients need more protection; however, that threatens to exacerbate the stratification of the bar.[230]

Some of the early-adopting states may want to include a reciprocity requirement in the language of their versions of Rule 5.5. Under this approach, the host state will only permit MJP by lawyers whose states of admission allow lawyers licensed in the host state to practice. Bar admissions committees and others may well urge this route, on the grounds that omitting a reciprocity requirement creates an imbalance by opening the door for out-of-state lawyers to practice in the host state, while host state lawyers remain unable to practice in the home states of the out-of-state lawyers. Conversely, requiring that lawyers licensed in the host state be permitted to practice law in the applicant's home state would operate as an incentive for the home state to adopt a parallel regulation. Reciprocal privileges are not optimum, since they restrict the clients' choice of attorney, but imposing this limitation might well make adoption of the new language more politically feasible, especially in those states that are the earliest to adopt the new language. Reciprocity requirements, however, are likely to create more problems than they solve. Even if both the host state and the home state allow multijurisdictional practice, a requirement of precise reciprocity would prevent host state practice in situations where the home state's regulation differs slightly, for example, in the scope of the permitted activity or one state imposes residency restrictions going beyond those in effect in the other.

Furthermore, in a situation in which the out-of-state lawyer is only admitted in a single state, reciprocity might work as an incentive for the out-of-state lawyer's home state to also revise its version of Rule 5.5. Many lawyers, however, are admitted in two or three states. How would the reciprocity requirement work if one of those states admits host state lawyers, but the others do not? It would operate as a disincentive to obtaining full admission in more than one state if the host state's reciprocity requirement stipulated that the lawyer could not engage in MJP in the host state unless every state in which he was admitted would allow lawyers licensed in the host state to engage in the same scope of practice. Full admission has long been encouraged, as it involves the most complete evaluation of the applicant. It would be better to continue encouraging lawyers to become fully admitted, rather than to create incentives for them to forego admission.

The better solution would be to allow the lawyer to work in the host state, as long as any of the states in which he is licensed would allow host state's lawyers to practice. Alternatively, the host state could require that the state in which the out-of-state lawyer maintains his office provide reciprocal treatment for host state lawyers. This would require a more detailed factual analysis of each out-of-state lawyer's practice, but

230. *See generally* JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982).

in situations in which there is a history of acrimony or vigorous enforcement of a restrictive UPL provision in a neighboring state against host state lawyers, it would provide a useful degree of calibration so that the door could be opened to allow some out-of-state lawyers to practice in the home state, while preserving the incentive for the restrictive neighboring state to adopt regulations allowing all host state lawyers to practice in the neighboring state.

On balance, however, reciprocity requirements are apt to create more problems than they solve. Insistence that the home state allow the same access to host state lawyers can result in an impasse in which slight differences in the wording of the regulations results in an inability to utilize the scope of practice purportedly granted. Without a reciprocity requirement, the host state can always amend its regulation to add one if it later determines that such a requirement is necessary in light of its experience.

VI. CONCLUSION

Multijurisdictional practice has become the norm, rather than the exception. The older UPL provisions in effect in many states make no distinction between ordinary legal work performed by out-of-state lawyers and advice given by persons who have no legal training at all. It is time to change those regulations. Accounting firms and other professional services providers feel free to send "consultants" across the United States without geographic restrictions imposed by the states. With the completion of the work of the ABA's MJP Commission and ABA Ethics 2000 Commission's project of revising the Model Rules, the opportunity for change is at hand. As each state considers revising its professional responsibility provisions in light of these commissions' work, we have a valuable opportunity to reexamine the application of its UPL provisions to the work of licensed attorneys.

A client who has established a relationship with a particular lawyer should be able to have that lawyer represent him, wherever the client's work takes the lawyer. There is no client protection problem presented when in-house lawyers are allowed to practice law across state boundaries. The disciplinary record in the jurisdictions that currently permit in-house lawyers to practice without taking yet another bar examination provides some empirical evidence supporting the contention that the out-of-state lawyers practicing in those jurisdictions continue to uphold their duty of competence and other professional obligations to their clients, even though they did not take the bar examination in those states and are not admitted there. Transactional attorneys working in private law firms should be permitted to give advice across state lines, especially advice on federal law. Surely an in-house lawyer, working exclusively for a single sophisticated client should be permitted to give advice wherever the corporation needs that attorney's legal services.