

**MULTIJURISDICTIONAL PRACTICE AND THE INFLUENCE
OF MODEL RULE OF PROFESSIONAL CONDUCT 5.5 –
AN INTERIM ASSESSMENT**

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I. INTRODUCTION

In 2002, the American Bar Association amended Model Rule of Professional Conduct 5.5 to address issues involving the multijurisdictional practice of law.¹ The amendment was intended to

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1. The rule was the product of the work of the ABA Commission on Multijurisdictional Practice. The Commission's ultimate report contained nine recommendations pertaining to various aspects of multijurisdictional practice of which two directly spoke to the Model Rules of Professional Conduct. ABA, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE (Aug. 2002) (recommending two proposed amendments to Model Rule 5.5 and recommending three

modernize the ethics rules to more closely mirror modern practice, which often involves lawyers licensed in one jurisdiction providing legal services in another.²

In pursuing this change, the drafters had several goals in mind. The foremost was to write a rule that well accommodates the legitimate interests of the states in regulating the practice of law within their jurisdictions, while providing sufficient freedom for lawyers to act outside their states of licensure where policy considerations justify it.³ In crafting the rule, the drafters took a pragmatic approach emphasizing the need to adopt a rule around which consensus could be found, rather than some “best” rule in the abstract.⁴ In fact, the rule they proposed, which was ultimately adopted, largely codifies what had become the *de facto* practice in the area.⁵

Nevertheless, it was hoped that articulating such a rule would be a step forward in at least three ways. First, because these practices had grown up in the face of statutes and rules that, if strictly read, seemed to prohibit them, lawyers engaged in multijurisdictional practice often appeared to be in technical violation of the law, which in turn undercut the precept that lawyers have a particular duty to adhere to the law. By restating the law, that disconnect could be corrected.⁶

proposed amendments to Rule 8.5) [hereinafter COMMISSION REPORT]. Those proposed rule amendments were adopted without change by the ABA House of Delegates in August 2002. ABA CENTER FOR PROF'L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1982-2005 613, 831 (2006).

2. For a brief history of the development of the regulation of multijurisdictional practice by the states, see COMMISSION REPORT, *supra* note 1, at 3-4.

3. COMMISSION REPORT, *supra* note 1, at 5.

4. See Stephen Gillers, *Lessons From the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 692-93 (2002).

5. See MAINE RULES OF PROF'L CONDUCT reporter's note (2009)

It was the consensus of the Task Force, to quote Maine Prof'l Ethics Commission in Opinion No. 189, that “. . . ABA Model Rule 5.5, as a whole, quite accurately reflects historical and widely accepted notions of the limits of multijurisdictional practice and the parameters of the unauthorized practice of law . . .” Accordingly, the Task Force recommended adoption of Model Rule 5.5 (2002), with noted modifications.

Id. This is not to suggest that the existing world of multijurisdictional practice was settled. In fact it was the very unsettling opinion of the California Supreme Court, in *Birbrower, Montalbano, Cordon & Frank, P.C. v. Super. Ct.*, 949 P.2d 1 (Cal. 1998), imposing fee forfeiture for routine multijurisdictional practice, that was a significant catalyst for the work of the Commission. See Gillers, *supra* note 4, at 691. Despite *Birbrower*, however, there was an emerging consensus over the contours of what permissible multijurisdictional practice should entail, which the Commission's rule reflects.

6. COMMISSION REPORT, *supra* note 1, at 12.

Second, the drafters recognized that while common practices had developed around the multijurisdictional practice of law, the law remained murky, and enforcement unpredictable.⁷ This seemed unfair for those whose otherwise unremarkable conduct suddenly had professional consequences.⁸ It also created a disincentive for some to engage in multijurisdictional practice that, from a policy perspective, we might want to encourage.⁹ The new rule was hoped to add clarity to an otherwise murky situation so that lawyers would be able to more easily identify the boundaries between legitimate out-of-state practice and unauthorized behavior.

Finally, the hope was that the new model would be widely adopted by the states, thus creating a uniform set of standards governing multijurisdictional practice.¹⁰ Given that many legal matters bring a lawyer in contact with a number of jurisdictions, having a common set of rules would greatly lighten the burden on the lawyer who otherwise would need to research the law of each such jurisdiction before engaging in limited practice there.¹¹ To this end, the ABA appointed an implementation committee to facilitate the widespread adoption of a number of ABA initiatives, including the policies of the Commission on Multijurisdictional Practice.¹²

7. *Id.* at 11-12 (describing enforcement as “sporadic” and the scope of jurisdictional restrictions as “vastly uncertain”); Gillers, *supra* note 4, at 696 (Commission member describing the rules governing multijurisdictional practice at that time as “ambiguous” and “uncertain”).

8. COMMISSION REPORT, *supra* note 1, at 12.

9. *Id.*

10. This concern was most clearly enunciated by Lucian Pera, who was the liaison between the ABA’s Commission on Multijurisdictional Practice and its Ethics 2000 Commission, which was considering a broad set of revisions to the Model Rules of Professional Conduct. See Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U.L. REV. 637 (2005). Mr. Pera has noted the Multijurisdictional Practice Commission was “significantly informed by a distinct, powerfully perceived need for uniformity . . . [U]niformity was an express goal, with its purpose being the achievement of a broadly applicable policy result through changes in the ethics rules” and that “the work of the ABA MJP Commission was constantly motivated by a strong uniformity imperative.” *Id.* at 642, 819. See also COMMISSION REPORT, *supra* note 1, at 59.

11. See Mark Hansen, *MJP Picks Up Steam: More States Are Looking at ABA Proposals to Ease Rules on Multijurisdictional Practice*, A.B.A. J., Jan. 2004, 1, 43-44 (quoting Susan Hackett, senior vice president and general counsel of the Association of Corporate Counsel, who stated that if uniformity is not achieved, “[l]awyers will find it practically impossible to sort out the varying obligations that a matter involving three or 10 or 50 states might involve”). This problem is exacerbated where it is difficult to ascertain at the outset of representation those states in which the lawyer will need to engage in some activity. Without a uniform rule, determining what standards at which even to look can be a challenge. See Cynthia L. Fountaine, *Have License, Will Travel: An Analysis of the New ABA Multijurisdictional Practice Rules*, 81 WASH. U. L.Q. 737, 762 (2003).

12. By letter dated March 26, 2003, Justice Randy Holland, then Chair of the CPR Policy Implementation Committee, and Wayne Positan, the Chair of the Commission on

In this piece I examine the influence of Model Rule 5.5 on the law of multijurisdictional practice in the states by lawyers licensed in the United States¹³ who are not working in-house for an organizational client.¹⁴ In doing so, I do not intend to revisit the debate on what lines should be drawn, if any, to control multijurisdictional practice. Those issues have been well debated in the adoption of the *Restatement (Third) of the Law Governing Lawyers*, the deliberations of the Commission on Multijurisdictional Practice,¹⁵ consideration surrounding state implementation initiatives, and voluminous commentary.¹⁶ Instead, I want to explore the impact Rule 5.5's adoption has had on the states. To what extent has its adoption led to a more uniform approach to multijurisdictional practice? What do state variations tell us about the stress points in the Model Rule as adopted? What are the traps for the unwary in this new golden age of multijurisdictional practice?

II. THE UNIFORMITY OBJECTIVE

As previously described, a central objective of the Commission on Multijurisdictional Practice was to establish a uniform standard for

Multijurisdictional Practice, sent a complimentary copy of the MJP Report, "Client Representation in the 21st Century," to the chief justice of the highest court of appellate jurisdiction in each state. The Committee offered to provide any assistance that might be required. *See also* ABA CENTER FOR PROF'L RESPONSIBILITY POLICY IMPLEMENTATION COMM. MISSION STATEMENT (October 20, 2007), available at <http://www.abanet.org/cpr/jclr/mission.pdf>.

13. The ABA has adopted a separate model standard for practice by foreign legal consultants in United States jurisdictions, as well as a model rule for temporary practice by foreign lawyers. ABA MODEL RULE FOR THE LICENSING AND PRACTICE OF FOREIGN LEGAL CONSULTANTS (2006); ABA MODEL RULE FOR TEMPORARY PRACTICE BY FOREIGN LAWYERS (2002). No fewer than thirty states have adopted some version of the rule regarding foreign legal consultants, while at least six states have adopted a rule for temporary practice by foreign lawyers. ABA CENTER FOR PROF'L RESPONSIBILITY, STATE IMPLEMENTATION OF ABA MJP POLICIES (July 1, 2009), available at <http://www.abanet.org/cpr/mjp/recommendations.pdf>. This issue will be reviewed again by the ABA's Commission on Ethics 20/20. *See* ABA, COMMISSION ON ETHICS 20/20 (Nov. 19, 2009), available at <http://www.aba.org/ethics20/20/outline.pdf>.

14. The ABA has adopted a separate model standard for the regulation of in-house counsel in multijurisdictional practice. ABA MODEL RULE FOR REGISTRATION OF IN-HOUSE COUNSEL (2008); MODEL RULES OF PROF'L CONDUCT R. 5.5(d)(2) (1983). For an extensive discussion of this topic, see Carol A. Needham, *The Changing Landscape for In-House Counsel: Multijurisdictional Practice Considerations for Corporate Law Departments*, 43 AKRON L. REV. 985 (2010).

15. Extensive information obtained in the process of adopting its recommendations can be found on the web at Center for Professional Responsibility — Commission on Multijurisdictional Practice, <http://www.abanet.org/cpr/mjp/> (last visited Apr. 11, 2010).

16. For an extensive bibliography of articles on the topic that preceded the adoption of the Commission's recommendations, see COMMISSION REPORT, *supra* note 1, at app. E. A June 2, 2009. A LexisNexis search for articles on multijurisdictional practice since the Commission's report identified more than 200 pertinent articles.

multijurisdictional practice.¹⁷ Given that the rule adopted largely codified existing norms, a hope that the rule would be widely adopted was not unreasonable.

Further, the goal of uniformity takes on a particular salience in this area. A lawyer confronted with a matter touching on a variety of states in which the lawyer is not admitted to practice needs to assess to what extent the lawyer can practice in each of them. Answering that question would be much easier if a common analysis were required. In fact, some have suggested that absent substantial uniformity, a patchwork set of reforms across the states could lead to an “end result . . . worse than having no reform at all.”¹⁸

That said, it must be recognized that a drive for complete uniformity was never truly contemplated, for it was inherent in the rule, from the outset, that such uniformity would not be achieved. Several factors account for this.

As the drafters recognized, states vary in their definitions of what constitutes the practice of law.¹⁹ Those variations, in turn, impact upon what multijurisdictional activities count as the practice of law and thus have the potential to be the unauthorized practice of law. Without a common definition, uniformity is impossible.

Even if there were a common definition of the practice of law, and the Model Rule was adopted without change in the states, uniformity still would not be assured because the rule, as written, is both open-ended and vague. For example, the rule identifies certain activities that are permissible and certain activities that are not. The comments expressly recognize, however, that “[t]he fact that conduct is not so identified does not imply that the conduct is or is not authorized.”²⁰ In this vast gray area, it is likely that variance will arise among the states as to what conduct is permissible.

Further, a number of the terms used in the rule to differentiate proper from improper multijurisdictional conduct were purposefully left

17. See *supra* text accompanying notes 10-12.

18. Hansen, *supra* note 11, at 44 (quoting Susan Hackett, senior vice president and general counsel of the Association of Corporate Counsel).

19. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. [2] (2009). See generally ABA TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, REPORT (Aug. 2003), available at http://www.abanet.org/cpr/model-def/taskforce_rpt_803.pdf.

20. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. [5] (2009). In contrast, Florida omitted this comment from its multijurisdictional practice rule. FLA. RULES OF PROF'L CONDUCT R. 4-5.5 (2009). This was done to make the listed categories of permissible multijurisdictional practice exclusive. FLA. SPECIAL COMM'N ON MJP, REPORT OF THE SPECIAL COMMISSION ON THE MULTIJURISDICTIONAL PRACTICE OF LAW 2002, at 10 n.3 (2003) [hereinafter FLA. REPORT 2002].

vague with the hope that their meaning would become clearer through interpretation. For example, it was expressly recognized that the line between permissible “temporary” practice and impermissible “regular” or “established” practice within a state was one that would become clearer over time as interpreted by courts, disciplinary authorities, relevant bar committees, and other entities.²¹ While consensus might ultimately emerge, there surely would be different developments until that consensus was reached. More generally, as with any rule or statute, interpretative issues that arise may be resolved differently by different jurisdictions. As the Commission recognized: “Because the exercise of determining what constitutes authorized conduct requires judgment and balancing, the application of the new standards leaves room for individual opinion and judicial interpretation.”²² This potential for variance is amplified by differences in the prevailing regulatory culture in states, as well as differing processes for rule adoption, which impact the shape each rule takes and undercuts the uniformity goal.²³

While complete uniformity was never really contemplated, two types of uniformity were clearly in reach. One was to establish categories of conduct that all could agree were permissible. This would provide lawyers with confidence that certain kinds of multijurisdictional practice could be engaged in safely without the need to deeply research the law of a given jurisdiction. The other was to create a template against which proposed conduct could be analyzed if its permissibility were unclear. At least lawyers would know the right questions to ask to determine if their proposed conduct were permissible.

The real question is whether Model Rule 5.5 has created substantial uniformity at those levels. Can a lawyer who understands the basic choices embraced in the rule engage in multijurisdictional practice at the level defined as “safe” by the Model Rule without having to engage in detailed state-by-state analysis of what is permissible? Has a common

21. COMMISSION REPORT, *supra* note 1, at 26. It should be noted that the rule itself employs the terms “temporary” and “systematic and continuous,” but the core notion that their meaning will develop over time remains the same.

22. *Id.*

23. See, e.g., Martin Whittaker, *Model Rules: Path From Proposals to Enforceable Rules Will Differ Among States, Speakers Observe*, 25 *Laws. Man. on Prof. Conduct (ABA/BNA)* 307 (June 20, 2009) (reporting on comments made at a panel of the 2009 ABA National Conference on Professional Responsibility). This may also affect how ambiguously terms in a state’s multijurisdictional practice statute should be interpreted. For example, in California, the rule was intended to expand the permissible range of multijurisdictional practice in the state. See THE SUPREME COURT OF CAL. MULTIJURISDICTIONAL PRACTICE IMPLEMENTATION COMM., FINAL REPORT AND PROPOSED RULES 3, 8 (2004) [hereinafter CAL. FINAL REPORT AND PROPOSED RULES]. This might suggest that, when in doubt, the adopted rule should be interpreted with that goal in mind.

approach been embraced to answer the unaddressed issue? The answers to those questions are mixed.

On one level, Model Rule 5.5 has had a substantial effect in moving the states toward a common approach to opening their borders to multijurisdictional practice. Fourteen states have adopted the rule as it relates to temporary practice almost verbatim, and twenty-nine have adopted a rule that is somewhat similar.²⁴ In addition, the rule has been relied upon even in states that had not yet formally adopted such a rule.²⁵ In light of this record, the degree of conformity of the states to the Model Rule has been characterized as “very good, if not truly remarkable.”²⁶

I fear, however, that this statement overstates the consensus. Several major jurisdictions, such as New York and Texas, have not jumped on the Rule 5.5 bandwagon. For some it is simply a work in progress, although that progress has been long in the making.²⁷ For a few, a conscious choice was made not to move down this path.²⁸ Even

24. ABA CENTER FOR PROF'L RESPONSIBILITY CPR POLICY IMPLEMENTATION COMM., STATE IMPLEMENTATION OF ABA MODEL RULE 5.5 (MULTIJURISDICTIONAL PRACTICE OF LAW) (Oct. 26, 2009), available at http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf. This comparison chart does not include an analysis of state adoption of the so-called “Katrina” amendment governing multijurisdictional practice in the case of disasters.

25. See, e.g., *Colmar, Ltd. v. Fremantlemedia N. Am., Inc.*, 801 N.E.2d 1017, 1025-26 (Ill. App. Ct. 2003); The Prof'l Ethics Comm. of the Bd. of Overseers of the Bar (Maine), Op. 189 (2005); cf. *Superadio Ltd. P'ship v. Winstar Radio Prods., LLC*, 844 N.E.2d 246, 250-51 (Mass 2006) (noting, but not relying on, Model Rule 5.5).

26. Pera, *supra* note 10, at 804. At a later point in the article, Pera, viewing all of the ABA rules and the desire for uniformity, dubbed the implementation of Model Rules 5.5 and 8.5 the “Greatest Leap Forward From a Standing Start.” *Id.* at 817. He elaborated:

There can be little doubt that the ABA achieved more agreement on the basic substance of a rule where the subject matter covered was exceedingly complex and not previously covered in its treatment of MJP issues in Model Rules 5.5 and 8.5. It is very clear that the adopting states do not agree on all the details of a solution to this problem; nevertheless, the ABA template has achieved real success in a remarkably short time, particularly given the fact that no state had adopted any rule on this subject.

Id.

27. Michigan, Mississippi, Texas, and West Virginia fall into this category. See ABA CENTER FOR PROF'L RESPONSIBILITY CPR POLICY IMPLEMENTATION COMM., STATE IMPLEMENTATION OF ABA MJP POLICIES (July 1, 2009), available at <http://www.abanet.org/cpr/mjp/recommendations.pdf>. In mid-October, Texas released a proposed rule for comment as part of a larger rule revision project. Sup. Ct. of Tex., Misc. Docket No. 09-9175 (Oct. 20, 2009).

28. See *Amendments to Kansas Ethics Rules Include Many ABA Updates, but Not MJP*, 23 *Laws. Man. On Prof. Conduct (ABA/BNA)* 251, 251 (May 16, 2007); Joan C. Rogers, *New York Adopts Format of Model Rules, But Keeps Much From Code and Omits MJP*, 24 *Laws. Man. on Prof. Conduct (ABA/BNA)* 666, 668 (Dec. 24, 2008); cf. WYO. RULES OF PROF'L CONDUCT R. 5.5 (2009) (adopting a rule on temporary multijurisdictional practice, but limiting it to participation in proceedings before tribunals). Montana has not adopted and is not actively considering the adoption

in states which have adopted a similar provision, substantial variations are present.²⁹ Jurisdictions such as California, Colorado, Connecticut, the District of Columbia, New Jersey, and Nevada are examples.

The variations increase when one explores the comments to the rule. Some states have adopted a version of the black letter law contained in the Model Rule, but not the accompanying comments.³⁰ Others have referenced the comments explicitly, but not adopted them as the law of the jurisdiction.³¹ Still others have adopted some of the comments, but varied from them substantially.³² While the rule itself sets forth the enforceable obligations for lawyer conduct, the comments provide “guidance for practicing in compliance with [them]”³³ and “carry much of the substantive weight of the policy decisions embedded in the rules.”³⁴ Thus, this uneven adoption of the comments to Rule 5.5 portends uneven application of the rules across the states.³⁵

of a multijurisdictional practice rule. ABA CENTER FOR PROF'L RESPONSIBILITY CPR POLICY IMPLEMENTATION COMM., STATE IMPLEMENTATION OF ABA MODEL RULE 5.5 (MULTIJURISDICTIONAL PRACTICE OF LAW) (July 1, 2009), available at http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf.

29. See *infra* Section III.

30. See, e.g., LA. RULES OF PROF'L CONDUCT R. 5.5 (2008); NEV. RULES OF PROF'L CONDUCT R. 5.5 (2008); N.J. RULES OF PROF'L CONDUCT R. 5.5 (2009); OR. RULES OF PROF'L CONDUCT R. 5.5 (2006); WYO. RULES OF PROF'L CONDUCT R. 5.5 (2009).

31. See, e.g., ALA. RULES OF PROF'L CONDUCT R. 5.5 cmt. (2008) (noting that the ABA comments “may be helpful” in interpreting Alabama rule provisions similar to those in Model Rule 5.5); cf. N.H. RULES OF PROF'L CONDUCT R. 5.5 (2008) (reprinting the 2004 comments to Model Rule 5.5 with express reference to their source rather than by incorporation into the New Hampshire rule itself); WIS. SUP. CT. RULES R. 20:5.5 (2009) (includes a Wisconsin comment and a section entitled “ABA comment” which sets forth the comments to Model Rule 5.5).

32. See, e.g., ARIZ. RULES OF PROF'L CONDUCT R. 5.5 cmt. (2009) (only adopting parts of Model Rule 5.5 comments [2] and [3]); VA. RULES OF PROF'L CONDUCT R. 5.5 (2009) (expressly noting that it did not adopt Model Rule 5.5 comments [11], [15]-[18] and [20]). Other states have embraced some of the concepts in the Model Rule comments, but have adopted their own comments rather than following the ABA model. See, e.g., IDAHO RULES OF PROF'L CONDUCT R. 5.5 (2004); N.D. RULES OF PROF'L CONDUCT R. 5.5 (2006).

33. MODEL RULES OF PROF'L CONDUCT Scope [14] (2009).

34. Pera, *supra* note 10, at 646.

35. This impact is likely to vary by context. For states that have adopted no comments, the ABA rules are likely to be used for interpretive guidance where the text of the rule mirrors the ABA model, unless the failure to adopt them was a conscious policy decision rather than simple practice not to include comments with their rules. Pera, *supra* note 10, at 646. The same should be true where states explicitly reference the comments, even though they do not formally adopt them. See *supra* note 31. Where the rejection of the ABA comments was, in whole or in part, a deliberate policy choice, however, that choice will be honored. Pera, *supra* note 10, at 646.

As to the later point, it should be noted that major variances for the Model Rule 5.5 comments usually reflect major differences in the black letter rule as well. Those will be discussed in section III, *infra*.

III. STATE VARIATIONS FROM MODEL RULE 5.5

To understand the state of multijurisdictional practice regulation today, one needs to move beyond this sort of macro analysis and analyze the choices states which have adopted some form of multijurisdictional practice rule have made. The easy path for any state would have been to adopt the Model Rule with negligible, if any, changes. The rule was the product of a rigorous process and largely captured current practice. In fact, that choice was made by a number of jurisdictions.³⁶

But a greater number of states that have adopted a rule in this area have chosen to diverge in some fashion.³⁷ Identifying the variances that emerge may help reveal the stress points in Rule 5.5 and multijurisdictional practice more generally. In this section I first look at some key provisions in Model Rule 5.5 and alternative approaches that have been adopted in some states. I then turn to areas in which some states have added provisions not directly addressed in the Model Rule which reflect continuing concerns about multijurisdictional practice.

A. *Model Rule 5.5 - Divergence From Core Provisions*

1. Calibrating the Temporary Versus Continuous and Systematic Continuum

Model Rule 5.5 distinguishes between “systematic and continuous” presence in the jurisdiction by out-of-state lawyers, which is generally prohibited, and the provision of legal services on a “temporary” basis, which is allowed in defined settings.³⁸ The comments provide further guidance. Presence may be systematic and continuous, even if the lawyer is never physically present in the state.³⁹ As for what is “temporary,” the comments emphasize the flexibility of the term:

There is no single test to determine whether a lawyer’s services are provided on a “temporary basis” in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be “temporary” even though the lawyer provides services in this jurisdiction on a recurring

36. *See supra* text accompanying note 24.

37. *See supra* text accompanying note 29.

38. MODEL RULES OF PROF'L CONDUCT R. 5.5(b), (c) (2009). The only concrete example provided in the text of the rule itself as to the meaning of these terms is that establishing an office in the host state by an out-of-state attorney is a prohibited systematic and continuous activity. *Id.* at 5.5(b)(1).

39. *Id.* at cmt. [4].

basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.⁴⁰

It is unclear whether these two terms are meant to cover the universe of action, i.e. activities are either continuous and systematic or temporary, or a continuum.⁴¹ If the latter, the rule can be read to allow certain practices on a temporary basis, disallow systematic and continuous activity in most cases, while remaining maddeningly silent about behavior that falls in between those poles.

Some states that have a multijurisdictional practice rule do not employ this continuum at all, but look for other factors to define when such practice is permissible.⁴² Most states that address multijurisdictional practice, however, do employ these principles or some variation of them.

Several states have shied away from the phrase “systematic and continuous.”⁴³ At one extreme, the ban is set to apply only when one establishes a “permanent presence” in the state.⁴⁴ At the other, words like “regular”⁴⁵ or “regular or repetitive”⁴⁶ are used. Kentucky bans any presence unless it is both temporary and in a list of approved conduct, but that list is not necessarily exclusive.⁴⁷ It is unclear whether these choices reflect a decision to set a different standard than that set by the ABA, or whether they are really attempts to state more clearly, at least in

40. *Id.* at cmt. [6]. At least one state with extensive rule comments eliminated the ABA’s amorphous description of what temporary practice might entail. N.D. RULES OF PROF’L CONDUCT R. 5.5 (2006). For a narrow view of the meaning of “temporary,” see Phila. Bar. Ass’n Prof’l Guidance Comm., Eth. Op. 03-13 (2003), which suggests that if an out-of-state lawyer participates in more than one ADR proceeding in the host state, that may no longer be considered temporary practice and could therefore constitute the unauthorized practice of law.

41. The Commission seems to suggest that there are but two categories and that the line between them is not a bright one. COMMISSION REPORT, *supra* note 1, at 26.

42. *See, e.g.*, COLO. RULES OF CIVIL PROC. R. 220-221.1 (2003) (allowing multijurisdictional practice without a limitation on amount); N.J. RULES OF PROF’L CONDUCT R. 5.5 (2009) (simply identifying the kinds of activities that are permissible, except in section 5.5(b)(3)(iv) which limits certain transactional work to that which is “occasional”).

43. Connecticut uses the phrase but adds in the rule’s comments that this includes “repeated and frequent activities of a similar nature.” CONN. RULES OF PROF’L CONDUCT R. 5.5 cmt. (2009). California not only disallows systematic and continuous activity, but also being “regularly employed” in California or “regularly engag[ing] in substantial business or professional activities in California.” CAL. RULES OF CT. R. 9.47(d)(4)-(5) (2009).

44. ALA. RULES OF PROF’L CONDUCT R. 5.5(D) (2008); *cf.* IDAHO RULES OF PROF’L CONDUCT R. 5.5 cmt. [2] (2004); N.D. RULES OF PROF’L CONDUCT R. 5.5 cmt. [2] (2006).

45. FLA. RULES OF PROF’L CONDUCT R. 4-5.5(b)(2) (2009).

46. NEV. RULES OF PROF’L CONDUCT R. 5.5(b)(4), (5) (2008).

47. KY. RULES OF PROF’L CONDUCT R. 5.5(b)(1), R. 5.5 cmt. [5] (2009).

the drafters' eyes, the limitation intended to be conveyed by the phrase "systematic and continuous."⁴⁸

There also has been both divergence and clarification concerning the extent to which one can be present in a state on a continuous and systematic basis without being physically present in the state. The District of Columbia is an apparent outlier in this regard as it requires at least one instance of physical presence in D.C. before some multijurisdictional limits attach.⁴⁹ Others not only embrace the notion that physical presence is not required, but also identify advertising and solicitation of in-state clients as an example of such activity.⁵⁰

The term "temporary" also has been supplanted by other terms in some states. Most common is the term "occasional."⁵¹ It is sometimes substituted for the term temporary⁵² and other times used in connection with it such that approved conduct must be both temporary and

48. *Compare* *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988) (where words of later statute differ from those of previous one on same or related subject, drafters must have intended the statutes to have different meanings), *and* *Klein v. Republic Steel Corp.*, 435 F.2d 762, 765 (3d Cir. 1970) (same), *with* *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 272 (7th Cir. 1986) (language change in subsequent statute from the statute on which it was modeled does not necessarily reflect an intent to change meaning). A similar critique applies to many of the language choices states have made which are discussed throughout the article.

49. RULES OF THE D.C. CT. APP. R. 49(b)(3), 49(c)(13), commentary to section (b)(3) (2008).

50. Model Rule 5.5 does not authorize in-state advertising, but neither does it expressly prohibit it. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. [21] (2009). Many states follow a similar pattern with respect to advertising or other solicitation of in-state clients. A few are more direct, however, barring such conduct outright or at least acknowledging that it could be considered systematic and continuous activity within the state. *See, e.g.*, NEV. RULES OF PROF'L CONDUCT R. 5.5(d)(2)(ii) (2008) (prohibiting client solicitation in the state by lawyers not admitted in Nevada); IND. RULES OF PROF'L CONDUCT R. 5.5 cmt. [4] (2007) (noting that such conduct "could be viewed as systematic and continuous presence"); OHIO RULES OF PROF'L CONDUCT R. 5.5 cmt. [4] (2009) (same); *cf.* KY. RULES OF PROF'L CONDUCT R. 5.5 cmt. [4] (2009) (not using the phrase systematic and continuous but noting that "advertising in media specifically targeted to Kentucky residents or initiating contact with Kentucky residents for solicitation purposes could be viewed" as unauthorized practice of law).

While not using these particular provisions, courts have found advertising and solicitation by out-of-state lawyers directed at forum state residents to constitute the unauthorized practice of law. *See, e.g.*, *Fla. Bar v. Rapoport*, 845 So. 2d 874 (Fla. 2003); *In re Murgatroyd*, 741 N.E.2d 719 (Ind. 2001). The Indiana Supreme Court's analysis seems to rely on a notion that by soliciting clients in Indiana the lawyers were implicitly suggesting they were authorized to practice in the state, which they were not. *Id.* at 721. Under the Model Rule, this rationale would seem to implicate section (b)(2) of the Model Rule which provides that a lawyer may not "hold out to the public or otherwise represent that the lawyer is admitted to practice law in [the host] jurisdiction. MODEL RULES OF PROF'L CONDUCT R. 5.5(b)(2) (2009).

51. *See infra* notes 52 and 53.

52. NEV. RULES OF PROF'L CONDUCT R. 5.5(b)(4)-(5) (2008) (approved activities must be "occasional" and not "regular or repetitive"); WIS. SUP. CT. RULES R. 20:5.5(c) (2009); *cf.* N.J. RULES OF PROF'L CONDUCT R. 5.5(b) (2009) (approving some conduct without a quantity of activity restriction, while limiting other conduct to "occasional" work).

occasional.⁵³ Use of the term “occasional,” whether alone or as an additional condition to be met, appears to narrow the range of permissible conduct from that approved in Model Rule 5.5.⁵⁴

In contrast, some states permit authorized conduct on a temporary or incidental basis,⁵⁵ while others drop the term “temporary” entirely and simply state that systematic and continuous behavior is not allowed.⁵⁶ These approaches appear more permissive than that of the Model Rule. In the former situation, the state allows conduct that, even if not temporary, is only incidental to other sanctioned activity. In the latter, if the temporary versus systematic and continuous dichotomy is in a fact a continuum,⁵⁷ states applying this approach seem to allow a quantum of activity above temporary until it is systematic and continuous.

One potentially intriguing approach is to attempt to quantify the permissible amount of behavior. This tack has been taken by several states which limit the number of *pro hac vice* admissions⁵⁸ or ADR

53. VA. RULES OF PROF'L CONDUCT R. 4-5.5(d)(4) (2009). The District of Columbia uses somewhat different language, approving the provision of legal services on an “*incidental* and temporary basis.” RULES OF THE D.C. CT. APP. R. 49(c)(13) (2008) (emphasis added).

54. In a report recommending the retention of the word “occasional” instead of replacing it with the word “temporary” in the state’s multijurisdictional practice rule, a New Jersey Committee described the difference in the following terms:

The Committee recommends retaining the requirement that cross-border practice undertaken pursuant to the catchall provision, RPC 5.5(b)(iv), be “occasional.” In contrast, the Model Rule requires that all forms of cross-border practice be conducted on a “temporary basis,” thus allowing recurring cross-border practice. See Model Rule 5.5, cmt. [6] (services “may be ‘temporary’ even though the lawyer provides services . . . on a recurring basis, or for an extended period of time . . .”). The Committee understands “occasional” to mean occurring infrequently or from time to time; thus, “recurring” practice is not “occasional.”

Report of the New Jersey Supreme Court Professional Responsibility Rules Committee, 191 N.J.L.J. 578, 580 (2008) [hereinafter *2008 New Jersey Report*].

55. See ALA. RULES OF PROF'L CONDUCT R. 5.5(B) (2008) (emphasis added).

56. N.C. RULES OF PROF'L CONDUCT R. 5.5, R. 5.5 cmt. [2] (2009) (rule contains no quantum of activity provisions, but comment speaks to limits on systematic and continuous activity); cf. IDAHO RULES OF PROF'L CONDUCT R. 5.5, R. 5.5 cmt. [2] (2004) (contains no quantum of activity provisions in its rule, but comment speaks to limit on “permanent presence”).

57. See *supra* text accompanying note 41.

58. Nine jurisdictions have numerical limits on the number of *pro hac vice* admissions a lawyer may obtain in that state in a given period. ABA CENTER FOR PROF'L RESPONSIBILITY CPR POLICY IMPLEMENTATION COMM., COMPARISON OF ABA MODEL RULE FOR *PRO HAC VICE* ADMISSION WITH STATE VARIATIONS AND AMENDMENTS SINCE AUGUST 2002 (May 14, 2009), available at http://www.abanet.org/cpr/mjp/prohac_admin_comp.pdf (noting such limitations in Alabama, D.C., Florida, Michigan, Mississippi, Montana, Nevada, Rhode Island, and Virginia) [hereinafter *PRO HAC VICE COMPARISONS*]. Virginia, the most generous, allows twelve admissions in a twelve-month period, whereas Montana, the most restrictive, allows only two in a lifetime. *Id.* The most common restriction allows five appearances in a year. *Id.* (Alabama, D.C., Michigan, Mississippi). Other states may have established limitations by case law.

proceedings⁵⁹ in which an out-of-state lawyer may participate in a particular period. A similar approach could be taken to transactional and planning work, although it may be more difficult to define what activity constitutes a single matter to which to apply a numerical limitation.⁶⁰

Assuming for the moment that an appropriate measure could be drafted, how should that number compare to the limits placed on *pro hac vice* appearances? On the one hand, we might be more willing to allow multijurisdictional practice in the *pro hac vice* setting than in the transactional context. After all, in the *pro hac vice* setting, courts are involved in assessing the bona fides of the out-of-state lawyer in question and are involved subsequently in an ongoing assessment of the lawyer's conduct through status conferences, consideration of motions, and the like. Further, it is an area of long-standing regulation and acceptance. Transactional work, in contrast, most often takes place without screening or oversight by state officials and has less of a track record of regulation.

On the other hand, *pro hac vice* admission allows out-of-state lawyers to use state resources in a prominent way, whereas private transactional work does not. In addition, the need for the assistance of an out-of-state lawyer may be less in trial work than work of a transactional nature. Trial lawyers are often brought in after a triggering event has occurred and learn about the client and its business from the ground up. Such lawyers may lack a long-term relationship with the client, or at least have a relationship that is sporadic in nature. Transactional lawyers, in contrast, are often intimately involved with the

59. See, e.g., RULES OF THE D.C. CT. APP. R. 49(c)(12), 49(c)(12) cmt. (2008) (limited to five new ADR proceedings annually; those ancillary to a judicial proceeding in which the lawyer is admitted *pro hac vice* and those in which the lawyer's work is only temporary and incidental are not included in the limitation); FLA. RULES OF PROF'L CONDUCT R. 4-5.5 cmt. (2009) (out-of-state lawyers involved in domestic arbitrations filing more than three demands for arbitration or responding to such demands in separate arbitration proceedings in a year are "presumed to be providing legal services on a regular, not temporary, basis"); S.C. RULES OF PROF'L CONDUCT R. 5.5 cmt. [12] (2009) (presumption services are "regular, not temporary" when out-of-state lawyer provides ADR services in more than three matters in a year).

60. For example, such an approach was considered in Florida but ultimately abandoned, both because of the difficulty in defining the scope of a single transaction and because the area would be difficult to police. FLA. REPORT 2002, *supra* note 20, at 22-23. Nevada adopted an annual report system to monitor transactional work instead of imposing a numerical limitation, in part because of the difficulty of setting such a limit on the number of clients or the number of matters or some combination thereof a lawyer might have in a year. THE SUPREME COURT OF NEV. COMM. ON MULTIJURISDICTIONAL PRACTICE, SUPPLEMENTAL REPORT 6 (May 2002). California also considered and rejected imposing a days-per-year limitation on multijurisdictional practice. CAL. FINAL REPORT AND PROPOSED RULES, *supra* note 23, at 10.

client and the transaction which may make continued association, even in out-of-state matters, more essential.

Even if numerical limitations are unnecessary or impractical in other settings, a state's comparative stance on numerical limitations may be a barometer of how liberal or conservative the state will be on multijurisdictional practice as a general matter.⁶¹ For example, of those states that have numerical limits on *pro hac vice* admissions, Florida, Montana, Nevada, and Rhode Island are among the more restrictive.⁶² It may be that they will be stricter on other forms of multijurisdictional practice as well.

2. Categories of Permissible Conduct By Out-Of-State Lawyers

Model Rule 5.5 lists four circumstances in which out-of-state lawyers may engage in multijurisdictional practice on a temporary basis. Each has seen some divergence among states that have adopted multijurisdictional practice rules.

a. Association with an Actively Participating In-State Lawyer

Association with local counsel has long been an approved way to engage in multijurisdictional practice.⁶³ The Model Rule's codification of this highlights two limitations that may not have been clear from past practice. First, these affiliations are only permissible on a temporary basis; such arrangements cannot be used to avoid the need for state licensure if these activities are more involved.⁶⁴ Second, the local lawyer must "actively participate[]" in the matter.⁶⁵ The local lawyer must be involved in more than name only. The comments expand on

61. Cf. CAL. FINAL REPORT AND PROPOSED RULES, *supra* note 23, at 10 (explaining that the meaning of the limitation on being "regularly employed" in California can be "understood in light of [its] meaning in the context of admission *pro hac vice*").

62. *PRO HAC VICE* COMPARISONS, *supra* note 58 (Florida permits three a year, Montana two in a lifetime, Nevada five in three years and Rhode Island three in five years).

63. See *infra* Section IV(A).

64. MODEL RULES OF PROFESSIONAL CONDUCT R. 5.5(c) (2009).

65. *Id.* at R. 5.5(c)(1). How much involvement is required to be considered "actively" participating in a matter is an open question. See Peter R. Jarvis, *Promising or Problematic?—Liberalizing Restrictions on Multistate Practice*, 63 OR. ST. BAR BULL. 15 (June 2003) (raising this concern).

this notion by also requiring that the local lawyer “share responsibility for the representation.”⁶⁶

While most states that have adopted multijurisdictional practice rules have followed the ABA model, there are some notable variations. A number of states have omitted any reference to association with a local lawyer as a permissible means of engaging in multijurisdictional practice.⁶⁷ The reasons are unclear. It may be a sense that such activity is often wasteful as it increases the number of lawyers the client must compensate, while often providing little additional service.⁶⁸ A rule that spells out permissible areas for multijurisdictional practice may be seen as sufficient protection for clients. If local counsel is necessary, other rules, like those for *pro hac vice* admission, will impose it,⁶⁹ or competent representation requirements may necessitate it in certain cases.⁷⁰ At the other extreme, the proposition that local affiliation sufficiently protects clients may be so long-standing that drafters felt it was self-evident and did not need to be included in the rule.⁷¹

In contrast, some states have made local affiliation mandatory rather than simply an option as does the Model Rule. North Dakota

66. MODEL RULES OF PROF'L CONDUCT 5.5 cmt. [8] (2009).

67. See, e.g., ALA. RULES OF PROF'L CONDUCT R. 5.5 (2008); KY. RULES OF PROF'L CONDUCT R. 5.5 (2009); N.J. RULES OF PROF'L CONDUCT R. 5.5(b)(1) (2009) (omits except in *pro hac vice* context); WYO. RULES OF PROF'L CONDUCT R. 5.5(c) (2009) (omits except where matter is pending before a Wyoming tribunal); cf. RULES OF THE D.C. CT. OF APP. R. 49, 49(c)(13) cmt. (2008) (omits except in *pro hac vice* context; but in commentary also suggests affiliation with local counsel if local counsel is lead on D.C. matters may help make the out-of-state lawyer's activities merely incidental in D.C.). It should be noted that in New Jersey a committee reviewing its initial multijurisdictional rule proposed amending the rule to explicitly authorize association with local counsel as a permissible form of multijurisdictional practice, but the New Jersey Supreme Court did not adopt the recommendation. See *New Jersey Adopts Some MJP Reforms But Defers Action on Other Recommendations*, 24 Laws. Man. on Prof. Conduct (ABA/BNA) 417, 417 (Aug. 6, 2009).

California is hard to assess. It has not adopted a safe-harbor provision for affiliating with local counsel on certain matters. The text only speaks to affiliation with local counsel in the sense that a non-California lawyer may provide legal assistance or advice to California lawyers on federal law or the law of jurisdictions other than California. CAL. RULES OF CT. R. 9.48(c)(2) (2009). The confusion arises from a provision that provides, “[n]othing in this rule limits the scope of activities permissible under existing law” by out-of-state attorneys. *Id.* at R 9.48(h). If local affiliation were previously considered a safe way to engage in multijurisdictional practice, then it still would serve that function. At least some California case law suggests that this was not the case. See, e.g., *Birbrower, Montalbano, Condon & Frank v. Super. Ct.*, 949 P.2d 1, 4 n.3 (Cal. 1998) (“[N]o 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.”).

68. See generally COMMISSION REPORT, *supra* note 1, at 12.

69. Forty-six jurisdictions require affiliation with local counsel in *pro hac vice* representation. *PRO HAC VICE COMPARISONS*, *supra* note 58, at n.9.

70. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009).

71. See generally *infra* Section IV(A).

insists on association with local counsel for “matters, transactions, or proceedings pending in or substantially related to [North Dakota]” not otherwise covered by *pro hac vice* admission.⁷² New Mexico also insists on such association in transactional matters “involving issues specific to New Mexico law.”⁷³

Other state variations focus on the active participation and shared responsibility requirements of the Model Rule. There, not surprisingly, the thrust has been to emphasize the requirements local lawyers must meet.⁷⁴ Principal among them is to emphasize that shared responsibility means to share “actual” responsibility.⁷⁵

b. Actions Pertaining to Litigation in Which Lawyer Is or Will Be Authorized to Appear

The Model Rule recognizes the legitimate need of out-of-state lawyers to come into a state, at times, in connection with a matter pending in another jurisdiction.⁷⁶ It also contemplates that out-of-state lawyers may be authorized to proceed *pro hac vice* on matters brought before the host state’s tribunals. Assuming the lawyer is or reasonably expects to be authorized to proceed in a pending or potential proceeding before a tribunal, such out-of-state practice is permissible if temporary.⁷⁷ The rule extends protection not only to the lawyer authorized to proceed in the tribunal, but also to other lawyers assisting that lawyer.⁷⁸

72. N.D. RULES OF PROF’L CONDUCT R. 5.5(b)(4), R. 5.5 cmts. [4], [6] (2006).

73. N.M. RULES OF PROF’L CONDUCT R. 16-505E (4) (2009).

74. While that has been the major thrust, at least one state toyed with the idea of allowing local affiliation as long as the in-state lawyer was accountable for the cross-border attorney’s conduct; active participation would not be required. *2008 New Jersey Report, supra* note 54, at 580. The provision was not adopted.

75. FLA. RULES OF PROF’L CONDUCT R. 5.5 cmts. (2009); IDAHO RULES OF PROF’L CONDUCT R. 5.5 cmt. [6] (2004) (also includes admonition that in-state lawyer cannot “serve merely as a conduit” and that if that lawyer’s participation is merely *pro forma*, both are subject to discipline); NEV. RULES OF PROF’L CONDUCT R. 5.5(b)(5) (2008); N.C. RULES OF PROF’L CONDUCT R. 5.5 cmt. [7] (2009); N.D. RULES OF PROF’L CONDUCT R. 5.5 cmt. [6] (2006) (also includes admonition that in-state lawyer cannot “serve merely as a conduit” and that if that lawyer’s participation is merely *pro forma*, both are subject to discipline).

76. *See* MODEL RULES OF PROF’L CONDUCT R. 5.5(c)(2), 5.5 cmt. [9] (2009).

77. *See id.* at R. 5.5(c)(2), 5.5 cmt. [10]. While the rule extends to those who reasonably expect to be admitted *pro hac vice*, failure to seek *pro hac vice* admission in a timely manner negates that reasonable expectation; the conduct then becomes the unauthorized practice of law. *See, e.g.,* *Carlson v. Workforce Safety & Ins.*, 765 N.W.2d 691, 702-04 (N.D. 2009) (applying this analysis to North Dakota rule similar to Model Rule 5.5(c)(2)).

78. *See* MODEL RULES OF PROF’L CONDUCT 5.5(c)(2), 5.5 cmt. [11] (2009).

The availability of *pro hac vice* admission to legitimate out-of-state practice is recognized throughout the United States,⁷⁹ although the requirements for *pro hac vice* status vary.⁸⁰ Thus, not surprisingly, there is little substantive deviation from Model Rule 5.5 among the states with multijurisdictional practice provisions.⁸¹ Of possible interest is New Jersey's provision that requires affiliation with local counsel if the activities of the out-of-state lawyer involve preparation for a proceeding in a jurisdiction in which the lawyer reasonably expects to be admitted.⁸²

More common is the omission of the provision permitting lawyers to come into the host state in connection with matters pending in other jurisdictions, but that is often recognized in the comments if not the text.⁸³ Even if not, it is hard to believe any state would want to limit that practice, and it may be covered by other more generic permissions in the state's multijurisdictional practice rules in any event.⁸⁴ Nevada requires that activities in Nevada on cases pending or anticipated elsewhere must be "incident" to those proceedings,⁸⁵ whereas the Model Rule uses the phrase "reasonably related,"⁸⁶ but it is unlikely that the scope of permission differs in fact.

The only significant variation concerns the extension of the rule's protection to those "assisting" a lawyer who is or reasonably expects to be authorized to practice before the tribunal in which the action is

79. For a state-by-state list of the rules governing *pro hac vice* admission, see ABA CENTER FOR PROF'L RESPONSIBILITY CPR POLICY IMPLEMENTATION COMM., *PRO HAC VICE* ADMISSION RULES (May 14, 2009), available at http://www.abanet.org/cpr/mjp/prohac_admin_rules.pdf.

80. See *PRO HAC VICE* COMPARISONS, *supra* note 58.

81. The most common change is a cross-reference to a separate state *pro hac vice* rule. ALA. RULES OF PROF'L CONDUCT R. 5.5(B)(2008); ARIZ. RULES OF PROF'L CONDUCT R. 5.5(f) (2009); FLA. RULES OF PROF'L CONDUCT R. 4-5.5 cmt. (2009); KY. RULES OF PROF'L CONDUCT R. 5.5(c)(1) (2009); MD. RULES OF PROF'L CONDUCT R. 5.5 cmt. 9 (2005). The District of Columbia rule provides extensive discussion of the *pro hac vice* requirements. RULES OF THE D.C. CT. APP. R. 49(c)(7) (2008).

82. N.J. RULES OF PROF'L CONDUCT R. 5.5(b)(1) (2009). Separate *pro hac vice* rules also may impose such a requirement at the pre-admission stage. See generally text accompanying note 69.

83. ALA. RULES OF PROF'L CONDUCT R. 5.5 official cmt. (2008); IDAHO RULES OF PROF'L CONDUCT R. 5.5 cmt. [5] (2004); N.C. RULES OF PROF'L CONDUCT R. 5.5 cmt. [5] (2009). *But see* WYO. RULES OF PROF'L CONDUCT R. 5.5(c) (2009) (limiting temporary practice to matters before Wyoming tribunals).

84. IDAHO RULES OF PROF'L CONDUCT R. 5.5 cmt. [5] (2004) (treating this behavior as falling into a catch-all provision in Rule 5.5(b)(2)(ii)); N.C. RULES OF PROF'L CONDUCT R. 5.5 cmt. [5] (2009) (treating this behavior as falling into a catch-all provision in Rule 5.5(c)(2)(B)).

85. NEV. RULES OF PROF'L CONDUCT R. 5.5(b)(2) (2008).

86. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(2) (2009).

pending. Several jurisdictions omit this language.⁸⁷ It is unclear whether this suggests that only lawyers directly authorized to participate in a proceeding may act in the host state,⁸⁸ or that utilizing the assistance of other lawyers by those authorized to participate in a proceeding is so common that permission for out-of-state practice by assisting lawyers is implied.

c. ADR Proceedings Arising out of or Reasonably Related to the Lawyer's Practice in a State of Admission

Model Rule 5.5 has a separate provision allowing out-of-state lawyers to engage in activities in the host state reasonably related to pending or potential ADR proceedings in any jurisdiction for which *pro hac vice* admission is not required if “the services arise out of or are reasonably related to” the lawyer’s practice where admitted.⁸⁹ This is an area where many states have diverged from the ABA model, but the divergences may be less significant than they first appear.

Some states have omitted express reference to representation in ADR proceedings from the text of the rule.⁹⁰ Kentucky retained the

87. ALA. RULES OF PROF'L CONDUCT R. 5.5(B)(2) (2006); FLA. RULES OF PROF'L CONDUCT R. 4-5.5(c)(2) (2009); NEV. RULES OF PROF'L CONDUCT R. 5.5(b)(1)-(2) (2008); N.C. RULES OF PROF'L CONDUCT R. 5.5(c)(1) (2009); N.D. RULES OF PROF'L CONDUCT R. 5.5(b)(3) (2006); WYO. RULES OF PROF'L CONDUCT R. 5.5(c) (2009); *cf.* KY. RULES OF PROF'L CONDUCT R. 5.5(c)(1)-(2), 5.5 cmt. 10 (2009) (reference omitted from text but retained in the comments); VA. RULES OF PROF'L CONDUCT R. 4-5.5(d)(4)(ii) (2009) (reference retained in text but accompanying comment omitted).

88. *See, e.g.*, FLA. REPORT 2002, at 10 (stating that the “assisting” provision was not adopted because “this language was too broad”).

89. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009). For court-annexed ADR, *pro hac vice* admission also is required. *Id.* at cmt. [12]. The rule applies to lawyers who provide “legal services” in the ADR context. As such, it addressed to lawyers acting in a representative capacity rather than those serving as arbitrators, mediators, or in other non-representative positions. *See* COMMISSION REPORT, *supra* note 1, at 24-25. The drafters assumed that those in non-representative positions should either be viewed as not practicing law, or as covered in Model Rule 5.5(b)(4). *Id.* For a comprehensive discussion of the issues that arise in multijurisdictional ADR practice, see Kristen M. Blankley, Emily E. Root & John Minter, *Multijurisdictional ADR Practice: Lessons for Litigators*, 11 CARDOZO J. CONFLICT RESOL. 29 (2009).

90. IDAHO RULES OF PROF'L CONDUCT R. 5.5 (2004) (omitted from text of rule, but comment [5] suggests it falls in the catch-all provision of the rule); NEV. RULES OF PROF'L CONDUCT R. 5.5 (2008) (omitted from text of rule, but rule does have a provision, (b)(7), allowing out-of-state lawyers to act as arbitrators, mediators and other third-party neutrals); N.D. RULES OF PROF'L CONDUCT R. 5.5 (2006) (omitted from text of rule, but comment [7] notes that out-of state lawyers may serve as arbitrators or mediators in North Dakota, that actions may be taken in support of ADR proceedings pending in another jurisdiction, and that representation of clients in-state in ADR proceedings may occur following the state's *pro hac vice* provision); WYO. RULES OF PROF'L CONDUCT R. 5.5 (2009).

provision with respect to work done in support of out-of-state ADR proceedings, but it eliminated the provision for out-of-state lawyer participation in Kentucky ADR processes.⁹¹ Others have narrowed the list of ADR procedures covered.⁹² However, many of those states have a catch-all provision, like Model Rule 5.5(c)(4), discussed in the next section, which may cover the otherwise omitted ADR activities.⁹³ In other states it may be covered by a *pro hac vice* rule or its equivalent.⁹⁴ Even if not, some states have determined that representing clients in ADR proceedings is not the practice of law, and as such, unauthorized practice of law issues do not arise.⁹⁵

The other area where substantial divergence arises is in the required nexus between the lawyer's practice in a state of admission and the work to be done in the host state. Some jurisdictions have eliminated any nexus requirement.⁹⁶ Any ADR-related activities are fine as long as they are temporary.⁹⁷ Others have not gone as far, but have sought to expand beyond the activity approved by the Model Rule. For example, Florida provides that in addition to services performed that are reasonably related to the lawyers practice where admitted, such services also may be conducted if the client "resides in or has an office in the lawyer's home state."⁹⁸

In contrast, others have sought to tighten the nexus required. For example, Connecticut requires that the "matter" be "substantially related to" a jurisdiction where the lawyer is admitted, rather than the more permissive "reasonably related to the lawyer's practice" standard of the Model Rule.⁹⁹ North Carolina requires that the activities must arise out of or be related to "the representation of a client" in a jurisdiction where

91. KY. RULES OF PROF'L CONDUCT R. 5.5(c)(2) (2009).

92. CONN. RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009) (omitting arbitration from the list of ADR devices covered).

93. IDAHO RULES OF PROF'L CONDUCT R. 5.5 cmt. [5] (2004) (expressly noting that ADR activities fall within its catch-all provision).

94. N.D. RULES OF PROF'L CONDUCT R. 5.5 cmt. [7] (2006).

95. *See, e.g.*, Prudential Equity Group, LLC v. Ajame, 538 F. Supp. 2d 605 (S.D.N.Y. 2008); *cf.* N.D. RULES OF PROF'L CONDUCT R. 5.5 cmt. [7] (2006) (providing this rationale to authorize out-of-state lawyers acting as mediators or arbitrators in North Dakota).

96. ALA. RULES OF PROF'L CONDUCT R. 5.5(B)(2) (2008).

97. In Alabama, such activity is also allowed if it is performed on an "incidental" basis. *Id.*

98. FLA. RULES OF PROF'L CONDUCT R. 4-5.5(c)(3) (2009). Arguably this is not an expansion of the Model Rules proposed grant of authority, since such client-centered conduct was subsumed in the discussion of whether practice in the host state is "reasonably related" to the lawyer's practice where admitted. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. [14] (2009). At a minimum, the Florida approach makes the importance of that connection more visible.

99. CONN. RULES OF PROF'L CONDUCT R. 5.5(c)(3), R. 5.5 cmt. (2009).

the lawyer is admitted.¹⁰⁰ This is much narrower than the Model Rule which requires only a nexus with “the lawyer’s practice” in such a jurisdiction.

New Jersey falls somewhere in between. On the one hand, New Jersey only requires that the services are “related to” a jurisdiction in which the lawyer is licensed to practice, rather than the Model Rules’ requirement that it be “reasonably related to” such a jurisdiction. On the other hand, the state imposes an additional requirement in that the provision is limited to instances in which the representation is of “an existing client in a jurisdiction in which the lawyer is admitted to practice.”¹⁰¹

Other variations include numerical limits on the number of ADR proceedings in which an out-of-state lawyer can participate,¹⁰² imposing filing and fee requirements,¹⁰³ and cross-referencing other controlling rules or statutes.¹⁰⁴

d. Other Activities Arising Out of or Reasonably Related to the Lawyer’s Practice in a Jurisdiction of Admission

As discussed in the previous sections, the Model Rule has direct provisions treating association with a local lawyer,¹⁰⁵ activities relating to proceedings before tribunals,¹⁰⁶ and those involving ADR.¹⁰⁷ The Rule also contains a catch-all provision permitting temporary practice in other situations so long as the activities “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted.”¹⁰⁸

100. N.C. RULES OF PROF’L CONDUCT R. 5.5(c)(2)(C) (2009).

101. N.J. RULES OF PROF’L CONDUCT R. 5.5(b)(3)(ii) (2009); *accord* N.C. RULES OF PROF’L CONDUCT R. 5.5(c)(2)(C) (2009) (containing a similar restriction), *and* TENN. RULES OF PROF’L CONDUCT R. 5.5(b)(3) (same). The impact of requiring a relationship with an existing client in a jurisdiction in which a lawyer is admitted, rather than to his practice there, is discussed *infra* note 120.

102. *See supra* text accompanying note 59.

103. *See generally infra* text accompanying notes 154-56, 164.

104. FLA. RULES OF PROF’L CONDUCT R. 4-5.5 cmt. (2009) (providing all three); S.C. RULES OF PROF’L CONDUCT R. 5.5 cmt. [12] (2009) (same).

105. *See supra* Section III(A)(2)(a).

106. *See supra* Section III(A)(2)(b).

107. *See supra* Section III(A)(2)(c).

108. MODEL RULES OF PROF’L CONDUCT R. 5.5(c)(4) (2009). This provision was drawn from section 3(3) of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS. COMMISSION REPORT, *supra* note 1, at 25. For an application of this standard see *In re Estate of Cooper*, 746 N.W.2d 653 (Neb. 2008) (applying the Nebraska counterpart to the Model Rule).

In an expansive comment, the Rules set forth a set of factors that help demonstrate a sufficient relationship. It provides:

Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be 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 . . .¹⁰⁹

Under this analysis, the tie can flow from certain characteristics of the client, the nature of the matter, or the lawyer's expertise in certain fields of law.

In this area, several states have diverged from this basic model. Wyoming, for example, has no such provision.¹¹⁰ New Mexico adopted the basic standard, but added an additional requirement that in transactions involving issues specific to New Mexico's law, association with local counsel is required.¹¹¹ North Dakota also recognizes the potential need for local counsel on certain matters, but address it differently. For matters that "arise out of" representation of a client in a state in which the lawyer is admitted, temporary practice is allowed without a local affiliation requirement.¹¹² For matters "pending in or substantially related to" North Dakota, for which *pro hac vice* admission

109. MODEL RULES OF PROF'L CONDUCT R. 5.5. cmt.[14] (2009). Several states which have adopted the basic Model Rule textual provision and have comments to their rules have omitted this one, presumably objecting to its breadth. *See, e.g.*, N.C. RULES OF PROF'L CONDUCT R. 5.5 (2009); N.D. RULES OF PROF'L CONDUCT R. 5.5 (2006).

110. WYO. RULES OF PROF'L CONDUCT R. 5.5 (2009).

111. N.M. RULES OF PROF'L CONDUCT R. 16-505E(4) (2009).

112. N.D. RULES OF PROF'L CONDUCT R. 5.5(b)(2) (2006).

is not available, temporary practice is permitted only by association with local counsel.¹¹³

Other states have chosen to recalibrate the nexus requirement. These changes largely fall into two categories. The first concerns the degree to which an out-of-state lawyer's activities in the host state must be tied to a jurisdiction in which the lawyer is admitted. The second concerns the focal point of that interrelationship. Some states change both.

North Dakota, for example, insists that the matter "arise out of" representation of a client in a state of the lawyer's admission, not merely be "reasonably related" to it.¹¹⁴ In Connecticut, more than the Model Rule's "reasonable" relationship must be shown; the relationship must be "substantial."¹¹⁵ Further, the representation must be substantially related to "legal services provided to an existing client," a narrower concept than the Model Rule's tie to "the lawyer's practice" in a state of admission.¹¹⁶ Nevada provides that activities undertaken in the host state must be "incident to work being done in a jurisdiction in which the lawyer is admitted."¹¹⁷ California requires that a "material aspect" of the matter must take place in a state where the lawyer is licensed.¹¹⁸ In the latter two states, it appears that multijurisdictional work under a catch-all provision cannot be centered solely in the host state simply because of some tie to the client or the lawyer's expertise in certain areas of law, as the Model Rule would allow.

Perhaps the most prevalent change is to insist on some sort of tie, variously phrased, to a client, rather than allowing the nature of the matter, or the lawyer's expertise in certain areas of the law, alone to justify multijurisdictional representation. In some states, temporary multijurisdictional practice in the catch-all category can only be

113. *Id.* at R. 5.5(b)(4).

114. *Id.* at R. 5.5(b)(2).

115. CONN. RULES OF PROF'L CONDUCT R. 5.5(c)(4) (2009). Florida is similar, requiring a "substantial connection," rather than a "reasonable relationship," but only in the context of allowing multijurisdictional practice by non-United States attorneys. FLA. RULES OF PROF'L CONDUCT R. 4-5.5(d)(4)(B)(2009).

116. *Id.*

117. NEV. RULES OF PROF'L CONDUCT R. 5.5(b)(4) (2008).

118. CAL. RULES OF CT. R. 9.48(c)(1) (2009). The phrase was chosen over "substantial part": based on the rationale that it is easier to determine whether part of a transaction is "material" than "substantial"; that the materiality (or importance) of the aspect of the transaction is more relevant than its substantiality (or size); and that use of the phrase "material aspect" would allow for greater range of practice in California in appropriate cases.

CAL. FINAL REPORT AND PROPOSED RULES, *supra* note 23, at 8.

undertaken on behalf of an “existing client” of the lawyer’s practice where admitted.¹¹⁹ The intent of this change appears to be to prohibit an out-of-state lawyer from representing a new host-state client in the host state.¹²⁰ Maine’s rule reflects a similar concern but approaches the matter differently. Maine requires that all temporary practice arise out of or be reasonably related to representation of an existing client.¹²¹ With that anchor, the rule then allows temporary practice in a number of situations including for matters reasonably related to the lawyer’s practice in a state of admission.¹²²

Other states require that the tie be to the “representation of a client” in a jurisdiction of admission, rather than to “the lawyer’s practice” in such a jurisdiction. The import of this change is unclear. While the change appears to tighten the nexus requirement, several states that use this language also kept the Model Rule comment in its entirety, defining what constitutes a reasonable relationship to a lawyer’s practice. This would suggest that the language change is only a matter of style.¹²³ North Carolina, in contrast, similarly ties the nexus requirement to representation of a client, but it omits the related Model Rule comment.¹²⁴ This suggests an attempt to narrow the rule.

Florida provides both for temporary practice with respect to matters that “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted”—the Model Rule’s test—but also “if the services are performed for a client who resides in or has an office in the lawyer’s home state.”¹²⁵ This latter provision seems to fit nicely into the Model Rule’s comment on what constitutes a tie to the

119. See, e.g., CONN. RULES OF PROF’L CONDUCT R. 5.5(c)(4) (2009); N.J. RULES OF PROF’L CONDUCT R. 5.5(b)(3)(i), (iv) (2009); S.C. RULES OF PROF’L CONDUCT R. 5.5(c)(4) (2009).

120. See, e.g., CONN. RULES OF PROF’L CONDUCT R. 5.5 cmts. (2009) (noting that an existing client is “one with whom the lawyer has a previous relationship and not arising solely out of a [host-state] based matter”); see also Jane Hawthorne Merrill, *Multijurisdictional Practice of Law Under the Revised South Carolina Rules of Professional Conduct*, 57 S.C. L. REV. 549, 558 (2006).

South Carolina modified (c)(3) and (c)(4) of the model rule by substituting “representation of an existing client” in place of the word “practice.” The modification permits a lawyer to appear temporarily in a matter involving an existing client but prevents an out-of-state attorney from seeking new clients in South Carolina without seeking admission in South Carolina or complying with the [other] provisions of Rule 5.5(c).

Id.

121. MAINE RULES OF PROF’L CONDUCT R. 5.5(c) (2009).

122. *Id.* at R. 5.5(c)(4).

123. See, e.g., KY. RULES OF PROF’L CONDUCT R. 5.5(c)(3), 5.5 cmt. [13] (2009); VA. RULES OF PROF’L CONDUCT R. 5.5(d)(4)(iv), 5.5 cmt. [14] (2009).

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

125. FLA. RULES OF PROF’L CONDUCT R. 4-5.5(c)(4) (2009).

“lawyer’s practice.” Thus, the change appears to be more a clarification than a substantive difference.

New Jersey takes a unique approach to multijurisdictional practice outside the litigation and ADR settings. To the extent the work involves negotiation of a transaction, it can be carried out only if the work is done for an existing client in a jurisdiction where the lawyer is admitted, and the transaction is “related to” such a jurisdiction.¹²⁶ The last condition seems less demanding than the Model Rule’s “reasonably related to” standard. For other activities, the work must “arise directly out of” representation of an existing client in a jurisdiction where the lawyer is admitted, be “occasional,” and be such that “disengagement would result in substantial inefficiency, impracticality or detriment to the client.”¹²⁷ Here, of course, the standard is much more demanding than its Model Rule counterpart. The matter cannot simply be reasonably related to the lawyer’s practice in a state of admission, but must “arise directly out of” representation of an existing client. Further, lawyer activities can be carried out in New Jersey only if barring them would harm the client.

B. *Additional Areas of State Concern*

In three general areas, states have expanded upon the Model Rule. These include providing additional client protections, enhancing the provisions for disciplinary enforcement, and adopting measures to help create a level playing field across jurisdictions.

1. Additional Client Protections

Model Rule 5.5 was written with an eye toward client protection, opening up for clients that possibility of retaining counsel of choice, even if the counsel is not licensed in the host jurisdiction, while limiting multijurisdictional practice where the potential for harm to client interests is too great.¹²⁸ In looking at state efforts in this area, two additional types of protection, both with roots in the Model Rule, have emerged. One is a limitation on who can engage in multijurisdictional practice. The other is the imposition of disclosure requirements on those engaged in multijurisdictional practice.

a. Limitations on Who May Engage in Multijurisdictional

126. N.J. RULES OF PROF’L CONDUCT R. 5.5(b)(3)(i) (2009).

127. *Id.* at R. 5.5(b)(3)(iv).

128. COMMISSION REPORT, *supra* note 1, at 5.

Practice

The Model Rules limit multijurisdictional practice to lawyers who are “admitted in another jurisdiction, and not disbarred or suspended from practice in any jurisdiction.”¹²⁹ As the comments point out, being “admitted to practice” connotes being on active status in the licensing state.¹³⁰

A number of states have elaborated on this basic requirement. Perhaps the most significant extension bars from multijurisdictional practice lawyers who already have been disciplined or held in contempt by the host state while engaging in multijurisdictional practice.¹³¹ New Jersey also bars those subject to “pending” disciplinary proceedings or substantial disciplinary sanction.¹³² Ohio limits its rule to those who “regularly” practice law. Presumably those who, although admitted to practice, do so only occasionally are not welcome in the state.¹³³ This limitation may be an attempt to capture some competence concern.

Surprisingly, the Model Rule’s bar to multijurisdictional practice for those who are “disbarred or suspended from practice in *any* jurisdiction”¹³⁴ has not been universally adopted. For example, North Dakota chose to eliminate the language pertaining to suspension or disbarment. As long as a lawyer is admitted somewhere, they apparently are eligible to engage in multijurisdictional practice within the state.¹³⁵ Ohio also adopted language that can be read to suggest that as long as a lawyer is admitted and in good standing in some state, he may engage in multijurisdictional practice even if he is suspended or disbarred in another.¹³⁶ Given the prevalence of reciprocal discipline, however, this situation should seldom arise.

129. MODEL RULES OF PROF’L CONDUCT R. 5.5(c) (2009). The rule is somewhat unclear with respect to suspension and disbarment. If the lawyer is presently suspended or disbarred in any jurisdiction, the lawyer may not engage in multijurisdictional practice. It is unclear whether this limitation extends to lawyers with past suspensions or disbarments which are no longer operative.

130. *Id.* at cmt. [7].

131. *See, e.g.*, FLA. RULES OF PROF’L CONDUCT R. 4-5.5(c) (2009); NEV. RULES OF PROF’L CONDUCT R. 5.5(d)(1)(ii) (2008).

132. N.J. RULES OF PROF’L CONDUCT R. 5.5(c)(1) (2009).

133. OHIO RULES OF PROF’L CONDUCT R. 5.5(c) (2009).

134. MODEL RULES OF PROF’L CONDUCT R. 5.5(c) (2009) (emphasis added).

135. *See* N.D. RULES OF PROF’L CONDUCT R. 5.5 (2006).

136. *See* OHIO RULES OF PROF’L CONDUCT R. 5.5(c) (2009) (requiring lawyer to be admitted and in good standing in a United States jurisdiction); *cf.* NEV. RULES OF PROF’L CONDUCT R. 5.5(b), (d) (2009) (using language like that in Ohio, but also providing in a later provision that those who have been suspended, disbarred, or took a disciplinary resignation in Nevada cannot practice under the multijurisdictional practice rule, nor can out-of-state lawyers previously sanctioned in Nevada while engaged in multijurisdictional practice).

Wisconsin's rule recognizes that suspension or disbarment may result from a number of different acts, only some of which should preclude multijurisdictional practice.¹³⁷ Thus, the right to engage in multijurisdictional practice is precluded for those suspended or disbarred for "disciplinary reasons or for medical incapacity."¹³⁸ Those administratively suspended in a jurisdiction other than their primary jurisdiction of practice apparently are not barred from multijurisdictional practice in Wisconsin.¹³⁹

b. Disclosure Requirements

The other protection found in some states is to require lawyers engaged in multijurisdictional practice to disclose to clients that they are not members of the bar of the host state. This issue is addressed in the comments to the Model Rule with a warning that "in some circumstances" such disclosure "may" be required.¹⁴⁰

A number of states have chosen to strengthen this requirement, making the duty mandatory in all instances of multijurisdictional practice and placing the duty in the text of the rule itself. Among these jurisdictions, variances arise over whether the disclosure must be in writing, whether informed consent to the representation must be obtained after disclosure, and what must be disclosed to whom.

Arizona requires that a lawyer engaged in multijurisdictional practice in Arizona notify clients that the lawyer is not admitted in Arizona and obtain the client's informed consent to the representation.¹⁴¹ While not spelled out directly in this rule, the notion of "informed" consent would seem to require disclosure of the risks and benefits to having out-of-state representation for the particular matter at issue.¹⁴² Tennessee has a similar rule.¹⁴³ North Dakota requires that clients be informed in writing that the lawyer is not licensed in that state, but no mention is made of informed consent.¹⁴⁴

137. WIS. SUP. CT. RULES R. 20:5.5(c) (2009)

138. *Id.* at R. 20:5.5(c) (2009).

139. *Id.* at Wisconsin cmt. (stating this with respect to *pro hac vice* admission, though the standard appears to apply from the text of the rule more broadly).

140. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. [20] (2009).

141. ARIZ. RULES OF PROF'L CONDUCT R. 5.5(e) (2009).

142. *See generally* ARIZ. RULES OF PROF'L CONDUCT R. 1.0(e) (2009) (defining informed consent).

143. TENN. RULES OF PROF'L CONDUCT R. 5.5(f) (2009).

144. N.D. RULES OF PROF'L CONDUCT R. 5.5(d) (2006).

Virginia has the most detailed rule in this regard.¹⁴⁵ Like North Dakota, it requires written notification without reference to informed consent. But it also enlarges both the category of people who must be informed and the nature of the disclosure. In Virginia, notice must be given not only to the client, but also to “interested third parties” as well. The written disclosure must contain a statement that the lawyer is not licensed in Virginia, a list of the jurisdictions in which the lawyer is licensed, and the lawyer’s home office address.

California, in contrast, does not attack the issue from a client communication perspective, but it instead treats the concern in the advertising context. Thus, those who wish to engage in multijurisdictional practice in California must “[i]ndicate on any Web site or other advertisement that is accessible in California” that they are not admitted to practice in California.¹⁴⁶

At the other end of the spectrum, North Carolina chose to eliminate the Model Rule comment that disclosure may be required at times.¹⁴⁷ Whether this is an indication that disclosure is considered unimportant in this context, or whether such disclosure is implicit in the duty of communication,¹⁴⁸ and hence need not be brought up separately in the multijurisdictional practice rule, is unclear.

2. Enhancing Disciplinary Enforcement

One concern about the potential expansion of multijurisdictional practice was that host jurisdictions might not be able to police misconduct by out-of-state lawyers as effectively as they do for in-state lawyers.¹⁴⁹ To this end, the drafters endorsed the notion that lawyers engaged in multijurisdictional practice are subject to the disciplinary authority of the host state,¹⁵⁰ and that discipline by the host state would most often also be enforced by reciprocal discipline in the disciplined

145. VA. RULES OF PROF’L CONDUCT R. 5.5(d)(3)(i)-(iii) (2009).

146. CAL. RULES OF CT. R. 9.47(b)(3), 9.48(b)(3) (2007) (requiring lawyer to state “either that the attorney is not a member of the State Bar of California or that the attorney is admitted to practice law only in the states listed”). Other states may impose similar requirements in their advertising rules.

147. N.C. RULES OF PROF’L CONDUCT R. 5.5 (2006).

148. *Id.* at R. 1.4.

149. COMMISSION REPORT, *supra* note 1, at 9.

150. MODEL RULES OF PROF’L CONDUCT R. 8.5(a) (2009).

lawyer's states of admission.¹⁵¹ These precepts have been largely endorsed by the states.¹⁵²

States also have adopted some unique provisions to facilitate the exercise of disciplinary authority over out-of-state lawyers involved in multijurisdictional practice. Some focus on monitoring the conduct of out-of-state lawyers, while others seek to facilitate the disciplinary enforcement process.

With respect to monitoring, the difficult question becomes how to monitor the behavior of out-of-state lawyers in a system that looks at the quantity and quality of their activities in the state—are the activities temporary or are they continuous and systematic? While this may be captured in instances in which the lawyer has to seek state approval to undertake the representation—like in the *pro hac vice* context, where lawyers often have to disclose the level of their in-state activities in their application—tracking the level of activity on other matters is difficult.¹⁵³

Connecticut has the most proactive rule to track multijurisdictional practice outside the *pro hac vice* setting. It provides that for “each separate matter” in which a lawyer engages in multijurisdictional practice approved by the rule, other than *pro hac vice* practice, or instances in which the representation is undertaken in association with an actively participating local lawyer, the lawyer must notify Statewide Bar Counsel prior to the representation and at the termination of each representation.¹⁵⁴

Other monitoring schemes do not provide real-time, matter-by-matter tracking, but they do attempt to keep some track of out-of-state lawyer activity within the host jurisdiction. In Nevada, for example, out-of-state lawyers involved in transactional or extra-judicial matters on behalf of Nevada clients must file an annual report which includes, *inter alia*, the nature of the Nevada clients represented and the number and general nature of the matters performed for each client in the previous

151. *Id.* at R. 8.5 cmt. [1].

152. See generally ABA CENTER FOR PROF'L RESPONSIBILITY CPR POLICY IMPLEMENTATION COMM., STATE IMPLEMENTATION OF ABA MODEL RULE 8.5 (DISCIPLINARY AUTHORITY; CHOICE OF LAW) (Oct. 26, 2009), available at http://www.abanet.org/cpr/mjp/quick-guide_8.5.pdf.

153. It may be possible to enlist other entities in the tracking/compliance process. For example, it may be possible to get ADR fora, such as the American Arbitration Association, to screen out-of-state lawyers for compliance with applicable state multijurisdictional requirements before allowing them to participate in proceedings in the host state. See New Jersey Committee on the Unauthorized Practice of Law, Op. 43, 187 N.J. L.J. 123 (2007) (making this suggestion).

154. CONN. RULES OF PROF'L CONDUCT R. 5.5(f) (2009). For guidance on what constitutes a “separate matter,” see State of Connecticut Judicial Branch Statewide Grievance Committee, Multijurisdictional Practice FAQ's No. 6, <http://www.jud.ct.gov/SGC/mjp/faq.htm#6> (last visited Apr. 11, 2010).

twelve-month period.¹⁵⁵ Failure to file the report subjects the lawyer to both discipline and fine.¹⁵⁶ Other states have specifically considered and rejected such requirements.¹⁵⁷

One step some states have made to facilitate disciplinary enforcement against out-of-state attorneys engaged in multijurisdictional practice in the host state is to declare, by rule, the lawyers' implied consent to the appointment of a designated official as such lawyers' agent for service of process for all actions that may arise from representation in the host state.¹⁵⁸

3. Creating A Level Playing Field Across Jurisdictions

Restrictions on multijurisdictional practice have always had a protectionist side, although not without some justification in preserving the values of a local bar.¹⁵⁹ In opening up their jurisdictions to multijurisdictional practice, states often calibrate how much activity out-of-state lawyers will be allowed, in part, with an eye toward preserving and protecting the local legal establishment. Some states have taken more direct steps to even the playing field for in-state and out-of-state lawyers.

One focus has been to assure some reciprocal treatment for a jurisdiction's own lawyers if that jurisdiction is going to open its doors to those not licensed there. This comes in two forms. One is simply to state that multijurisdictional practice is only available to lawyers from those states that would allow the host state's lawyers the same opportunity to engage in multijurisdictional practice there. In Connecticut, for example, the authorization to conduct certain multijurisdictional practice on a temporary basis in that state is extended

155. NEV. RULES OF PROF'L CONDUCT R. 5.5A(c)(5) (2008).

156. *Id.* at R. 5.5A(d).

157. *See, e.g.*, CAL. FINAL REPORT AND PROPOSED RULES, *supra* note 23, at 9 (finding a registration requirement "neither practical or necessary").

158. N.J. RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009); WIS. SUP. CT. RULES R. 20:5.5(e) (2009). Similarly, Tennessee provides that a lawyer engaged in multijurisdictional practice under its Rule 5.5 (c) and (d) "shall be deemed to have submitted himself of herself to personal jurisdiction in Tennessee for claims arising out of the lawyer's actions in providing such services in the state." TENN. RULES OF PROF'L CONDUCT R. 5.5(g) (2009).

159. *Compare* Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977, 998 (2003) (noting the protectionist aspect of limited multijurisdictional practice rules), *with* Gillers, *supra* note 4, at 702-07 (acknowledging the legitimate need to protect and maintain healthy local bars in the face of multijurisdictional practice).

only to lawyers admitted in a United States jurisdiction “that accords similar privileges to Connecticut lawyers.”¹⁶⁰

Other states do not require such formal reciprocity, but instead insulate their lawyers, at some level, from misconduct charges for engaging in multijurisdictional practice in a state that might otherwise not approve of it. For example, the Minnesota rule provides that if a Minnesota lawyer engages in multijurisdictional conduct in another state that involves conduct which Minnesota would allow an out-of-state lawyer to perform under the Minnesota multijurisdictional practice rule, such conduct is permissible even if it violates the rules of that other state.¹⁶¹ Of course, nothing precludes the host jurisdiction from penalizing the conduct.¹⁶² Wisconsin has a similar provision.¹⁶³

A less direct form of parity is to require out-of-state lawyers to pay some fee if they engage in multijurisdictional practice.¹⁶⁴ Since in-state lawyers pay fees to support the state’s disciplinary system, fee arbitration, client protection funds, and the like, requiring that of out-of-state lawyers practicing in the host jurisdiction simply places a similar burden upon them.¹⁶⁵ Placing other regulatory burdens on them that in-state lawyers bear follows a similar logic.¹⁶⁶

IV. SOME UNDER-APPRECIATED CONSEQUENCES OF THE MJP CLARIFICATION MOVEMENT

A. *Local Affiliation and Firms with Multi-State Offices*

Before the advent of Rule 5.5, one commonly recognized way to engage in multijurisdictional practice was to affiliate with local counsel.

160. CONN. RULES OF PROF’L CONDUCT R. 5.5(c) (2009). For a list of those jurisdictions, see *Multi-Jurisdictional Practice Notice*, State of Connecticut Judicial Branch, <http://www.jud.ct.gov/sgc/mjp/mjpmenu.htm#Notice> (last visited April 11, 2010).

161. MINN. RULES OF PROF’L CONDUCT R. 5.5(a) (2007).

162. *Id.* at cmt. [1]. The rule is unclear about whether the host state sanction would then be imposed through reciprocal discipline, but the thrust of the rule is that it would not.

163. WIS. SUP. CT.R. 20:5.5(a)(1) (2009).

164. NEV. RULES OF PROF’L CONDUCT R. 5.5A(c) (2008) (imposing \$150 annual fee for out-of-state lawyers representing Nevada clients in transactional or extra-judicial matters); N.J. RULES OF CT. R. 1:20-1(b) (2008) (requiring those in multijurisdictional practice to pay an annual fee, like licensed New Jersey lawyers, to help fund the state’s attorney discipline and fee arbitration processes).

165. I am not suggesting that I favor such fees, merely that there is a sensible rationale behind them. See generally *2008 New Jersey Report*, *supra* note 54, at 580.

166. See, e.g., S.D. RULES OF PROF’L CONDUCT R. 5.5(c)(5), (d)(2) (2003) (requiring those involved in multijurisdictional practice to obtain a South Dakota sales tax license and tender the applicable taxes collected to the state).

Sources typically recommended this as a way to avoid violating unauthorized practice of law provisions without suggesting any limitations on the frequency with which a lawyer might engage in such conduct. For example, the ABA's *Annotated Model Rules of Professional Conduct*, when discussing how to avoid unauthorized practice when handling multistate matters, flatly provided: "Another option is to associate with counsel in the foreign jurisdiction."¹⁶⁷ Indeed one author suggests that the disincentive to "routinely" associating with local counsel for this purpose was that it was costly to clients and disruptive for law firms and commerce, rather than that it was improper.¹⁶⁸ Another described the situation as one in which "as long as the out-of-state lawyer can find a member of the target state's bar to join him as local counsel on a matter, the out-of-state lawyer is able to give advice to clients within the target state."¹⁶⁹

This suggestion that local affiliation, even if extensive, necessarily insulates lawyers engaged in multijurisdictional practice from unauthorized practice concerns, clearly does not survive the Model Rule. Under that rule, even local affiliation is limited to conduct undertaken on a "temporary" basis.

A similar change has occurred with respect to firms with offices in multiple states in which lawyers licensed in the host state serve as an anchor for practice there by firm lawyers from out of state.¹⁷⁰ At one time, that relationship was seen to insulate the out-of-state firm

167. ABA, ANNOTATED MODEL RULES OF PROF'L CONDUCT 456-57 (4th ed. 1999).

168. Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 677 (1995).

169. Carol A. Needham, *Splitting Bar Admission Into Federal and State Components: National Admission for Advice on Federal Law*, 45 U. KAN. L. REV. 453, 501 (1997). That probably overstates the matter, although it certainly states an accurate mood point. *See generally In re Babies*, 315 B.R. 785, 792 (Bankr. N.D. Ga. 2004) (pre-adoption of Rule 5.5 type provision; mere association with local counsel does not shield out-of-state lawyer from unauthorized practice of law charges).

170. Gillers, *supra* note 4, at 696-97 (noting that under the standards in place before the adoption of Rule 5.5, such an "anchor is all a firm may need to provide legal services 'in' the particular jurisdiction without fear of sanction, including loss of fee"). That probably overstates the matter, although it certainly states an accurate mood point. *See generally Haymond v. Lundy*, 174 F. Supp. 2d 269, 282 n.5 (E.D. Pa. 2001) (finding that out-of-state firm lawyer violated the unauthorized practice of law even though the lawyer worked with firm members licensed in the host state where out-of-state lawyer directed the in-state lawyers who "were, at the most, conduits"), *vacated and remanded on other grounds by Lundy v. Hochberg*, 91 Fed. Appx. 739 (3d Cir. 2003); Fla. Bar v. Savitt, 363 So. 2d 559 (Fla. 1978) (adopting a settlement agreement between the Florida Bar and a New York law firm delineating the scope of practice out-of-state lawyers could conduct in the firm's Florida office). *See also* William T. Baker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501, 1519-22 (2001) (summarizing the few cases and opinions on out-of-state practitioner activities in an office of a multi-state firm).

member's conduct with respect to in-state matters even more effectively than affiliation with local counsel. Professor Gillers has written that in the famed *Birbrower* case, the conduct of the New York lawyers might have been permissible had they been working through a local branch of the firm, whereas working through an affiliated local lawyer would not have been enough.¹⁷¹ Here too, such practice is now approved only on a temporary basis.¹⁷²

That these practices are curtailed under the Model Rule appears warranted. Nevertheless, the changes are not as substantial as they might appear.

On one level, allowing out-of-state practice in these circumstances has always been premised on a fiction that the in-state lawyer supervises the work of the out-of-state attorney.¹⁷³ When a major partner from a national firm affiliates with a local lawyer, or goes to a distant firm outpost of the lawyer's own firm to work on a matter, it is unlikely that the lawyer's work is really being supervised by the local lawyer involved. As Professor Wolfram so colorfully put it:

It is preposterous to think that when one of the gurus of the mergers and acquisitions bar, Joseph Flom or Martin Lipton, emerges from an airplane in a jurisdiction far from New York City that they modestly submit themselves to the "supervision" of whatever locally-admitted lawyer their firms hypothetically might have engaged in an effort to comply with local restrictions on unauthorized practice.¹⁷⁴

As with other fictions in the law, it arose to provide a way to achieve a desired result, increased multijurisdictional practice, within an established framework that taken literally unnecessarily restricted such practice. With the adoption of a more accepting multijurisdictional practice rule, the need for the fiction diminishes. Thus, the Model Rule both restricts recourse to local affiliation, tying it to "temporary" activity, and emphasizes the need for active participation by the affiliated lawyer.

171. Gillers, *supra* note 4, at 697.

172. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(1) (2009). *See also* Ark. Bar Ass'n, Advisory Op. 2004-03 (2004) (stressing this under the state's then proposed multijurisdictional practice rule).

173. Wolfram, *supra* note 168, at 677.

174. *Id.* at 678. Some have suggested that the likelihood of such supervision is smaller in the context of a senior partner working out of one of the firm's other offices than it is for affiliation with independent local counsel. *See* Carol A. Needham, *Negotiating Multi-State Transactions: Reflections on Prohibiting the Unauthorized Practice of Law*, 12 ST. LOUIS U. PUB. L. REV. 113, 124 n.44 (1993).

That said, the impact of these changes is muted by two factors. First, note that the Model Rule standard does not require supervision by the local lawyer, only involvement.¹⁷⁵ Moreover, some activity that was formerly conducted through local affiliation can now be conducted without it through other provisions in Model Rule 5.5.

B. The Prospect of Enhanced Enforcement of Multijurisdictional Practice Limitations

One concern for lawyers is that violation of the multijurisdictional practice rule can lead to professional discipline. This prospect for discipline extends not only to the lawyer practicing in violation of the multijurisdictional practice rule,¹⁷⁶ but also to those who assist the lawyer in doing so,¹⁷⁷ or who fail to exercise the required supervisory authority over the lawyer to ensure the violation does not occur.¹⁷⁸ For example, if an out-of-state lawyer were to affiliate with a local lawyer on more than a temporary basis at the direction of a superior at the out-of-state lawyer's firm, then all three lawyers would have violated the rules.

But concerns about unauthorized practice arise in many settings far removed from the disciplinary process. Criminal¹⁷⁹ and civil¹⁸⁰ statutes

175. However, state rules may impose a more substantial obligation on the host-state attorney. For example, Nevada has a separate rule for firms with offices in multiple states including Nevada. If an out-of-state firm lawyer conducts work in the Nevada office, “[t]he members of the firm who are admitted to practice in Nevada shall be responsible for and actively participate as a principal or lead lawyer in all work performed for Nevada clients” NEV. RULES OF PROF'L CONDUCT R. 7.5A(j) (2008).

176. MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (2009).

177. *Id.*

178. MODEL RULES OF PROF'L CONDUCT R. 5.1 (2009). Since the firm must “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct,” the firm may be required to track the work of individual lawyers engaged in multijurisdictional practice to assure the work is temporary. MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2009). Separate liability arises for ordering a subordinate attorney to engage in impermissible conduct, such as work that is too extensive in a host jurisdiction where the lawyer in question is not admitted. MODEL RULES OF PROF'L CONDUCT R. 5.1(c)(1) (2009). *See, e.g.,* Ethics Comm. of the Colo. Bar Ass'n, Ethics Op. 121 (2008) (recognizing the interplay of the supervisory duties and the restrictions on unauthorized practice). One firm general counsel mused at a conference that if he failed to inform a colleague at the firm engaged in multijurisdictional practice in a state requiring notification, registration, or fee payments of those requirements, the general counsel might be found to be assisting in the colleague's unauthorized practice. Martin Whittaker, *Panelists Explore Variations That Exist in Regulation of Multijurisdictional Practice*, 24 *Laws. Man. on Prof. Conduct* (ABA/BNA) 574, 575 (2008).

179. Most states have criminal remedies available to regulate the unauthorized practice of law. *See Latest ABA Review of UPL Enforcement Finds More Regulation, More Prosecution*, 25 *Laws. Man. on Prof. Conduct* (ABA/BNA) 253, 254 (2009) [hereinafter *Latest ABA Review of UPL Enforcement*] (finding that of the thirty-nine jurisdictions responding to the *ABA Standing*

regulate the practice. In some states, a private cause of action lies for those harmed by unauthorized practice.¹⁸¹ Unauthorized practice concerns can underlie a claim for disqualification,¹⁸² cast doubt on the results of an arbitration,¹⁸³ nullify the effect of acts taken in litigation,¹⁸⁴ negate the attorney-client privilege,¹⁸⁵ and lead to fee forfeiture,¹⁸⁶ among other consequences.¹⁸⁷ While state adoption of a modern multijurisdictional statute does not change the potential consequences for engaging in unauthorized multijurisdictional practice, it may affect the chance that those consequences will lie.

Committee on Client Protection, 2009 Survey of Unlicensed Practice of Law Committees, twenty-seven had the power to seek criminal fines and twenty-three to seek prison sentences). At times these powers are invoked against out-of-state lawyers engaged in multijurisdictional practice. *See Unauthorized Practice: Georgia Law Firm Lawyers Are Indicted for Unauthorized Practice in North Carolina*, 20 *Laws. Man. on Prof. Conduct (ABA/BNA)* 203 (2004).

180. Much of the enforcement of unauthorized practice of law provisions is through civil injunction or civil fine. *See Latest ABA Review of UPL Enforcement, supra* note 179, at 254 (finding that of the thirty-nine jurisdictions responding to the *ABA Standing Committee on Client Protection, 2009 Survey of Unlicensed Practice of Law Committees*, thirty-one had the power to seek civil injunctions and thirteen to seek civil fines); *see, e.g., Fla. Bar v. Rapoport*, 845 So. 2d 874 (Fla. 2003) (enjoining out-of-state lawyer from engaging in unauthorized practice of law, i.e. representing parties in federal securities arbitrations in the state).

181. *See, e.g., Fogarty v. Parker, Poe, Adams, and Bernstein, L.L.P.*, 961 So. 2d 784 (Ala. 2006). *See generally* Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and Its Impact on Effective Enforcement*, 20 *GEO. J. LEGAL ETHICS* 719, 733-34 (2007) (five states and the District of Columbia that recognize some form of private action for harm caused by unauthorized practice of law). *Compare* *Johnson v. Nextel Commc'ns, Inc.*, 2009 WL 928131, at *8 (S.D.N.Y. Mar. 31, 2009) (rejecting private cause of action for unauthorized practice under New York law), *and* *Carlson v. Roetzel & Andress*, 2008 WL 873647, at *5 (D.N.D. Mar. 27, 2008) (rejecting private cause of action for unauthorized practice under North Dakota law).

182. *See, e.g., In re Fauchoux*, 818 So. 2d 734 (La. 2002) (disciplinary action in which the filing of a disqualification motion and motion for sanction based on lawyer's unauthorized multijurisdictional practice in underlying matter is noted); *Rozmus v. Rozmus*, 595 N.W.2d 893 (Neb.1999) (trial court granted motion to disqualify party's lawyers because they were engaged in the unauthorized practice of law).

183. *See, e.g., Superadio Ltd. P'ship v. Winstar Radio Prods., LLC*, 844 N.E.2d 246 (Mass. 2006) (unsuccessful attempt to have arbitration award vacated because the out-of-state lawyer representing the prevailing party allegedly was engaged in the unauthorized practice of law).

184. *See, e.g., Carlson v. Workforce Safety & Ins.*, 765 N.W.2d 691 (Neb. 2009) (filing of a motion for reconsideration before an administrative agency by an out-of-state lawyer who did not secure *pro hac vice* admission within the time required by court rule was treated as a nullity); *Mitchell v. Progressive Ins. Co.*, 965 So. 2d 679 (Miss. 2007) (filing of complaint by out-of-state lawyer who had not secured *pro hac vice* status was a nullity and its filing did not toll the statute or limitations); *Preston v. Univ. of Ark. for Med. Scis.*, 128 S.W.3d 430 (Ark. 2003) (same).

185. *Needham, supra* note 14.

186. *See, e.g., Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct.*, 949 P.2d 1 (Cal. 1998); *Ranta v. McCarney*, 391 N.W.2d 161 (N.D. 1986).

187. *See, e.g., In re Jackman*, 761 A.2d 1103 (N.J. 2000) (lawyer denied admission to the bar for a period of time due to previous unlicensed practice in the state).

Before the adoption of rules like Model Rule 5.5, unauthorized practice predominately was governed by antiquated statutes and scattered case law largely out of tune with the realities of modern practice.¹⁸⁸ Faced with antiquated laws and murky standards, disciplinary authorities and courts were reluctant to wade too heavily into the policing of multijurisdictional practice.¹⁸⁹ Extreme cases were pursued, and the occasional outlier case arose, but the threat of real consequences for engaging in such activity was largely absent.¹⁹⁰

With state adoption of modern multijurisdictional practice rules, the game has changed. The rules are no longer murky; they are much clearer. The rules no longer are out of touch with the times; they reflect a modern policy choice on the situations in which multijurisdictional practice is condoned.

A further development is the relaxation of the rules for admission on motion.¹⁹¹ To the extent we make it easier for lawyers to join another bar without having to take the bar exam of the host state or incur other impediments, the need to be lenient about multijurisdictional practice declines. The new regime provides ample room for temporary multijurisdictional practice, with an easy avenue for the lawyer who wants to do more in a state in which the lawyer is not admitted—the lawyer can just join the state bar.¹⁹²

From a disciplinary perspective, the drafters hinted at the possibility that new rules could lead to greater enforcement. As the Commission stated in its final report supporting what became Rule 5.5: “The Commission believes that allowing such practices will not only serve the public interest, but also improve obedience to and enforcement of the applicable rules.”¹⁹³

While this new playing field provides the opportunity for stronger disciplinary enforcement of multijurisdictional practice restrictions, it is not inevitable that this will come to pass. First, monitoring problems abound outside the litigation area. At least with respect to litigation being conducted in the host state by out-of-state lawyers, the need to request *pro hac vice* approval to proceed places lawyers in an oversight setting where application questions can get at the extent of lawyer

188. See COMMISSION REPORT, *supra* note 1, at 3.

189. *Id.* at 11-12 (describing enforcement actions under the old multijurisdictional practice rules as “sporadic” and “infrequent”).

190. *Id.* at 11.

191. *Id.* at 47 (recommending Model Rule on Admission by Motion).

192. *Id.* at 49 (recognizing the interplay).

193. COMMISSION REPORT, *supra* note 1, at 15.

conduct in the state. Conduct undertaken in the host state in support of litigation elsewhere and transactional work is much less easy to monitor. Registration requirements are one attempt to do so,¹⁹⁴ but the success of such ventures remains to be seen.¹⁹⁵ It has also been suggested that host state lawyers who witness unauthorized practice by an out-of-state attorney have a duty to report it to disciplinary authorities,¹⁹⁶ but given the nature of the reporting duty in most states, it is unclear how often that duty will arise.¹⁹⁷

Even if monitoring can be successful, it still raises budgetary concerns. Registration and fee regimes might be necessary to both police the degree of activity engaged in by out-of-state lawyers, and to provide funds for disciplinary enforcement of the multijurisdictional practice rules.¹⁹⁸ In fact, some states have adopted such procedures.¹⁹⁹

A related concern is one of prosecutorial discretion. Disciplinary authorities lack the funding to pursue all potential violations of the disciplinary rules. Except in extreme cases, or as an add-on offense to other misconduct, violations of the multijurisdictional practice rules may not be of sufficient importance to pursue. At the very least, such prosecutions may be postponed as current budgetary problems in the states place particular constraints on their judiciaries.²⁰⁰

Nevertheless, some have observed that “more and more jurisdictions are actively policing unauthorized practice prohibitions and

194. See *supra* text accompanying note 154-56.

195. In New Jersey only seventeen lawyers registered as cross-border attorneys in the first nearly two and a half years of the registration requirement, which has been viewed as a reflection on the difficulties of using registration to monitor and enforce the multijurisdictional practice rule. 2008 *New Jersey Report*, *supra* note 54, at 579.

196. See Letter from Hon. Stewart G. Pollock, Chair of the Supreme Court of New Jersey Prof'l Responsibility Rules Comm. to Chief Justice James R. Zazzali, Chief Justice of the New Jersey Supreme Court 4 (Feb. 28, 2007) (recommending, in the context of the court-mandated review of New Jersey's recently adopted multijurisdictional practice rules, that New Jersey lawyers should be reminded of their Rule 8.3 duty to report multijurisdictional practice violations).

197. As I have discussed in detail elsewhere, the reporting rule contains numerous ambiguities and exceptions which afford lawyers the opportunity to avoid reporting if they choose, and even where a duty arises, it is widely believed to be often ignored. See generally Arthur F. Greenbaum, *The Attorney's Duty to Report Professional Misconduct, A Roadmap for Reform*, 16 GEO. J. LEGAL ETHICS 259 (2003).

198. Gillers, *supra* note 4, at 700 (former Commission member suggesting this as a possible solution to the funding issue).

199. A number of states have done this as part of their general multijurisdictional practice rule. See *supra* text accompanying notes 153-55, 163. Other states may impose such a requirement in other court rules.

200. See generally Lynda Edwards, *Justice Systems Sent Reeling*, A.B.A. J., Jan. 2009, at 60 (noting that “[a]cross the nation, state and local justice systems are feeling the effects of the economic crisis”).

expect increased UPL enforcement activity in the coming year.”²⁰¹ Further, some early enforcement action might set the tone that a state takes its new multijurisdictional balance seriously, which would create substantial pressure for compliance without the need for repeated adjudications. To the extent a down economy encourages protectionism for local lawyers, the chance for enforcement also increases.²⁰²

Even if disciplinary authorities steer away from a rigorous enforcement of the new multijurisdictional practice rules, local prosecutors and lay individuals operating under different incentives and restraints may do so. Prosecutors at times may have a political agenda to pursue through unauthorized practice of law prosecutions.²⁰³ In states where any lawyer injured by the unauthorized practice of law by another can sue to enforce the state’s unauthorized practice of law provisions,²⁰⁴ anti-competitive agendas may come into play. In private actions, private interests may be furthered by an aggressive stance against unauthorized multijurisdictional practice. Some scholars have suggested that such non-disciplinary actions are already on the rise.²⁰⁵

Although the impact of these new rules will often be indirect, it may still be appreciable. As a general matter, the disciplinary rules are promulgated to set standards to be enforced in the disciplinary process.²⁰⁶ They do not set binding standards in other settings, although they are often turned to where they overlap with other areas of the

201. *Latest ABA Review of UPL Enforcement*, *supra* note 179, at 253 (drawing this conclusion from the data provided in the ABA Standing Committee on Client Protection, 2009 Survey of Unlicensed Practice of Law Committees). While it is unclear what of this effort will be directed toward unauthorized practice by out-of-state lawyers, at least one jurisdiction, Louisiana, may have that as a focus. ABA STANDING COMMITTEE ON CLIENT PROTECTION, 2009 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES, Chart II at 17, *available at* <http://www.abanet.org/cpr/clientpro/09-upl-survey.pdf> (“[I]n the context of lawyer discipline prosecution by ODC is very aggressive”; but it is unclear whether focus is on out-of-state lawyers or in-state lawyers assisting others in unauthorized practice).

202. Many assert that restrictions on multijurisdictional practice are largely motivated by parochial attempts to protect local lawyers from outside competition. *See, e.g.*, Perlman, *supra* note 159, at 998.

203. *Cf.* Jonathan Ringel, *Ga. Lawyers Indicted for Advising N.C. College*, LAW.COM. (April 8, 2004), <http://www.law.com/jsp/article.jsp?id=900005538605> (noting that lawyers indicted for unauthorized practice were engaged in investigation of a highly charged matter at a college and were reported by disgruntled, politically connected former trustee of college).

204. *See, e.g.*, *Mallen v. MyInjuryClaim.com*, 769 N.E.2d 74, 76 (1st Dist. Ill. 2002).

205. STEPHEN GILLERS, *REGULATION OF LAWYERS* 683 (8th ed., Aspen Publishers 2009) (1985).

206. MODEL RULES OF PROF’L CONDUCT Scope [20] (2009) (“The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies.”).

law.²⁰⁷ In fact, the rule drafters recognized this disconnect and recommended that state statutes on unauthorized practice of law be amended to be in harmony with the ethics standard.²⁰⁸ To the extent this has taken place, the new disciplinary standard will be employed in other enforcement settings. Even where it has not, the new standards reflect the modern public policy position on where to draw the line on multijurisdictional practice. As such, they are likely to be influential when courts decide such things as whether the enforcement of a fee agreement for multijurisdictional practice is consistent with public policy.²⁰⁹

V. THE FUTURE OF MULTIJURISDICTIONAL PRACTICE

For many states, adoption of a multijurisdictional practice rule was a grand experiment which warranted proceeding with caution. Several states, in adopting such a rule, mandated that the choice be reexamined after several years experience with the rule in operation.²¹⁰ The results

207. *Id.* (noting that the Rules “are not designed to be a basis for civil liability,” but “since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct”).

208. COMMISSION REPORT, *supra* note 1, at 21 (noting that not only rule changes by state judiciaries, but also state legislative reform for statutes might be necessary to fully authorize multijurisdictional practice). Some states raised this issue specifically when adopting new multijurisdictional practice rules. *See, e.g.*, ME. RULES OF PROF’L CONDUCT R. 5.5 reporter’s note (Proposed 2008), <http://www.courts.state.me.us/news/Ethics%202000%20Proposal%2010-08.pdf> (last visited Apr. 11, 2010); *cf. North Carolina Adopts Rule Allowing MJP, Other Recent Changes to ABA Model Rules*, 19 *Laws. Man. on Prof. Conduct (ABA/BNA)* 151, 151 (2003) (citing study committee memorandum noting the split between state statutes and new North Carolina Rule 5.5). The extent to which such actions are necessary may turn on the question of what government entities have the right to define and regulate the unauthorized practice of law. On this question there is substantial variation among the states. *See, e.g.*, Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 *WILLAMETTE L. REV.* 795, 823-30 (2003).

209. *See, e.g.*, *Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct.*, 949 P.2d 1, 12 (Cal. 1998) (denying fees for services that constituted unauthorized practice of law because to allow them would be against public policy).

210. *See, e.g.*, CAL. FINAL REPORT AND PROPOSED RULES, *supra* note 23, at 11 (recommending assessment of California rules and similar rules in other jurisdictions within five years of adoption of California multijurisdictional practice rules); *In re Amendments to the Rules Regulating the Fla. Bar & the Fla. Rules of Judicial Admin.*, 907 So. 2d 1138, 1140, 1143 (Fla. 2005) (Court raised “concerns that difficulties might arise once these [multijurisdictional] amendments are enacted” and ordered the Bar to “monitor the implementation of these amendments and any challenges that arise” and report back within two years from the provision’s effective date); N.J. RULES OF PROF’L CONDUCT R. 5.5 official cmt. (2009) (New Jersey Supreme Court directive to have its committee evaluate experience under the multijurisdictional practice rule and suggest modifications, if needed, three years after the rule’s adoption); Sylvia Stevens, *A UPL Conundrum: Where to Draw the Boundaries on Out-of-State Practice*, *OR. ST. BAR. BULL.* 9, 10 n.3 (June 2007)

of those reexaminations that have been conducted have been, for the most part, quite positive.²¹¹ Concerns that have arisen focus more on peripheral issues, like registration of out-of-state lawyers, than to multijurisdictional practice itself.²¹²

Once experience with a modern multijurisdictional regime proves positive across a number of jurisdictions, the outliers that have not yet adopted a rule are likely to follow. And as the forces that created the movement to multijurisdictional practice continue to accelerate, it is likely that the permissible scope of multijurisdictional practice also will broaden.²¹³ Given that, I think the ABA's adoption of Model Rule 5.5 has been a real success. It was a catalyst for states to think seriously

(noting that when the Oregon Supreme Court adopted a modern multijurisdictional provision, it provided for its automatic repeal Jan. 1, 2009, unless the Court ordered otherwise by Dec. 31, 2007). The Oregon rule has since been permanently adopted. *See* Oregon Sup. Ct. Order 08-003 (Jan. 18, 2008).

211. *See, e.g.*, REPORT OF THE FLORIDA BAR RE: RULES REGARDING THE MULTIJURISDICTIONAL PRACTICE OF LAW (2007) (noting, in court-mandated review of recently adopted Florida multijurisdictional practice rule, that implementation of rule had generally "gone smoothly"); Letter from Hon. Stewart G. Pollock, Chair of the Supreme Court of New Jersey Prof'l Responsibility Rules Comm. to Chief Justice James R. Zazzali, Chief Justice of the New Jersey Supreme Court 2 (Feb. 28, 2007) (noting, in court-mandated review of the recently adopted New Jersey multijurisdictional practice rule, that the Office of Attorney Ethics was unaware of any incidents arising out of the rule); Stevens, *supra* note 210, at 9 (state bar counsel noting that the Oregon rule "has not proved to have any apparent negative consequences" and that the bar's Board of Governors had asked the Oregon Supreme Court to adopt it permanently).

212. *See, e.g.*, Letter from Hon. Stewart G. Pollock, Chair of the Supreme Court of New Jersey Prof'l Responsibility Rules Comm. to Chief Justice James R. Zazzali, Chief Justice of the New Jersey Supreme Court 3-4 (Feb. 28, 2007) (noting apparent lack of compliance with state's registration requirements for out-of-state lawyers engaged in multijurisdictional practice and suggesting rule amendments to more clearly identify registration and record-keeping requirements). The New Jersey Supreme Court declined to adopt these suggestions but instead directed the Committee to do an overall review and evaluation of the state's multijurisdictional practice rule. Notice to the Bar: Supreme Court Action on Recommendations of the Professional Responsibility Rules Committee - Rule 1:20A-5; RPC 5.5 (July 16, 2007). *See also* REPORT OF THE FLORIDA BAR RE: RULES REGARDING THE MULTIJURISDICTIONAL PRACTICE OF LAW (2007) (proposing amendments to the Florida multijurisdictional practice rule to cure certain ambiguities in the original rule's language). The Florida Supreme Court adopted these amendments. *In re* Amendments to the Rules Regulating the Florida Bar and the Rules of Judicial Admin.—Multijurisdictional Practice of Law, 991 So. 2d 842 (Fla. 2008).

213. New Jersey's recent experience appears to the contrary. Recommendations by its Professional Responsibility Rules Committee, in 2008, to allow multijurisdictional practice through association with local counsel, and to exempt lawyers involved in ADR from state registration and fee requirements, were not adopted by the New Jersey Supreme Court, although they may still be under consideration. *See, e.g.*, Henry Gottlieb, *In-House Counsel Given Wider Latitude But New Rules Don't Ease Restrictions on Practice by Out-of-State Attorneys*, 193 N.J. L.J. 141 (2008); *New Jersey Adopts Some MJP Reforms but Defers Action on Other Recommendations*, 24 Laws. Man. on Prof. Conduct (ABA/BNA) 417 (2008). Nevertheless, this is still early on in our experience under the modern multijurisdictional practice rules and does not necessarily reflect the long-term trend.

about multijurisdictional practice issues, and a necessary first step toward a broader multijurisdictional practice regime which will more closely mirror the needs of clients and the abilities of lawyers in an increasingly interconnected world.