**Report 201B**

# AMERICAN BAR ASSOCIATION
# COMMISSION ON MULTIJURISDICTIONAL PRACTICE
# REPORT TO THE HOUSE OF DELEGATES

## RECOMMENDATION

RESOLVED, that the American Bar Association adopts the proposed amendments, dated August 2002, to Rule 5.5 of the ABA *Model Rules of Professional Conduct* as follows:

## RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not~~: (a)~~ practice law in a jurisdiction ~~where doing so violates~~ in violation of the regulation of the legal profession in that jurisdiction~~;~~, or ~~(b)~~ assist ~~a person who is not a member of the bar~~ another in ~~the performance of activity that constitutes the unauthorized practice of law~~ doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.



Exhibit A

**Comment**

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

~~[1]~~ [2] 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)~~ This Rule 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.

[3] ~~Likewise, it does not prohibit lawyers from providing~~ 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*.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

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

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. 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.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted *pro hac vice*. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's

work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a 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 provision of personal legal services to the employer's officers or employees. 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 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.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

## REPORT

Rule 5.5 of the ABA *Model Rules of Professional Conduct* (Unauthorized Practice of Law) currently prohibits a lawyer from practicing law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction and from assisting a person who is not a member of the bar in the unauthorized practice of law. The MJP Commission proposes to re-title the Rule "Unauthorized Practice of Law; Multijurisdictional Practice of Law." Additionally, the Commission proposes two sets of amendments to the Rule.

First, Rule 5.5 would be clarified and strengthened by adoption of amended sections 5.5(a) and (b). As amended, Rule 5.5(a) would make clear that a lawyer is prohibited not only from engaging in the unauthorized practice of law, but also from assisting another in the unauthorized practice of law. Proposed Rule 5.5(b) would make clear that, except when authorized by law or rule, a lawyer may not establish an office or other systematic and continuous presence for the practice of law in a jurisdiction in which the lawyer is not admitted to practice. Nor may the lawyer hold out to the public or otherwise represent that the lawyer is admitted to practice law in that jurisdiction.

Second, the standards identified in proposed sections 5.5(c) and (d) would recognize specific exceptions to otherwise applicable restrictions on the practice of law by out-of-state lawyers, in order to facilitate multijurisdictional law practice in identifiable situations that serve the interests of clients and the public and do not create an unreasonable regulatory risk. These standards draw on the prior work of the Ethics 2000 Commission, the American Law Institute's Restatement (Third) of the Law Governing Lawyers, the ABA Standing Committee on Ethics and Professional Responsibility, the ABA Section of Business Law, other ABA entities and state and local bar associations.

The Ethics 2000 Commission anticipated the MJP Commission's work by proposing for inclusion in ABA Model Rule 5.5 exceptions to the general rule that a lawyer may practice law only in a jurisdiction in which the lawyer is licensed. The Ethics 2000 Commission's proposed multijurisdictional practice standards were specific applications of the general principle that, under certain circumstances, it is in the public interest for a lawyer admitted in one United States jurisdiction to be allowed to provide legal services in another United States jurisdiction because the interests of the lawyer's client will be served if the lawyer is permitted to render the particular services, and doing so does not create an unreasonable risk to the interests of the lawyer's client, the public or the courts.[1] In such circumstances, it should not be the unauthorized practice of law for a

[1]In our November 2001 Interim Report, we referred to the several categories of authorized cross-border practice as "safe harbors." However, none of the Commission's recommendations in that Report, and none in this one, contain the phrase "safe harbor." Rather, the term, a familiar one to lawyers, has been a useful metaphor for conceptualizing the categories of legal work that a lawyer admitted in one jurisdiction may do in another jurisdiction. The phrase "safe harbor" does not, however, help clarify

lawyer admitted in another United States jurisdiction to provide legal services in a jurisdiction in which the lawyer is not admitted. To similar effect, Restatement (Third) of the Law Governing Lawyers § 3(3) identified specific situations where a lawyer not admitted to practice law in a jurisdiction may provide legal services to a client in that jurisdiction.

The MJP Commission worked to develop, refine and harmonize the Ethics 2000 Commission's initial list of multijurisdictional practice standards and the Restatement provision in light of the study conducted by the MJP Commission. Both before and after the Commission issued its Interim Report, the Commission received extremely helpful proposals for developing and refining the provisions of proposed Rule 5.5.[2] The Commission drew liberally on the suggestions it received.

The multijurisdictional practice standards will not eliminate all uncertainty regarding interstate law practice but will provide a framework for the activities that the

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the policies behind, or the language chosen for, our recommendations. We have deleted the term from this Report, but do not intend this drafting choice to alter the fundamental organization of our recommendations or the policies that we believe support them. For example, our proposed Rule 5.5 forbids certain conduct in violation of the regulation of the legal profession. So did the draft of this Rule in our Interim Report. Our proposal then describes certain categories of work that are nonetheless authorized in a jurisdiction in which a lawyer is not admitted to practice. The draft of the Rule in the Interim Report did the same (although the Report, but not the Rule or comment, labeled these categories "safe harbors.") Although we have rewritten the scope of the authorized work in light of testimony and comments we received in response to our Interim Report, the structure of Rule 5.5 – forbidding certain conduct but authorizing other conduct – remains unchanged.

[2]*See, e.g.,* Report and Recommendations of the State Bar of Arizona (submitted March 15, 2002), www.abanet.org/cpr/mjp/comm2_asb.doc; ABA Section of Business Law, Memorandum to ABA Commission on Multijurisdictional Practice (March 13, 2002), www.abanet.org/cpr/mjp/comm2_bl.pdf.; Connecticut Bar Association, Updated Report of the CBA Task Force on Multijurisdictional Practice, (March 18, 2002), www.abanet.org/cpr/mjp/comm2_connba.pdf; ABA Standing Committee on Ethics and Professional Responsibility, Memorandum to the ABA Commission on Multijurisdictional Practice (March 15, 2002) www.abanet.org/cpr/mjp/comm2_ethics2.pdf; Federal Communications Bar Association (FCBA) Statement at the Philadelphia Hearing of the ABA Commission on Multijurisdictional Practice (Feb. 1, 2002), http://www.abanet.org/cpr/mjp/comm2_fcba.html; ABA Section of International Law and Practice, Follow-up Testimony on Multi-jurisdictional Practice Attorney Conduct Rules (June 1, 2001) (http://www.abanet.org/cpr/mjp-comm_silp2.html; Missouri Bar Multijurisdictional Practice Committee, Comments on the Interim Report of the American Bar Association's Commission on Multijurisdictional Practice (Jan. 16, 2002), www.abanet.org/cpr/mjp/comm2_mbc3.html.

Commission believes should be authorized. In identifying these new standards, the Commission has taken a conservative approach, addressing only those classes of conduct that do not pose unacceptable risks to the public interest. Because the exercise of determining what constitutes authorized conduct requires judgment and balancing, the application of the new standards leaves room for individual opinion and judicial interpretation.

While the MJP Commission's proposed Model Rule 5.5 identifies situations in which United States lawyers may practice law outside the jurisdictions in which they are licensed, the adoption of this rule by state judiciaries may not, in itself, provide the necessary authorization to out-of-state lawyers. As discussed earlier, restrictions on unauthorized practice of law are also embodied in laws and rules that differ from state to state. Particularly in jurisdictions in which the UPL restrictions are contained in legislation, state legislative reform may also be necessary.

**Proposed Model Rule 5.5(a)** would make clear that a lawyer may not assist another, whether a lawyer or nonlawyer, in the unauthorized practice of law. Existing Rule 5.5 has two provisions: Rule 5.5(a) forbids a lawyer from engaging in the practice of law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction and Rule 5.5(b) forbids a lawyer from assisting a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. The Commission proposes combining and refining these restrictions into a single provision, which would provide that "[a] lawyer shall not practice law in a jurisdiction, or assist *another* in doing so, in violation of the regulation of the legal profession in that jurisdiction." (emphasis added) However, this would not effect a substantive change to the Model Rules, since this is simply a specific application of Model Rule 8.4(a) (Misconduct), which prohibits a lawyer from "knowingly assist[ing]" another in violating the Rules of Professional Conduct.

**Proposed Model Rule 5.5(b)** would prohibit a lawyer from establishing an office or maintaining a systematic and continuous presence in a jurisdiction, except as authorized by the Model Rules or other law; and it would also prohibit a lawyer from representing that the lawyer is admitted in a jurisdiction if the lawyer is not admitted. Nothing in the proposed rule would authorize lawyers to open an office or otherwise establish a permanent law practice in states where they are not licensed or otherwise authorized to do so. Nor would any part of the proposed rule permit lawyers to hold themselves out as licensed to practice law in jurisdictions where they are not in fact licensed. The amendments recommended by the Commission make these limitations clear. The Commission has developed a separate recommendation on "admission on motion" directed at lawyers seeking to establish a law practice in jurisdictions where they are not currently licensed to practice law.

**Proposed Model Rule 5.5(c)(1)** would allow work on a temporary basis in a state by an out-of-state lawyer who is associated in the matter with a lawyer who is admitted to practice in the jurisdiction and who actively participates in the representation. This provision would promote the client's interest in counsel of choice in many circumstances

where the client has good reason to engage both a local and an out-of-state lawyer. One recurring example is where local counsel recommends engaging the assistance of a lawyer with special or particularized expertise. Another is where the client has a prior or ongoing relationship with the out-of-state lawyer in whom the client has particular confidence and whose advice is sought in evaluating the services of the local counsel. Lawyers who assist litigation counsel but who do not themselves appear in judicial proceedings would also be covered by this provision.

For this provision to apply, the lawyer admitted to practice in the jurisdiction could not serve merely as a conduit for the out-of-state lawyer, but would have to share actual responsibility for the representation.[3] When that condition is met, the state's regulatory interest in protecting the interests of both clients and the public is adequately served. The lawyer who is licensed in the jurisdiction will have an opportunity to oversee the out-of-state lawyer's work and to assure that the work is performed competently and ethically. The local lawyer, having been found to have the requisite fitness and character to practice law in the state, is presumptively qualified to carry out this responsibility.

This provision would permit a lawyer to provide legal services on a temporary basis in an office of the lawyer's firm outside the lawyer's home state, as long as the lawyer is in a genuine co-counsel relationship with a lawyer of the firm who is licensed in the jurisdiction. However, this provision is not intended to cover associates who rotate among a law firm's offices for periods that would be longer than "temporary."[4]

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[3]*See, e.g.*, Ethics Advisory Committee of the South Carolina Bar Advisory Opinion 93-35 (1993).

[4]Law firms sometimes "rotate" lawyers among offices of the firm located in different jurisdictions; there are various salutary reasons to do so, such as to improve the lawyers' understanding of firm work, culture and operations, to enhance their skills, or to increase their exposure to the work of other lawyers or firm clients. Alternatively, a lawyer may be brought into the office with the expectation that the lawyer will obtain admission to that state's bar, but the admissions process may take several months or longer to achieve.

Proposed Model Rule 5.5(c) often will not apply to an extended residence in a law office in a jurisdiction in which these lawyers are not licensed, because the intended presence in the jurisdiction will not be "temporary." However, UPL provisions will ordinarily permit these lawyers to engage in certain work, as long as they are competent to perform it, the work is performed under the supervision of a lawyer admitted in the jurisdiction who takes responsibility for the work, the out-of-state lawyers identify their jurisdictional limitations on all communications with the public, clients or prospective clients, and they do not otherwise hold themselves out as locally admitted. *See In re* Jackman 761 A.2d 1103, 1107 (N.J. 2000); Shapiro v. Steinberg, 440 N.W.2d 9, 11 (Mich. App. 1989); Dietrich Corp. v. King Resources Co., 596 F.2d 422, 426 (10th Cir. 1979); New York County Lawyers' Association Committee on Professional Ethics Opinion 682 (1990).

**Proposed Model Rule 5.5(c)(2)** would allow lawyers to provide services ancillary to pending or prospective litigation. Specifically, it would permit a lawyer's temporary presence in a state where the lawyer is not presently admitted to practice, if (a) the lawyer's services are in anticipation of litigation reasonably expected to be filed in a state where the lawyer is admitted or expects to be admitted *pro hac vice*, or (b) the lawyer's services are ancillary to pending litigation in which the lawyer lawfully appears (or reasonably expects to appear), either because the lawyer is licensed in the jurisdiction where the litigation takes place or because the lawyer has been or reasonably expects to be admitted *pro hac vice* to participate in the litigation. This provision would not supplant *pro hac vice* requirements, however. In order to appear before a tribunal in a state where the lawyer is not licensed, the out-of-state lawyer would be required to comply with existing *pro hac vice* provisions.

When a lawyer represents a party in a pending lawsuit in a jurisdiction in which the lawyer is licensed to practice law or in a pending litigation in which the lawyer appears *pro hac vice*, this provision would cover work related to the lawsuit that is performed in other states. Often, a lawyer representing a party in pending litigation must travel outside the jurisdiction where the litigation takes place in order to interview or depose witnesses, review documents, conduct negotiations, and perform other necessary work. It is generally recognized that work of this nature, insofar as it does not involve appearances in court by the out-of-state lawyer, is and should be permissible. It would be exceedingly costly and inefficient for a party to retain separate counsel in every state in which work must be performed ancillary to a pending litigation, and requiring parties to do so would not strongly serve any regulatory interest, since lawyers in litigation are generally supervised adequately by the courts before which they appear.

Additionally, this provision would cover work of a similar nature in connection with prospective litigation when there is a reasonable expectation that the lawsuit will be filed in a jurisdiction in which the lawyer is admitted to practice law or reasonably expects to be admitted *pro hac vice*. Prior to the filing of a lawsuit in a particular jurisdiction, lawyers may need to perform a variety of tasks, such as interviewing witnesses and reviewing documents, which may occur in multiple states. As in the case of pending litigation, in the context of prospective litigation it would be exceedingly costly and inefficient to require a party to retain separate counsel in every state in which such preliminary work must be done.

This provision would also cover supporting work by assisting lawyers who do not appear before the tribunal and are not themselves admitted *pro hac vice*. When a group of lawyers from an out-of-state law firm works collectively on a substantial litigation, it is understood that those lawyers who are making formal appearances in court or in depositions must seek *pro hac vice* admission, but it is customary for assisting lawyers not to do so if they serve exclusively in certain supporting roles, such as conducting legal research and drafting documents. The Commission's proposed amendment would establish that as long as the supervisory lawyers involved in the litigation are or reasonably expect to be authorized to appear in the proceeding, this type of supporting

legal work by assisting lawyers is permissible, even if some of it is performed outside the states in which the assisting lawyers are licensed.

Proposed Model Rule 5.5(c)(2) would also make clear that jurisdictional restrictions do not apply when out-of-state lawyers are authorized by law or court order to appear before a tribunal or administrative agency in the jurisdiction. As the Ethics 2000 Commission provided in Comment [3] to its proposed provision on this subject,

> Lawyers not admitted to practice generally in the jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. Such authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency.[5]

To avoid confusion, the proposed Rule would incorporate the substance of this Comment.

**Proposed Model Rule 5.5(c)(3)** would allow a lawyer to provide services on a temporary basis in a jurisdiction in which the lawyer is not licensed to practice law in connection with the representation of clients in pending or anticipated arbitrations, mediations or other alternative dispute resolution ("ADR") proceedings, where the work arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The provision would not apply, however, when participation in an ADR proceeding is governed by a *pro hac vice* provision.

It is generally recognized that, in the ADR context, there is often a strong justification for choosing a lawyer who is not admitted to practice law in the jurisdiction in which the proceeding takes place but who has an ongoing relationship with the client, who is admitted to practice in the jurisdiction in which the client is located, or has developed a particular knowledge or expertise that would be advantageous in providing the representation. Admission to practice law in the jurisdiction in which the proceeding takes place may be relatively unimportant, in part, because that jurisdiction may have no relation to the law governing the proceeding or to the dispute. Unlike litigation, in ADR parties may select the site of the proceeding simply on the basis of convenience. At times, as in the case of international arbitrations, a site is chosen precisely because it has no connection to either party or to the dispute. Thus, in ADR proceedings, the in-state lawyer is not ordinarily better qualified than other lawyers by virtue of greater familiarity with state law, state legal processes and state institutions.[6] Further, as noted by the ABA Section of Litigation in its comments to the Commission, "Clients have important considerations in ADR, which include confidentiality, consistency, uniformity, costs, and

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[5]*See* Commission on Evaluation of the Rules of Professional Conduct, Report 401 to the ABA House of Delegates (February 2002).

[6]*See* American Arbitration Association ("AAA"), Letter to the ABA Commission on Multijurisdictional Practice, (June 15, 2001), http://www.abanet.org/cpr/mjp-comm_aaa.html.

convenience. After all, non-binding ADR procedures usually require client 'buy in' to succeed. Denying a client her preferred counsel could hamper early ADR efforts and impede prompt resolution of disputes."[7] It is for these reasons that many found the *Birbrower* decision troubling, and that the California legislature subsequently adopted a law temporarily authorizing out-of-state lawyers to represent clients in arbitration proceedings.[8]

This proposed provision would not address the work of arbitrators, mediators and others serving in ADR proceedings in comparable non-representative roles. It is questionable whether work as an adjudicator or "neutral" in an ADR proceeding comprises the practice of law for purposes of UPL restrictions. Assuming it does, this work would typically be covered by the proposed provision, discussed below in Model Rule 5.5(c)(4), applicable to providing services that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

**Proposed Model Rule 5.5(c)(4)** would permit, on a temporary basis, transactional representation, counseling and other non-litigation work that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. This provision would address legal services provided by the lawyer outside the lawyer's state of admission that are related to the lawyer's practice in the home state. The provision is drawn from § 3(3) of the Restatement (Third) of the Law Governing Lawyers. The Commission's proposed Comment to Rule 5.5 offers guidance as to its scope and limitations, and it is anticipated that courts and other authorities would provide additional guidance.

This provision is intended, first, to cover services that are ancillary to a particular matter in the home state. For example, in order to conduct negotiations on behalf of a home state client or in connection with a home state matter, the lawyer may need to meet with the client and/or other parties to the transaction outside the lawyer's home state. A client should be able to have a single lawyer conduct all aspects of a transaction, even though doing so requires traveling to different states. It is reasonable that the lawyer be one who practices law in the client's state or in a state with a connection to the legal matter that is the subject of the representation. In such circumstances, it should be sufficient to rely on the lawyer's home state as the jurisdiction with the primary responsibility to ensure that the lawyer has the requisite character and fitness to practice law; the home state has a substantial interest in ensuring that all aspects of the lawyer's provision of legal services, wherever they occur, are conducted competently and professionally.

Second, this provision would respect preexisting and ongoing client-lawyer relationships by permitting a client to retain a lawyer to work on multiple related matters,

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[7]ABA Section of Litigation, Preliminary Position Statement on Multi-jurisdictional Practice (June 2001) at 24, http://www.abanet.org/cpr/mjp-comm_sl.html.

[8]Rule 983.4, California Rules of Court. No final resolution of the issue has been arrived at in California as the statute is scheduled to sunset on January 1, 2006.

including some having no connection to the jurisdiction in which the lawyer is licensed. Clients who have multiple or recurring legal matters in multiple jurisdictions have an interest in retaining a single lawyer or law firm to provide legal representation in all the related matters. In general, clients are better served by having a sustained relationship with a lawyer or law firm in whom the client has confidence. Through past experience, the client can gain some assurance that the lawyer performs work competently and can work more efficiently by drawing on past experience regarding the client, its business, and its objectives. In order to retain the client's business, lawyers representing clients in multiple matters have a strong incentive to work competently, and to engage other counsel to provide legal services work that they are not qualified to render.

Third, this provision would authorize legal services to be provided on a temporary basis outside the lawyer's home state by a lawyer who, through the course of regular practice in the lawyer's home state, has developed a recognized expertise in a body of law that is applicable to the client's particular matter. This could include expertise regarding nationally applicable bodies of law, such as federal, international or foreign law. A client has an interest in retaining a specialist in federal tax, securities or antitrust law, or the law of a foreign jurisdiction, regardless of where the lawyer has been admitted to practice law. This could also include expertise regarding the law of the lawyer's home state if that law governs the matter, since a client has an interest in retaining a lawyer who is admitted in the jurisdiction whose law governs the particular matter and who has experience regarding that law.[9] The provision would, thus, bring the law into line with prevalent law practices. For example, many lawyers who specialize in federal law currently practice nationally, without regard to jurisdictional restrictions, which are unenforced.[10] The same is true of lawyers specializing in other law that applies across state lines.

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[9]The ABA Section of Intellectual Property Law comments that:

> our expertise in intellectual property law and in the subject matter, often combined with knowledge of a client's business, is the overriding reason our clients retain us.... In fact, our clients frequently place a greater value on our expertise than on our location, retaining us even though we do not have an office in any state where they do business. Such clients are seeking uniform, well-informed and efficiently rendered advice regardless of state lines, and they do not want to hire multiple lawyers for multiple states.

ABA Section of Intellectual Property Law, Memorandum to the ABA Commission on Multijurisdictional Practice (Feb. 2, 2001) at 2, http://www.abanet.org/cpr/mjp-comm_silp.html.

[10]For example, according to the ABA Section of Health Law,

> [R]egardless of geographic bar admission, many lawyers concentrating in health law effectively already practice on a national basis: the Federal law of Medicare, Medicaid and Federal health care reimbursement is interpreted, analyzed and applied by health lawyers nation-wide, usually without reference to the individual attorney's bar admissions.

To be covered by this provision, the lawyer's contact with any particular host state would have to be temporary. As the California Supreme Court Advisory Task Force noted in its preliminary report on MJP,

> clients often request an out-of-state transactional or other nonlitigating lawyer to come temporarily to [a host state] to provide legal services on a discrete matter. In many circumstances, such conduct poses no significant threat to the public or the legal system, particularly where the attorney is representing a client located in another state [or] has a longstanding relationship with the client . . .. [11]

When a lawyer seeks to practice law regularly in a state, to open an office for the solicitation of clients, or otherwise to establish a practice in the state, however, the state has a more substantial interest in regulating the lawyer's law practice by requiring the lawyer to gain admission to the bar. Although the line between the "temporary" practice of law and the "regular" or "established" practice of law is not a bright one, the line can become clearer over time as Rule 5.5 is interpreted by courts, disciplinary authorities, committees of the bar, and other relevant authorities.

Additionally, for this provision to apply, the lawyer's work in the host state must arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted, so that as a matter of efficiency or for other reasons, the client's interest in retaining the lawyer should be respected. For example, if a corporate client is seeking legal advice about its environmental liability or about its employment relations in

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ABA Section of Health Law, Position Statement on Multijurisdictional Practice, at 1 (June 29, 2001), http://www.abanet.org/cpr/mjp-comm_shl.html.

A number of entities that commented to the MJP Commission endorsed a provision allowing lawyers to practice federal law in jurisdictions where they are not licensed. *See e.g.,* ABA Section of Antitrust Law, Memorandum to the ABA Commission on Multijurisdictional Practice (Jan. 22, 2001), http://www.abanet.org/cpr/mjp-comm_sal.html; Colorado Bar Association Subcommittee on Multijurisdictional Practice, Proposal (June 22, 2001), http://www.abanet.org/cpr/mjp-comm_cba.html; Federal Communications Bar Association ("FCBA"), Statement at the San Diego Hearing of the ABA Commission on Multijurisdictional Practice (Feb. 17, 2001), http://www.abanet.org/cpr/mjp-comm_fcba.html; New York County Lawyers' Association ad hoc Committee on Multi-jurisdictional Practice (Jan. 29, 2001), http://www.abanet.org/cpr/mjp-comm_nycla.html; ABA Section of Public Utility, Communications and Transportation Law, submission dated March 10, 2001, http://www.abanet.org/cpr/mjp-comm_puctl.html.

[11]California Supreme Court Advisory Task Force on Multijurisdictional Practice, Preliminary Report and Recommendations (Aug. 1, 2001) at 30, http://www.abanet.org/cpr/mjp-comm_csc.doc.

each of the twenty states in which it has plants, it is likely to be unnecessarily costly and inefficient for the client to retain twenty different lawyers. Likewise, if a corporate client is seeking to open a retail store in each of twenty states, the client may be best served by retaining a single lawyer to assist it in coordinating its efforts. On the other hand, work for an out-of-state client with whom the lawyer has no prior professional relationship and for whom the lawyer is performing no other work ordinarily will not have the requisite relationship to the lawyer's practice where the matter involves a body of law in which the lawyer does not have special expertise. In the context of determining whether work performed outside the lawyer's home state is reasonably related to the lawyer's practice in the home state, as is true in the many other legal contexts in which a "reasonableness" standard is employed, some judgment must be exercised.

**Proposed Model Rule 5.5(d)(1)** would permit a lawyer employed by an organizational entity (e.g. an in-house corporate lawyer or a government lawyer), admitted in another United States jurisdiction, to provide legal services in a jurisdiction in which the lawyer is not admitted, other than representations for which *pro hac vice* admission is required, on behalf of the employer, an affiliated entity (i.e., an entity controlling, controlled by, or under common control with, the lawyer's organizational employer).[12] This proposed provision would authorize the employed lawyer to give advice to the employer-client or assist in transactions on the employer-client's behalf in jurisdictions where the lawyer does not maintain an office. This provision would not apply, however, to appearances in judicial and agency proceedings that are subject to *pro hac vice* provisions; to participate in such proceedings, out-of-state employed lawyers, like other out-of-state lawyers, would be required to seek and obtain admission *pro hac vice*.

This proposed provision reflects well-accepted contemporary law practice. Corporations and similar entities with ongoing and recurring legal issues have an interest in retaining in-house lawyers to provide legal assistance with respect to those matters, wherever they arise. In recent years, in-house corporate lawyers' work has grown increasingly national and global along with the business of corporate clients. The organization's interest in being provided legal services in an efficient, cost-effective and competent manner by a lawyer in whom it reposes confidence is furthered by permitting an organization to employ a lawyer to assist it with recurring matters. From a regulatory perspective, a lawyer who is employed to represent an organization on an ongoing basis poses less of a risk to the client and the public than a lawyer retained by an individual on a one-time basis, since, as the California report observed, an in-house attorney is "under the constant scrutiny of his or her employer." [13]

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[12]*Cf.* 17 CRF 230.144(a)(1) ("'an affiliate' of an issuer is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such issuer").

[13]California Supreme Court Advisory Task Force on Multijurisdictional Practice, Final Report and Recommendations (Jan. 7, 2002) at 28, http://www.abanet.org/cpr/mjp/comm2_csca.pdf.

The proposed provision would allow an out-of-state lawyer to work permanently from the office of a corporate, government or other organizational employer. This is consistent with the explicit understanding in many jurisdictions. In New Jersey, for example, established practice by an employed lawyer is authorized by opinion.[14] In other states, this practice is authorized by a court rule or statute that requires the employed lawyer to apply to the admissions authority and receive permission to practice to this limited extent.[15] The Commission is unaware of significant regulatory concerns raised by the practice in these jurisdictions and, accordingly, recommends that ABA Model Rule 5.5 be amended to recognize this practice.

Comment [16] to Rule 5.5 clarifies that paragraph (d)(1) would not authorize representing the employer's officers or employees solely in their personal capacity. Nor would this provision authorize representation of customers of the corporate employer, or other third parties, if the lawyer is not licensed to practice law in the jurisdiction. Comment [17] to Rule 5.5 makes clear that the employed lawyer who has an office in the jurisdiction must comply with registration requirements and any other requirements that are applicable.

**Proposed Model Rule 5.5(d)(2)** would permit a lawyer to render legal services in a jurisdiction in which the lawyer is not licensed to practice law when authorized to do so by federal law or other law. Among other things, the proposed provision would made clear that in a jurisdiction that has adopted rules permitting established practice by foreign lawyers who serve as legal consultants, a lawyer may establish a law practice in the jurisdiction as permitted by such a rule.[16]

Because it is axiomatic that a lawyer may perform work when authorized by federal law to do so, the Ethics 2000 Commission initially proposed relegating a provision to this effect to a Comment to Model Rule 5.5. However, the MJP Commission has been told that it is important to lawyers who perform such work that this provision be codified in black letter law, because at times they have been threatened with sanctions for violating state UPL laws. Although this qualification of jurisdictional restrictions would apparently apply to federal prosecutors and federal patent attorneys, among others, the Commission has not undertaken to identify every federal law that authorizes particular

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[14]N.J. Comm. On Unauthorized Practice of Law, Formal Op. 14 (May 1, 1975).

[15]*See generally* Carol A. Needham, *The Application of Unauthorized Practice of Law Regulations to Attorneys Working in Corporate Law Departments* (Symposium on the Multijurisdictional Practice of Law, March 2000) (unpublished manuscript, *see* http://www.abanet.org/cpr/mjp-home.html); Carol A. Needham, *The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice*, 36 S. TEX. L. REV. 1075 (1995).

[16]*See*, ABA *Model Rule for the Licensing of Legal Consultants*. To date, 24 states have enacted a rule licensing foreign legal consultants in the United States.

work and thereby may preempt state UPL laws. Nor has the Commission attempted to identify every state law that specifically authorizes out-of-state lawyers to render particular legal services in the state as an exception to the state's general UPL restriction.

EXHIBIT B

**[As to formatting: The Montana Bar Association's proposed amendments from the 2003 Petition are underlined and stricken. TSRIA's recommendations, based upon the ABA's Model Rules, are underlined and stricken, and are also in *italics*.]**

| **Montana's Rules of Professional Conduct** | **Recommendations of the State Bar of Montana in the 2003 Petition** | **ABA Model Rules** |
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| **Rule 5.5 Unauthorized Practice of Law**<br><br>A lawyer shall not:<br><br>(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or<br><br>(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. | **Rule 5.5: Unauthorized Practice of Law**<br><br>(a) A lawyer shall not~~: (a)~~ practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction~~; or~~ .<br><br>(b) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when:<br><br>(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or<br><br>(2) other than engaging in conduct governed by paragraph (1):<br><br>(i) a lawyer who is an employee of a client acts on the client's behalf or, in connection with the client's matters, on behalf of the client's commonly owned | **Rule 5.5: Unauthorized Practice of Law**<br><br>*(a)* A lawyer shall not:<br><br>~~(a)~~ *(1)* practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or<br><br>~~(b)~~ *(2)* assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.<br><br>*(b) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:*<br><br>*(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or* |

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| | organizational affiliates;<br><br>(ii) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice; or<br><br>(iii) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation.<br><br>~~(b)~~ (c) A lawyer shall not assist ~~a~~ another person ~~who is not a member of the bar~~ in ~~the performance of activity that constitutes~~ the unauthorized practice of law. | *(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.* |

# Nevada Supreme Court Rule 49.10

**Rule 49.10. Limited practice of attorneys employed in government or as in-house counsel.**

1. **Who may apply.** Notwithstanding the provisions of Rule 49, an attorney who is admitted to practice law in any other jurisdiction, and who is employed exclusively for a single governmental entity or as in-house counsel for a single corporation (including its subsidiaries and affiliates), association, partnership, or other business entity situated in or qualified to do business in Nevada, whose lawful business consists of activities other than the practice of law or the provision of legal services, may be certified to limited practice in this jurisdiction subject to the conditions of this rule and to such further conditions as the court may hereafter direct.

2. **Procedure for applying.** An attorney applying for certification under this rule shall file the following documents and fees with the State Bar of Nevada at its Las Vegas, Nevada, office:

(a) **Verified certificate.** To be certified under this rule, an applicant shall file an original and one (1) copy of a verified certificate, on a form supplied or approved by the State Bar of Nevada, which shall include all of the following:

(1) The attorney's residence and office address;

(2) The name, address, and telephone number of the attorney's employer;

(3) The courts before which the attorney has been admitted to practice and the dates of admission;

(4) That the attorney is currently a member in good standing of, and eligible to practice law before, the bar of those courts;

(5) That the attorney is not currently on suspension or disbarred from the practice of law before the bar of any court; and

(6) That the attorney agrees to be subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as an active member of the State Bar of Nevada.

(b) **Certificate of good standing.** A certificate from the state bar or clerk of the supreme court or highest admitting court of each state, territory, or insular possession of the United States in which the applicant has been admitted to practice law certifying the applicant's membership and good standing therein.

(c) **Employer affidavit.** An affidavit signed by the applicant's immediate governmental supervisor or an officer, director, or general counsel of the attorney's employer attesting that:

(1) The applicant is a bona fide full-time employee;

(2) The nature of the employment conforms to the requirements of this rule; and

(3) The affiant will notify the State Bar of Nevada within thirty (30) days after the applicant ceases to be so employed.

(d) **Evidence of character and fitness.** Affidavits signed by two (2) members of each bar where the applicant has been admitted or other evidence satisfactory to the State Bar of Nevada establishing the applicant's good moral character and fitness to practice law.

(e) **Application fee.** A non-refundable application fee of $250.

(f) **Annual fee.** An annual fee equivalent to the annual membership dues paid by active members of the State Bar of Nevada of comparable longevity.

(g) Such other information or documentation as the State Bar of Nevada may request in the course of its investigation.

3. **Certificate containing false information.** An applicant who files a certificate containing false information or who otherwise fails to comply with the standards of professional conduct required of members of the State Bar of Nevada shall be subject to the disciplinary jurisdiction of the Supreme Court of Nevada and the State Bar of Nevada with respect to any of his or her acts occurring in the course of the work performed.

4. **Review by state bar and certification by state bar.** The State Bar of Nevada shall investigate each application and, if necessary, interview the applicant. The state bar may grant the application and permit the attorney to practice in Nevada, subject to the restrictions of this rule.

5. **Bar membership.** An attorney certified to practice under this rule does not qualify for active membership in the State Bar of Nevada.

6. **Activities permitted under this rule.** An attorney certified under this rule may render legal advice and services to, and communicate and negotiate with third persons on behalf of, the attorney's employer,

other employees, or the employer's subsidiaries and affiliates in matters related to the business of the employer.

7. **Limitations of activities.**

(a) Unless otherwise permitted by law, an attorney certified under this rule may not:

(1) Appear as counsel of record for the employer in Nevada in any court, before any administrative or political agency, or in any arbitration, mediation, or alternative dispute resolution proceeding which is court ordered or annexed or authorized by law or administrative rule;

(2) Render legal advice or services to the public or to anyone other than the attorney's employer, other employees, or the employer's subsidiaries and affiliates; or

(3) Hold himself or herself out to the public as an attorney so authorized or engaged.

(b) All business cards and employer letterhead used by an attorney certified under this rule in Nevada shall clearly indicate that the attorney is certified to practice in Nevada as governmental or in-house counsel.

8. **Continuing legal education.** During the time an attorney is certified under this rule, the attorney shall comply with the same requirements for continuing legal education as may be prescribed for active members of the State Bar of Nevada.

9. **Discipline.** Attorneys certified under this rule shall be subject to the jurisdiction of the courts and disciplinary boards of this state with respect to the law of this state governing the conduct of attorneys to the same extent as an active member of the State Bar of Nevada. He or she shall familiarize himself or herself and comply with the standards of professional conduct required by members of the State Bar of Nevada. The rules of the Supreme Court of Nevada shall govern in any investigation or proceeding conducted by the State Bar of Nevada under this rule.

10. **Renewal of certification.**

(a) On or before March 1 of each year, an attorney certified under this rule must certify to the State Bar of Nevada that:

(1) The attorney is still employed by the same employer that submitted the affidavit required under subsection 2(c) of this rule;

(2) The attorney has complied with the continuing education requirements prescribed for active members of the State Bar of Nevada; and

(3) The attorney is still in good standing before the courts before which the attorney has been admitted to practice.

(b) An attorney certified under this rule who continues to perform legal services shall remit to the State Bar of Nevada by March 1 of each year, a fee equivalent to the annual membership dues paid by active members of the State Bar of Nevada of comparable longevity.

11. **Failure to renew.**

(a) An attorney certified under this rule who continues to perform legal services for an employer and fails to provide the proper certification or pay the renewal fees set forth in subsection 10 of this rule shall be suspended from practicing law upon expiration of a period of thirty (30) days after the anniversary date.

(b) The executive director of the State Bar of Nevada shall notify the attorney certified under this rule, and the entity employing that attorney of the suspension.

12. **Reinstatement after failure to renew certification.** An attorney certified to practice under this rule who has been suspended from that practice under subsection 11 of this rule may be reinstated upon compliance with the requirements of subsection 10 of this rule and the payment of a late penalty of $50. Upon payment of all accrued fees and the late penalty, the executive director may reinstate the attorney and shall notify the attorney and the entity employing the attorney of the reinstatement.

13. **Termination.** Certification to practice under this rule shall terminate whenever the attorney ceases to be employed by the employer submitting the affidavit under subsection 2(c) of this rule. The employer shall promptly notify the State Bar of Nevada in writing whenever the attorney's employment ceases. Attorneys certified to practice under this rule who cease to be employed as required by this rule shall not retain membership with the State Bar of Nevada and shall not be considered for active membership unless they have made application for admission and have been examined in accordance with Rules 49 to 75, inclusive, in the same manner as all other applicants.