

DELAWARE STATE BAR ASSOCIATION

Report of the Multijurisdictional Practice Special Committee
to Dennis L. Schrader, Esquire
President, Delaware State Bar Association

Dated: April 23, 2001

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I. Introduction

In December 2000, in response to an ongoing debate within the American Bar Association (“ABA”), Dennis L. Schrader, Esquire, the president of the Delaware State Bar Association (“DSBA”), appointed a special committee of the DSBA (the “Committee”) to look at the issue of multijurisdictional practice (“MJP”) and to make recommendations to him.

Mr. Schrader requested Harvey Bernard Rubenstein, Esquire, a former DSBA president, to serve as the chair of the Committee. In addition, Mr. Schrader appointed the following Committee members, who came from a wide range of practice areas: Don C. Brown, Esquire; Louis G. Hering, Esquire; Stephen E. Jenkins, Esquire; Douglas W. Lundblad, Esquire; Bonnie L. Metz, Esquire; Andrea L. Rocanelli, Esquire; William Schab, Esquire; and Helen L. Winslow, Esquire. DSBA staff member Janice L. Myrick was asked to provide support for the Committee. The Committee wishes to acknowledge and thank Ms. Myrick for her outstanding assistance.

At an initial meeting on January 12, 2001, the Committee discussed the issues relating to MJP in significant depth. Prior to the meeting, the Committee members had received materials relating to certain MJP issues. At the meeting, the Committee decided to establish three initial subcommittees. Those were (1) a subcommittee on the definition of MJP; (2) a subcommittee on the description of the problem; and (3) a subcommittee to consider other views.

By early March, the subcommittees had completed their assignments and submitted reports to the full Committee. At a meeting of the full Committee on March 13, 2001, the Committee made certain preliminary determinations about its likely recommendations, and, in addition, decided to gather further information from, among others, the Corporate Counsel Section of the DSBA.

At a meeting on April 23, 2001, the Committee approved the adoption of this Report.

II. Executive Summary and Recommendation

A. An Overview of the Situation

Delaware permits significant MJP activities. Lawyers from other states routinely practice in Delaware's state and federal courts, and out-of-state transactional lawyers routinely conduct business in Delaware. These activities are either permitted by Court rule or sanctioned by long tradition and understanding. The advent of new forms of legal practice, however, and the increasing nationalization and internationalization of the economy, have raised questions about other activities conducted by lawyers.

In examining these questions, the Committee attempted to look primarily at those issues for which there was no existing definitive guidance by the Delaware Supreme Court. For example, the Committee did not look at the potentially separate issue of real estate transactions because the Delaware Supreme Court recently conclusively settled that issue in *Matter of Mid-Atlantic Settlement Services, Inc.*, No. 102, 2000 (Del. May 31, 2000). Rather, the Committee focused on areas of the law in which the rules were more uncertain.

The Committee identified four categories of practice involving MJP: litigation, transactional practice, in-house practice, and federal specialty law practice. Obviously there is work done by lawyers – such as advising clients—that might not clearly fall within these four categories. In addition, while the work of government lawyers normally will fall within these categories, other considerations might affect them, especially if they work for the federal government. Nevertheless, the Committee believes that the four categories serve as a useful template for analyzing the issues.

1. Litigation. Delaware currently allows a form of MJP by allowing out-of-state attorneys to practice in its courts by affiliating with a local attorney and becoming admitted *pro hac vice*. The Committee believes that while there are certain litigation situations that would benefit from clarification as to whether they constitute the unauthorized practice of law, the current *pro hac vice* system is working and does not require adjustment. As discussed below,

proposed Model Rule 5.5 propounded by the “Ethics 2000” panel would appear to resolve some of these issues.

2. Transactional Practice. Given the California Supreme Court’s decision in *Birbrower, Motalbano, Conder & Frank, P.C. v. Superior Court*, 949 P. 2d 1 (Cal. 1998), cert. denied, 525 U.S. 920 (1998), there are a number of open questions concerning transactional practice that the Committee believes might be addressed by Rule in order to clarify when a lawyer might be crossing the line and engaging in the authorized practice of law. Again, as discussed below, proposed “Ethics 2000” Model Rule 5.5 appears to resolve some of those issues.

3. In-house Counsel. The realities of daily practice of in-house counsel are not fully addressed by current rules and pose issues important to much of the MJP debate nationwide. To put the situation bluntly, many Delaware in-house lawyers are not admitted to practice in Delaware. The Committee understands that there are numerous such lawyers in Delaware as well as in probably every other state. The Committee believes that this situation will not change and that attempting to require corporate counsel to become members of the bar by traditional examination in each state in which they are located will likely be futile and almost certainly not necessary. The Committee believes that that leaves three practical options. First, do nothing and tacitly permit the status quo. Second, explicitly allow the present situation to continue by some ratification or rulemaking. That is the course chosen by the Ethics 2000 panel. Finally, change current practice to create a registration process that will allow non-Delaware admitted in-house counsel who are in good standing in their home jurisdiction to be “registered” and thus subject to local disciplinary rules and possible assessment, but not require them to take the bar examination as a new lawyer.

4. Federal Administrative Specialty Law Practice. As with in-house counsel, the present rules might not adequately address issues related to those engaged exclusively in the

practice of federal administrative or specialty law on a national basis, such as federal tax, securities, immigration, patent and trademark prosecution, environmental, and telecommunications law. The Committee understands that there are federal specialty law practitioners with national practices who are resident in offices in Delaware but are not admitted to the Delaware bar.

The Committee believes that there are three ways to deal with the issue. First, maintain the status quo. Second, clarify the present rules to make clear that those engaged in such practice must be members of the Delaware bar. Third, modify the rules to provide for the registration or licensing of such practitioners and require that they submit to the jurisdiction of the Delaware Supreme Court and its disciplinary rules without requiring that they take the Delaware bar examination, as well as possibly requiring them to pay all or part of the assessments paid by attorneys admitted to the Delaware bar.

Recommendations

The Committee proposes the following recommendations.

Litigation and Transactional Practice. Because the current system is working well, the Committee recommends that no major changes be made. Rather, the Committee recommends that the law be clarified to make plain that lawyers from other jurisdictions may come into Delaware in the ordinary course of their business to practice within the State for limited periods of time on discrete projects. Lawyers who are in the private practice of law full- or part-time in Delaware (including all lawyers maintaining an office in the State that is not devoted exclusively to federal specialty practice, which is discussed below) should either be members of the Delaware bar or in the process of taking the bar examination. The Committee believes that adoption of proposed Model Rule 5.5 promulgated by the ABA's Ethics 2000 Commission would go a long way toward clarifying the situation.

In-house Counsel. After viewing the options, the Committee believes that there is no need to attempt to force in-house counsel to be admitted in the state in which they practice, but that it is desirable to acknowledge formally the validity of the practice arrangements currently in place. It is enough that they are admitted and in good standing in some jurisdiction; proposed Ethics 2000 Model Rule 5.5 would adequately address the issue. The Committee has considered whether in-house counsel ought to be registered with, and subject to the disciplinary processes of, the Delaware Supreme Court, and perhaps pay an assessment. While a majority of the Committee would at least tentatively say that such a procedure is probably unwarranted, the Committee does believe the question is close enough for further discussion on the issue.

Federal Specialty Law Practice. Finally, the Committee is split on the issue of lawyers engaged in solely private federal specialty practice in Delaware. Some members of the Committee believe that such lawyers are engaged in the practice of law in Delaware and should be admitted to the bar. Other Committee members – including probably a majority of the Committee – believe that it would be enough for such lawyers to register with the Supreme Court and subject themselves to its discipline and possible assessment. The entire committee, however, believes that such lawyers should be subject to some regulation: Because they are in the private practice of law, failure to regulate them could result in harm to the public.

The following sections address those issues at more length.

III. Historical Summary of the Unauthorized Practice of Law

The Delaware Supreme Court has inherent jurisdiction over the governance of the practice of law in this State, which includes the exclusive authority to regulate conduct constituting the unauthorized practice of law. Unlike many states, there is no criminal sanction in Delaware against the unauthorized practice of law. However, engaging in the practice of law without a license granted by the Delaware Supreme Court is contempt of its authority and is punishable.

The Court “does not exercise its inherent authority to regulate the practice of law for the purpose of protecting the financial interests of the lawyer,” but rather its “role is to insure that the public will enjoy the representation of individuals who have been found to possess the necessary skills and training to represent others.” *In re Arons*, 756 A.2d 867, 874 (Del. 2000), *petition for cert. filed*, 69 U.S.L.W. 3269 (U.S. Oct. 2, 2000) (No. 00-0590). Delaware lawyers are also subject to disciplinary action by the Court if they “assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.” Delaware Lawyers’ Rules of Professional Conduct, 5.5(b). The comment to this rule emphasizes that the purpose underlying the definition and regulation of the practice of law is to protect the public from the rendition of legal services by unqualified persons.

As a general proposition, the “practice of law” occurs where there is an exercise of judgment on a legal matter by someone acting in a representative capacity. In Delaware, the practice of law is “unauthorized” if it occurs in Delaware, on a matter of Delaware law, by someone not admitted to the Delaware bar or specially permitted to engage in such activity by Supreme Court Rule. *See Matter of Mid-Atlantic Settlement Services, Inc.*, UPL No. 95-15, at 12 (Bd. on the Unauthorized Practice of Law, Mar. 8, 2000), *approved*, No. 102, 2000 (Del. May 31, 2000) (ORDER). *See also Delaware State Bar Association v. Alexander*, 386 A.2d 652, 654 (Del.) (explaining in detail the kinds of activities that may constitute the “practice of law”), *cert. denied*, 439 U.S. 808 (1978).

The American Bar Association is actively investigating the issues relating to multi-jurisdictional practice. Its first formal review of this complex issue was through the Commission on Evaluation of the Rules of Professional Conduct (“CERPC”). CERPC began its inquiry in mid-1997 and recently submitted its report to the ABA. It has recommended changes to many of the model rules. While a complete review of the recommendations of CERPC is beyond the scope of this report, two of the changes recommended address multi-jurisdictional practice

issues. CERPC explicitly recognized that it is not charged with making general recommendations regarding multi-jurisdictional practice. The recently formed Commission on Multi-Jurisdictional Practice is charged with that responsibility. Its report is to be submitted later this year.

The two model rules are directly applicable to multi-jurisdictional practice are 5.5 and 8.5. Model Rule 5.5 addresses the unauthorized practice of law. The changes recommended by CERPC are intended to identify four “safe harbors” for lawyers who practice outside the jurisdiction in which they are licensed. Briefly summarized, the four safe harbors are: 1) The lawyer is preparing for a proceeding in which the lawyer reasonably expects to be admitted *pro hac vice*. 2) The lawyer is an employee of the client and is acting on behalf of the client, its employees or affiliates. 3) The lawyer is acting on a matter that is reasonably related to the representation of a client in a jurisdiction in which the lawyer is licensed. 4) The lawyer is associated in a particular matter with a lawyer admitted to practice in the jurisdiction.

Proposed amendments to proposed Model Rule 8.5, dealing with disciplinary authority, would make it clear that lawyers are subject to the rules and authority of both the jurisdiction in which the lawyer is licensed and the jurisdiction in which the conduct occurs. In the event the rules of the two jurisdictions differ with regard to conduct not before a tribunal, the choice of law rules permit the application of the rules of the jurisdiction where the conduct had its predominant effect.

A related topic that has been addressed by both the ABA and the DSBA is the question of multi-disciplinary practice. The Delaware Multi-Disciplinary Practice Task Force was established in June 1999. It reviewed the ABA recommendations and findings on the subject and then presented its own analysis. Its report may be found in the December 2000 issue of IN RE:. To summarize, the Task Force found significant ethical problems relating to multidisciplinary practice and did not believe that merely making changes to the Delaware Lawyers’ Rules of

Professional Conduct would solve those problems. It concluded that the issues raised by multi-disciplinary practice go to the very essence of lawyer responsibilities on behalf of clients and can not be adequately addressed by mere modification of ethical rules.

IV. Views of DSBA Delaware Lawyers, DSBA Sections, and Others

A. Comments from DSBA Sections

The Committee contacted the chairs of each of the sections of the DSBA and requested their input. The following is a summary of the input received:

The Intellectual Property Law Section reported that its members experience multijurisdictional practice occurring in the following ways: (1) litigation in federal courts outside of Delaware; (2) alternative dispute resolution outside of Delaware; (3) discovery outside of Delaware relating to cases in Delaware District Court; (3) counseling clients located outside of Delaware; (4) litigation or prosecution of applications before the United States Patent and Trademark Office (“USPTO”) (the section reported that *Sperry v. State of Florida, ex rel., Florida Bar*, 373 U.S. 379 (1963) held that an attorney practicing before the USPTO from an attorney’s office in one of the states, although not admitted in that state, was not engaged in the unauthorized practice of law); and (5) serving as Delaware counsel with non-Delaware attorneys in Delaware District Court. That section reported the following concerns: (1) to maintain the status quo with regard to serving as local counsel for out-of-state counsel in Delaware; (2) protecting the section members against charges of unauthorized practice of law arising out of their multijurisdictional practice activities, particularly the concern of attorneys employed by corporations who are not admitted to practice law in the state where their employer is located. The section did not offer any specific solutions.

The Corporate Counsel Section reported that multijurisdictional practice occurs in the following ways: (1) attorneys employed by corporations who are not admitted to practice law in the state where their employer is located; (2) transactional work; (3) rendering corporate advice;

and (4) litigation management and first chair litigation. The only concern it expressed was for corporate-employed attorneys who are not admitted to practice law in the state where their employer is located. It suggested the following solutions: (1) creating an explicit exemption (with proper limitations) reflecting that practicing as in-house counsel should not arbitrarily be deemed violative of the rules regarding the unauthorized practice of law. The section was particularly interested in promoting uniformity of this rule across jurisdictions. The section also expressed a general preference, on behalf of consumers of legal services that involve matters in many jurisdictions, for permissive multijurisdictional practice rules that recognize in a realistic and practical way the national and international nature of the corporate client's transactions and pockets. For example, a corporation doing business in many jurisdictions may rely upon in-house counsel to provide advice relating to contracts to be entered into in all of the jurisdictions in which it does business, although the attorney advising the corporation may only be admitted in one jurisdiction. Rules that result in the need for local counsel in these situations will add cost but not value to the corporation.

The Labor and Employment Section reported that multijurisdictional practice occurs (1) when section members and non-Delaware attorneys appear before administrative bodies and courts in many jurisdictions; (2) when rendering advice to clients in multiple jurisdictions; and (3) in labor arbitrations. The section reported that attorneys familiar with the National Labor Relations Board's decisions and federal case law not admitted to practice in the state in which an arbitration hearing is being held are generally considered to be as competent as attorneys who are admitted in that state, so the section is concerned that current practice be allowed to continue in that regard. The section was also concerned to protect the requirement of having local counsel present in Delaware court matters, because out-of-state counsel seem to breach Delaware's rules more often. The following specific problems were mentioned: (1) The courts too frequently hold teleconferences without local counsel's participation; (2) some firms' attorneys appear

repeatedly in Delaware courts on a *pro hac vice* basis; and (3) some out-of-state firms associate with local counsel but then send an associate not admitted *pro hac vice* to cover depositions. The section made the following suggestions: (1) pass a rule barring attorneys not admitted *pro hac vice* from taking depositions in Delaware; (2) pass a rule giving court discretion in each case to excuse local counsel from participating in certain aspects of the litigation upon that counsel's application only; (3) pass a rule requiring nonlawyers appearing before administrative bodies to sign a form stating that they are familiar with the forum's rules and that they agree to abide by them and naming an agent for service of process.

The Council of the Corporation Law Section noted that multijurisdictional practice occurs when (1) section members give advice to boards of directors, officers and in-house attorneys of corporations having their principal places of business located outside Delaware; (2) section members interview witnesses, take depositions and engage in other forms of litigation activity outside Delaware; (3) correspondent counsel are admitted *pro hac vice* in Delaware and are hosted by Delaware counsel to interview witnesses, take depositions, and the like. This section does not want Delaware to impose restrictions on out-of-state attorneys beyond what currently exist so as to avoid any risk that restrictions might be placed on the activities of the members of our bar in other jurisdictions. Generally, the section does not want the status quo changed.

The Workers' Compensation Section reported that multijurisdictional practice occurs when (1) an out-of-state resident represented by out-of-state counsel is injured in Delaware; and (2) when an individual collecting workers' compensation benefits under Delaware's statute files a third-party action against a responsible party in an out-of-state court. The section expressed no particular concerns about multijurisdictional practice. It noted that the Delaware Industrial Accident Board has a rule requiring all attorneys who appear before it to be members of the Delaware bar, which seems to work to everybody's satisfaction.

The Government Law Section reported that multijurisdictional practice occurs (1) under Rule 72 when an out-of-state attorney is admitted *pro hac vice* to appear before a state administrative agency; and (2) responding to requests of non-Delaware out-of-state attorneys for copies of legal opinions or copies of statutes and rules for government agencies. This section had no particular concerns about the issue and, accordingly, no suggestions for solutions.

B. Comments From Individual Members of the DSBA

The Committee sent an e-mail message to all DSBA members who are on the DSBA's list-serve list, as well as publishing a request for comments in IN RE:. Comments received were considered by the Committee.

C. Comments of the Symposium on the Multijurisdictional Practice of Law at Fordham University School of Law.

The participants at this symposium identified three broad goals for reforming the existing regulatory system: (1) to promote greater uniformity in how jurisdictions address the work of out-of-state lawyers; (2) to achieve greater clarity, so lawyers have more guidance about what they may or may not do in relation to a state in which they are not licensed; and (3) to liberalize restrictions on work of out-of-state lawyers so as to serve the state regulatory interest in a manner that is not simply exclusionary and that, recognizing the changing nature of clients' legal needs, accommodates the legitimate interests of clients in retaining counsel of choice and in obtaining effective and economical legal assistance.

The participants identified the following possibilities to explore: (1) uniform state laws that set forth the restrictions on out-of-state lawyers more narrowly and more clearly; (2) uniform state laws that permit out-of-state lawyers to receive permission to render a broader array of legal services in the state; (3) uniform state laws that allow out-of-state lawyers more liberally to be admitted to the state bar for general purposes; and (4) regulatory reforms, including a national

registration system, mandatory malpractice insurance coverage, uniform national CLE requirements, and adoption of uniform choice-of-law provisions.

D. ABA Commission on Multijurisdictional Practice

This commission is (1) studying the extent to which lawyers are currently practicing across state lines; (2) studying whether lawyers believe there are preferable alternatives to existing restrictions on such practice; and (3) reviewing alternative proposals. The two most extreme and the three intermediate proposals most often mentioned are the following: (1) maintain the status quo; (2) national licensure of attorneys; (3) developing uniform state laws that set forth restrictions on out-of-state lawyers more narrowly and clearly than currently exist; (4) permitting out-of-state lawyers to render a broader array of legal services in a particular state; and (5) allowing out-of-state lawyers to be admitted to the state bar for general purposes.

The full list of twelve proposals that are being considered are as follows:

(1) the organized bar could maintain the status quo;

(2) the organized bar could encourage states to adopt rules that authorize employed lawyers in good standing in their home state who move into another state to serve their corporate, governmental, or other organizational employer to practice law for that employer so long as they remain employed by it (“safe harbor” provision). Where laws already exist, they have generally excluded permission to make court appearances, where *pro hac vice* admission is possible. Note that this deals only with the employed lawyer’s practice in the lawyer’s state of domicile and does not address the employed lawyer’s practice in multiple other jurisdictions on behalf of the employer.

(3) the organized bar could encourage states to adopt laws or court rules that explicitly authorize out-of-state lawyers in good standing (and perhaps admitted for some minimum number of years), while temporarily in the state, to engage in activities for which a law license is required. This proposal (and the next one) requires a definition of “temporary.” For example, it

might exclude a permanent physical presence and also systematic solicitation of clients in the other state.

(4) a more limited version of the foregoing proposal would allow lawyers admitted in any state to practice temporarily in a state if that lawyer's home state affords reciprocity to lawyers elsewhere.

(5) the organized bar could encourage states to adopt rules that bring within *pro hac vice* authorization work done in contemplation of filing an action in which the lawyer plans to seek *pro hac vice* admission and reasonably believes it will be granted. Obviously, the pre-filing work would then have to be protected even if the action is not filed.

(6) The organized bar could encourage states to adopt rules that make some sort of *pro hac vice* admission process applicable to activities in anticipation of or in connection with state or local administrative proceedings, arbitration, mediation, or other non-court-administered alternative dispute resolution process or with respect to discovery processes outside a lawyer's licensing state or the state where the lawsuit pends.

(7) The organized bar might encourage states to adopt rules that permit an out-of-state lawyer in good standing to do work in the state for which a law license is required, so long as the lawyer collaborates with an in-state lawyer (who may but need not be in the same firm).

(8) The organized bar could encourage the states to adopt rules that would entitle a lawyer admitted in any state to advise on federal or non-U.S. law (and perhaps incidental state law) anywhere.

(9) The organized bar could encourage the states to adopt rules that would entitle a lawyer admitted in any state to advise on highly specific or specialized areas of the law requiring a high degree of specialization or expertise (and perhaps incidental state law) anywhere.

(10) The organized bar could encourage the states to adopt rules that would entitle a lawyer admitted in any state to conduct any activities in a jurisdiction (short of permanent

establishment or wrongfully holding the lawyer out as admitted in that jurisdiction) that a non-lawyer in that jurisdiction could undertake without violating the unauthorized practice of law laws of that state. This would level the playing field as between out-of-state lawyers and in-state nonlawyer professionals, such as accountants or environmental consultants.

(11) The organized bar could urge a rule that would entitle a lawyer admitted and in good standing anywhere (perhaps after some specified number of years) to open an office anywhere, perhaps following a character investigation. Essentially, this would be a form of national motion admission. (Many lawyers think this and the next proposal go beyond the problem and that they may have constitutional infirmities.)

(12) The organized bar could urge a national licensing process to solve all multijurisdictional practice issues and as well, to serve as a prelude to seeking reciprocity in the global community. The following are some typically recurring hypothetical situations that the ABA suggests people keep in mind when they consider the above proposals:

(1) Lawyer Smith, admitted only in State A, is working on a business deal for a client. The work requires her to travel to the client's satellite site in State B to speak with and counsel officers there. Also in State B, she spends two days negotiating portions of the transaction with lawyers for the other party. Due diligence requires Smith to investigate the laws of several jurisdictions, including federal law and the laws of State A and State B.

(2) Same as (1) except Smith's communications with her client's officers and the opposing lawyer are all done via e-mail, fax, and telephone into State B.

(3) Brown is a nationally recognized expert on federal copyright law admitted only in State A. A company in State B invites her to come to State B and work with its staff in developing some protocols that will afford maximum protection for the company's intellectual property. She plans to spend a week in State B.

(4) Same as (3), except Brown's expertise is in commercial law. The state's laws in this area are nearly uniform and all are easily available nationwide through computer research. She plans to spend a week in State B advising her State B client on procedures to protect their interests under that State's commercial laws.

(5) Lawyer Jones, admitted only in State A, is an expert in trade regulation. A company in State B asks him to come to its headquarters, speak to its officers and employees, and review its files in order to advise it on whether or not to bring an action against a competitor under federal law or the laws of State B (or both). Any such action would be brought in federal or state court in State B. Jones would be lead counsel and would seek *pro hac vice* admission once an action is brought, if it is.

E. Corporate Counsel Section

The Corporate Counsel Section hosted a multijurisdictional practice seminar on April 4, 2001. Chief Justice Veasey and the chair of the Committee, Harvey Bernard Rubenstein, opened the program by giving an overview of the issues. Ethical and unauthorized practice of law issues were then addressed by Justice Randy J. Holland, Louise Hill, Esquire, a professor at the Widener University School of Law, and Mary M. Johnston, Esquire. MJP issues relating to the following subjects were then discussed in panels: (1) litigation (Judge Joseph J. Farnan, Jr.; Judge Susan C. Del Pesco; William H. Sudell, Esquire (bankruptcy); and Richard L. Horwitz, Esquire); (2) in-house perspectives (Susan Hackett, Esquire, general counsel of American Corporate Counsel Association, ("ACLA") and Committee member Don C. Brown, Esquire, of DuPont); (3) transactional practice/written opinion issues (Robert J. Krapf, Esquire; Norman M. Powell, Esquire; and Benjamin Strauss, Esquire); and (4) Multi-jurisdictional Law Firm issues (Jay W. Eisenhofer, Esquire; and Richard A. Forsten, Esquire).

The following are just a few of the points made at this excellent seminar:

Two different speakers pointed out that Ethics 2000 proposed Model Rule 5.5 works very well if all parties are in good faith trying to understand the scope of the problem. However, if there is a falling out between the client and the attorney, or if a disciplinary prosecutor needs to get involved, the language of this rule is so ambiguous as to be virtually impossible to use as a method of resolving a disagreement between the attorney and the client or to successfully prosecute an attorney who is violating the rule.

In the litigation context, the point was made that national licensing is unworkable, because the need to know local rules is paramount.

In the in-house context, the point was made that no state is feeling a need to regulate in-house counsel and that there is no reason to create regulation where none is needed. It was recommended that Delaware (and all other states) consider adopting the ACLA proposal, which would provide for state-based licensure of attorneys allowing for free movement among all states, and which is based on the driver's license model. Alternatively, the safe harbor provision of Ethics 2000 proposed Model Rule 5.5 was recommended.

In the transactional context, the point was made that transactional lawyers engage in MJP every day. The "shingle rule" was proposed: If an attorney permanently practices in a state, that attorney should be subject to regulation in that state. If, however, the attorney opines on the law of another state from that office, or if the attorney visits another state temporarily to practice law, then that attorney would not be subject to regulation by that state. The point was made that this is basically a malpractice issue and that each attorney needs to know the extent of his or her competence. This is true as between various disciplines (an attorney must decide whether he or she is competent to handle, for example, a divorce matter) as it is between states (an attorney must decide whether he or she is competent to handle a matter governed by the law of a state other than the state in which he or she is licensed).

In the regional law firm context, however, the point was made that the physical location of the attorney should be the least important factor. We need certainty in the rules, and we need to remember the perspective of the clients, who often feel victimized by ethics rules. The point was made that current practices of regional law firms are not addressed by Ethics 2000 Model Rule 5.5. For example, Model Rule 5.5 arguably does not cover the situation of an attorney from a regional law firm being sent to Arkansas for two months to fight a hostile takeover, when that attorney will not be admitted *pro hac vice* in Arkansas. Also, an attorney may go to another state for a lengthy period of time to investigate its own client without any expectation of appearing before a tribunal. Also, local counsel currently does not typically assume responsibility for costs, but that appears to be required by Model Rule 5.5. Finally, what does “regularly appearing” in Model Rule 5.5 mean?

Several people commented with approval that we are moving toward a national certification in specialty practice areas.

F. Other Bar Associations

The Committee contacted the Nebraska Bar Association MJP Special Committee. That committee was just beginning to meet, however, so it had no information to share with the Committee.

Rina Marks, the Executive Director of the Delaware State Bar Association, contacted the executive directors of all other state bar associations to find out which state bar associations have addressed this issue. To date, she has not received a response from any of them.

V. Description and Analysis of the Issue

The Committee has looked at two interrelated issues. The first is to what extent restrictions currently exist on MJP in Delaware. The second is whether those current restrictions should be changed or redefined in the face of a nationwide movement to reduce the barriers to lawyers being able to practice in other jurisdictions. To be able to make recommendations on the

second issue, and comment upon the first, it is initially appropriate to examine the reasons behind the regulation of lawyers and the concomitant restrictions on their right to practice in other jurisdictions.

A. The Reasons for Regulation

The current restrictions on lawyers' ability to practice in jurisdictions other than those in which they are admitted are entirely regulatory in nature. In Delaware, the Delaware Supreme Court has plenary and exclusive jurisdiction over the regulation of lawyers;¹ other states follow similar regimes. The main form of regulation comes in requiring any person practicing "law" in a given jurisdiction to be admitted to the bar and to be subject to the disciplinary sanctions from that jurisdiction's bar authorities. Generally, practicing law without admission to the bar constitutes the unauthorized practice of law. The justification for attorney regulation is the protection of the public, including protection of consumers and protection of the legal system as a whole.²

Protecting the public is the classic reason given for regulating lawyers. The public might not know enough about law to be able to pick a competent lawyer, and thus it is generally thought necessary to ensure that all lawyers are at least minimally competent. The primary competence-screening device is the bar examination. In addition, to protect the public from unethical or incompetent members of the bar, lawyers are often regulated through disciplinary measures, client trust funds, mandatory continuing legal education and the like. The belief that lawyer regulation is needed to protect the public appears to be universal among American jurisdictions and is an important reason behind the Delaware Supreme Court's current regulatory scheme. Any adjustment to the current state of regulation to expand multi-jurisdictional practice

¹See *Appeal of Infotechnology, Inc.*, 582 A. 2d 215, 218 (Del. 1990).

²Historically, there has often been a third reason for regulating lawyers – protecting existing members of the bar from competition. The United States Supreme Court has held that activities designed to inhibit competition can violate the antitrust laws. See *Goldfarb v. Virginia State Bar*, 95 S.Ct. 2004 (U.S. 1975).

would have to insure that it did not weaken the protection that current regulations provide to the public.

Systemic protection is an equally important reason for the continued regulation of lawyers. Systemic protection deals with the protection of the legal system as a whole, including the courts and opposing parties. It seems plain that it is in the legal system's interest to promote standards to ensure that lawyers are competent, have integrity and will respect the rules. For example, even a few incompetent lawyers can weigh a court system down with papers, pleadings and motions that are unintelligible or baseless. Even with the current regulatory structure, courts must on occasion devote extraordinary amounts of time attempting to decipher incoherent papers that, when finally understood, advance arguments that often make little sense. Because the time and attention of courts are finite resources, and because it is unfair to all other litigants to divert those resources to deal with the problems caused by incompetent attorneys, regulating attorney competence is an important systemic concern.

Equally important are the system's interests in the integrity of attorneys and their respect for the rules. Dishonest attorneys can create havoc not only for their own clients, but for the system as a whole, and, as many courts have found in the past several decades, attorneys willing to disregard the rules to advance the interests of their clients can, over time, create an "anything goes" ethos that permeates the profession and makes litigation far more expensive, difficult and alienating than it otherwise might be. The Delaware courts have been in the forefront of the effort to combat such abuses by reminding attorneys that they are officers of the courts—and hence have responsibilities to the system—as well as advocates for their clients.³ Because of the importance that the efficient functioning of its courts has to the State of Delaware, its courts can be expected to remain committed to protecting them from abuses by attorneys.

³See, e.g., *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A. 2d 34 (1994).

Those, of course, are merely summary descriptions of the two fundamental concerns that provide the basis for the regulation of attorneys. But, an understanding of those concerns is necessary to understand the regulatory structure that is currently in place.

B. The Regulatory Framework in Delaware.

The regulatory framework in Delaware is similar to that in most other states. Only lawyers admitted to the bar are entitled to practice law in the State, and the Delaware Supreme Court has established a Board on the Unauthorized Practice of Law in order to prevent others from so practicing.⁴ To ensure competence, attorneys must not only pass a very rigorous bar exam, but must undergo a clerkship that includes numerous specific requirements and pass an exacting character and fitness evaluation.⁵ Thereafter, a Delaware attorney must register annually with the Supreme Court, is subject to the Rules of Professional Conduct as well as numerous specific requirements on the conduct of his or her practice. Those include the maintenance of an office in the State, and the compliance with mandatory continuing legal education requirements.⁶ We note that among the most significant areas of regulation in Delaware are those rules dealing with the handling of client funds. Lawyers who are not admitted but practice in Delaware are not subject to these requirements. Thus, a critical question is precisely what constitutes the practice of law in Delaware. As set forth below, the answers to that question can be ambiguous.

1. Litigation.

The paradigmatic example of legal practice is a lawyer appearing in court. In one version of MJP, albeit one that the proponents of more extreme MJP variants might find unsatisfactory,

⁴See Rule 86, Rules of the Supreme Court of the State of Delaware (the “Supreme Court Rules”); Rule 4(c) of the Delaware Unauthorized Practice of Law Board Rules.

⁵See Supreme Court Rule 52.

⁶See generally Supreme Court Rules 51-73.

the Delaware courts have lawyers from throughout the United States appearing before them on a daily basis. The Delaware courts welcome such appearances – it is not unusual for prominent out-of-state counsel to be on a first-name basis with Delaware judges – but at the same time they strictly regulate those lawyers. Under the Delaware Supreme Court’s Rules, as well as the rules of the other Delaware courts, any lawyer appearing before any Delaware state court or administrative agency must either be admitted to the Delaware bar or formally admitted *pro hac vice*. Although admission *pro hac vice* used to be on simple motion, the procedures were made far more rigorous in the early 1990s after some disturbing problems arose, and the rules now establish detailed and largely uniform *pro hac vice* procedures.⁷ There are no exceptions to these requirements. Any attorney appearing in a Delaware case – which specifically includes representing a party in a deposition in that case – must be admitted *pro hac vice*, and attorneys admitted *pro hac vice* must be associated with co-counsel admitted to the Delaware bar.⁸ Delaware co-counsel are expected to police the behavior of their out-of-state colleagues and guide them into an understanding of the standards expected by the Courts.

The Delaware courts regard these rules as important safeguards to the integrity of the Delaware court system. While the courts welcome lawyers not admitted in Delaware, there have been problems in the past, perhaps largely arising out of the widely varying expectations of attorney behavior throughout the country, for the courts to be willing to relax the existing requirements.

The United States District Court has plenary jurisdiction over the attorneys practicing before it and is not required to follow the lead of the Delaware Supreme Court. Nevertheless, perhaps in part because it faces similar issues and the long tradition of cooperation between the

⁷See Supreme Court Rules 71 & 72; Chancery Ct. R. 170; Superior Ct. Civ. Rule 90.1; Superior Ct. Crim. R. 63; Ct. Comm. P. Civ. R. 90.1; Ct. Comm. P. Crim. R. 62; F. Ct. Civ. R. 90(b); F. Ct. Civ. R. 61 (b); J.P. Ct. Civ. R. 90.1; J.P. Ct. Crim. R. 63.

⁸See *Paramount Communications, supra*.

state and federal courts in Delaware, it has required attorneys appearing before it to be admitted to the Delaware bar or to be formally admitted *pro hac vice* with Delaware co-counsel.⁹ Again, this is a requirement that is unlikely to be changed.

Those requirements are plain enough. The Committee, however, has identified other litigation scenarios in which the outcome is somewhat less clear. These include:

a. Attorneys Working in Delaware on a Non-Delaware Litigation Matter. The Delaware Supreme Court's regulatory framework extends to Delaware attorneys who often work on litigation matters pending in other jurisdictions. Although the exact boundaries are not precisely clear, the basic rule is that the Delaware disciplinary rules apply to any legal practice conducted by a Delaware attorney anywhere, even if another body also regulates that conduct.¹⁰ At the other extreme, Delaware would not claim that litigation work done by an out-of-state attorney passing through Delaware on the Metroliner falls within its regulatory purview, although some might argue that it literally constitutes the practice of law in Delaware.

Another example of conduct that is not generally thought to invoke Delaware's regulatory jurisdiction arises when out-of-state attorneys come to Delaware to take the deposition of a witness in Delaware for a proceeding in another state. That is a normal occurrence, and since another jurisdiction is regulating the conduct of the deposition and the Delaware courts have no direct interest in it, it is normally not thought to constitute the practice of law in the State.¹¹

⁹See Local Rule 83.5 of the Rules of the United States District Court for the District of Delaware (the "District Court Rules"). The Committee notes that the local rules of the United States Bankruptcy Court for the District of Delaware have recently been amended to permit out-of-state lawyers to file certain simple papers without retaining Delaware co-counsel.

¹⁰Thus, the Delaware Supreme Court has taken reciprocal action against members of the Delaware bar for violations of the Rules of Professional Conduct they have committed in other states that were the subject of disciplinary action in those states.

¹¹Of course, if that deposition is pursuant to a commission from the other court, and a subpoena from a Delaware court, then Delaware would have regulatory jurisdiction over it. One question that arises in such cases is whether

b. Non-Delaware Attorneys Providing Advice on a Delaware Litigation Matter.

Non-Delaware attorneys routinely offer advice to clients about Delaware litigation. Sometimes these attorneys are admitted *pro hac vice* in the matter, but oftentimes they are not, and, of course, they cannot be so admitted until the litigation is filed. Delaware has prosecuted out-of-state attorneys for the unauthorized practice of law in personal injury cases who have conducted investigations and settlement discussions before litigation is filed.

c. Attorneys Admitted to Practice in Other Jurisdictions.

Increasingly, law firms of all sizes in Delaware employ associates who are admitted to practice in other jurisdictions. Often these associates work on litigation pending in Delaware, and they are not infrequently asked to take depositions and perform other tasks restricted to lawyers who have been admitted to practice. Usually, such associates are in the process of seeking admission to the Delaware bar, but sometimes they are short-term employees who have no intention of becoming Delaware lawyers. Clients and the system are presumably largely protected by the regulatory scrutiny that exists over those associates' supervisors, but this practice would seem to constitute the unauthorized practice of law.

With respect to Federal District Court practice, the situation may arise where attorneys, admitted in another jurisdiction but practicing and resident in Delaware, might be providing litigation support services to a Delaware-admitted attorney practicing exclusively in Federal District Court. Such practice, although not explicitly prohibited by the District Court Rules, appears to conflict with the spirit of them. Under the District Court Rules, an attorney must either be admitted in Delaware or admitted *pro hac vice* to practice in the District Court. Rule 83.5(c) governs admission *pro hac vice* and provides that an applicant is not eligible for permission to practice *pro hac vice* if he or she: (i) resides in Delaware, (ii) is regularly

the attorneys taking the deposition must be admitted *pro hac vice* in Delaware. The apparently universal current practice is that no such admission is sought.

employed in Delaware, or (iii) is regularly engaged in business, professional or other similar activity in Delaware. Apparently, the District Court Rules contemplate that those engaged in such activities should be admitted to the State bar. Although non-Delaware admitted attorneys resident in Delaware would be prohibited from appearing in the District Court, the question of whether they are prohibited from practicing “federal law,” as opposed to State law, is less clear. Presently, it appears that the only avenue available for regulating the conduct of such attorneys is through their state of admission or their Delaware-admitted supervisors.

The Committee believes that it would be worthwhile to clarify that any lawyer practicing fullor part-time in Delaware (except an in-house or perhaps a federal specialty lawyer) should either be a member of the bar or have applied for admission to the bar, and be under the direct supervision of a Delaware attorney.

d. Summary and Conclusions on Litigation.

The Committee believes that the current regulatory scheme of litigation in Delaware works and that no significant changes are needed. MJP is permitted, but the Delaware Supreme Court has created a regulatory scheme that protects both the public, clients and the system as a whole.

Consideration should be given, however, to more clearly defining what constitutes the unauthorized practice of law. The practice of law in Delaware ought to be defined as either: (1) practicing in its courts (including participation in depositions for cases pending in Delaware and the like); or (2) the private practice of law in Delaware for a substantial period of time. It might not be possible to create precise and encompassing definitions, but the Committee believes that the Delaware Supreme Court ought to regulate any lawyer in private practice practicing in the State (with the possible exception of attorneys whose practice is limited solely to federal specialty matters), but should not attempt to regulate those attorneys who are in Delaware for a short period of time working on a non-Delaware matter.

Proposed Model Rule 5.5 of the Ethics 2000 Commission addresses these issues in part. It provides that “[a] lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.” It then goes on to allow practice when a lawyer has been admitted *pro hac vice* “or is preparing for a proceeding in which the lawyer reasonably expects to be so” admitted or “is otherwise reasonably related to the lawyer’s practice on behalf of a client in a jurisdiction in which the lawyer is admitted to practice.” The last exception appears to plainly allow lawyers to, for example, take a deposition in one state for a proceeding in another. Proposed Model Rule 5.5 also allows a lawyer who is “associated in a particular matter with a lawyer admitted to practice in” the jurisdiction.

Neither the Rule nor the Comment to it is entirely clear as to its meaning and extent. Thus, it might cover the case of a lawyer working in a Delaware attorneys’ office – or it might not. Proposed Model Rule 5.5 also does not define the “unauthorized practice of law.” Through its listed exceptions it defines certain activities as not constituting the unauthorized practice, but this negative “definition” is less than completely inclusive. Moreover, the standard of “reasonably related” is so broad that it could vitiate the Rule. Thus, to the extent that proposed Model Rule 5.5 is adopted in Delaware, it might be advisable to couple it with a formal definition of what constitutes the unauthorized practice of law.

2. *Transactional Lawyers.*

The regulatory status of transactional lawyers is more murky, perhaps in part because the reasons for regulating transactional lawyers are somewhat less compelling than those regulating litigating lawyers. While the conduct of transactional lawyers can have systemic effects--for example, dishonest transactional lawyers can make transactions more difficult and expensive, overall those effects are likely to be less severe and more easily remedied through such devices as lawsuits than the adverse effects caused by litigators. Thus, the primary justification for regulating the actions of transactional lawyers might largely (but not exclusively) be the

protection of clients.¹² Here too, that justification can often be attenuated by the sophistication of many transactional clients. It is worth noting, however, that the Delaware Supreme Court has held that a closing of a sale or refinancing of Delaware real property must be conducted by a Delaware attorney. *See Matter of Mid-Atlantic Settlement Services, supra.*

What is clear is that the work of transactional lawyers can raise a host of MJP issues. The following lists some of the issues identified by the Committee:

a. Working for a Limited Period in Another Jurisdiction. Although litigators can usually apply to be admitted *pro hac vice* while practicing in another jurisdiction, no such procedure exists for transactional lawyers. Yet, transactional lawyers are constantly working for a short period in other jurisdictions.¹³ On any given day, one can expect to find Delaware transactional lawyers working on a deal in New York, , Chicago, Los Angeles, Brussels, or some other city, and one can expect to find out-of-state transactional lawyers visiting clients in Delaware. Under a strict interpretation of the words – and perhaps the California Supreme Court’s decision in *Birbrower* – all of them are guilty of practicing law in jurisdictions in which they are not admitted to practice, but little thought seems to have been given the issue. The Committee believes that this practice will continue because it is economically necessary and that attempts to regulate it would be futile and serve no apparent purpose.

b. Opining on Matters of Delaware Law. Out-of-state lawyers routinely provide written opinions on routine matters of Delaware corporate and commercial law. This practice

¹²The fact that transactional lawyers have known ethical responsibilities, however, and thus may not, for example, lie in negotiations, might well be an important factor in helping to establish the trust that is necessary to accomplish many deals. *But see* D. Schrader, [President’s Corner], *In Re:*, April 2001 (noting that nationally state bar association presidents are worried that far too many attorneys lie in their dealings with other counsel). To the extent this is correct, the regulation of transactional lawyers may be seen as a way to reduce transaction costs, and hence benefits the system as a whole. Though the Committee is aware of no empirical evidence on the subject, to the extent that concepts such as “professional courtesy” are at least partly the result of the regulated status of the profession, then there might be significant – if difficult to capture – systemic benefits from regulating transactional lawyers, so long as those regulatory schemes actually provide the virtues they are designed to advance.

¹³ In-house lawyers often face the same situation.

appears to be close-to-universal, and in fact is encouraged by Delaware attorneys who want to make Delaware law as user-friendly as possible. Such lawyers are not practicing law in Delaware, but like those lawyers giving advice on litigation in Delaware, they are practicing Delaware law. Delaware makes no attempt to regulate such attorneys, and, of course, there would be no easy way to regulate them. But an expansive view of what constitutes the unauthorized practice of law could include such activities within its purview.

c. Practicing Non-Delaware Transactional Law Within Delaware. As described below, Delaware might take the position that attorneys who practiced exclusively in the field of patent prosecution, or some other federal specialty area of the law in Delaware must be members of the Delaware bar. Would the same hold true for transactional attorneys practicing in the State? The answer should seemingly be the same, and that seems to have been the traditional understanding of Delaware attorneys, though it is the Committee's understanding that transactional attorneys not admitted to the Delaware bar might be practicing in the State at this time.

Given what might be ambiguities in the regulatory system at the present, the Committee believes that it might be desirable to provide transactional lawyers more guidance on these issues in the future.

d. Summary and Conclusion on Transactional Lawyers. As with litigators, the Committee believes that there are no serious problems raised by the current regulation of transactional lawyers. Nevertheless, the Committee believes that it would be helpful to clarify just what constitutes the unauthorized practice of law to make clear that out-of-state transactional lawyers are welcome to practice law in the State for relatively brief periods, but that transactional lawyers who maintain a principal office in Delaware should be a member of the Delaware bar. Indeed, the Committee sees no need to distinguish between litigators and transactional lawyers in

this regard. Thus, the Committee's prior discussion of proposed Ethics 2000 Model Rule 5.5 extends to transactional lawyers.

3. In-House Counsel.

The practitioners who would benefit from a clear acknowledgement of current practice and the adoption of the model rules relating to MJP are in-house counsel – attorneys who are employed by, and practice for, corporations. These lawyers receive their compensation for the practice of law from their corporate employer. Like other corporate employees during their legal careers they might be transferred from one place to another and, as a result, their offices might be physically located in states in which they are not admitted to practice law. Their employers typically are concerned that their attorneys are admitted to practice in some jurisdiction and that they remain in good standing in that jurisdiction, but generally are not concerned about in which jurisdiction they are admitted. In-house counsel tend to be employed as commercial generalists or in areas of specialization, such as environmental, securities, antitrust, copyright, patent, labor and benefits, or immigration law. Nevertheless, the practice of using in-house counsel not admitted in the jurisdiction in which they practice leaves these attorneys in a regulatory twilight. There are a large number of in-house attorneys in the United States and probably well over one hundred in Delaware alone. The percentage not admitted in the jurisdiction in which they are located is unknown, but there are many such lawyers in Delaware.

This situation presents a challenge to the current regulatory scheme, which was created before current communications technology and the sheer ease of global corporate practice for attorneys dealing in various fields came into play. When one looks at the purposes of regulating lawyers – public protection and systemic protection – it seems clear that traditional regulation of in-house counsel might not be necessary and deserves review. They are employees of their clients, they are unlikely to handle corporate funds, and – unless they are admitted to the local bar – they will not be appearing in court. Court appearance or participation in ADR processes or

appearances before local administrative bodies can be handled under the rules addressing litigation and transactional counsel. It is conceivable that the current lack of regulation over many in-house attorneys could lead to future problems. In addition, there is a real question as to whether under the current system in-house attorneys are required to be admitted in the states in which they practice and thus they might be, in some, cases, violating the law.

The current state of affairs is therefore uncertain, with neither state regulators nor in-house attorneys clear as to the best way to address the issue. The Committee believes that the status of in-house attorneys presents a compelling case for regulatory reform, but the nature and the extent of what might be done is debatable. Some members of the Committee doubt the practicality of requiring all in-house attorneys to become admitted in the jurisdiction in which they are located.

What then should be done? Should states simply agree not to attempt to regulate most in-house attorneys? That is, should they recognize de jure what is now the de facto situation? That is the solution proposed by proposed Ethics 2000 Model Rule 5.5. Proposed Model Rule 5.5(b)(2)(i) states that a lawyer admitted in another jurisdiction only does not engage in the unauthorized practice of law when that lawyer “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 other employees or its commonly owned organizational affiliate.”

The official Comment explains that:
paragraph (b)(2)(i) recognized that some clients hire a lawyer as an employee in circumstances that may make it impractical for the lawyer to become admitted to practice in this jurisdiction. Given that those clients are unlikely to be deceived about the training and expertise of these lawyers, lawyers may act on behalf of such a client’s other employees or its commonly owned organizational affiliates but only in connection with the client’s matters.

Comment [5] to 5.5 acknowledges the daily and various other real-life aspects that face in-house counsel, as well as the rest of the bar, such as “negotiations with private parties, as well as

negotiations with government officers or employees, appearances in an administrative or rule-making proceedings or before tribunals for which *pro hac vice* admissions are unavailable, and participation in alternative dispute-resolution procedures.”

An alternative approach would be to attempt to create a mid-level status that would require some sort of registration of in-house attorneys, thus, allowing the disciplinary system to cover their activities, but would not require them to take the bar examination or go through the clerkship process, so long as they were admitted and in good standing in another jurisdiction. The Committee believes that serious consideration should be given to such a possibility.

The Committee also notes that at least one national corporate counsel organization¹⁴ advocates the consideration of a new regime for the admission of lawyers containing two options. One option is a national bar examination. Another option is the demonstration of basic competence through admission in one of the fifty states and/or a minimum number of years of practice, continued good standing, agreement to some state’s disciplinary jurisdiction for actions in the state of their in-house practice, and maintaining certain continuing legal education requirements. Either system could be accomplished through a common framework that would facilitate such reciprocity under a “compact” based upon a uniform model Rule. Such a step would, no doubt, require open and thoughtful scrutiny by Delaware, but might provide a useful beginning point for the consideration of our bar, although the Committee is in favor of neither a national bar examination nor a national registry of lawyers. In addition, the Committee notes that several states specifically address the practice of law by non-admitted in-house counsel with specificity.

4. *Federal Administrative and Specialty Lawyers.*

Many of the same issues, considerations and conclusions noted above with respect to in-house counsel apply equally to those attorneys engaged exclusively in federal administrative or

¹⁴American Corporate Counsel Association Report to the American Bar Association, dated February 16, 2001.

specialty law. Although the number of attorneys involved in such practice is limited, the Committee believes that there are attorneys practicing in these areas full-time in the State who are not members of the Delaware bar. Some of these are clearly not “engaged in an activity that has traditionally been performed exclusively by persons who are authorized to practice law.”¹⁵

Like in-house counsel, federal practitioners are required to be admitted to practice in a state. In many cases, the state of admission is not the state in which the administrative court or office is located. In almost all cases, federal administrative agencies and courts have their own rules governing admission and provide for regulation or discipline of an attorney from practice before the agency for a variety of reasons, some of which are unique to the agency and others that relate to proceedings in the attorney’s state of admission.¹⁶

Delaware undoubtedly has an interest in protecting the public within the State and, for that reason, the Committee believes that all attorneys with offices in the State should be subject to regulation by the Supreme Court. A more subtle question, however, is whether attorneys who are admitted to practice in another state and before a federal administrative court or agency, who practice exclusively federal administrative or specialty law should be required to take the Delaware bar exam, thereby demonstrating their proficiency in Delaware law, if they never intend to practice Delaware law, or whether they should be merely subject to the Supreme Court’s disciplinary authority.

Unlike the in-house counsel situation, the Ethics 2000 Rules do not address this issue. Possible options are to: (1) maintain the status quo; (2) clarify present rules to make clear that specialty law practitioners must be admitted to the bar if, in fact, they have an office and practice in Delaware; or (3) provide for a registration/licensing process whereby such practitioners would submit themselves to the jurisdiction of the Supreme Court and its disciplinary rules but would

¹⁵Rule 4 (c) (v) of the Rules of the Board on the Unauthorized Practice of Law.

¹⁶*See, e.g.*, 31 CFR Part 10, governing practice before the IRS; 31 CFR Part 8, governing practice before the Bureau of Alcohol, Tobacco and Firearms; 8 CFR Part __, governing practice before the INS.
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not be required to pass the bar exam if they are admitted to practice and are in good standing in another state and before the federal administrative agency in which they practice. The Committee is divided over which option Delaware should follow, although it notes that there are probably far fewer practitioners in this area than there are in-house counsel.

VI. Conclusion

The Committee believes that the MJP rules in Delaware need some, but not substantial, updating. The boundaries of what constitutes the unauthorized practice of law should be better defined. Overall, though, the Committee believes that the MJP rules in Delaware are working and do not need to be substantially revised.

Respectfully submitted,
Multijurisdictional Practice Special Committee

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