Utah Supreme Court's Advisory Committee on the Rules of Professional Conduct

Agenda

February 6, 2024
4:00 to 6:00 p.m.
Utah Law and Justice Center with Zoom available

Welcome; approval of minutes.	Tab 1	Cory Talbot (chair)
Introductions; new member Lynda Viti.	--	Cory Talbot (chair)
Discussion: ABA Request for input on possible amendments to Rule 5.5 to increase permissible cross-border practice. Deadline is March 1, 2024.	Tab 2	Beth Kennedy (staff)
Discussion: Possible amendment(s) to indicate mandatory nature of Rule 14-301 (Standards of Professionalism and Civility) in light of the attorney oath.	Tab 3	Cory Talbot (chair)
Projects in the pipeline: - Revisions to **Rule 1.0 (terminology)** for consistency; on hold until current revisions to Rule 1.0 are resolved.		

Meetings are held at the Utah Law and Justice Center, usually on the first Tuesday of the month from 4 to 6 p.m.

2024 Meeting Schedule: Jan 2 • Feb 6 • Mar 5 • April 2 • May 7 • June 4 • Aug 6 • Sep 3 • Oct 1 • Nov 5 • Dec 3

http://www.utcourts.gov/committees/RulesPC/

Tab 1

Utah Supreme Court's
Advisory Committee on the Rules of Professional Conduct

[Draft] Meeting Minutes
January 2, 2024

Utah Law and Justice Center & Zoom
16:00 Mountain Time

Cory Talbot, Chair

Attendees:
Cory Talbot, Chair
Adam Bondy
Hon. James Gardner
Robert Gibbons
Mark Hales
Alyson McAllister
Hon. Trent Nelson
Mark Nickel
Hon. Amy Oliver
Jurhee Rice
Gary Sackett
Dane Thorley

Staff:
Beth Kennedy

Guests:
Eric Weeks

Excused:
Ashley Gregson; Christine Greenwood; Hon. Craig Hall; Hon. M. Alex Natt; Ian Quiel; Austin Riter; Billy Walker

1. **Welcome, approval of the November 2023 meeting minutes (Chair Talbot)**

   Chair Talbot recognized the existence of a quorum and called the meeting to order at 4:05. Chair Talbot asked for a Motion to approve the November 7, 2023 meeting minutes. Mr. Gibbons moved for approval. Judge Oliver seconded. The Motion passed unanimously.

2. **Discussion of the Judicial Council's Committee on Fairness and Equity and Rules 8.4 and 14-301 (Ms. Kennedy)**

   The Chair asked Ms. Kennedy to update the Committee on her conversations with the Judicial Council's Committee on Fairness & Equity concerning proposed changes to Rules 8.4 and 14-301. Ms. Kennedy reported that the Council offered to review any rule changes proposed by the Committee but could not propose any changes as the Council is not a rulemaking body.

   The Committee discussed the history of the proposed changes. The Committee recounted that the Committee had presented proposed rule changes to the Supreme Court, but the Supreme Court wanted input from the Council. The Committee discussed how to obtain the Council's input and decided that the Council should provide its feedback directly to the Supreme Court.

   The Committee decided to resubmit the rules to the Supreme Court. The Committee will simultaneously provide the rules to the Council so that it may provide input to the Court if it wishes.

3. **Discussion of the ACLU's concerns with Rule 7.1**

   Chair Talbot then turned the Committee's attention to the recent Supreme Court conference concerning Rule 7.1. The Court invited an ACLU representative to the conference to discuss the ACLU's public comment and concerns regarding the prohibition on contacting potential clients.

   Chair Talbot reported that, after the conference, the Supreme Court asked this committee to consider limiting the prohibition to contacts intended for "pecuniary gain."

   The Committee discussed the history of the rule change and considered whether additional changes should be made. The Committee decided to reconvene the subcommittee on this issue and invite the ACLU representative to attend so the subcommittee can better understand the concern.

4. **Discussion of the Supreme Court conference on the proposed referral fee rules**

   Chair Talbot then recounted the Supreme Court's discussion of the Committee's proposed changes on the referral fee rules. The Court has asked the Committee to revise the rules to redefine "referral fees" and "fee sharing" to be more

consistent with the ABA's Model Rules. Chair Talbot noted that the referral fee subcommittee was scheduled to meet to begin the revisions.

February 6, 2024, is the next meeting of the Committee.

The meeting adjourned at 4:44 pm.

Tab 2

AMERICAN BAR ASSOCIATION

Center for Professional Responsibility

To: **ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Individuals, and Entities**

From: **David Majchrzak, Chair**
Center for Professional Responsibility Working Group on ABA Model Rule of Professional Conduct 5.5

Re: **Issues Paper For Comment: Regulatory Issues Associated With Possible Amendments to ABA Model Rule of Professional Conduct 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law)**

Date: **January 16, 2024**

Introduction

The ABA has long advanced and, when appropriate, proposed amendments to its Model Rules of Professional Conduct (MRPC) and other professional regulatory policies to ensure that they align with the changing nature of law practice and the delivery of legal services. Since the last largescale review of ABA MRPC 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law), technology, globalized legal practice, and client expectations regarding the delivery of legal services have continued to evolve. In light of these developments, as described further below, questions have arisen as to whether Model Rule 5.5 remains fit for purpose, or whether reality of 21st century legal practice and delivery of legal services merits changes to the current manner in which multijurisdictional practice is permitted.

These questions originate from various quarters, including the ABA Center for Professional Responsibility, as well as from outside organizations, most prominently from the Association of Professional Responsibility Lawyers (APRL). APRL is a professional organization comprised of lawyers who represent other lawyers, law professors, judges, and others who work in the area of, or are concerned with, regulation of lawyers and the legal profession. What follows is the history of MRPC 5.5, a description of the work leading up to this Issues Paper, and specific questions on which both I and the Center for Professional Responsibility working group seek your input to assist us in determining whether and how to amend MRPC 5.5. Your responses to the questions posed in this issues paper are critical to our work. Because the goal is an active exchange of ideas, when crafting your response please provide your reasoning in addition to expressing agreement or disagreement. On behalf of the working group and the Center, thank you for taking the time to respond.

Written comments should be submitted to Natalia Vera, ABA Center for Professional Responsibility Senior Paralegal at natalia.vera@americanbar.org by March 1, 2024. Written comments may be posted by the Center for Professional Responsibility on its website.

History of MRPC 5.5

MRPC 5.5 provides that lawyers shall not practice law in a jurisdiction where to do so would be in violation of that jurisdiction's rules. Originally appearing in the ABA Model Code of Professional Responsibility, the ABA has reiterated this policy position over time, in the 1983 Model Rules of Professional Conduct in MRPC 5.5(a), and later in amendments to the Model Rules that created certain instances where lawyers could practice in a jurisdiction where they were not licensed without engaging in the unauthorized practice of law (UPL).[1]

For example, in July 2000, ABA President Martha Barnett appointed the Commission on Multijurisdictional Practice (MJP Commission) to "research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law."[2] The MJP Commission was directed to "analyze the impact of those rules on the practices of in-house counsel, transactional lawyers, litigators and arbitrators and on lawyers and law firms maintaining offices and practicing in multiple state and federal jurisdictions" and "make policy recommendations to govern the multijurisdictional practice of law."[3]

The MJP Commission was created as the profession "struggled with the application of UPL laws to licensed lawyers . . . in light of the changing nature of clients' legal needs and the changing nature of law practice."[4] Its members understood that "the law and the transactions in which lawyers assist clients have increased in complexity, requiring a growing number of lawyers to concentrate in particular areas of practice rather than being generalists in state law."[5] Also, "modern transportation and communications technology have enabled clients to travel easily and transact business throughout the country, and even internationally. Because of this globalization of business and finance, clients sometimes now need lawyers to assist them in transactions in multiple jurisdictions (state and national) or to advise them about multiple jurisdictions' laws."[6]

The MJP Commission's central focus became offering recommendations to create uniformity and clarity for multijurisdictional practice in those circumstances when the level or extent of risk of harm to the public was low. Its final report explained:

> The guiding principle that informs the Commission's recommendations is simple to state: we searched for the proper balance between the interests of a state in protecting its residents and justice system, on the one hand; and the interests of clients in a national and international economy in the ability to employ or retain counsel of choice efficiently and economically.[7]

In August 2002, the MJP Commission recommended, and the ABA House of Delegates adopted, revised MRPC 5.5(a) to provide that a lawyer "shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction … ." Revised paragraph (b)

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[1] As adopted in 1983, Rule 5.5 read: A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
[2] Final report
[3] *Ibid.*
[4] Interim report
[5] *Ibid.*
[6] *Ibid.*
[7] Final report

prohibited a lawyer, not admitted by the jurisdiction, from establishing an office or other systematic and continuous presence in the jurisdiction or holding out to the public that the lawyer was licensed by the jurisdiction, except as otherwise authorized by rule or other law.

At the same time and based on the MJP Commission's recommendation, the ABA adopted amendments to MRPC 5.5 allowing for specific exceptions to the broad statement of prohibition in MRPC 5.5(a).[8] The amendments to MRPC 5.5 creating new paragraph (c) allowed a lawyer admitted in another United States jurisdiction to provide legal services on a temporary basis in a jurisdiction in which the lawyer was not admitted when the lawyer is not disbarred or suspended from practice in any jurisdiction and when the exceptions noted in (c) "served the interests of clients and the public" and did not "create an unreasonable regulatory risk."[9] Those exceptions were:

- When the lawyer was associated with another lawyer who was licensed by the jurisdiction;
- When the lawyer was providing services reasonably related to a pending or potential matter for which that lawyer would in the future or already had secured pro hac vice admission;
- When the lawyer was providing services reasonably related to a pending or potential ADR proceeding;
- When the lawyer's service arose out of or were reasonably related to the lawyer's practice in the lawyer's licensing jurisdiction;

In addition to new paragraph (c), the ABA adopted new paragraph (d)(1) providing that a lawyer, admitted in another U.S. jurisdiction, and not disbarred or suspended in any jurisdiction, could provide legal services that did not require pro hac vice admission through a systematic and continuous presence to the lawyer's employer or its organizational affiliates. New paragraph (d)(2) provided that a lawyer, admitted in another U.S. jurisdiction, and not disbarred or suspended in any jurisdiction, could provide legal services through on a systematic and continuous presence when authorized by federal or other law.[10]

As part of its final report, the MJP Commission also recommended strengthening MRPC 8.5, addressing disciplinary authority and choice of law. As amended, MRPC 8.5 provides that a jurisdiction may discipline any lawyer who provides or offers to provide legal services in that jurisdiction regardless of whether the lawyer is licensed by that jurisdiction.[11] Rounding out its work, the MJP Commission recommended amendments to Rule 22 the ABA Model Rules for Lawyer Disciplinary Enforcement (Reciprocal Discipline and Reciprocal Disability Inactive Status), amendments to the Model Rules on Pro Hac Vice Admission and the Licensing and Practice of Foreign Legal Consultants, and the creation of the Model Rule on Temporary Practice by Foreign Lawyers and the Model Rule on Admission on Motion.[12]

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[8] A Legislative History p. 655.
[9] *Ibid.*
[10] *Id.* at p. 651.
[11] MRPC 8.5(a). This aligns with MRLDE 6A. That Rule states that "… any lawyer not admitted in this jurisdiction who practices law or renders or offers to render any legal services in this jurisdiction, is subject to the disciplinary jurisdiction of this court and the board." The MJP Report for 8.5 states: "The proposal is consistent with existing ABA policy, as embodied in Rule 6 of the ABA Model Rules for Lawyer Disciplinary Enforcement."
[12] MJP Commission website:
https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission-on-multijurisdictional-practice/?login

The ABA continued to monitor and study developments impacting the multijurisdictional practice of law in the years following adoption and implementation of the MJP Commission recommendations. In 2009, then ABA President Carolyn Lamm created the ABA Commission on Ethics 20/20 (Ethics 20/20 Commission) to review the Model Rules in the context of advances in technology and global legal practice developments. The Ethics 20/20 Commission proposed, and the House of Delegates adopted, the Commission's first set of recommendations in 2012. Then, in 2013, the Ethics 20/20 Commission recommended, and the House of Delegates adopted, amendments to MRPC 5.5(d)(1) to allow lawyers admitted by foreign jurisdictions to have a U.S. office and to provide legal services to the lawyer's employer regarding the law of a foreign country.[13] The amendments further provide that the foreign lawyer may advise on U.S. law when based on the advice of a U.S. licensed lawyer. The House also adopted, at the Ethics 20/20 Commission's recommendation, new paragraph (e) to MRPC 5.5, defining a "foreign lawyer" for purposes of the amendments to (d).

The Association of Professional Responsibility Lawyers Proposal

In April 2022, the Association of Professional Responsibility Lawyers (APRL) forwarded to ABA President Reggie Turner a white paper and proposal to amend MRPC 5.5 to expand opportunities for lawyers to practice across jurisdictional borders.[14] In its transmission, APRL explained, "lawyers in the United States have continued to expand their practices beyond state and national borders" and "APRL believes that a broader rule is critical to the future of the profession."

Focusing on "the client's right to choose counsel" the APRL proposal was based on the idea that "protecting clients from incompetent lawyering does not require artificial boundaries that prevent clients from choosing competent counsel of their choice even if the lawyer they choose is licensed elsewhere." APRL rejected the idea that a state-based license always assures that every state-licensed lawyer is competent to represent every client with any kind of legal problem in that jurisdiction. The report argued that the practice has changed for many lawyers allowing them to focus narrowly and practice one or two areas of the law. The result has been lawyers developing deep expertise that extends beyond one state's laws. APRL notes that this "outcome has arisen because of the marketplace, not any ethical restrictions on practice."

The APRL proposal to revise MRPC 5.5 provides that a lawyer admitted and authorized to practice law in any United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services—including on a systematic and continuing basis—in a jurisdiction in which the lawyer was not licensed, subject to the following conditions:

- the lawyer may not hold out to the public or otherwise represent that the lawyer is admitted to practice law in a jurisdiction in which the lawyer is not licensed;
- the lawyer must disclose where the lawyer is admitted to practice law;
- the lawyer must comply with the jurisdiction's rules of professional conduct, including but not limited to MRPC 1.1 (Competence), and with the admission requirements of courts of this jurisdiction;
- the lawyer will be subject to MRPC 8.5 regarding the disciplinary authority and choice of law rules of this jurisdiction; and

[13] History, p. 660.
[14] See Appendix A for the APRL proposal for a revised MRPC 5.5.

- the lawyer may not assist another person in the unauthorized practice of law in this, or any other, jurisdiction.

The APRL proposal also retains the language in MRPC 5.5 permitting a lawyer admitted and authorized to practice law in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, to provide, in this jurisdiction, legal services that are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and do not arise under the law of any U.S. jurisdiction, unless the services are provided after consultation with a lawyer authorized to practice law in this jurisdiction.

President Turner forwarded the APRL proposal to the ABA Standing Committee on Ethics and Professional Responsibility.

Standing Committee on Ethics and Professional Responsibility Draft

Before APRL published its report and proposal, the Standing Committee on Ethics and Professional Responsibility ("Ethics Committee") had also started looking at whether and how MRPC 5.5 might be amended.[15]

The Ethics Committee's March 2022 draft permitted a lawyer admitted and authorized to practice law[16] by any United States jurisdiction, and not disbarred or suspended from practice by any jurisdiction, to provide legal services in any jurisdiction,[17] if that lawyer:

- discloses, in writing, to the client or prospective client who will be receiving legal services in this jurisdiction, the jurisdiction(s) where the lawyer holds an active license to practice law and that the lawyer is not actively licensed to practice law by this jurisdiction;[18] and
- complies with the pro hac vice admission or other regulatory requirements of this jurisdiction.[19]

But a lawyer would not be required to make such a disclosure if the services being provided while the lawyer is located in the jurisdiction are services limited to: the law of the jurisdiction in which the lawyer is admitted; authorized by federal law or rule; or federal law or tribal law.

The Ethics Committee's March 2022 draft also permitted, in paragraph (c), a lawyer admitted and actively licensed to practice law in a foreign jurisdiction or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction to "provide legal services in this jurisdiction to the lawyer's employer or its organizational affiliates, unless they are services for which the forum requires pro hac vice admission, in which case such services may be provided following pro hac vice admission."

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[15] See Appendix B for the Ethics Committee's proposal dated March 2022.
[16] The March 2022 draft from the Ethics Committee requires that the lawyer seeking to engage in cross border practice is both "admitted" by a jurisdiction and "authorized to practice by any jurisdiction." Therefore, a lawyer admitted, but not authorized to practice because the lawyer is, for example, retired, suspended, or disbarred, would not be permitted to engage in cross-border practice.
[17] March 2022 draft, paragraph (a).
[18] March 2022 draft, paragraph (b)(1).
[19] March 2022 draft, paragraph (b)(2).

New paragraph (c)—borrowing language from current MRPC 5.5(d)(1)—also explained, "If services provided by a foreign lawyer require advice on the law of this or another United State jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is actively licensed or otherwise authorized to practice law by that jurisdiction." Additionally, that same paragraph—borrowing language from current MRPC 5.5(e)(1)—provided that, "The foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority."

The Ethics Committee asked entities within the Center for Professional Responsibility to review and comment on the initial discussion draft because the Committee recognized that multijurisdictional practice implicated enforcement and other systemic issues for the regulation of lawyers under the U.S. system of state-based judicial regulation. These issues include lawyer discipline, IOLTA account oversight and regulation, client protection fund payments, operations and procedures, and professional liability insurance.

Concerns Raised by CPR Entities

While CPR entities did not express disagreement with the concepts behind the discussion draft, their collective comments identified multiple issues requiring further internal discussion. To address these concerns Paula Frederick, Chair of the Center for Professional Responsibility Coordinating Council, formed a working group on MRPC 5.5.[20] The working group was composed of representatives from all the Center entities, APRL, and the National Organization of Bar Counsel (NOBC).

While discussing the systemic issues noted above, the working group members noted that many of these issues exist today with the multijurisdictional practice permitted by current MRPC 5.5. What follows is a recitation of the issues the working group discussed, concerns raised, and areas where input is sought.

The Competence Paradox

Working group members discussed APRL's assertion that there exists today a competency paradox:

> The seemingly arbitrary nature of the geographical limitations imposed by the current regulatory structure is heightened by an understanding of the paradox associated with how few restrictions exist on a lawyer's ability to practice by subject matter. Once admitted in a U.S. jurisdiction, a lawyer is permitted to practice in any area of law of the lawyer's choosing or in multiple areas of law.

Once admitted in a U.S. jurisdiction, a lawyer is permitted to practice in any area of law of the lawyer's choosing or in multiple areas of law because MRPC 1.1:

> assumes that the lawyers can educate themselves about the subject matter and competently handle the case … The 'Competency Fallacy of Rule 5.5,' however,

[20] After reviewing the APRL submission and collecting comments from CPR entities on its March 2022 draft, the Ethics Committee refined and circulated what it titled Draft 1.0 of possible amendments to Model Rule 5.5. This was circulated to representatives appointed to the working group. See Appendix C.

> dictates that a lawyer licensed in 'State A', who has devoted their entire career to personal injury work for example, would not be competent to represent the car-accident victim described above (without the association of local counsel) because the lawyer is presumed to be incapable of knowing or coming to understand 'the law of State B.' Instead, if that State A-licensed lawyer wanted to be able to regularly represent clients with personal injury cases in State B, the lawyer would have to obtain a second license to practice law, a license issued by State B.

The working group also noted that 39 states, the District of Columbia, and the Virgin Islands require applicants to pass the Uniform Bar Exam for admission, and the minimum score for passing the multi-state bar exam diverges by only 12 points in these jurisdictions.

Question: Given that 39 states, D.C., and the Virgin Islands require applicants to pass the Uniform Bar Exam for admission, and that the minimum score for passing the multi-state bar exam diverges by only 12 points in these jurisdictions, should we assume that lawyers who take and pass that exam are competent to practice anywhere? If yes, why? If not, please explain.

Question: Does the fact that admission on motion is available in all but seven states, and many jurisdictions allow for other exceptions to cross-border practice, including those modeled on the ABA Model Rule for Registration of In-House Counsel, the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster, the ABA Model Rule on Practice Pending Admission, and the ABA's support for and urging of state and territorial bar admission authorities to enact an "admission by endorsement" for military spouse attorneys affect your analysis?

Lawyer Discipline

The working group discussed a variety of disciplinary enforcement and concomitant resource related issues raised by the Ethics Committee's March 2022 discussion draft and the APRL proposal, keeping at the fore that the purpose of lawyer discipline is to protect the public.

For example, as noted at footnote 11 above, Rule 6 of the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE) provides that any lawyer "not admitted in this jurisdiction who practices law or renders or offers to render any legal services in this jurisdiction, is subject to the disciplinary jurisdiction of this court and the board." But the Working Group noted that not all jurisdictions have analogous provisions in their disciplinary procedural rules. In addition, Rule 9 of the MRLDE provides that it is grounds for discipline in a jurisdiction where a lawyer is admitted for a lawyer to "engage in conduct violating applicable rules of professional conduct of another jurisdiction."

The Commentary to MRLDE 6 states, with regard to lawyers specially admitted[21] to practice in a jurisdiction, that: "It is inappropriate for the jurisdiction in which the lawyers is specially admitted to rely exclusively upon the lawyer's home jurisdiction to enforce ethical standards. The witnesses and other evidence of misconduct are likely to be located in the adopted jurisdiction. Moreover, the jurisdiction in which the misconduct occurred will be far more interested in pursuing the matter. Finally, misconduct should, in the first instance, be judged by the ethical standards of the jurisdiction where it occurred."

[21] Rule 6 refers to lawyers "specially admitted by a court of this jurisdiction for a particular proceeding."

Consistent with Rule 6 of the MRLDE, MRPC 8.5 provides:

> (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

In light of the above, some on the working group posited that liberalizing MRPC 5.5 in the manner proposed in the March 2022 discussion draft or APRL proposal could exacerbate the already existing number of instances where there are difficulties for disciplinary entities to determine which jurisdiction has the authority to proceed with a complaint of misconduct by a lawyer providing legal services in a jurisdiction in which the lawyer is not licensed or authorized to practice.

Question: Given the above, do you agree that there currently are barriers for regulators to determine which jurisdiction should proceed with a complaint of misconduct by a lawyer providing legal services in a jurisdiction in which the lawyer is not licensed or authorized to practice? If yes, please explain why, and if applicable, please cite your jurisdiction's rules that are at issue. If not, please also explain why not.

Question: Will amending MRPC 5.5 in the manner proposed by the March 2022 discussion draft or APRL proposal create any new barriers for determining which jurisdiction should first investigate a complaint of lawyer misconduct? If yes, please explain why, including whether amendments to Rule 6 of the MRLDE or MRPC 8.5 would be necessary to address this issue. If not, please explain why.

Question: If both disciplinary entities have jurisdiction, does it make sense for them to investigate and prosecute concurrently, and if so, in what circumstances? Please explain your reasoning.

If two jurisdictions are concurrently investigating and prosecuting, should the MRLDE be amended to include a model for determining when parallel investigation and prosecution is appropriate? Please explain why.

Some members of the working group expressed concerns about whether the proposed changes to MRPC 5.5 would impact the enforcement of disciplinary subpoenas when the lawyer resides or works from an office in a different jurisdiction that that investigating or prosecuting the lawyer. MRLDE 14 states, in relevant part:

> **Subpoena Pursuant to Law of Another Jurisdiction**. Whenever a subpoena is sought in this state pursuant to the law of another jurisdiction for use in lawyer discipline or disability proceedings, and where the issuance of the subpoena has been duly approved under the law of the other jurisdiction, the chair of the board, upon petition for good cause, may issue a subpoena as provided in this section to compel the attendance of witnesses and production of documents in the county where the witness resides or is employed or elsewhere as agreed by the witness. Service, enforcement, or challenges to this subpoena shall be as provided in these rules.

Question: In the context of the March 2022 discussion draft and the APRL proposal, does MRLDE Rule 14(G) continue to set forth an effective framework for enforcement of reciprocal subpoenas? If not, how should MRLDE 14 be amended to address this issue?

Another issue that the working group discussed in the context of possibly expanding the authority to engage in multijurisdictional practice related to the ability of regulators to share information. In almost all jurisdictions the investigation of complaints of misconduct is confidential. Upon the filing and service of formal charges, disciplinary matters become public in almost all jurisdictions.

MRLDE 16B (Access to Disciplinary Information) states:

B. Confidentiality. Prior to the filing and service of formal charges in a discipline matter, the proceeding is confidential within the agency, except that the pendency, subject matter, and status of an investigation may be disclosed by disciplinary counsel if:
(1) the respondent has waived confidentiality;
(2) the proceeding is based upon allegations that include either the conviction of a crime or reciprocal discipline;
(3) the proceeding is based upon allegations that have become generally known to the public; or
(4) there is a need to notify another person or organization, including the client protection fund, in order to protect the public, the administration of justice, or the legal profession.

While paragraph (4) would permit some information sharing with another disciplinary entity, the extent of the information that may be shared may not be sufficient. Some jurisdictions may feel constrained by their confidentiality rules from alerting regulators in other jurisdictions where the lawyer is admitted or authorized to practice, which could, in turn, be contrary to the goal of public protection.

Question: During the course of an otherwise confidential investigation, should lawyer disciplinary entities be free to share any information they deem relevant with other regulators in a jurisdiction where a lawyer is admitted or authorized to practice? If yes, please indicate whether concomitant amendments should be made to MRLDE 16. If not, please explain why you disagree, and describe any limitations on any sharing of such information you believe appropriate.

Finally, the working group discussed creating a mechanism to ensure that disciplinary entities know the identity and contact information for lawyers who, under the March 2022 discussion draft or APRL proposal, though not be admitted, would be permissibly practicing in their jurisdictions. The working group discussed whether the creation of some type of national database or a registration-like process akin to the Model Rule for Registration of In-House Counsel made sense.[22] Questions related to a possible registration regime include whether it would apply to lawyers engaging in temporary practice in a jurisdiction where they are not admitted or authorized—something that is not currently required for temporary practice—or only when the lawyer is engaged in systematic or continuous practice. If so, at what point would temporary practice become systematic and continuous?

[22] Link to In House Counsel Registration Rule.

Question: Does creation of a registration regime make sense? If not, please explain why? If yes, should such registration regime apply only to systematic and continuous practice or also to temporary practice, and why?

Client Protection Funds

The legal profession is the only profession that collectively undertakes to reimburse victims of misappropriation by fellow lawyers. The profession does this through Client Protection Funds established in each jurisdiction. In 1981, the ABA adopted Model Rules for Lawyers' Funds for Client Protection (MRCPF). Most jurisdictions have adopted a version of the MRCPF for the operation of their client protection fund. As explained in the preface to the MRCPF:

> [I]t is a fact that some lawyers misappropriate money from their clients. Typically, those lawyers lack the financial wherewithal to make restitution to their victims. The organized bar throughout the United States has responded by creating Client Protection Funds to provide necessary reimbursement.

Traditionally, client protection funds have been state-based and many such programs are underfunded. As a result, many funds limit the allowable reimbursement amount for victims of a lawyer's misconduct.

Although MRCPR 1.A. explains that a fund will reimburse losses caused by the dishonest conduct of lawyers "licensed or otherwise authorized to practice law in the courts of this jurisdiction," MRCPF 1. B. does not state that a lawyer licensed in another jurisdiction but providing services in this jurisdiction on a temporary basis under current MRPC 5.5(c) is a lawyer for purposes of the MRCPF.[23] Additionally, MRCPF 10. E. allows a fund to consider whether it—or another fund—should reimburse the claimant. Rule 10.E. reads:

> In determining whether it would be more appropriate for this Fund or another Fund to pay a claim, the Board should consider the following factors:
>
> (1) the Fund(s) into which the lawyer is required to pay an annual assessment or into which an appropriation is made on behalf of the lawyer by the bar association;
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> (2) the domicile of the lawyer;
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> (3) the domicile of the client;
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> (4) the residence(s) of the lawyer;
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> (5) the number of years the lawyer has been licensed in each jurisdiction;
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> (6) the location of the lawyer's principal office and other offices;
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> (7) the location where the attorney-client relationship arose;
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> (8) the primary location where the legal services were rendered;
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> (9) whether at the time the legal services were rendered, the lawyer was engaged in the unauthorized practice of law as defined by the jurisdiction in which the legal services were rendered; and
>
> (10) any other significant contacts.

[23] MRCPF 1. B reads: For purposes of these Rules, "lawyer" shall include a person: (1) licensed to practice law in this jurisdiction, regardless of where the lawyer's conduct occurs; (2) admitted as in-house counsel; (3) admitted pro hac vice; (4) admitted as a foreign legal consultant; (5) admitted only in a non-United States jurisdiction but who is authorized to practice law in this jurisdiction; or (6) recently suspended or disbarred whom clients reasonably believed to be licensed to practice law when the dishonest conduct occurred.

The working group discussed that, in practice, most funds will reimburse for the dishonest acts of a lawyer who is licensed by the jurisdiction in which the fund operates ***and*** when there is some nexus between the harm and the jurisdiction. Both must be true. The working group was told that client protection funds are much less likely to reimburse harmed clients if the lawyer is not licensed by the jurisdiction or if the lawyer is licensed by the jurisdiction, but the legal services are provided outside the licensing jurisdiction. The working group was told that, under the current multijurisdictional practice of law, there are some jurisdictions where consumers of legal services are not being compensated through existing CPF because of limitations in funds, limitations in current rules, and/or discretion provided by those rules when the relevant lawyer or consumer are from different jurisdictions.

It appears to the working group that in the current multijurisdictional manner in which law is currently practiced, there are consumers of legal services who are not being compensated through existing CPF because of limitations in current rules.

Question: Do you agree that this is an issue? Please explain your reasoning.

The working group discussed changes that could be made to the current MRCPF and jurisdictional CPF rules to address today's cross-border practice concerns as well as concerns that could be raised by allowing for increased cross-border practice. As a result, they are interested in knowing:

Question: Do you believe that MRCPF 1 should be amended to include lawyers providing legal services on a temporary basis in a jurisdiction in which the lawyer is not licensed?

Question: Should a lawyer providing legal services on a temporary basis in a jurisdiction be required to contribute to the client protection fund operating in the jurisdiction in which the lawyer is providing temporary services? Some jurisdictions pro hac vice rules require such a contribution.[24]

Interest on Lawyers Trust Accounts (IOLTA)

MRPC 1.15 requires lawyers to hold client property in connection with a representation separately from the lawyer's property. Funds are to be maintained in a separate account—commonly referred to as an Interest on Lawyers Trust Account ("IOLTA") account. An IOLTA is a pooled, interest- or dividend-bearing business checking account into which lawyers deposit client funds that are held for brief periods of time. The interest from the account is paid to the Lawyers Trust Fund for the state in which the account is located. Lawyers Trust Funds are a critical source ($175+ million nationally)[25] for the operation of no-cost and low-cost civil legal services provided to moderate and income insecure persons.

MRPC 1.15(a) provides that the lawyer shall hold client funds in a "separate account maintained in the state whether the lawyer's office is situated, or elsewhere with the consent of the client or third person." Not all jurisdictions have adopted MRPC 1.15(a) verbatim. The majority provide that the funds must be held in the jurisdiction in which the lawyer's office is situated; a

[24] See, e.g., New Jersey Rule 1:21-2(a)(1); Alabama Client Security Fund Rule VIII, E.; Tennessee Lawyers' Fund for Client Protection Rule 1.05(c) and 2.01(a).
[25] ABA Commission on Lawyers' Trust Funds overview available at https://www.americanbar.org/groups/interest_lawyers_trust_accounts/overview

minority mandate that the funds be held in a jurisdiction in which the legal services are provided.[26] Additionally, ABA Model Rules for Client Trust Account Records explains that "only a lawyer admitted to practice law in this jurisdiction . . . shall be an authorized signatory or authorize transfers from a client trust account."[27]

Jurisdictions differ as to whether IOLTA accounts are randomly audited, whether there is overdraft notification from the bank to the jurisdiction's disciplinary authority, and whether there is payee notification that settlement funds have been deposited into the lawyer's IOLTA account.

Question: Do you agree that MRPC 1.15, Rule 2 of the Model Rules for Client Trust Account Records, and jurisdictional variations raises issues for the lawyer providing legal services on a temporary basis under MRPC 5.5(c) in a jurisdiction in which the lawyer is not licensed? Please explain your reasoning.

Question: Does MRPC 8.5(b), Choice of Law, provide adequate guidance for the lawyer facing these issues? If yes, how? And, if no, how would you amend any of the above-cited Rules to address this concern?

Lawyers Professional Liability Insurance

Members of the working group discussed how lawyers' professional liability insurance would be affected by amendments to MRPC 5.5 that allow broader opportunities for multijurisdictional practice, akin to that proposed by APRL and the March 2022 discussion draft. Some noted that allowing increased cross border practice in these ways may embolden lawyers to "dabble" in jurisdictions and in subject matters in which they are not familiar. A portion of the working group expressed concerns that many malpractice claims have at their root a lawyer who was either dabbling in a subject matter in which the lawyer was not familiar or with a particular procedural issue they had mishandled.

Question: Would liberalization of MRPC 5.5 as suggested by APRL or the March 2022 discussion draft necessitate insurers developing new application questions, risk assessment, and liability insurance pricing beyond those that already exist for permissible temporary practice in jurisdictions where a lawyer is not licensed?

Other Issues of Note

Jurisdictions differ in how they regulate continuing legal education for lawyers they license. Some of the working group believed this issue should also be considered when evaluating whether and how to allow for greater cross-border practice. For example, currently, only four U.S. states and the District of Columbia do not require a licensed lawyer to attend CLE.[28] The jurisdiction with the least number of hours required per year mandates only three hours of CLE annually. The jurisdiction requiring the most CLE hours mandates 20 hours annually.[29]

[26] A common jurisdiction split raised is the split between Ohio and its neighbor Pennsylvania. While Ohio's rules require an account held in the state in which the lawyer is licensed, Pennsylvania requires an account where the services are rendered.
[27] Check this.
[28] https://www.americanbar.org/events-cle/mcle
[29] https://www.americanbar.org/events-cle/mcle

Question: Should a lawyer providing legal services temporarily in a jurisdiction in which the lawyer is not licensed be subject to the CLE requirements of that jurisdiction? Please explain your reasoning.

Additionally, some jurisdictions have adopted statewide, enforceable professionalism standards or standards regarding mandatory or voluntary fee dispute resolution. Others have not.

Question: Should the lawyer providing legal services on a temporary basis in a jurisdiction that has adopted enforceable professionalism standards or standards regarding mandatory or voluntary fee dispute resolution be subject to the rule of the jurisdiction in which those services are provided? Please explain your reasoning.

Appendix A

APRL ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

600 W. Van Buren Street
Suite 700
Chicago, IL 60607
www.aprl.net

Phone: (312) 782-4396
Fax (312) 782-4725

April 18, 2022

By email: rturner@clarkhill.com
Reginald M. Turner, Esq.
President, American Bar Association

Re: APRL's Proposal for a Revised Model Rule 5.5

Dear President Turner:

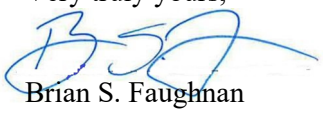
On behalf of APRL, an association of over 400 lawyers and law professors advising and representing lawyers in ethics matters, I enclose APRL's proposal for a replacement Model Rule 5.5 to better reflect the way lawyers practice in the 21st Century. Our proposal advocates that a lawyer admitted in any United States jurisdiction should be able to practice law and represent willing clients without regard to the geographic location of the lawyer or the client, without regard to the forum where the services are to be provided, and without regard to which jurisdiction's rules apply at a given moment in time. At the same time, our new Model Rule 5.5 would still preserve judicial authority in each state to regulate who appears in state courts, emphasizes that lawyers must be competent under Rule 1.1 no matter where they are practicing or what kind of legal services they are providing, and ensures that lawyers will be subject to the disciplinary jurisdiction of not only their state of licensure but wherever they practice.

Several years ago, one of my predecessors as President of APRL, George Clark, established a committee focused on the Future of Lawyering. The Future of Lawyering Committee is chaired by two other past presidents of our organization, Jan Jacobowitz and Art Lachman. After several years of hard work and discussions, the first action item from that group is a proposal to replace current ABA Model Rule 5.5 with a new version. That group has also created a very detailed report that discusses the history of the existing rule, how it is rooted in troubling presumptions, and how it is anachronistic in relation to the modern practice of law. In addition to the revised proposed rule itself, I also enclose a copy of that Report of the Future of Lawyering Subcommittee of the Association of Professional Responsibility Lawyers.

In March, APRL's Board voted to adopt the proposed revised rule as APRL's own proposal and authorized the report prepared by a Subcommittee of our Future of Lawyering Committee to be publicly disseminated. We hope to garner support not only within the ABA for this proposal, but also in any states independently willing to consider changes to their own versions of RPC 5.5. I would ask that you help disseminate these materials to the appropriate channels within the ABA.

I thank you for your time, your consideration, and your service to our profession.

Very truly yours,



Brian S. Faughnan
APRL 2021-2022 President
Lewis Thomason, P.C.

APRL MODEL RULE 5.5

RULE 5.5: Multijurisdictional Practice of Law

(a) A lawyer admitted and authorized to practice law in any United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction, subject to the other provisions of this rule.

(b) Only a lawyer who is admitted to practice in this jurisdiction may hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer who provides legal services in this jurisdiction shall:

(1) Disclose where the lawyer is admitted to practice law;

(2) Comply with this jurisdiction's rules of professional conduct, including but not limited to Rule 1.1 (Competence), and with the admission requirements of courts of this jurisdiction;

(3) Be subject to Rule 8.5 regarding the disciplinary authority and choice of law rules of this jurisdiction; and

(4) Not assist another person in the unauthorized practice of law in this, or any other, jurisdiction.

(d) A lawyer admitted and authorized to practice law in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates;

(2) are not services for which the forum requires pro hac vice admission; and

(3) do not arise under the law of any U.S. jurisdiction, unless the services are provided after consultation with a lawyer authorized to practice law in this jurisdiction.

New Comments

1. This rule acknowledges that the practice of law now routinely transcends geographic jurisdictional boundaries. The question of what it means for a lawyer to practice law "in" a jurisdiction has been clouded by advances in technology that facilitate lawyers' ability to communicate, work, and appear in other jurisdictions. For example, historically a lawyer's physical presence in a jurisdiction was the predominate factor in determining where the lawyer practiced law. In modern law practices, lawyers routinely send e-mails, place phone calls, and participate in video calls with clients and other parties in other jurisdictions, rendering the lawyer's physical location irrelevant to the lawyer's capacity to provide legal

services. Similarly, the advent of on-line research, including access to local rules and ordinances, has enhanced lawyers' ability to master competency without regard to artificial geographic limitations. Hence, this rule recognizes the realities of current law practice and expanding access to lawyers while still being mindful of the need for public protection.

2. The definition of the practice of law may be established by statute or common law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to individuals admitted and authorized to practice law in at least one United States jurisdiction, protects the public against rendition of legal services by unqualified and unaccountable persons. Under the circumstances specified in section 5.5(d) of this rule, lawyers licensed in a foreign jurisdiction may also practice law without undue risk of harm to the public.

3. A lawyer is "admitted" in a jurisdiction when they have been formally licensed to appear in the courts of that jurisdiction without limitation. A lawyer may be "authorized" to practice in a jurisdiction if they are admitted to practice in any U.S. jurisdiction or, where court rules so require, the lawyer has been admitted to appear by a pro hac vice procedure, or other similar mechanism. A lawyer may be admitted to practice but not authorized to do so, because, for example, the lawyer is on inactive status. Under this rule, a lawyer must be both admitted and authorized to practice in at least one United States jurisdiction.

4. The distinction of being admitted in a particular jurisdiction relates to the privilege of regularly appearing in the courts of this jurisdiction and communicating that privilege to the public. Thus, while lawyers admitted in other jurisdictions may practice in this jurisdiction as provided in this rule, only lawyers admitted in this jurisdiction may represent that they are fully authorized to appear regularly in the courts of this jurisdiction.

5. Paragraph (c)(1) requires that all lawyers, including lawyers admitted in this jurisdiction, disclose the jurisdiction(s) in which they are admitted. Such disclosure is necessary to inform consumers of legal services and other parties where the lawyer's license originates and to facilitate disciplinary enforcement. This Rule anticipates that the primary form of disclosure will be in written communications, such as lawyers' signature blocks on correspondence and in lawyer advertising, including websites. A lawyer who communicates orally with another person and knows, or reasonably should know, that the other person has a misunderstanding about the lawyer's licensure, has an affirmative duty to correct the person's impression. *See* Rule 4.3.

6. A lawyer may establish an office for the practice of law in this jurisdiction with proper disclosure of the jurisdiction(s) in which the lawyer is admitted.

7. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 – 7.3.

8. All lawyers are required to be competent in the practice of law. *See* Rule 1.1. The lawyer's duty of competence applies regardless of practice area or the jurisdiction in which a matter is located.

9. All lawyers are subject to the disciplinary authority of the jurisdictions in which they practice. *See* Rule 8.5(a). The frequency with which disciplinary authorities have exercised their authority to prosecute and discipline lawyers not licensed in their jurisdiction has increased in the past decade, suggesting that geographic boundaries are not an impediment to holding lawyers accountable for ethical misconduct. Hence, allowing lawyers to practice in multiple jurisdictions does not undermine public protection.

10. A lawyer does not engage in the unauthorized practice of law by employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3. A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

11. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority. In the absence of such requirements, this Rule permits lawyers to appear before administrative agencies in jurisdictions in which they are not admitted, subject to the other provisions of this Rule.

12. In situations in which pro hac vice admission is required, this Rule permits a lawyer to engage in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law under this rule but for which pro hac vice admission has not yet been obtained. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents.

13. Paragraph (d) applies to a foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the foreign lawyer to provide personal legal services to the employer's officers or employees or legal services to the general public. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the foreign jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under this Rule needs to first consult with a lawyer admitted and authorized to practice in at least one U.S. jurisdiction.

REPORT OF THE FUTURE OF LAWYERING SUBCOMITTEE OF THE ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS REGARDING PROPOSED REVISED MODEL RULE 5.5[1]

Introduction

The Association of Professional Responsibility Lawyers Committee on the Future of Lawyering proposes a revised Model Rule 5.5 that offers a 21st century approach to the practice of law. Since the adoption of the current Model Rule 5.5 in 2002, lawyers in the United States have continued to expand their practices beyond state and national borders. The existing rule no longer adequately addresses the day-to-day questions lawyers have about multi-jurisdictional practice and it preserves outdated notions of how lawyers serve their clients. APRL believes that a broader rule is critical to the future of the profession.

APRL's proposed revision of Model Rule 5.5 reflects the concept that a lawyer admitted in any U.S. jurisdiction should be able to engage in the practice of law and represent willing clients without regard to the geographic location of the lawyer or the client, the forum the services are provided in, or which jurisdiction's rules apply at a given moment in time. The proposed revision recognizes that ethics rules will continue to govern the conduct of lawyers and require competence in the delivery of legal services provided; acknowledges that courts and other tribunals have the inherent power to control who appears before them; and embraces the fact that technology has fundamentally changed the ease with which clients and lawyers work together over vast distances.

The proposed revised Model Rule 5.5 offers up a regulatory model that would be similar, though not identical to the way that driver's licensing works in our nation. Although each jurisdiction implements its own scheme for granting drivers' licenses, those licenses are, of necessity, recognized in every U.S. jurisdiction. Drivers are expected to inform themselves of the laws in jurisdictions to which they travel.

APRL's proposal does not ignore state licensure. To the contrary, APRL's proposal would enhance public protection by requiring that all lawyers, in every jurisdiction,

[1] The members of the subcommittee involved in the drafting of the proposed rule and of this report are: Kendra Basner (San Francisco, CA), Eric Cooperstein (Minneapolis, MN), Craig Dobson (New York, NY), Brian S. Faughnan (Memphis, TN), Jan Jacobowitz (Miami, FL), Arthur Lachman (Lake Forest Park, WA), David Majchrzak (San Diego, CA), Sari Montgomery (Chicago, IL), Lynda Shely (Scottsdale, AZ), and Hope Todd (Washington, D.C.).

disclose the jurisdictions in which they are licensed. APRL's proposal preserves the authority of judicial branches to regulate who appears before them, reminds lawyers of their ethical obligation under Rule 1.1 to be competent in all the services they provide, and ensures that lawyers will be held responsible for any misdeed committee in the relevant jurisdictions.

The proposal which APRL now urges acknowledges that clients must continue to be protected from the incompetent practice of law. However, the proposal also elevates the client's right to choose counsel to a co-equal status in the context of the regulation of multijurisdictional practice and acknowledges that protecting clients from incompetent lawyering does not require artificial boundaries that prevent clients from choosing competent counsel of their choice even if the lawyer they choose is licensed elsewhere.

The report provides APRL's reasoning and support for its proposal, including some significant historical context for Rule 5.5. The report addresses the realities of today's practice to highlight the unnecessary restriction on the ability of lawyers to practice in multiple jurisdictions and considers the recent experience of lawyers and their clients during the global pandemic.

The report also expands the principles that APRL believes should be at the heart of a regulatory structure that addresses multijurisdictional practice in a manner that benefits both clients and their lawyers. The report also discusses why certain existing "solutions" to these problems are insufficient, unjust, or both. Finally, the report includes historical context and insight into the origin of today's approach and the systemic problems that are exacerbated by its continuing existence.

Technology and the Evolution of the Practice of Law

If it was not already clear before the onset and consequences of the Covid-19 Global Pandemic ("2020 Pandemic") that technology has changed the modern practice of law, the conclusion is now undeniable. In the face of stay-at-home and other quarantine orders, technology has allowed lawyers to remotely meet with clients, negotiate deals, mediate, and appear in court via Zoom and other video conferencing technology.[2] Today's

[2]Jan L. Jacobowitz, Chaos or Continuity? The Legal Profession: From Antiquity to the Digital Age, the Pandemic, and Beyond, 23 Vanderbilt Journal of Entertainment and Technology Law 279 (2021);

technology readily allows a lawyer to practice law from almost anywhere assuming available access to a wireless network. However, Model Rule 5.5 and its various state iterations prohibit the unauthorized practice of law—even with the use of remarkable technology during a global Pandemic. As discussed below, both the historical underpinnings of Rule 5.5 and the contemporary practice of law compel a review and revision to what should be considered the unauthorized practice of law and the rules that prohibit it.

It is important to note that not only is there a lack of evidence that lawyers are harming the public by working across state lines (assuming that they are licensed and in good standing in at least one state), but also that there is no evidence clients prioritize the location of their lawyer when deciding who to retain. In fact, Clio's 2020 Legal Trends Report indicates that:

> - …Many consumers (37%) prefer to meet virtually with a lawyer for a consultation or first meeting, and 50% would rather conduct follow-up meetings through video conference. 56% of consumers would prefer videoconferencing over a phone call.
> - …The majority of consumers (65%) prefer to pay using electronic forms of payment, such as credit cards, debit cards, or online payment systems such as Clio Payments, PayPal, or Apple Pay over cash or check.
> - …The majority of consumers (69%) prefer working with a lawyer who can share documents electronically through a web page, app, or online portal. [3]

Thus, not only can lawyers and clients conduct the business of law remotely, regardless of physical location, but many even find it preferable. Just as the rules have evolved regarding competence, confidentiality, and technology so too should Rule 5.5 be revised to permit lawyers and clients to work together remotely without fear of

https://news.bloomberglaw.com/us-law-week/pandemic-pressures-restriction-on-where-lawyers-can-practice.

[3] 2020 Legal Trends Report (Clio) available at https://www.clio.com/resources/legal-trends/2020-report/.

disciplinary or statutory action against the lawyer for violations of Rule 5.5 or UPL regulations.

Geographical Limitation and The Public's Access to Legal Services

There is no legitimate dispute that there is an access to justice crisis in the United States. This access to justice crisis – in all U.S. jurisdictions - exists under the current regulatory framework restricting the unauthorized practice of law. The "access to justice" gap includes many under-served clients who are willing to pay legal fees for a lawyer's representation, but do not ever hire a lawyer. Admittedly, there are multiple reasons why clients with some means to pay may not hire a lawyer. One of those reasons is an actual physical access problem -- the unavailability of lawyers in the clients' geographic area. Legal services "deserts" exist in many states where there are too few lawyers, or none at all, in a geographic area. Rural consumers have less access to lawyers than urban and suburban consumers.[4] Geographic restrictions on admission further compound the problem.

In some rural areas lawyers are retiring, but new lawyers are not moving to those areas to replace them. Other locations do not have locally admitted lawyers, thus causing consumers in these legal services deserts to have to travel long distances to meet with a lawyer.

The lack of truly local lawyers can be remedied to some degree by harnessing technology to make representation by lawyers from other parts of the same state easier, but it is only the profession's current ethical rules that make using lawyers geographically nearby but, in another state or jurisdiction as a broader remedy untenable.

Unfortunately, even in jurisdictions that have written their UPL rules and laws to be in line with ABA Model Rule 5.5, lawyers in another state or jurisdiction cannot provide legal services on a regular basis in a jurisdiction where they are not admitted. The current state regulatory restrictions on practicing law reinforce some of the reasons these geographic legal deserts continue to exist.

[4] *See* Conference of State Court Administrators, *Courts Need to Enhance Access to Justice in Rural America*, p. 1-3 (2018).

Lawyers who may be only a few miles away from clients in need cannot provide the services if the lawyers are not admitted to practice law where the clients live. Those same available lawyers may be under-employed or unemployed, yet an arbitrary state boundary prohibits them from providing services.

Additionally, those unemployed and under-employed lawyers may not be able to afford to pay a second state's admission fees, repeatedly satisfy CLE requirements, and so forth. Yet those lawyers may be competent and would otherwise be available at a reasonable fee but for current ethical and regulatory restrictions. Forcing unemployed lawyers who are competent and licensed in at least one state to take an additional bar examination, pay additional bar dues, and be challenged again about their character and fitness for the ability to serve underserved legal communities in another jurisdiction is illogical.

An unyielding, purely geographic, border inhibits the ability for competent and willing lawyers to provide legal services to consumers who need access to those services. The current state admission framework inhibits clients' ability to receive legal services and further inhibits clients' choice of counsel. If there were more flexibility for "border" lawyers to provide legal services for clients who are geographically close, whatever the applicable state law may be, the cost of legal services would be reduced, availability and access would be increased, and lawyers could be more gainfully employed.

U.S. jurisdictions continue to struggle to bridge the access to justice gap by failing to adequately amend rules concerning the "practice of law" and who may provide legal services because much of the focus is on including more and more categories of nonlawyers.[5] This is not the only solution, and it blatantly ignores an obvious path forward.

Jurisdictions continue to have lawyers who are unemployed and under-employed[6] all while legal services "deserts" exist in places where paying clients would be willing to

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[5] *See, e.g., Washington LLLTs and legal navigators, AZ CLDPs and LPS, California Document Preparers, Minnesota Nonlawyers, NM nonlawyers, NY advocates, Utah Sandbox Participants.* National Center for State Courts, Non-Lawyer Legal Assistant Roles Efficacy, Design, and Implementation (2015) at 2 (A study by the National Center for State Courts (NCSC) in 2013, "Estimating the Cost of Civil Litigation" reports that the average cost for typical civil court case types puts the courts beyond the financial means of many litigants).

[6] 2020 Legal Trends Report (Clio), *supra*.

hire a lawyer who is presently unavailable to them. The current outdated state regulatory framework further reinforces the access to legal services problem in the U.S and it does so despite a wealth of experience demonstrating that modern technology can allow lawyers to provide many legal services seamlessly and competently to clients from just about any location.

Competency and the Paradox of the Licensed Lawyer

The seemingly arbitrary nature of the geographical limitations imposed by the current regulatory structure is heightened by an understanding of the paradox associated with how few restrictions exist on a lawyer's ability to practice by subject matter. Once admitted in a U.S. jurisdiction, a lawyer is permitted to practice in any area of law of the lawyer's choosing or in multiple areas of law.

Indeed, historically, lawyers might take any case that crossed their office threshold, be it a family law matter one day, a criminal matter the next, or HIPAA compliance for a third-party provider of information systems the day after that. Over the past several decades, the profession has observed a trend away from the concept of lawyers as generalists and toward lawyers narrowing their practice to only one or two areas, in which they develop deep expertise. But that outcome has arisen because of the marketplace, not any ethical restrictions on practice.

A lawyer's voluntary devotion to one area of practice, however, in no way restricts the scope of the lawyer's license in their state. An attorney with 20 years of experience, but only involving family law, who learns of a neighbor's, relative's, or former client's severe car accident may agree to represent that person. Similarly, a lawyer who, following admission to the bar, works in a non-legal setting for twenty years, faces no licensing restrictions in taking on that same personal injury case as long as they have an active law license. Moreover, a newly minted lawyer immediately after passing the bar could take on a family law case, a car-accident lawsuit, and a contract negotiation with a hospital for a physician. The lawyers in these scenarios might not be the best lawyers for the job, but the Rules of Professional Conduct assume that the lawyers can educate themselves about the subject matter and competently handle the case. *See* Rule 1.1, cmt. [2].

The "Competency Fallacy of Rule 5.5," however, dictates that a lawyer licensed in "State A", who has devoted their entire career to personal injury work for example, would not be competent to represent the car-accident victim described above (without the association of local counsel)[7] because the lawyer is presumed to be incapable of knowing or coming to understand "the law of State B." Instead, if that State A-licensed lawyer wanted to be able to regularly represent clients with personal injury cases in State B, the lawyer would have to obtain a second license to practice law, a license issued by State B. Those who accept the current systemic issues often rely upon arguments that lawyers who wish to be able to practice across state lines more freely can simply obtain such additional licenses through reciprocity. This option to pursue additional licenses through reciprocity is not an adequate solution, and for many jurisdictions, is simply not true.

Those who tout the virtues of reciprocity not only ignore that 11 states do not offer reciprocity or provisional/reduced admission requirements at all, but they usually gloss over the burdens that this default imposes upon lawyers in the jurisdictions where it is a possibility. First, many jurisdictions impose a "time in practice" requirement such that a lawyer seeking to become licensed in a new jurisdiction without having to sit for the bar examination must have either practiced law for a set number of years, often five or more, or must have been engaged in active law practice for some percentage (often 60% or more) of the most recent time-period or both.

For example, to seek admission by reciprocity in Tennessee, a lawyer must have been licensed in another jurisdiction for at least 5 years and must have been engaged in the active practice of law for 5 of the 7 years preceding the date of the application. See Tenn. Sup. Ct. R. 7, § 5.01(a)(3). On the other hand, there are some jurisdictions that allow reciprocity if the lawyer received a minimum passing score on the Multistate Bar Examination so long as the lawyer applies within a certain amount of time after passing that test.

Second, for those jurisdictions that conditionally allow reciprocity, the application and admissions process for reciprocity has built in expenses – both upfront and recurring

[7] Of course, even with local counsel, the lawyer will likely also have to seek pro hac vice admission to appear in the State B court in connection with the litigation. Furthering the paradox, most rules for pro hac vice admission do not include anything that would require the lawyer seeking admission to demonstrate substantive competence with respect to the issues being litigated or even as to litigation generally.

-- in the form of application fees, the fee charged by the National Conference of Bar Examiners for conducting a background investigation (discussed below), additional annual registration or bar fees, and, in some jurisdictions, additional imposed taxes in the form of professional privilege taxes and the like.

Third, the addition of another state of licensure can also lead to the imposition of even more required hours of continuing legal education if both the lawyer's original jurisdiction and the new jurisdiction impose mandatory hours requirements and if the states' approaches to calculating hours or certifying courses are not identical.

Fourth, even for lawyers that have practiced for long enough to be eligible for admission by reciprocity, the process can take an excessive time, especially when considering that the person awaiting a ruling on their application is someone who has most likely already passed a bar examination (unless they are among the small minority of lawyers (pre-pandemic) to have obtained licensure in a diploma-privilege state) and also has already been vetted through a state's character and fitness evaluation process.

The process can take months and may even last for a year or longer. The timing of the process is prolonged because it is not one of a rubber stamping of decisions made in the home licensing jurisdiction; nor is it one in which the exploration into the applicant's background is reasonably limited to life events occurring after the issuance of the original law license.

Instead, an applicant must authorize a brand-new background investigation by either the National Conference of Bar Examiners or other state authorized investigatory body. The state entity from which reciprocity is sought then waits for the results of that new investigation and has the power to dig into any aspects of the applicant's background that it feels raises substantial questions about the applicant's character and fitness.

Thus, someone who is already a licensed lawyer in one state can find themself facing opposition to their admission in another jurisdiction on character and fitness grounds involving past conduct that did not prevent their admission to their home jurisdiction. These situations seem discordant enough when the grounds being examined truly involve only "conduct." But the unfairness is made even starker when situations arise involving concerns about physical or mental health conditions rather than actual incidents of past misconduct. Such a situation, indirectly presented in subsequent federal court litigation, resulted in one federal district judge (now a member of the D.C. Circuit Court of Appeals),

authoring a scathing opinion taking Kentucky's regulatory process to task. *See Jane Doe v. Supreme Court of Ky.*, No. 03:19-cv-00236-JRW, (W.D. Ky. Aug. 28, 2020).

The collective burdens this general approach imposes have been the subject of scrutiny with application to military spouse attorneys, a very small subset of the population with very successful lobbying efforts at seeking regulatory reforms. Roughly 30 states have enacted rule revisions or other accommodations in response to such efforts. You can find an up-to-date listing of such revisions at https://www.msjdn.org/rule-change/.

While much of the focus of lobbying efforts made on behalf of military spouse attorneys focused on the sympathetic nature of their circumstances and the practical realities associated with being required to move frequently – sometimes even faster than the wheels of the regulatory system can turn to fully process a reciprocity application – there is fundamentally little reason to believe that a lawyer falling within this small subset is more ethical or more competent than another lawyer simply because they are married to someone in active military service.

Returning to Tennessee as an example, after lobbying efforts and a rules revision petition filed by a prominent military spouse attorneys' group, an exception was adopted in Tennessee that permits someone who is not licensed in Tennessee, but who is married to an active member of the U.S. armed forces, to obtain a temporary license in Tennessee without having to submit to a new NCBE character and fitness investigation as long as they are "the spouse of an active duty servicemember of the United States Uniformed Services," are "physically residing in Tennessee or Fort Campbell, Kentucky due to the servicemember's military orders," and can demonstrate several other basic requirements. *See* Tenn. Sup. Ct. R. 7, § 10.06(a).

Although the overall sample size is small when compared to the bar as a whole, the apparent dearth of any known cases of discipline for incompetent handling of matters by military spouse attorneys in the 30 jurisdictions where barriers to licensure have been dropped cannot be overlooked as an indicator that the "Competency Fallacy of Rule 5.5" cries out for re-evaluation. While allowing these lawyers more freedom to represent clients has not resulted in any noticeable increase in discipline, state bars have been actively imposing discipline against lawyers solely for engaging in "unauthorized practice

of law" in circumstances where the existence of any harm to consumers of legal services is questionable.

Client Trust and Choice of Counsel

APRL's proposed revisions to Model Rule 5.5 do not reject the need for client protection but elevates the client's right to choose counsel to a co-equal status in the context of the regulation of multijurisdictional practice. Providing client protection does not require artificial boundaries that prevent clients from choosing competent counsel of their choice even if the lawyer they choose is licensed elsewhere.

A client's right to choose, discharge, or replace their lawyer is a core ethical principal that permeates the Rules of Professional Conduct and is underscored in case law throughout the country. The law of law firm breakups and lawyer departures clarifies that neither a law firm nor any of its lawyers have a possessory interest in clients. The Supreme Court of Indiana has articulated in concise fashion the broadly recognized concept that clients are not "chattel" but independent actors with agency: "Although the firm may refer to clients of the firm as 'the firm's clients,' clients are not the 'possession' of anyone, but, to the contrary, control who will represent them." *Kelly v. Smith*, 611 N.E.2d 118, 122 (Ind. 1993).

The concept that an individual has a right to legal counsel is traditionally centered around the concept that "choice" necessarily suggests alternatives from which to choose. When the client is prepared to pay for legal representation, it would make sense that the client should be empowered to choose whoever the client wishes. This largely unchallenged freedom of choice continues past the initial selection of a lawyer. "[T]he right to change attorneys, with or without cause, has been characterized as 'universal.'" *Echlin v. Super. Ct. of San Mateo County*, 90 P.2d 63, 65 (Cal. 1939).

One scenario that highlights this issue is when a lawyer who has been working on a matter departs the firm where they have been employed. In such instances, the client has three choices, to remain a client with the firm, to remain a client with the departing lawyer, or whether to select new counsel altogether. *See, e.g.*, ABA Formal Ethics Op. 489; Rules Regulating the Florida Bar, rule 4-5.8; Virginia State Bar Professional Guidelines, rule 5.8 (both requiring that clients be notified of these three options).

It is because of a client's choice of counsel that restrictive covenants precluding lawyers who depart a firm from competing in the same marketplace have generally been found to be unenforceable outside of conditions on retirements, such as permitted by Model Code of Professional Responsibility DR 2-108(A) and Model Rule 5.6. Such restrictions not only discourage mobility within the marketplace but also deny clients the ability to choose between the firm and the withdrawing lawyer who previously represented them.

Under common law, the client's right to choose who should serve as their lawyer has been regarded as necessary to ensure that the proper dynamics exist for this unique fiduciary relationship. More than 90 years ago, the City Court of New York remarked, "It is unquestioned that a client has the right to terminate the relationship of attorney and client at any time, with or without cause. That right is afforded him by the law because of the peculiar nature and character of the relationship, which in its very essence is one of trust and confidence. It is a right for the benefit of the client and is intended to save him from representation by an attorney whose services he no longer desires." *Gordon v. Mankoff*, 261 N.Y.S. 888, 889-90 (1931).

Further, under the Sixth Amendment, there is a presumption that a criminal defendant may retain counsel of choice. For example, the Supreme Court concluded that the denial of a defendant's request for a continuance to consult with a lawyer violated due process rights. "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified. …A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." *Chandler v. Fretag*, 348 U.S. 3, 9, 10 (1954). This is consistent with the Supreme Court's earlier statement that "it is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama,* 287 U.S. 45, 53 (1932).

A client's preference for counsel is even honored when looking at the termination of the relationship between a lawyer and a client. Clients may end a lawyer's representation at any time and for any reason. Conversely, lawyers may terminate the relationship only based on one or more of the enumerated situations set forth in Model

Rule 1.16(a) and (b)—and may only do so upon following the procedures set forth in (c) and (d).

Indeed, it is not unheard of for a court to deny a lawyer's application to withdraw from representing a client, even when the appropriate conditions are present. This issue is often litigated when a client terminates a lawyer's engagement before the occurrence of an event that a fee is contingent upon. The terminated lawyer often argues that the client's decision is unfair, particularly if the lawyer believes there was no just cause for the termination. But fairness to lawyers is subordinate to clients' right to choose and change their legal representatives. *See*, *e.g.*, *Fracasse v. Brent*, 494 P.2d 9, 13 (Cal.1972). The Supreme Court of California has remarked:

> The interest of the client in the successful prosecution or defense of the action is superior to that of the attorney, and he has the right to employ such attorney as will in his opinion best subserve his interest. The relation between them is such that the client is justified in seeking to dissolve that relation whenever he ceases to have absolute confidence in either the integrity or the judgment or the capacity of the attorney. . . . The fact that the attorney has rendered valuable services under his employment, or that the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action, does not deprive the client of this right. (*Id.*.)

Even where a client's right to choose is not absolute, for example, where a lawyer has a conflict of interest that cannot be waived, courts still articulate that the right to choose counsel should be of paramount importance. Particularly when addressing challenges by third parties—often in the context of asserted conflicts—courts have consistently concluded that a client's choice of counsel should be infringed upon only in cases where injustice will result. [8]

[8] *See*, *e.g.*, *Blumenfeld v. Borenstein*, 247 Ga. 406, 408 (1981) (reversing disqualification based solely on marital status, holding, "The mere fact that the public may perceive some conduct as improper is, without some actual impropriety, insufficient justification for interference with a client's right to counsel of choice."); *United States v. Urbana*, 770 F. Supp. 1552, 1556 (S.D.Fla. 1991) (courts disqualify an accused's lawyer of choice only as a measure of last resort). *Macheca Transport Co. v. Philadelphia Indem. Co.*, 463 F.3d 827, 833 (8th Cir. 2006) (the extreme measure of disqualifying counsel of choice should be used only when absolutely necessary); *In re BellSouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003) (the right to counsel of choice may only be overridden for compelling reasons); *Optyl Eyewear Fashion Intern. Corp. v. Style Companies, Ltd.*, 760 F.2d 1045, 1050 (9th Cir. 1985) (because of potential for abuse, disqualification motions should be subject to particularly strict judicial scrutiny); *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 794 (2d Cir. 1983) (movant must meet a heavy burden to remove opposing counsel).

Yet when it comes to the multi-jurisdictional practice of law, the principal of client choice of counsel is strikingly absent. No matter that the prospective client has known the lawyer personally for many years, is related to the lawyer, has a prior professional relationship with the lawyer, is familiar with the lawyer's expertise in a narrow area of the law, or was referred to the lawyer by a trusted associate. If the lawyer is not licensed in the state in which the client resides or where a matter occurs, the client's choice receives no deference under Rule 5.5. Client choice of a lawyer is paramount, except when it contravenes an outdated regulatory scheme based on state boundaries

The Long and Problematic History of Placing Geographic Restrictions on the Right to Practice Law

Historical context proves useful when attempting to understand the current framework and to justify amending it to reflect the contemporary practice of law. In fact, "[t]he state-based licensing process originated more than two centuries ago when the need for legal services was locally based and often involved the need for representation in court."[9] It is worthwhile to journey back to this time to understand both the historical reasoning and its inapplicability to today's legal profession.

The authority to admit lawyers to practice in a jurisdiction derives from the role of the judiciary in the American legal system:

> From the colonial period until today, American courts have claimed the English common law tradition of inherent power—a power not derived from statute—to regulate the lawyers practicing before them, especially with respect to admission to practice. Thus, the courts must license lawyers before lawyers will be given audience, courts set the terms upon which legal practice is pursued, and courts enforce the rules they have themselves established.[10]

From Colonial Times to 1921

[9] Report of the ABA Commission on Multijurisdictional Practice, at 7 (August 2002) ("2002 MJP Report")."

[10] 1 Geoffrey Hazard, Jr., William Hodes & Peter Jarvis, THE LAW OF LAWYERING §1.07, at 1-26 (4th ed. 2021).

In colonial America, local judges generally determined admission in colonial courts, usually based on service in an apprenticeship for a number of years. An alternative approach was to permit lawyers admitted to the English bar to practice anywhere in the colonies.[11] After the American Revolution, states imposed varying admission requirements, with bar examinations, where they existed, generally a mere formality that could be bypassed by choosing a different area of study, such as clerking under a practitioner or judge.[12]

"[C]ontrol of the American legal profession remained highly localized and dispersed through the first hundred years or so following the Revolution."[13] Thus, "during the Jacksonian era, Bar admission requirements became increasingly less strict because of the perceived elitism of admission practices as contrary to democratic ideals."[14] As a result, almost any *man* who desired to practice law could gain admittance.[15] Where examinations were required, they were often oral and minimal, and have been characterized as "laughable" and almost a "farce" or a "joke."[16] "By 1860, of the thirty-nine states, only nine had any specific requirements for admission to their Bar."[17]

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[11] Daniel Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives,* 45 CASE W. RES. L. REV. 1191, 1193-94 (1995).

[12] *Id.* at 1194-95.

[13] James Jones, Anthony Davis, Simon Chester & Caroline Hart, *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?,* 30 GEORGETOWN J. LEGAL ETHICS 125, 129 (2017).

[14] Hansen, *supra,* at 1195; Carol Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process,* 36 HOFSTRA L. REV. 1193, 1199 (2008). *See also* Jones, et al., *supra,* at 129 ("early efforts by the old established bars of the original colonies to keep the legal profession small and elite through rigorous admissions standards following the American Revolution largely collapsed, in no small part because of the diverse legal needs of a vast and rapidly expanding country of individual entrepreneurs"), citing Lawrence Friedman, A HISTORY OF AMERICAN LAW 315–18 (2d ed. 1985).

[15] Hansen, *supra,* at 1195-96; Langford, *supra,* at 1199. *See also* Matthew Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions*, 39 CAL W. L. REV. 1, 7 (2002) ("Although good moral character remained requisite for admission to the practice of law in many states, Bar membership was effectively open at the end of the Civil War to any and all male citizens who could produce a personal reference.").

[16] Hansen, *supra,* at 1196, 1200; Lawrence Friedman, A HISTORY OF AMERICAN LAW 317, 652 (2d ed. 1985). An often-told anecdote from the pre-Civil War period is of Abraham Lincoln examining an Illinois bar applicant while the future president was taking a bath. Hansen, *supra,* at 1196 (quoting Joel Seligman, *Why the Bar Exam Should be Abolished,* JURIS DR., at 48 (Aug.-Sept. 1978).

[17] Ritter, *supra*, at 7.

"The radical democratization of Bar admissions prompted widespread calls for its reform in the later nineteenth century."[18] The post-Civil War years saw the beginning of the standardized law school curriculum in this country, as Christopher Columbus Langdell's theory of legal education, based on the case method of Socratic instruction and focused on increased standards and more uniformity (which would effectively limit competition in the profession), became accepted.[19]

In addition, "[e]xpanding post-war industrialization increased concern over the character certification and competency of lawyers to deal with the extensive legalization of the social economy."[20] "The ancestor to the modern written bar examination developed between 1870 and 1890 and gained substantial ground and acceptance in the 1890s… [B]y the 1920s, there was a written bar examination in most states."[21] Further, "[b]etween 1880 and 1920, states adopted additional entry procedures, such as publication of applicants' names, probationary admissions, recommendations by the local Bar, court-directed inquiries, and investigation by character committees."[22]

1921 ABA Root Report

What has become the traditional route to bar admission now includes "graduating from an accredited law school, passing the admitting state's bar examination, and satisfying the state's bar examiners that the applicant possesses the requisite character to

[18] Deborah Rhode, *Moral Character as a Professional Credential,* 94 YALE L.J. 491, 498 (1985)

[19] Hansen, *supra,* at 1198-99.

[20] Langford, *supra,* at 1204.

[21] Hansen, *supra,* at 1200 (noting that "the written bar exam principally developed as a replacement for oral bar exams, and not as a check on law schools," and citing George Stevens, *Diploma Privilege, Bar Examination or Open Admission,* 46 B. EXAMINER 15, 25-26 (1977), for the proposition that "the bar exam was intended to standardize admissions requirements and was considered egalitarian in the sense that its mission was to equalize the disparate admissions requirements in various regions around the country").

[22] Rhode, *supra,* at 499.

practice law."[23] This uniform route to lawyer admission in virtually every state has its roots in the ABA Root Committee Report, issued 100 years ago, in 1921.[24]

The Root Report established the ABA's position that three years of law school education should be required for licensed lawyers (with two years of college as a prerequisite for law school entry), but that such a requirement alone was not sufficient. "[G]raduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness."[25] The diploma privilege was eventually eliminated and replaced by required exams by all of the states with the exception of Wisconsin as of 2020.[26]

The Root Report urged states to impose these legal education and bar examination requirements based on two primary considerations: "efficiency" and "character." "The part played by lawyers in the formulation of law and in the establishment and maintenance of personal and property rights requires a high degree of efficiency for the proper service of the public."[27]

As to "character" considerations specifically, the Report noted that "it is plain that the private and public responsibilities of the profession demand a high standard of morality and implicit obedience to correct standards of professional ethics."[28] Thus, "character screening effectively arrived in the early twentieth century."[29] By 1927, a large

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[23] 2002 MJP Report, at 7.

[24] Elihu Root, et al., *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association,* 44 REP. ANNUAL MTG. A.B.A. 679 (1921) ("Root Report").

[25] *Id.* at 687-88

[26] *See* Hansen, *supra,* at 1192 & n.7. Objections to the diploma privilege in the 20th Century included "(1) a fear that law school education lacked uniformity in the length of time given over to study; (2) a belief that the diploma privilege was anti-democratic because it tended to favor state law schools over private schools, which were often not granted the privilege; (3) a belief that the diploma privilege discriminated against state residents who studied at out-of-state institutions; (4) a belief that the bar examination produced a higher standard of practice; and (5) a fear that the diploma privilege allowed law schools to circumvent the state's control of the bar." Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It,* 2000 WISC. L. REV. 645, 647. The third and fifth of these objections implicate federalism concerns that form the basis of current UPL regulation in state statutes and the ethics rules.

[27] *Id.* at 680.

[28] *Id.*

[29] Keith Swisher, *The Troubling Rise of the Legal Profession's Good Moral Character,* 82 ST. JOHN'S L. REV. 1037, 1041 (2008). Other articles exploring the history of character and fitness requirements in detail

majority of the states had "strengthen[ed] character inquiries through mandatory interviews, character questionnaires, committee oversight, or related measures."[30]

The Report urged immediate action by the organized bar, the ABA, and state and local bar associations "to prevent the admission of the unfit and to eject the unworthy," and to "purify the stream at its source by causing a proper system of training to be established and to be required."[31] It is probably an understatement to say that when enforcement of character requirements began in earnest in the middle part of the 20th Century, "both its motivations and outcomes were extremely problematic."[32] In 1971 and again in 1991, the ABA and the National Conference of Bar Examiners reaffirmed the basic conclusions and recommendations of the Root Report.[33]

Statutory Developments and Enshrinement of UPL Restrictions in the Ethics Rules

Although the original 1908 ABA Canons on Professional Ethics did not contain a provision regarding the Unauthorized Practice of Law (UPL), professional bar associations began to organize against UPL about a decade before the issuance of the Root Report. In 1914, "the New York County Lawyers Association launched the first unauthorized practice campaign by forming an unauthorized practice committee to curtail competition from title and trust companies," and the ABA followed suit by forming

include Deborah Rhode, *Moral Character as a Professional Credential,* 94 YALE L.J. 491, 498-503 (1985); Roger Roots, *When Lawyers Were Serial Killers: Nineteenth Century Visions of Good Moral Character,* 22 N. ILL. U. L. REV. 19 (2001); Matthew A. Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions,* 39 CAL. W. L. REV. 1, 4-13 (2002); and Carol Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process,* 36 HOFSTRA L. REV. 1193, 1196-1208 (2008).

[30] Swisher, *supra,* at 1041 (quoting Rhode, *supra,* 94 YALE L.J. at 499).

[31] Root Report, at 681.

[32] Swisher, *supra,* at 1040. As well documented in Professor Rhode's seminal 1995 article and expanded upon by Professor Swisher in his 2008 piece, scrutiny based on "character" excluded from admission "unworthy groups" based on gender and ethnicity considerations, as well as other perceived "problem" applicants. *Id.* at 1041-42. By the late 1950s, the U.S. Supreme Court had imposed constitutional constraints on these standards, requiring a rational connection to fitness to practice. *Id.* at 1042 (citing cases).

[33] Hansen, *supra,* at 1201 & nn.62, 63 (citing the 2nd and 3rd editions of the NCBE's Bar Examiner's Handbook).

its own committee on unauthorized practice by 1930.[34] "Beginning in the 1920s, bar associations attempted to gain greater control over the practice of law by spearheading efforts to 'integrate' the bar through court rules (pursuant to inherent powers) or statutes that required every lawyer to belong to the state bar."[35] And beginning in the 1930s, most state legislatures adopted statutes outlawing (and sometimes criminalizing) UPL,[36] with state supreme courts asserting their authority (often stated as "exclusive" authority vis-à-vis the legislature) to define and regulate UPL and the practice of law.[37]

UPL was first mentioned in an ABA ethics code in a September 30, 1937, amendment to the ABA Canons. New Canon 47, titled "Aiding the Unauthorized Practice of Law," provided that "No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate."

Three decades later, the restriction on assisting UPL was enshrined in the ABA Model Code of Professional Responsibility but also paired with a new prohibition. Canon 3 of the 1969 ABA Model Code of Professional Responsibility was titled "A Lawyer Should Assist In Preventing the Unauthorized Practice of Law." DR 3-101 of the Model Code,

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[34] Derek Denckla, *Nonlawyers & the Unauthorized Practice of Law: An Overview of the Legal & Ethical Parameters,* 67 FORDHAM L. REV. 2581, 2583-84 (1999).

[35] *Id.* at 2582. "Invoking 'inherent powers,' the highest state courts have claimed the jurisdiction—sometimes exclusive—to regulate every aspect of the practice of law, through such activities as specifying conditions for admission, disciplining or disbarring those lawyers who fail to exercise good conduct, and promulgating lawyers' codes of conduct." *Id.; see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §1, cmt. *c* (2000) ("The highest courts in most states have ruled as a matter of state constitutional law that their power to regulate lawyers is inherent in the judicial function. Thus, the grant of judicial power in a state constitution devolves upon the courts the concomitant regulatory power."). The historical development of, and the role of the organized bar in, the "inherent power" doctrine in the context of state UPL regulation is extensively discussed in Laurel Rigertas, *Lobbying & Litigating Against "Legal Bootleggers"—The Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century,* 46 CAL. W. L. REV. 65 (2009); and in Laurel Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law,* 37 QUINNIPIAC L. REV. 97 (2018).

[36] The language of these statutes appears to focus on the unauthorized practice of law by nonlawyers, but "most jurisdictions regarded even out-of-state *lawyers* as engaged in UPL, unless they had met local licensing requirements. Thus, lawyers were prohibited from practicing law in violation of local regulations, which meant that in courtroom litigation, at least, and perhaps in arbitration as well, out-of-state lawyers were required to seek admission *pro hac vice.* . . . Furthermore, whether out-of-state lawyers could participate in interstate transactional work in the 'wrong' jurisdiction, or even advise clients about the situation was uncertain, and many lawyers were willing to test the limits of a state's tolerance." 2 Hazard, Hodes & Jarvis, *supra,* §49.02, at 49-5.

[37] *See* Denckla, *supra,* at 2585.

titled "Aiding Unauthorized Practice of Law," provided that "(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law" and "(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." The focus of the Ethical Considerations in Canon 3 was on practice by so-called non-lawyer "layman," but EC 3-9 explained the restriction on multijurisdictional practice:

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

In a footnote supporting the first proposition in this EC (that regulation of the practice of law is accomplished principally by the respective states), the ABA Code cited the U.S. Supreme Court decision in *United Mine Workers v. Illinois State Bar Ass'n,* 389 U.S. 217, 222 (1967): "That the States have broad power to regulate the practice of law is, of course, beyond question." Quoting ABA Ethics Op. 316 (1967), the footnote also noted that "It is a matter of law, not of ethics, as to where an individual may practice law. Each state has its own rules." In recognizing the potential practical difficulties with imposing these restrictions, another footnote also quoted ABA Ethics Op. 316 for the proposition that

> Much of clients' business crosses state lines. People are mobile, moving from state to state. Many metropolitan areas cross state lines. It is common today to have a single economic and social community involving more than

> one state. The business of a single client may involve legal problems in several states."[38]

The Ethical Consideration noted these practical difficulties without providing guidance on how to resolve them.

This uncertainty continued with the enactment of the Model Rules. "When Model Rule 5.5 was originally promulgated in 1983, . . . it carried forward from the Model Code of Professional Responsibility, without elaboration, both aspects of the traditional prohibition on the unauthorized practice of law."[39] The rule simply provided that "A lawyer shall not (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." There was a single comment:

> The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

As of the adoption of the Model Rules in the early 1980s, the state-based framework for regulation of lawyer admission and practice by the 50 individual states and

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[38] An additional footnote quoted from a New Jersey Supreme Court case, *In re Estate of Waring,* 47 N.J. 367, 376, 221 A.2d 193, 197 (1966): "[W]e reaffirmed the general principle that legal services to New Jersey residents with respect to New Jersey matters may ordinarily be furnished only by New Jersey counsel; but we pointed out that there may be multistate transactions where strict adherence to this thesis would not be in the public interest and that, under the circumstances, it would have been not only more costly to the client but also 'grossly impractical and inefficient' to have had the settlement negotiations conducted by separate lawyers from different states."

[39] 2 Hazard, Hodes & Jarvis, *supra,* §49.02, at 49-4.

the District of Columbia was a *fait accompli,* altogether consistent with traditional and historical federalism principles, and seemingly immutable.[40] Any and all constitutional and other challenges to the individual states' authority to regulate the practice of law within their borders, as well as federal courts' authority to condition admission based on admission in the state in which they sit, have been decisively and universally rejected by the courts.[41]

Birbrower: The California Supreme Court Grabs Lawyers' Attention

Despite the long history of the restrictions set forth above, the application of UPL restrictions to licensed lawyers who practice law across state lines where they are not licensed, referred to as interstate UPL, did not receive much attention in the profession until 1998 when the Supreme Court of California issued its landmark decision in the case *Birbrower, Montalbano, Condo & Frank v. Superior Court of Santa Clara County*.[42] In sum, the Court held that New York-licensed lawyers from the New York law firm of Birbrower, Montalbano, Condo & Frank had engaged in UPL because the firm's lawyers

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[40] For example, the 2002 MJP Report, at page 7, noted: "Lawyers in the United States are not licensed to practice law on a national basis, but are licensed by a state judiciary to practice law within the particular state. In general, state admissions processes are intended to protect the public by ensuring that those who are licensed to practice law in the state have the requisite knowledge of that state's laws and the general fitness and character to practice law." And §3 of the Restatement of the Law Governing Lawyers, adopted in 2000, accepts as essentially unchangeable based on historical experience the concept of judicial authority of each state to regulate law practice within state boundaries. *See* RESTATEMENT, *supra,* §3 & cmt. *b* ("[J]urisdictional limitations on practice applicable to lawyers are primarily a function of state lines. . . . Occasionally, proposals are put forward for removal of state-line limitations on practice, as by means of a national bar-admission process. However, local interest in maintaining regulatory control of lawyers practicing locally is strong and historically has prevented adoption of such proposals.").

[41] *E.g., Schoenefeld v. Schneiderman,* 821 F.3d 273 (2d Cir. 2016) (upholding against constitutional challenge under the Privilege and Immunities Clause a state requirement for nonresident bar members to maintain a physical office in the state), *cert. denied,* 137 S. Ct. 1580 (2017); *National Association for the Advancement of Multijurisdictional Practice (NAAMJP) v. Howell,* 851 F.3d 12 (D.C. Cir.) (joining "the chorus of judicial opinions" rejecting constitutional challenges of the NAAMJP and lawyer Joseph Giannini to local rules of practice limiting who may appear in particular state and federal courts), *cert. denied,* 138 S. Ct. 420 (2017); *NAAMJP v. Lynch,* 826 F.3d 191 (4th Cir.) (rejecting NAAMJP's constitutional challenge to conditions placed on admission to the Maryland federal district court bar), *cert. denied,* 137 S. Ct. 459 (2016); *Giannini v. Real,* 911 F.2d 354 (9th Cir.) (upholding constitutionality of California bar examination and local federal rules conditioning admission), *cert. denied,* 498 U.S. 1012 (1990); *Lawyers United Inc. v. U.S.,* 2020 WL 3498693 (D.D.C. June 29, 2020) (rejecting constitutional challenges to federal bar admission rules in D.C., California, and Florida), *aff'd,* 839 Fed. Appx. 570 (March 15, 2021).

[42] 949 P.2d 1 (1998), *cert. denied,* 525 U.S. 920 ("*Birbrower*")

handled a matter in California for a California client in preparation for a California arbitration based on a contract governed by California law. The Court further held that because the firm violated California's UPL statute it could not enforce its fee agreement and collect the substantial fees it had earned for the California legal services it had provided.[43]

Birbrower generated a great deal of controversy and concern among lawyers and law firms throughout the country. It particularly created uncertainty for lawyers who regularly practiced across state lines as to what amount of legal work and activity would constitute the unlawful practice of law. (Those interested in a more thorough discussion of *Birbrower* can find a deeper dive into its facts and ramifications at Appendix A.)

Although the California Court of Appeal case that quickly followed on the heels of *Birbrower*, *Estate of Condon v. McHenry* 65 Cal.App.4th 1138, 76 Cal. Rptr. 2d 922 (1998) ("*Condon*"), attempted to clarify some of these concerns by emphasizing that purpose of the UPL rules to protect the state's people and entities should be paramount in any analysis, the holding in Condon that a Colorado lawyer did not commit UPL by representing a Colorado client concerning a California matter was not widely noticed.

While there are courts that have deviated from *Birbrower*, *Birbrower's* influence continues to impact interstate UPL. For example, in the 2016 case *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016), a Colorado-admitted lawyer agreed to represent his in-laws in a post-judgment debt collection matter in Minnesota. The Colorado lawyer was not licensed in Minnesota and never set foot in the state, but he unsuccessfully tried to negotiate a settlement of the Minnesota matter by telephone and email.

In defending himself against disciplinary charges, the Colorado lawyer argued that a lawyer practices law *in* a jurisdiction in one of three ways: (1) by being physically present in the jurisdiction; (2) by establishing an office or other systematic and continuous presence in the jurisdiction; or (3) by entering an appearance in a matter through the filing of documents with a tribunal. *Id.* at 665. Citing *Birbrower*, the court determined that physical presence in the state was not the only way to practice law in Minnesota and that through multiple e-mails sent over several months, the lawyer advised Minnesota

[43] *Id.* at 11.

clients on Minnesota law in connection with a Minnesota legal dispute and attempted to negotiate a resolution of that dispute with a Minnesota attorney demonstrating an ongoing attorney-client relationship with his Minnesota clients and that his contacts with Minnesota were not fortuitous or attenuated. *Id.* at 666. Thus, the court held that the out-of-state lawyer committed the unauthorized practice of law in Minnesota by violating Minn. R. Prof. Conduct 5.5(a) resulting in the lawyer being disciplined.

In response to *Birbrower* and after issuance of the 2002 MJP Report, the ABA eventually adopted a revision to the Model Rules to authorize temporary practice in jurisdictions other than a lawyer's licensed jurisdiction.

The 2002 MJP Report and the Most Recent Revisions to ABA Model Rule 5.5

The 2002 MJP report, which preceded and largely served as an advocacy piece for changes to ABA Model Rule 5.5 adopted by the House of Delegates the same year, summarized the purported policy basis for multijurisdictional UPL restrictions in state statutes and the lawyer ethics rules:

> In general, a lawyer may not represent clients before a state tribunal or otherwise practice law within a particular state unless the lawyer is licensed by the state or is otherwise authorized to do so. Jurisdictional restrictions promote a variety of state regulatory interests. Most obviously, by limiting law practice in the state to those whom the state judiciary, through its admissions process, has deemed to be qualified to practice law in the state, they promote the state interest in ensuring that those who represent clients in the state are competent to do so. Jurisdictional restrictions also promote the state interest in ensuring that lawyers practicing law within the state do so ethically and professionally. Lawyers licensed by the state are thought to be more conversant than out-of-state lawyers with state disciplinary provisions as well as with unwritten but understood expectations about how members of the local bar should behave, and lawyers in the state may be disciplined more easily and effectively than out-of-state lawyers when they engage in professional improprieties. By strengthening lawyers' ties to the particular communities in which they maintain their offices, jurisdictional restrictions may also help maintain an active and vibrant local bar, which in many communities serves a crucial public role, because lawyers serve voluntarily on court committees, in public office, and on boards of not-for-profit institutions in the community. 2002 MJP Report, at 9.

The 2002 MJP Report noted that "no state categorically excludes out-of-state lawyers and there is general agreement that, as a practical matter, lawyers cannot serve clients effectively unless accommodations are made for multijurisdictional law practice, at least on a temporary or occasional basis." *Id.* at 10. For litigation matters, the Report noted that *pro hac vice* admission rules existed in every state but was not available for some aspects of litigation matters, such as pre-litigation work and ADR. *Id.* at 10, 12. Transactional lawyers "also commonly provide services in states in which they are not licensed," and on behalf of clients in their state of admission, often "travel outside the state in order to conduct negotiations, gather information, provide advice, or perform other tasks relating to the representation." *Id.* at 12. Thus, the Report noted that lawyers, as of the end of the 20th Century,

> have general understandings about how jurisdictional restrictions apply to their work in states where they are not licensed. These understandings are shaped less by the wording of the UPL provisions or by decisional law, which is sparse, than by conventional wisdom or by what the U.S. Supreme Court has called "the lore of the profession." On one hand, lawyers understand that they may not open a permanent office in a state where they are not licensed and also that they may not appear in the court of a state where they are not licensed without judicial authorization. On the other hand, lawyers recognize that they may give advice in their own states concerning the law of other jurisdictions, that they may represent out-of-state clients in connection with transactions and litigation that take place where the lawyer is licensed, and that they may travel to other jurisdictions in connection with legal work on behalf of clients who reside in and have matters in the state where the lawyer is licensed.

Id. at 13. And these understandings were "to some extent, reinforced by the sporadic enforcement of state UPL laws," with regulatory actions "rarely brought against lawyers who assist clients on a temporary basis in connection with multi-state or interstate matters." *Id.*

Consistent with the recommendations of the 2002 MJP Report, the ABA adopted temporary practice rules contained in Model Rule 5.5(c). It permits four exceptions to UPL that allow lawyers to "provide legal services on a temporary basis" in a jurisdiction where they are not admitted: (1) when they associate with local counsel who actively

participates in the matter; (2) when they are assisting or participating in an actual or potential proceeding before a tribunal, generally by obtaining pro hac vice admission; (3) when they are participating in an arbitration, mediation or other alternative resolution; and (4) where the legal services in the second state "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." Model Rule 5.5(c) (1-4).

Model Rule 5.5(d) further allows lawyers admitted in another US jurisdiction or in a foreign jurisdiction, or a person lawfully practicing as in-house counsel under the laws of a foreign jurisdiction to provide legal services through an office or other systematic or continuous presence in a jurisdiction where the lawyer is not licensed if certain criteria are met. Model Rule 5.5(d-e). Model rule 5.5(a-b), however, essentially continued, other than otherwise as excepted under the above sub-sections, to prohibit interstate multijurisdictional practice.

These revisions to the ABA Model Rules met widespread approval in terms of being adopted by a majority of U.S. jurisdictions, but not all jurisdictions have done so, and issues persist. Some of those issues revolve around lawyers' need to evaluate the approaches of jurisdictions that have not embraced the Model Rule approach to temporary practice, while other issues stem from problems involving the lack of "fit" between modern law practice and either regulating activity based only on geographic boundaries or based upon notions that any lawyer practices "the law of a jurisdiction."

Competence as an Ongoing Regulatory Justification

Defenders of the current version of Rule 5.5 often assert that restrictions on multi-jurisdictional practice are necessary to ensure the competence of lawyers who represent clients in their jurisdiction. In addition to the previously discussed competence paradox involved in the privileges of licensed lawyers under the current regulatory structure, the modern landscape of how lawyers become licensed to practice law across the United States undermines this rationale.

As discussed above, jurisdiction to regulate the practice of law has been largely a matter of geographic boundaries up to this point,[44] with some exceptions.[45] Notably, authorization to practice law within the state of licensure is comprehensive; the license does not limit a lawyer to work involving the law of the licensing jurisdiction. Although jurisdictional licensing based exclusively on a lawyer's location has provided the benefit of clarity both in terms of the authorization and freedom to practice regardless of what laws or jurisdictions the lawyer's work might touch; lawyers can now effectively practice nationwide in many respects without ever leaving their licensing jurisdictions. Moreover, the jurisdictional regulatory scheme limits lawyers' ability to physically relocate while serving clients only in those jurisdictions in which the lawyers are admitted to practice.

Licensing Lawyers in 2021

Admission by Bar Examination

As discussed above, the competency argument for multi-jurisdictional practice restrictions assumes that admission to practice in one jurisdiction does not establish competence to practice in any other jurisdiction. The underlying premise in that proposition is that some special training or testing is required to demonstrate competence in a particular jurisdiction.

Presently, 41 U.S. jurisdictions have adopted the Uniform Bar Examination (including Michigan, which announced in October 2021 that it would adopt the UBE, to be administered starting in 2023). The candidates for admission in those jurisdictions take identical bar examinations, although the minimum threshold for passing scores varies among jurisdictions:[46]

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[44] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §3(1) (2000), "A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client…at any place within the admitting jurisdiction." *Id.* COMMENT (e): "Admission in a state permits a lawyer to maintain an office and otherwise practice law anywhere within its borders."

[45] Federally authorized practice, for example, allows one to practice law nationwide. See *Sperry v. Florida*, 373 U.S. 379 (1963). Federal law sets the maximum qualifications required to practice before all but one federal agency at being a member of the bar of a state. See 5 USC §500(b). Some federal courts also allow for application to admission based upon a bar license in any jurisdiction along with admission to a federal court in that jurisdiction. See, e.g., L.R.Civ.P. 83.1 (WDNY).

[46] *See* https://www.ncbex.org/exams/ube/score-portability/minimum-scores/ (last visited Jan. 8, 2022).

260	Alabama, Minnesota, Missouri, New Mexico, North Dakota
264	Indiana, Oklahoma
266	Connecticut, District of Columbia, Illinois, Iowa, Kansas, Kentucky, Maryland, Montana, New Jersey, New York, South Carolina, Virgin Islands
270	Arkansas, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wyoming
272	Idaho, Pennsylvania
273	Arizona
276	Colorado
280	Alaska

Twenty-four of the UBE jurisdictions have no additional or substitute exam component tailored to that particular jurisdiction.[47] Of the 16 jurisdictions that have a state-specific component, nine require attending a course or tutorial in the jurisdiction's law (all the courses but one, New Mexico's, are online, and only New York requires both an online course and an online test). When an applicant from another jurisdiction transfers in a passing UBE score, such applicants may also be required by these nine states to complete the state-focused course or tutorial. Seven jurisdictions (including New York) require an applicant to complete an online multiple-choice test. All seven states require anyone seeking admission, either by bar exam or transfer of score from another jurisdiction, to complete the test.

[47] https://reports.ncbex.org/comp-guide/charts/chart-5/#1610472174303-4aeee78b-6a74 (last visited Jan. 8, 2022).

Admission on Motion

Virtually all of the jurisdictions permitting admission by motion impose the same jurisdiction-specific exam and course requirements for those applicants. Otherwise, the states permitting admission by motion treat the lawyer's experience in their home jurisdiction as sufficient to demonstrate competence to be licensed in the new jurisdiction.

Conclusion

Geographic limitations on a lawyer's provision of services long accepted by the legal profession in the name of client protection often deprive clients of ever having an opportunity to exercise a truly full and free "choice" of counsel. These geographic restrictions exist even if lawyer and client are both willing to enter into the engagement, oftentimes already having an existing professional relationship. Geographic limitations also make no accommodation for the idea that the relationship may benefit from both the level of trust that the client has in the lawyer as the "first choice" as well as any existing knowledge the lawyer has about the client, including relevant goals, priorities, tendencies, and communication style.

Instead of such a rigid approach, APRL's proposed Model Rule 5.5 allows clients to consciously choose the lawyer they want to represent them as long as the lawyer has disclosed to the client the facts as to where they are licensed. It does not abandon client protection in empowering client choice. It also ensures that lawyers who ultimately do provide incompetent legal services, or who otherwise run afoul of their ethical obligations, will be capable of being held responsible for their misconduct or shortcomings in any (or all) of the relevant jurisdictions.

APRL's proposal to revise Model Rule 5.5 is also consistent with the trend that has come from several jurisdictions who have issued guidance during the 2020 Pandemic to lawyers who found themselves practicing across state lines less by choice and more by necessity.[48] Not all of the guidance issued in these jurisdictions has been focused entirely

[48] D.C. Opinion 24-20: Teleworking from Home and the COVID-19 Pandemic (March 23, 2020) (interpreting the "incidental and temporary practice" exception of DC's Rule 49(c)(13)); *see also* N.J. Committee on the Unauthorized Practice of Law Op. 59, Advisory Committee on Prof. Ethics Op. 742 (Oct. 6, 2021); Pennsylvania State Bar Op. 300 (April 2020); Utah State Bar Ethics Advisory Committee Opinion

upon, or limited to situations where, lawyers were forced for public health reasons to live somewhere other than where they were licensed, but, if history is a guide, absent further improvements in the rule itself, then the progress that has been made will likely not come to fruition. APRL's proposed Model Rule 5.5 embeds the concepts of client choice, transparency, and accountability in a way that we believe will long outlive those who currently practice law under the existing regulatory system.

No. 19-03 (May 14, 2019); The Fla. Bar re: Advisory Opinion – Out-of-State Attorney Working Remotely From Florida Home, SC20-1220 (Fla. May 20, 2021).

Appendix B

RULE 5.5: AUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer admitted and authorized to practice law by any United States jurisdiction, and not disbarred or suspended from practice by any jurisdiction, may provide legal services in this jurisdiction, subject to the other provisions of this rule.

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

(b) A lawyer admitted and actively licensed to practice law by another United States jurisdiction may provide legal services in this jurisdiction if the lawyer:

(1) discloses, in writing, to the client or prospective client who will be receiving legal services in this jurisdiction where the lawyer is licensed to practice law and that the lawyer is not actively licensed to practice law by this jurisdiction; and

(2) complies with the pro hac vice admission or other regulatory requirements of this jurisdiction.

A lawyer is not required to comply with (b)(1) if the services being provided while the lawyer is located in this jurisdiction are services authorized by federal law or rule; limited to federal law or tribal law; or limited to the law of the jurisdiction in which the lawyer is admitted

(c) A lawyer admitted and actively licensed to practice law in a foreign jurisdiction or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services in this jurisdiction to the lawyer's employer or its organizational affiliates, unless they are services for which the forum requires pro hac vice admission, in which case such services may be provided following pro hac vice admission. If services provided by a foreign lawyer require advice on the law of this or another United State jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is authorized to practice law by that jurisdiction. The foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority

Comments

[1] To practice law in this jurisdiction, a lawyer must be "actively" licensed to practice law by at least one United States jurisdiction or, for legal services addressed in paragraph (c), by a foreign jurisdiction. "Actively" licensed means both that the lawyer has been admitted to practice law by at least one jurisdiction and that the lawyer is currently and affirmatively authorized to practice law by that jurisdiction.

[2] Paragraph (a) applies to the authorized practice of law and the unauthorized practice of law by a lawyer, whether through the lawyer's own action or by the lawyer assisting another person in activities constituting unauthorized practice by this jurisdiction.

[3] The definition of the practice of law is established by law and varies from one jurisdiction to another. Practicing law "in a jurisdiction" does not necessarily relate to a lawyer's physical presence there. Rather, for purposes of this Rule, the practice of law "in" a jurisdiction entails either performing legal services in a matter pending before a tribunal of the jurisdiction or providing legal services regarding a subject matter governed solely or primarily by the law of the jurisdiction. For purposes of this Rule, "primarily" shall mean the law of that jurisdiction is applicable more than the law of any other single jurisdiction.

[4] The practice of law in this jurisdiction by a lawyer licensed only by one or more other jurisdictions may be either temporary or systematic and continuous. If such a lawyer maintains a systematic and continuous presence in this jurisdiction, that lawyer may be required to comply with other regulatory requirements of this jurisdiction governing the practice of law. Temporary practice ordinarily involves advising a client on the law of this jurisdiction as part of the lawyer's representation of that client in the lawyer's licensing jurisdiction or the occasional pro hac vice admission by a tribunal in this jurisdiction in compliance with the rules of the tribunal and the regulations of this jurisdiction governing the authorized practice of law. A systematic and continuous presence in this jurisdiction, on the other hand, denotes more than mere occasional or attenuated contacts with this jurisdiction and exists when lawyers or law firms hold themselves out as having a professional presence in or ties to this jurisdiction, regularly solicit or direct advertising towards clients in the jurisdiction, or establish an ongoing office or business presence in this jurisdiction.

[5] If a lawyer is practicing law in this jurisdiction, the lawyer is subject to this jurisdiction's disciplinary authority regardless of whether the lawyer has been admitted to practice by this jurisdiction, in addition to being subject to the disciplinary authority of the lawyer's jurisdiction or jurisdictions of admission. See Rule 8.5.

[6] A lawyer who is not admitted to practice by this jurisdiction may not hold out to the public or otherwise state that the lawyer is admitted to practice by this jurisdiction. *See Rule 7.1.*

[7] Nothing in this rule supersedes or abrogates the admission rules of any local court or tribunal or the admission-to-practice rules of this jurisdiction requiring pro hac vice admission for a particular action or proceeding. If a tribunal requires pro hac vice admission to appear before that tribunal, then lawyers admitted only by other jurisdictions must comply with that requirement.

[8] The disclosure provision of paragraph (b)(1) enables clients to make informed decisions regarding the selection of a lawyer in such circumstances. Such a lawyer has an obligation to ensure that the lawyer is competent to provide legal services involving the law of this jurisdiction. See Rule 1.1. In order to comply with the duty of competence, such a lawyer may, for example, elect to associate with local counsel in order to assist in the representation.

[9] The paragraph (b)(1) disclosure obligation is not applicable if a lawyer actively licensed to practice law by another United States jurisdiction is providing services the lawyer is authorized to provide by federal law, tribal law, or the law of another United States jurisdiction. For example, if a lawyer's services are strictly limited to federal law or if a legal matter involves only the law of the jurisdiction where the lawyer is actively licensed, then the lawyer is not required to disclose the lawyer's jurisdictions of licensure. "Authorized by federal law" may include specific authorization to represent clients before a tribunal or administrative agency or it may mean the lawyer limits the practice to advising and representing clients solely on federal law matters that do not involve appearances before a tribunal or federal agency.

[10] A lawyer licensed only in another jurisdiction who is employed as in-house counsel and provides legal services to the lawyer's employer in this jurisdiction must inform the employer and any of its individual constituents to whom the lawyer provides services about the lawyer's licensure status, i.e. provide notice that the

lawyer is not actively licensed to practice law by this jurisdiction, as well as specify where the lawyer is licensed to practice law.

Appendix C

RULE 5.5: AUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer admitted [and/or authorized to practice law] by any United States jurisdiction, and not disbarred or suspended from practice by any jurisdiction, may provide legal services in this jurisdiction, subject to the other provisions of this rule.

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

(b) A lawyer admitted and actively licensed to practice law by another United States jurisdiction may provide legal services in this jurisdiction if the lawyer:

(1) discloses, in writing, to the client or prospective client who will be receiving legal services in this jurisdiction, the jurisdiction(s) where the lawyer holds an active license to practice law and that the lawyer is not actively licensed to practice law by this jurisdiction; and

(2) complies with the pro hac vice admission or other regulatory requirements of this jurisdiction.

A lawyer is not required to comply with (b)(1) if the services being provided while the lawyer is located in this jurisdiction are services limited to the law of the jurisdiction in which the lawyer is admitted; authorized by federal law or rule; or limited to federal law or tribal law.

(c) A lawyer admitted to practice law in a foreign jurisdiction who is not suspended or disbarred, or the equivalent thereof, by any jurisdiction, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services in this jurisdiction to the lawyer's employer or its organizational affiliates, unless they are services for which the forum requires pro hac vice admission, in which case such services may be provided following pro hac vice admission. If services provided by a foreign lawyer require advice on the law of this or another United State jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is actively licensed or otherwise authorized to practice law by that jurisdiction. The foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the

equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority

Comments

[1] To practice law in this jurisdiction, a U.S. lawyer must be "actively" licensed to practice law by at least one United States jurisdiction and not disbarred or suspended by an jurisdiction. "Actively" licensed means both that the lawyer has been admitted to practice law by at least one jurisdiction and is currently and affirmatively authorized to practice law by that jurisdiction.

[2] Foreign lawyers providing legal services in this jurisdiction pursuant to paragraph (c) must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority, or are otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction. The latter qualification is because some foreign jurisdictions do not permit otherwise qualified in-house counsel to be members of or admitted to the bar. Lawyers in such foreign jurisdictions who are employed as in-house counsel may be required to relinquish any bar membership or admission while so employed or they may never have obtained such admission or membership status. In addition, to qualify to deliver legal services pursuant to this Rule, the admitted foreign lawyer must not be suspended or disbarred, or the equivalent thereof, by any jurisdiction.

[3] Paragraph (a) applies to the authorized practice of law and the unauthorized practice of law by a lawyer, whether through the lawyer's own action or by the lawyer assisting another person in activities constituting unauthorized practice by this jurisdiction.

[4] The definition of the practice of law is established by law and varies from one jurisdiction to another. Practicing law "in a jurisdiction" does not necessarily relate to a lawyer's physical presence there. Rather, for purposes of this Rule, the practice of law "in" a jurisdiction entails either performing legal services in a matter pending before a tribunal of the jurisdiction or providing legal services regarding a subject matter governed solely or primarily by the law of the jurisdiction. For purposes of this Rule, "primarily" shall mean the law of that jurisdiction is applicable more than the law of any other single jurisdiction.

[5] The practice of law in this jurisdiction by a lawyer licensed only by one or more other jurisdictions, and who is not disbarred or suspended, or the equivalent thereof, in any jurisdiction, may be either temporary or systematic and continuous. If such a lawyer maintains a systematic and continuous presence in this jurisdiction or a temporary presence, that lawyer may be required to comply with other regulatory requirements of this jurisdiction governing the practice of law. Temporary practice ordinarily involves advising a client on the law of this jurisdiction as part of the lawyer's representation of that client in the lawyer's licensing jurisdiction or the occasional pro hac vice admission by a tribunal in this jurisdiction in compliance with the rules of the tribunal and the regulations of this jurisdiction governing the authorized practice of law. A systematic and continuous presence in this jurisdiction, on the other hand, denotes more than mere occasional or attenuated contacts with this jurisdiction. It exists when lawyers or law firms hold themselves out as having a professional presence in or ties to this jurisdiction, regularly solicit or direct advertising towards clients in the jurisdiction, or establish an ongoing office or business presence in this jurisdiction.

[6] If a lawyer is practicing law in this jurisdiction, the lawyer is subject to this jurisdiction's disciplinary authority regardless of whether the lawyer has been admitted to practice by this jurisdiction, in addition to being subject to the disciplinary authority of the lawyer's jurisdiction or jurisdictions of admission. See Rule 8.5 and Rule 6 of the ABA Model Rules for Lawyer Disciplinary Enforcement.

[7] A lawyer who is not admitted to practice by this jurisdiction may not hold out to the public or otherwise state that the lawyer is admitted to practice by this jurisdiction. *See Rule 7.1*.

[8] Nothing in this rule supersedes or abrogates the admission rules of any local court or tribunal or the admission-to-practice rules of this jurisdiction requiring pro hac vice admission for a particular action or proceeding. If a tribunal requires pro hac vice admission to appear before that tribunal, then lawyers admitted only by other jurisdictions must comply with that requirement.

[9] The disclosure provision of paragraph (b)(1) enables clients to make informed decisions regarding the selection of a lawyer in such circumstances. Such a lawyer has an obligation to ensure that the lawyer is competent to provide legal services involving the law of this jurisdiction. See Rule 1.1. In order to comply with the duty of competence, such a lawyer may, for example, elect to associate with local counsel in order to assist in the representation.

[10] The paragraph (b)(1) disclosure obligation is not applicable if a lawyer actively licensed to practice law by another United States jurisdiction is providing services the lawyer is authorized to provide by federal law, tribal law, or the law of another United States jurisdiction. For example, if a lawyer's services are strictly limited to federal law or if a legal matter involves only the law of the jurisdiction where the lawyer is actively licensed, then the lawyer is not required to disclose the lawyer's jurisdictions of licensure. "Authorized by federal law" may include specific authorization to represent clients before a tribunal or administrative agency or it may mean the lawyer limits the practice to advising and representing clients solely on federal law matters that do not involve appearances before a tribunal or federal agency.

[11] Paragraph (b)(1) also applies to a lawyer licensed only in another jurisdiction who is employed as in-house counsel.

Tab 3

SUPREME COURT OF THE STATE OF UTAH

I DO SOLEMNLY SWEAR that I will support, obey and defend the Constitution of the United States and the Constitution of Utah; that I will discharge the duties of attorney and counselor at law as an officer of the courts with honesty, fidelity, professionalism, and civility; and that I will faithfully observe the Rules of Professional Conduct and the Standards of Professionalism and Civility promulgated by the Supreme Court of the State of Utah.

_____
Signature of new Admittee

_____
(Printed Name)

State of _____

} **ss.**

County of _____

Subscribed and sworn to before me this _____[DAY]

Day of _____[MONTH]_, 20_____[YEAR]

_____
Signature of Person Administering Oath of Office

_____
Printed Name and Title of Person Administering Oath of Office