

**THE JOHN MARSHALL LAW SCHOOL
CENTER FOR REAL ESTATE LAW**

ETHICS AND PROFESSIONALISM IN REAL ESTATE TRANSACTIONS

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**ETHICAL AND PRACTICAL ISSUES
IN
MULTIJURISDICTIONAL
REAL ESTATE PRACTICES**

**JANET M. JOHNSON
SCHIFF HARDIN LLP
233 SOUTH WACKER DRIVE, SUITE 6600
CHICAGO, ILLINOIS 60606**

JANET M. JOHNSON is a partner in the Real Estate Group of Schiff Hardin LLP, a law firm headquartered in Chicago, Illinois, where she has practiced since November 1980. Her current practice is concentrated in real estate transactions and development projects. She represents clients throughout the United States in their transactions involving the acquisition, sale and financing of real estate projects, in rezonings, annexations and development or construction contracts for commercial and residential developments; and in lease and ground lease negotiations. Janet has served as an arbitrator of real estate lease disputes through the American Arbitration Association. She is a member of the American College of Real Estate Lawyers (ACREL), CREW Chicago (the Chicago affiliate of CREW Network, an international network of over 8,000 executive level women in all professions supporting the commercial real estate industry), the International Association of Attorneys and Executives in Corporate Real Estate (AECRE) and a number of bar associations. She also serves on the Board of Directors of CREW Chicago and on the Advisory Committee to the Center for Real Estate Law of The John Marshall Law School in Chicago, where she has taught Commercial Real Estate Transactions as an adjunct professor in the school's LLM Program. Janet has authored a number of articles published in professional journals, including a Chapter entitled "Landlord's Duties and Liabilities" in the Illinois Institute for Continuing Legal Education Manual on Commercial Landlord Tenant Practice. She has also spoken to professional organizations on many different topics of interest to real estate lawyers and other professionals. She received her Bachelor of Business Administration degree in Accounting in 1974 and her J.D. in 1980 from the University of Iowa.

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**ETHICAL AND PRACTICAL ISSUES
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**Janet M. Johnson
Schiff Hardin LLP**

I. Introduction

A. The Legal Profession Is Regulated by the States.

The practice of law in the United States is regulated by the individual states. Each state sets its own qualifications for admission to the bar, and each state prohibits any person not admitted to that state's bar from practicing law within that state, even though the person may be a member of the bar in good standing of one or more other states. Although every state provides an exception to this rule by allowing its courts to grant a *pro hac vice* motion, whereby an attorney admitted in another state is permitted to appear before the court in connection with a single litigated matter,¹ there is no similar mechanism permitting an out-of-state attorney to engage in activities involving transactional or other non-litigation matters.

B. Every State Forbids the Unauthorized Practice of Law.

Three groups of persons come under every state's prohibition on the unauthorized practice of law: persons who have never been admitted to the practice of law in any jurisdiction (*i.e.*, laypersons); persons who have been admitted to the practice of law in the state, but have been formally suspended or disbarred or who have voluntarily allowed their licenses to lapse; and persons who are members in good standing of the bar of one or more jurisdictions, but who engage in the "practice of law" in a state in which they are not admitted.² This paper focuses on

¹ The Illinois requirements for *pro hac vice* admission of foreign attorneys in isolated cases are found in Illinois Supreme Court Rule 707. This rule and all other Illinois Supreme Court Rules are available on the Court's website at www.state.il.us/court/SupremeCourt/Rules/default.asp. The adverse consequences for a client that engages a lawyer who fails to be properly admitted *pro hac vice* in a litigation matter can be enormous. See Fruin v. Northwestern Medical Faculty Foundation, Inc., 194 Ill. App. 3d 1061, 551 N.E.2d 1010 (1st Dist. 1990). In Fruin, a Wisconsin lawyer filed a complaint in Illinois prior to the expiration of the statute of limitations; an appearance by Illinois lawyer was filed after the statute of limitations had run. The trial court granted a motion to dismiss the complaint with prejudice and the appellate court affirmed, declaring the complaint a nullity because it had not been signed by an Illinois admitted attorney. 194 Ill. App. 3d at 1064, 551 N.E.2d at 1012. However, another Illinois Appellate Court case, McEvers v. Stout, 218 Ill. App. 3d 469, 578 N.E.2d 321 (4th Dist. 1991), declined to follow Fruin on the grounds it improperly penalized the client rather than the lawyer. 218 Ill. App. 3d at 472; 578 N.E.2d at 322. Thus, the law in Illinois on this subject is not yet settled. For a summary of the requirements for *pro hac vice* admission in all states, see the American Bar Association's website for the Center for Professional Responsibility, www.abanet.org/cpr/mjp.

² While the author has not conducted a study of all of the Illinois unauthorized practice of law cases, most real estate lawyers are familiar with Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 34 Ill. 2d 116, 214 N.E.2d 791 (1966), in which the Illinois Supreme Court held that drawing up offers to purchase real estate, and filling in blanks in deeds, mortgagees, contracts and other legal instruments is the practice of law. However, as explained in a more recent case, King v. First Capital Financial Services Corp., 215 Ill. 2d 1, 828 N.E.2d 1155 (2005), while the (Con't)

the third category and examines the issues that arise when a real estate practitioner, licensed to practice law in one state, is considered to be engaged in the unauthorized practice of law in another state, and the consequences of engaging in the unauthorized practice of law in another state.

C. Traditional Justifications for Prohibiting the Unauthorized Practice of Law.

Several justifications are put forth for prohibiting the practice of law by any person not licensed in a jurisdiction. One difficulty is that in stating these justifications, traditionally there has rarely been a distinction made between persons who have never been attorneys, attorneys who have been admitted to practice in the jurisdiction but are either disbarred, under suspension, or otherwise prohibited from practice in the jurisdiction, and attorneys who have been admitted to practice in another jurisdiction and remain in good standing in that jurisdiction, but have never been admitted to the jurisdiction in question.³

1. Assurance of Competent Representation.

The primary purpose of unauthorized practice of law statutes is to protect state residents from incompetent legal representation by persons who have not been trained in the law and who are unable to recognize legal issues pertaining to the client's particular situation. *See e.g., King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 12, 828 N.E.2d 1155, 1162 (citing *Herman v. Prudence Mutual Casualty Co.*, 41 Ill. 2d 468, 479-80, 244 N.E.2d 809 (1969)). This concern goes far beyond simply making sure that whoever provides legal services merely "knows the law" in the objective sense of knowing what the statutes and rules of law say. It also is concerned with a person who has been trained to "think like a lawyer," who can recognize subtle legal issues that are likely to lurk in an even unfamiliar area of law, who has some competence in understanding possible practical consequences to the client of particular actions, who can recognize the questions that must be asked and researched, who knows how to frame the questions, and who knows how to conduct the research. Most of these skills lie at the center of the everyday practice of attorneys, but are likely to be quite foreign even to sophisticated laypersons who are familiar with statutes and rules of law.

preparation of notes and mortgages is without doubt the practice of law, there is a "*pro se* exception" to what would otherwise be the unauthorized practice of law, first articulated in *Quinlan*. The *King* court held where employees prepared loan documents for their employer's own benefit for loan transactions to which the employer was a party, they were not engaged in the unauthorized practice of law. The fact that the lenders charged their borrowers a fee for preparing the documents "did not transform their conduct into the unauthorized practice of law." 215 Ill. 2d at 22, 828 N.E.2d at 1167. However, under the *King* case, if an independent third party prepared the loan documents for the lender in the transaction, the *pro se* exception would not be available. 215 Ill. 2d at 23, 828 N.E.2d at 1168-69.

³ For a comprehensive review of many state cases and ethics opinions involving claims of unauthorized practice of law involving banks, title insurance companies and other non-attorneys involved in real estate title, conveyances and closings, and other types of real estate matters, as well as cases involving the practice in a state by an attorney not licensed in that state, *see* John C. Murray, *The Unauthorized Practice of Law: What is Prohibited in Illinois Real-Estate Transactions*, a 2005 article available online from the First American Title Insurance Company website at www.firstam.com/content.cfm?id=3394. *See also* Celeste M. Hammond, *The Unauthorized Practice of Law: How Transactional Lawyers Can Avoid It*, 19 Prob. & Prop. 54 (July/August 2005).

2. Assurance of Representation by an Attorney in Good Standing.

The prohibitions against the unauthorized practice of law apply to disbarred or suspended attorneys as well as to laypersons and out-of-state attorneys. Prohibiting an attorney whose misbehavior rises to the level that disbarment or suspension from practicing law is appropriate and furthers the interest of the state in protecting its citizens from representation that, although it may be competent, has been found to be questionable ethically. Likewise, the argument goes, by prohibiting an attorney not licensed in the state from practicing, a state's citizens will be assured only those attorneys who meet their own state's ethical standards will be holding themselves out to clients as attorneys.

3. Assurance of Loyalty and Confidentiality.

Attorneys are subject to discipline for failing to serve their clients disinterestedly and for revealing client information subject to the attorney-client privilege. Attorneys are also subject to a variety of other rules, including, for example, levels of competence, conflict of interest rules, treatment of client funds, and diligence. None of these factors is present when a non-attorney presumes to represent a client. Thus a client has much greater assurance of disinterested service and confidentiality when he or she is represented by a licensed attorney.

4. Assurance of Familiarity With Local Law and Procedures.

Attorneys licensed within a jurisdiction are presumed to be familiar with that jurisdiction's laws and the often intricate trial and appellate procedures prevailing in that jurisdiction, as well as the unique nuances of real property law and related disciplines as interpreted by the courts in that state. Attorneys not licensed in the state would not have the same familiarity or competency.

D. Applicability of Traditional Justifications to Attorneys Licensed in Other States.

Few of the traditional justifications for prohibiting the unauthorized practice of law appear to be very applicable to transactional attorneys (such as real estate lawyers) licensed in other states. Instead, most seem to be more applicable laypersons and disbarred or suspended attorneys, or to attorneys practicing before courts or other tribunals in a particular jurisdiction.

1. Similar Training and Experience.

Attorneys licensed elsewhere have the same level of training and experience as in-state attorneys. They deal with the same legal issues and problems and are familiar with the same modes of legal reasoning and methods of research that prevail throughout the country. Although there are some variations from state-to-state, most real estate law and practice follow the same general common law principles. There are exceptions, however, such as Louisiana, which relies on civil law rather than the common law.

2. Similar Admission and Disciplinary Standards.

Out-of-state attorneys are subject to similar admission and disciplinary standards. Codes of professional conduct are quite similar today from state to state, with 49 states having adopted the Model Rules of Professional Conduct (“Model Rules”) adopted by the American Bar Association (“ABA”), though with variations in each state.⁴ California has developed its own rules instead of adopting the Model Rules.⁵ All state bars require similar bar examination procedures and fitness examinations. It is doubtful that any differences that do exist from state to state are of such a magnitude that they would render a lawyer admitted in one state and continuing in good standing immediately suspect in any other state.

3. Practice Involves Federal and Uniform Laws.

Much of the modern practice of law, including the tax planning, environmental and bankruptcy specialties often associated with real estate transactions, involves federal law. Also an increasingly large portion of state law is based on various uniform laws, such as the Uniform Commercial Code, the Uniform Partnership Act, the Uniform Limited Partnership Act, and to a lesser extent, the Model Business Corporation Act and the newer Model Limited Liability Company Act. Many of these federal or uniform laws cover areas that are particularly prominent in cross-border practice: real estate, taxation, corporate law, commercial and financial law, and other areas. Thus, the concern with respect to familiarity with local laws may be overstated for transactional practices.

E. Remaining Reasons.

What survives these criticisms as reasons for prohibiting an out-of-state attorney from practicing law within a state? There really are only three, only two of which are heavily relied upon in the cases or state ethics opinions dealing with the unauthorized practice of law.

1. Lack of In-State Control Over Qualifications.

That the out-of-state lawyer has not been subjected to the state’s process for evaluating the intellectual and moral fitness of the lawyer to practice law is often cited as the reason for prohibiting an out-of-state attorney from practicing in the state. Thus, even though the lawyer has been qualified elsewhere, the state cannot really be sure as a result of its own inquiry that the lawyer qualifies. Furthermore, if problems develop during a representation, the out-of-state attorney would not be subject to the state’s rules of professional conduct and therefore not

⁴ One such important variation concerns when an attorney is permitted or required to reveal confidential information received from a client. Also, Illinois has not chosen to adopt Model Rule 5.7 Responsibilities Regarding Law-Related Services (see Appendix H for the text of Model Rule 5.7), which has been adopted in a number of other states. The complete ABA Model Rules can be found online at the ABA website at http://www.abanet.org/cpr/mrpc/mrpc_toc.html. Links to the websites containing the ethical rules for all 50 states and the District of Columbia can also be found online at the ABA website at <http://www.abanet.org/cpr/links.html>.

⁵ See www.abanet.org/cpr/mrpc/model_rules.html.

subject to discipline under those rules.⁶ As indicated in Part III of this paper, however, this concern would no longer be a valid one in those states that adopt the new Model Rule 5.5.

2. Lack of Familiarity with State Law and Procedure.

Real estate is one area where there are numerous state peculiarities with respect to the forms required for recordable documents, the customs and practices regarding the status of title and means of taking title (*e.g.*, land trusts, tenancies by the entireties, community property), as well as the manner in which real estate loans are secured (*e.g.*, mortgages v. deeds of trust), the exercise of remedies associated with the security instruments (*e.g.*, foreclosure v. exercise of power of sale), the procedures and required entitlements for the development or redevelopment of property (*e.g.*, zoning laws), state environmental laws (some of which vary considerably from the federal laws), and property taxation and real estate transfer tax systems. Thus, lack of familiarity with a state's laws, which is often cited as the reason to prohibit non-admitted attorneys from practicing law in a state, does have some merit as applied to the practices of real estate transactional attorneys.

Although the lack of familiarity with state law and procedures is often put forth as a primary justification for the prohibition on the unauthorized practice of law, it does not, in practice, seem to control court decisions. In most cases involving the unauthorized practice of law, courts do not distinguish between state and federal law practices when finding an out-of-state attorney in violation of the state's unauthorized practice statute.⁷ Nor has the application by an attorney of a foreign state's laws to a client's situation that does not otherwise involve the unauthorized practice of law generally been the cause of disciplinary proceedings.

It seems to be generally understood that the special expertise of a lawyer resides more in the knowledge of how legal questions should be framed, how to research those questions, and the recognition of legal issues that would likely escape the notice of a layperson than in the factual knowledge of a particular jurisdiction's law. Although nothing in the statutes and rules of most states prohibiting the unauthorized practice of law explicitly allows an out-of-state attorney, sitting in the attorney's office in his or her own state, to advise an in-state client regarding another state's laws, there is virtually no record of an attorney being disciplined for doing so. Many attorneys evidently feel quite comfortable advising their in-state clients on the laws of another state.⁸ There are some recent cases, cited later in these materials, however, that suggest the lack of license to practice law in the state in which a transaction occurs may be a basis for liability to clients or third parties.

⁶ Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. Tex. L. Rev. 665, 689 (1995).

⁷ See, *e.g.*, the Gould and Savitt cases discussed in Part III.B.3 *infra*.

⁸ Indeed, Model Rule 1.1 requires all lawyers to provide "competent representation" (that requiring "the legal knowledge, skill, thoroughness and preparation necessary for the representation"). Illinois Rule 1.1(b) currently prohibits a lawyer from "represent[ing] a client in a legal matter in which the lawyer knows or reasonably should know that the lawyer is not competent to provide representation without the association of another lawyer who is competent to provide such representation." See Appendix H. The ISBA/CBA Report (*see* Part III.B.2 below) recommends Rule 1.1(b) be deleted as part of adopting the new ABA Model Rules. See footnote 2 to Appendix H.

3. Competition with In-State Attorneys.

Competition with in-state attorneys is rarely, if ever, stated explicitly in judicial decisions or bar opinions. Although state control over the mental and character fitness of those who purport to provide legal services to its citizens is certainly the paramount justification, nevertheless competition, while impossible to quantify, undoubtedly plays a significant role. This probably best explains the lack of reciprocity for attorneys licensed in another state seeking admission to the bar of states such as California, Florida, Hawaii and Indiana. Instead of offering reciprocity, those states require all attorneys take the bar examination.⁹

F. Today's Profession Is Far Different than in the Past.

Throughout much of American legal history, when the practice of law was primarily local, the pattern of local regulation of the practice of law had little impact. In our increasingly mobile and technologically connected society, however, local regulation and registration of attorneys can pose formidable barriers to providing efficient and effective counsel to their clients.

1. Clients Moving or Conducting Business Out of State.

Clients may move to another jurisdiction, but may wish to continue their professional relationship with the attorney with whom they have been working and who is already intimately familiar with their business, financial, personal, and legal affairs and goals. Furthermore, it may be prohibitively expensive for the client to pay another attorney for the time it takes just to “get up to speed” with the client’s affairs. Real estate developers and investors today often develop or purchase projects in other states. Frequently, individuals purchase residences in multiple states. More often than not, the first attorney such clients will turn to for advice is the one they have grown accustomed to using in their home state.

2. Interdisciplinary Nature of Real Estate.

Real estate practices today often include far more than is traditionally considered “real estate” or “dirt” law. Sophisticated federal and state tax planning is often involved in representing a client in a real estate transaction, as well as financial planning issues, estate planning, and other issues involving corporate and partnership or limited liability company law, business succession planning, and federal environmental statutes. Even though the client may reside or have his or her primary business interests in the attorney’s home state, and certain of the more traditional “dirt” law issues may be strictly local, others may well involve property or persons in multiple states, as well as the laws of those states. To sever the client’s affairs along state lines would nearly always be highly artificial as well as detrimental to the client’s interests.

⁹ For a list of the requirements of all jurisdictions for admission to practice law in that jurisdiction *see* item (4) in the Chart on State Implementation of ABA MJP Recommendations that can be found on the ABA website at <http://www.abanet.org/cpr/mjp/recommendations.pdf>. It may not be up-to-date, but it does provide citations and hyperlinks for finding the actual requirements of the particular jurisdiction.

The same interdisciplinary and multi-state issues face corporate attorneys whose clients may be incorporated in one state yet have a principal place of business in another state or branches or subsidiaries in several different states. Bankruptcy or work out attorneys representing clients with assets and/or creditors or debtors in several states, whose practices are governed primarily by federal bankruptcy law, still must deal with laws in multiple states pertaining to property, security interests, fraudulent conveyances, and rights as against bankrupt tenants or landlords.

3. Clients' Right to Counsel of Their Choice.

There is increasing recognition that the right of clients to counsel of their choice may involve the choice of counsel who is not licensed to practice in the relevant jurisdiction. Often this situation arises where a client of an attorney moves to another state, but still wishes to have his or her legal affairs handled by an attorney already familiar with the client's affairs. That lawyer is likely one who the client trusts and is someone with whom the client has developed a working rapport. A client's desire to use a particular attorney may also arise where that attorney has gained a particular expertise the client wishes to exploit, or where the client has been referred to an attorney by a friend, relative, or acquaintance of the client who has been particularly satisfied with the attorney's representation. For real estate developers, purchasers and landlords, having one attorney or set of attorneys familiar with the key terms they wish to see in all of their purchase, construction and other contracts or in all of their leases also may be key to cost-effective, efficient and consistent representation. *See* Raymond J. Werner, *Licensed in One State, But Practicing in Another: Multijurisdictional Practice*, 17 *Probate and Property* 6, 9 (March/April 2003) (the "Werner Article").

II. Lawyers Must Be Aware of Rules and Consequences of Violating Unauthorized Practice of Law Prohibitions

As the number and frequency with which attorneys represent clients involved in out-of-state transactions seems to be increasing, the number of civil and criminal cases against lawyers by clients, third parties and the states also seems to be on the rise. Attorneys involved in real estate transactions outside the state in which they are admitted to practice need to be aware not only of the disciplinary rules applicable in the state in which they are licensed, but also in the other states in which they are involved in real estate transactions. They should also be aware of the potential cost of "practicing law" in states where one is not licensed. Violating the unauthorized practice of law statutes can lead to a number of different, adverse consequences.

A. Claims for Damages Filed by Third Parties.

Attorneys not authorized to practice law in a state may find themselves subject to claims for damages by third parties. In *Fogarty v. Parker, Poe, Adams and Bernstein, L.L.P.*, 961 So.2d 784 (Ala. 2006), *as modified on denial of rehearing* (Jan. 12, 2007), the plaintiffs, who were minority investors in a failed real estate venture in Alabama, brought a lawsuit against the individual North Carolina lawyers and their law firm that had represented the majority

shareholder in the venture,¹⁰ and one or more of its individual shareholders. The counts against the lawyers and law firm included claims for: (1) the unauthorized practice of law, (2) fraud, suppression and misrepresentation, (3) conspiracy to defraud and suppress, and (4) violations of the Alabama Limited Liability Company Act and Business Corporation Act for refusal to provide copies of the venture records. *Id.* at 787. The Supreme Court of Alabama refused to dismiss these counts against the lawyers and their firm, although it did dismiss a number of other causes of action. *Id.* at 795.

In analyzing the claims for the unauthorized practice of law in Alabama, the court cited the Alabama statute that makes it a misdemeanor criminal offense to engage in the unauthorized practice law in Alabama or to conspire with, aid or abet another person, firm or corporation in the commission of the unauthorized practice of law. *Id.* at 791. It also cited Armstrong v. Brown Service Funeral Home West Chapel, 700 S.2d 1379 (Ala. Civ. App. 1997) (claim against funeral home for charges related to legal services in assisting in completion of forms), and McMahon v. Advanced Title Services Co. of West Virginia, 216 W.Va. 413, 607 S.E.2d 519 (2007), for the proposition that Alabama, as well as many other states, recognizes a private cause of action for injuries caused by the unauthorized practice of law. *Id.* at 790-91.¹¹

There is no reported case dealing with the ultimate disposition of this case against the lawyers and their firm, which means it may have been settled. Nevertheless, the lesson is clear – disgruntled or dissatisfied investors may use an unauthorized practice of law claim as another arrow in the quiver with which to seek deep pockets for recovering their losses from a failed venture. Whether they will be successful or not depends on the law of the state in which the lawyers are practicing without a license.

The King case in Illinois (cited at footnote 2 *supra*) temporarily settled the issue as to whether a private cause of action for claims for damages by third parties against non-attorneys for the unauthorized practice of law in Illinois. It held there was none – “[i]ts plain language does not provide for any other remedy [than a contempt of court sanction] Had the legislature intended to provide a cause of action for damages violation of the Attorney Act, it could have easily done so.” 215 Ill. 2d at 27, 828 N.E.2d at 1170. The plaintiffs in the King

¹⁰ It is unclear from the facts of the case whether the majority shareholder was a corporate manager of the two limited liability companies, as well as the majority shareholder in the corporation that was sued. There were apparently two limited liability companies and one corporation in which the plaintiffs were investors.

¹¹ The McMahon court cited cases in Arkansas, Illinois, Washington, the District of Columbia and Michigan as recognizing a private cause of action for damages against one not licensed to practice law, but noted a case in Hawaii that held the “statutory authorization of the attorney general and any bar association to seek declaratory judgment and injunctive relief in cases of unauthorized practice of law . . . [under the relevant Hawaii statute] should be regarded as exclusive” Reliable Collection Agency, Ltd. v. Cole, 59 Haw. 503, 510, 584 P.2d 107, 111 (1978). The Illinois case cited by the McMahon court, Herman v. Prudence Mutual Casualty Company, 41 Ill. 2d 468, 244 N.E.2d 809 (1969), held only that the plaintiff could seek injunctive relief against the unauthorized practice of law. However, the later King case, cited at footnote 2 *supra*, held there was no private cause of action for damages for the unauthorized practice of law in Illinois. 215 Ill. 2d at 27; 828 N.E.2d at 1170. A subsequent amendment to the Illinois Attorney Act, 705 ILCS 205/0.01 *et. seq.* provides for actual damages as a remedy for violation of the Act so that out-of-state attorneys practicing in Illinois without being admitted may be subject to a suit for damages, just as Illinois licensed lawyers practicing in Alabama or another state that does recognize a private right of action for damages may be.

case, a class of borrowers that had been charged document preparation fees by a lender as part of their loan closings, were not entitled to damages, even when the documents were prepared by an unlicensed third-party corporation. The plaintiffs also were not entitled to be reimbursed for the fees paid to a third party document preparation company under the Illinois voluntary payment doctrine. 215 Ill. 2d at 36, 828 N.E.2d at 1175.¹²

After the decision in King, the Illinois legislature amended Section 1 of the Illinois Attorney Act, 705 ILCS 205/0.01 *et seq.*, to provide for actual damages as a remedy for a violation of the Attorney Act, which became effective August 24, 2007. *See* 2007 Ill.Legis.Serv. P.A. 95-410 (S.B. 148)(West). While neither the King case nor the revised Illinois Attorney Act addresses the issue in the context of a claim for damages arising out of the unauthorized practice of law against out-of-state attorneys practicing in Illinois without a license, it seems likely the Illinois Supreme Court would hold such a right exists. Of course, as the Fogerty and King cases illustrate, because the regulation of the unauthorized practice of law is the province of the states, one could imagine a situation where a real estate venture has “gone bad” involving properties in multiple states and investors in multiple states. In such a situation, one could easily see that a disgruntled investor suing an attorney in one state could have a very different result than if he or she sued that attorney in another state.

B. Disallowance of Claims for Fees by Lawyers Not Admitted to Practice in a State Against Their Clients.

Probably the most widely known recent case in which an out-of-state law firm was denied the right to pursue a claim for attorneys’ fees against a client in a state in which no partner of the law firm had been admitted to practice is Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County, 17 Cal. 4th 119, 949 P.2d 1 (1998). The case arose out of a falling out between a New York based law firm that had agreed to represent ESQ Business Services, Inc., a California corporation with its principal place of business in California, in pursuing a claim against a computer company for breach of a software development and marketing contract that stated it was to be governed by California law. Several Birbrower attorneys had traveled multiple times to California to meet with the client and the representatives for the computer company to discuss strategies, to make recommendations to ESQ, to interview potential arbitrators, and later to discuss and negotiate a proposed settlement. The case never went to arbitration because it was settled. In addition, while ESQ and Birbrower had initially signed a contingent fee representation agreement in New York, that agreement was modified to a fixed fee contract before the settlement was finalized. 17 Cal. 4th at 124-25, 949 P.2d at 3-4.

Sometime after the settlement, ESQ sued Birbrower for malpractice and other related claims, and Birbrower filed a counterclaim for attorneys’ fees for work performed both in New York and California. ESQ argued the fee agreement was unenforceable because Birbrower had

¹² The King court cited as the definitive statement of the voluntary payment doctrine Illinois Graphics Co. v. Nickum, 159 Ill. 2d 469, 497, 639 N.E.2d 1282 (1994), which said: “The rule is that in the absence of fraud, misrepresentation, or mistake of fact money voluntarily paid under a claim of right to the payment, with full knowledge of the facts by the person making the payment, cannot be recovered unless the payment was made under circumstances amounting to compulsion.” 215 Ill. 2d at 30; 828 N.E.2d at 1171.

engaged in the unauthorized practice of law in California. The trial court agreed, finding none of the Birbrower attorneys were admitted to practice in California, they had provided legal services in California, and under California law, “no one may recover compensation for services as an attorney at law in this state unless [the person] was at the time the services were performed a member of The State Bar.” 17 Cal. 4th at 126, 949 P.2d at 4. On appeal by Birbrower, the California Supreme Court agreed with the trial court that Birbrower and the attorneys involved in the ESQ matter had engaged in the unauthorized practice of law in California, and could not recover fees for services performed in California. The California Supreme Court parted ways with the trial court, however, by holding that, to the extent Birbrower could demonstrate that certain of the legal services for which it was seeking compensation were provided to ESQ in New York, Birbrower would be entitled to recover those fees. 17 Cal. 4th at 140, 949 P.2d at 12.¹³

The California unauthorized practice of law statute at the time (Business and Professional Code section 6125) simply stated “No person shall practice law in California unless the person is an active member of the State Bar.” 17 Cal. 4th at 123-24, 949 P.2d at 2. In 2004, a number of years after Birbrower, the ABA proposed new Model Rules applicable to multijurisdictional practices discussed in Part III of this paper. California has now adopted rules similar to the ABA Model Rules 5.5 and 8.5, but it is not likely the new Model Rules would have made a difference in the Birbrower case. As discussed in more detail in Part III.A.1 below, it is likely the Birbrower attorneys would have had a difficult time meeting the exemptions in Section 5.5(c) of the Model Rules, particularly because it does not appear from the facts of the case that ESQ’s business had any connections to New York or that it had any prior connection to the Birbrower firm or its attorneys prior to the representation that led to ESQ’s claim against the Birbrower firm and attorneys.

A later California case, Estate of Condon, 76 Cal. Rptr. 2d 922 (1998), reached a different result as to the right of a Colorado attorney who had represented the co-executor of a will in an estate matter in California to collect his fees. The California probate court initially denied the Colorado attorney fees rendered to the estate under Section 6125 of the Business Code, but the Court of Appeal reversed the trial court’s decision. The basis for the decision was that “the state of California has no interest in disciplining an out-of-state attorney practicing law on behalf of a client residing in the lawyer’s home state.” Id. at 927. According to the court, “the client’s residence or its principal place of business is determinative of the question of whether the practice is proscribed by Section 6125” and thus the attorneys fees would be allowed. Id. at 928.

¹³ While the Birbrower case created quite a stir in the legal community when the opinion was issued, it should have been no surprise to New York and California lawyers. As far back as 1965, the New York Court of Appeals had denied a California admitted attorney the right to recover legal fees against a New York resident wife the California attorney represented in matrimonial litigation in New York even when he had advised and consulted with the wife and her New York attorneys in New York and Connecticut proceedings. Spivak v. Sachs, 16 N.Y.2d 163, 211 N.E.2d 329 (1965). According to the court, the California lawyer was engaged in practicing law in New York in violation of Section 270 of the New York Penal Law. The court refused to read into the statute an exception for a single isolated incident. 16 N.Y.2d at 166-67, 211 N.E.2d at 330-31.

For a complete summary of the cases in various jurisdictions allowing or not allowing non-admitted attorneys to recover their attorneys fees for services rendered in a state in which they are not admitted, see *Rights of attorney admitted in one state to recover compensation for services rendered in another state where he was not admitted to the bar*, 11 A.L.R.3d 907. The cases cited include Illinois cases dating back to 1885 and 1890 that refused to allow attorneys not admitted to practice in Illinois from recovering attorneys' fees for matters in which they were engaged in the practice of law in Illinois.

The most recent case in Illinois denying an out-of-state attorney the right to recover his attorney's fees for work performed in the State of Illinois is Lozoff v. Shore Heights, Ltd., 35 Ill. App. 3d 697, 342 N.E.2d 475 (2d Dist. 1976), *aff'd*, 66 Ill.2d 398, 362 N.E.2d 1047 (1977). The Lozoff case involved a claim for attorney's fees by a Wisconsin admitted attorney against a corporation, Shore Heights, Ltd., that was the beneficiary of a land trust owning 209 lots in Kendall County, Illinois. Attorney Lozoff represented a potential purchaser of the lots in negotiating a contract between his client, Flintlock Investments, an Aurora, Illinois-based firm, and Shore Heights that was entered into but never consummated. After the Flintlock-Shore Heights contract was terminated, Lozoff proposed to Shore Heights' attorney that Lozoff be employed by Shore Heights to sell the lots to Aldridge Construction Company, an unsuccessful bidder at the same time as the Flintlock contract was negotiated. The president of Shore Heights sent a letter (following a meeting between Shore Heights' attorney and general manager) to Lozoff agreeing to pay attorneys fees of \$65,000 to Lozoff for legal services in connection with a "land agreement" with Aldridge for the Kendall County properties. 35 Ill. App. 3d at 698, 342 N.E.2d at 477.

Although a contract was entered into with Aldridge, it was not consummated, and Lozoff was not paid. He filed suit for the \$65,000 in attorneys fees against Shore Heights (and the officers of Shore Heights individually) claiming the reason the sale failed to close was the "refusal, failure or inability" of Shore Heights to comply with the contract. 35 Ill. App. 3d at 698-99, 342 N.E.2d at 477. The court held that Lozoff had practiced law in Illinois without being licensed, and because there was no exception to the statutory rule that legal fees cannot be paid to persons other than licensed attorneys, Mr. Lozoff could not recover his claimed attorneys fees. 66 Ill. 2d at 401-02, 362 N.E.2d at 1048-49. There may be exceptions for out-of-state attorneys representing out-of-state clients (or clients domiciled in the attorney's home state) in another state, as the Condon case suggests, but attorneys need to be aware of the potential problems when representing clients in states in which they are not admitted to practice law.

The Birbrower and Lozoff cases, and the New York case cited at footnote 13 *infra*, make it very clear that, at least in California, Illinois and New York, an attorney who is admitted in another state and who is not admitted in one of these three states (but who represents a client in one of these three states) will not be able to recover his or her attorneys fees from the in-state client if the client fails to pay that out-of-state attorney.

C. Malpractice Claims for Damages Filed by Clients.

The opinion in the Birbrower case did not address the merits of the initial malpractice claim made by ESQ. However, lawyers must be mindful of ABA Model Rule 1.1 (adopted in Illinois and most, if not all, states) that requires a lawyer to "provide competent representation to

a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.” As noted in the Werner Article (p. 9):

If the lawyer knows or is concerned that a certain legal issue may be treated differently under the law of a state that governs a transaction, the lawyer is duty bound to investigate that issue and react accordingly. Acquiring knowledge of relevant law and using it are merely aspects of the professionalism that sophisticated clients expect and to which all clients are entitled. Moreover, the lawyer has an obligation to explain matters to the client so as to enable the client to make an informed decision regarding matters that are the subject of the representation. MODEL RULE 1.4(b). If the lawyer believes that there are limits on the lawyer’s ability to represent the client, the lawyer must so inform the client so the client can decide how to proceed.

While not directly involving a malpractice claim arising out of a transactional real estate practice, a recent Illinois Supreme Court malpractice case, Tri-G, Inc. v. Burke, Bosselman and Weaver, 222 Ill. 2d 218, 856 N.E.2d 389 (2006), deserves mention because of the reasons for the judgment against the law firm, and the fact that the original claims in the litigation by the disgruntled client arose out of a real estate development financing that went bad. In the underlying case, the developer (Tri-G) had obtained a bank loan to finance the construction of homes on several lots. Tri-G claimed the written loan documents did not contain all of the terms of the loan that had been orally agreed to by one of the principals of Tri-G and the lender’s loan officer initially assigned to the loan. 222 Ill. 2d 228-36, 856 N.E.2d at 396-400.

After the original loan officer left the employment of the lender and a new loan officer was assigned, Tri-G claimed payouts from the construction loan were slowed down to such an extent (and ultimately ceased) that Tri-G was unable to pay its suppliers. Tri-G also claimed the lack of funding from the lender caused Tri-G to have to sell off some of its lots at less than fair market value and the lender later foreclosed on 14 open construction loans. Tri-G sued the lender in 1981 on various theories and was represented by a number of different law firms during the period of time between 1981 and 1987. At some point, the court set a final trial date for May 11, 1987.

Approximately three months before the final trial date, Tri-G engaged the law firm of Burke, Bosselman and Weaver (“BBW”) to represent it in the case, although BBW did not file an appearance in the case until one week before the trial date. 222 Ill. 2d at 226-27, 856 N.E.2d at 395. When the trial date came, the lawyer for Tri-G assigned to the matter by BBW appeared and stated “not ready” in response to whether the plaintiff was ready to begin its case. The trial court judge dismissed the case with prejudice, and the Appellate Court later dismissed an appeal of that ruling. Tri-G hired new counsel to file a new complaint against the lender which was also dismissed on the grounds of *res judicata* and the court imposed sanctions against the law firm that represented Tri-G in the second action. 222 Ill. 2d at 227, 856 N.E.2d at 395.

Two years after the dismissal of the first case, Tri-G filed a malpractice suit against BBW. The trial of the malpractice suit essentially was a trial on the merits of the Tri-G claims against the lender. 22 Ill. 2d at 226-27, 856 N.E.2d at 395. Tri-G sought damages of only \$750,000 against the law firm in its claim against BBW. After the trial in Tri-G’s case against

BBW, the jury found that, if the law firm had not been negligent, Tri-G would have recovered compensatory and punitive damages totaling over \$2.3 million from the lender – more than three times what Tri-G had sought from BBW. 222 Ill. 2d at 240, 856 N.E.2d at 402.

The Appellate Court rejected BBW's argument that the awards of compensatory and punitive damages Tri-G claimed it would have recovered from the lender had BBW sought leave to amend the complaint against the lender were speculative because it was impossible to know if the trial court in the underlying suit against the lender would have granted the motion to amend. According to the Appellate Court, the objective in a malpractice lawsuit is to establish what the result should have been, and the motion to amend "should have been granted because it would have been proper under the prevailing rules of pleading." Tri-G, Inc. v. Burke, Bosselman and Weaver, 353 Ill. App. 3d 197, 214, 817 N.E.2d 1230, 1248 (2d Dist. 2004). The Appellate Court also held BBW was responsible for Tri-G's attorneys' fees and costs because the Illinois Consumer Fraud Act allows such fees, and Tri-G would have prevailed had its case against the lender gone to trial. 353 Ill. App. 3d at 225, 817 N.E.2d at 1257.

The Supreme Court held where there was no basis in the law or the record to support a verdict in the amount of compensatory damages found by the jury, it was obligated to correct the verdict award on a remittitur to the amount Tri-G had asked for at trial, conditioned on Tri-G's consent (otherwise a new trial would be ordered). 222 Ill. 2d at 252-54, 856 N.E.2d at 409-10. It also reversed the award of punitive damages against BBW, holding that punitive damages are not allowed by statute in Illinois in malpractice actions. Even if they might have been awarded in the underlying action, allowing Tri-G to recover punitive damages against BBW would not advance the public policy basis for awarding them – to punish the offender and deter the offender and others from committing similar wrongs. 222 Ill. 2d at 267, 856 N.E.2d at 417.

The principal learning from this case for lawyers seems to be they should not accept a legal engagement unless they are prepared and able to properly represent the client. This is just as relevant for transactional representations as it is for trial lawyers. Based on the precedent established in the Tri-G opinion, a court or jury following the Tri-G precedent in a malpractice suit brought by an unhappy client might determine but for the attorney's malpractice, the client would have prevailed or otherwise realized the benefits of the result the client claims would have happened from the consummation of a successful transaction. This could leave the lawyer exposed for millions of dollars of compensatory damages depending on the nature of the claimed malpractice. It is easy to see that a lawyer representing a client is a malpractice claim against another lawyer could come up with a theory that "but for" the malpractice committed by a lawyer not admitted to practice in another state by failing to include a term in the contract or loan document involving real estate in that other state because he or she was not familiar with that state's laws, the client suffered economic damages far in excess of those in the Tri-G case.

D. Possible Criminal Prosecution, Disbarment or Censure By State Bar Licensing Agencies.

The need for an awareness of the unauthorized practice rules and the possible consequences for violating them are highlighted by the indictment in April 2004 of two Atlanta

attorneys and their law firm by a Cleveland County, North Carolina grand jury for the unauthorized practice of law.¹⁴ The Georgia firm had conducted an investigation in 2002 that cleared a North Carolina college's President of wrongdoing in ordering the recalculation of a basketball player's grade point average to make him eligible for the season. The firm's report led to the reassignment of two faculty members, the resignation of several faculty members in protest to the reassignments, and the resignation of the President. In addition, the President's actions were one factor in the NCAA putting the college on probation for three years.

Two trustees filed an unauthorized practice of law complaint with the North Carolina State Bar and copied the Cleveland County District Attorney. Ultimately, the North Carolina Bar's Authorized Practice Committee, acting on a complaint filed by a North Carolina lawyer, concluded that the report prepared by the attorneys' law firm went beyond an investigation and was therefore the unauthorized practice of law in violation of the North Carolina statute, but in July 2003 issued a letter to counsel for the two attorneys cautioning the attorneys that the unauthorized practice of law in violation of the statute was a Class 1 misdemeanor that could be prosecuted criminally. The bar declined to report the matter to the Georgia attorneys' local district attorney or to take any other action against the attorneys, but its letter stated it "expect[ed] this caution will prevent your clients from engaging in this activity in the future."¹⁵ The Cleveland County District Attorney then indicted the two attorneys and the law firm. The reaction of the Georgia Bar was unclear when this was first reported in April 2004. The North Carolina Supreme Court adopted its version of Model Rule 5.5 effective March 1, 2003 (after the conduct complained on in this case occurred), which allows for a lawyer admitted in another jurisdiction to provide legal services on a temporary basis in North Carolina under certain circumstances.

Under Rule 5.5(a) of the Illinois Rules of Professional Conduct adopted in 2009 and as in effect as of the date of this paper (which is identical to the ABA Model Rule 5.5(a)), a lawyer is prohibited from "practic[ing] law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist[ing] another in doing so." Thus, conduct such as that engaged in by the Birbrower firm attorneys involved in a California breach of contract matter and the Atlanta attorneys involved in the North Carolina college investigation, both of which were held to be engaged in the unauthorized practice of law, would have violated the Illinois

¹⁴ Jonathan Ringel, *Ga. Lawyers Indicted for Advising N.C. College: Atlanta Attorneys, Firm Accused of Unauthorized Practice of Law*, 115 *Fulton County Daily Report* No. 96 (April 8, 2004). See also Thomas P. Sukowicz and Thomas P. McGarry, *Practice caution when venturing into law out of state*, *The Chicago Law.*, p. 37 (June 2004).

¹⁵ The text of the letter is reprinted in Joan C. Rogers, *Georgia Law Firm, Lawyers Are Indicted For Unauthorized Practice in North Carolina*, 20 *Law. Man. Prof. Conduct* 203 (April 21, 2004), which is available from the ABA website at http://www.abanet.org/rppt/section_info/upl/GA-Lawyers.pdf. The two attorneys contended their advice to the college was not providing legal advice, but rather was a factual investigation related to allegations of violations of NCAA rules and the policies and procedures of the college in question. However, in concluding that the attorneys' conduct constituted the unauthorized practice of law, the bar cited sections of the firm's report that outlined and advised the board of the college concerning the college's potential legal liabilities, considered assertions made by one of the attorneys to third parties that the firm represented the college in a legal capacity, and noted that certain communications to the board were designated by the firm as attorney-client communications.

Rules of Professional Conduct and would have been grounds for disciplinary action in the State of Illinois, had those attorneys been admitted in Illinois.

As further support for such a result even prior to the adoption of the new versions of Model Rule 5.5 and 8.5 in Illinois, see Matter of Stambulis, 2001 Ill. Atty. Reg. Disc. LEXIS 342 (Ill. S. Ct.). In Stambulis, an Illinois lawyer who “acted as ‘Chief Trust Counsel’ for an organization . . . that was in the business of marketing and selling estate planning services,” was suspended for, among other things, engaging in the unauthorized practice of law by assisting at least 100 clients in more than six states prepare trust documents, some of which were not properly prepared according to the law of the client’s state or would not achieve the estate planning goals promised in the organization’s promotional materials. Id. at *1, 5.

III. What Constitutes the Unauthorized Practice of Law in Another Jurisdiction?

The answer to the question of what constitutes the unauthorized practice of law in a state by an attorney not licensed in that state varies from state to state at the present time. Following the decision in Birbrower and similar decisions in other states, the then President of the ABA, Martha Barnett, appointed the Commission on Multijurisdictional Practice (“MJP Commission”). According to the final *Report of the Commission on Multijurisdictional Practice* (“MJP Report”) issued by the MJP Commission in June 2002, President Barnett assigned to the members of the MJP Commission the following tasks:

- (1) “Research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law;”
- (2) “analyze the impact of those rules on the practice of in-house counsel, transactional lawyers, litigators and arbitrators and on lawyers and law firms maintaining offices and practicing in multiple state and federal jurisdictions;”
- (3) “make policy recommendations to govern the multijurisdictional practice of law that serve the public interest and take any other actions as may be necessary to carry out its jurisdictional mandate;” and
- (4) “review international issues related to multijurisdictional practice in the United States.” [MJP Report, p. 3.]

The MJP Commission also noted in the MJP Report the trend toward “globalization of business and finance [has meant] clients sometimes now need lawyers to assist them in transactions in multiple jurisdictions (state and national) or to advise them about multiple jurisdictions’ laws.” Despite this evolution in client needs and legal practice, the MJP Commission noted there was a concern that the regulation of lawyers had not yet responded effectively. As a result, it was becoming “increasingly uncertain when a lawyer’s work (other than a trial lawyer in court)” would constitute the unauthorized practice of law in a jurisdiction other than where the lawyer was licensed to practice. Id. The MJP Commission’s recommendations in the MJP Report were adopted by the ABA House of Delegates on August 12, 2002. The full MJP Report can be found on the ABA website at www.abanet.org/cpr/mjp/home.html.

The work of the MJP Commission proceeded independently but at the same time as the ongoing work of the Commission on the Evaluation of the Rules of Professional Conduct (the “Ethics 2000 Commission”). The Ethics 2000 Commission had been appointed in 1997 to review, evaluate and revise the ABA’s Model Rules of Professional Conduct in order to respond

to changes in legal practice since the Model Rules were first published by the ABA in 1983 and to address the need for national uniformity. The Ethics 2000 Commission was asked to report back to the ABA House of Delegates in 2000. It actually took five years before the Ethics 2000 Commission issued the second of its two reports. In February 2002, the ABA House of Delegates acted to adopt the changes to the Model Rules of Professional Conduct recommended by the Ethics 2000 Commission. At the recommendation of the Ethics 2000 Commission, however, the ABA deferred taking action on any changes to Model Rules 5.5 and 8.5 dealing with multijurisdictional practice until after the work of the MJP Commission was completed. *See* Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 *Georgetown Journal of Legal Ethics* 1, 4 (2002). The MJP Commission relied on both the Ethics 2000 Commission's work and other sources to draft its recommendations on changes to Model Rules 5.5 and 8.5. MJP Report, p. 2.

A. The ABA Report on Multijurisdictional Practice.

For purposes of the MJP Report and the amendments to the Model Rules recommended in the MJP Report, the term “multijurisdictional practice” (or MJP) “describes the legal work of a lawyer in a jurisdiction in which the lawyer is not admitted to practice law.” MJP Report at p. 5. Among other recommendations in the MJP Report, were amendments to Model Rule 5.5 relating to the unauthorized practice of law in the state that adopts the rule. Recommended amendments to Model Rule 8.5¹⁶ were also made that address the laws of the jurisdictions to which a lawyer engaged in a multijurisdictional practice will be subject.

1. Model Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law.

The full text of Model Rule 5.5, which shows the changes both to the Rule itself and to the Comments are contained in Appendix A. Section 5.5(a) of the modified rule still prohibits attorneys from practicing in other jurisdictions¹⁷ where doing so would violate the regulation of the legal profession in that jurisdiction. For the real estate transactional attorney, this means that, before engaging in the practice of law by becoming involved in a transaction or with a client in another state, a lawyer should consider researching that state's rules and laws regarding the unauthorized practice of law to determine whether the activities in which he or she is about to be engaged in would violate the rules or laws in that state.

Section 5.5(b) of the new Model Rules is substantially changed. It prohibits a lawyer not admitted to practice in a jurisdiction from (1) establishing an office or another “systematic and continuous presence in this jurisdiction for the practice of law” or (2) “hold[ing] out to the public

¹⁶ The prior versions of ABA Model Rules 5.5 and 8.5 were previously adopted by the Illinois Supreme Court in 1990.

¹⁷ References to “state” or “states” in this paper are intended to include all 50 states and the District of Columbia, as well as all United States territories. While the prohibitions on practicing, establishing an office or not holding oneself out as admitted to practice in a jurisdiction where the lawyers not admitted would apply to of the all United States and United States territory lawyers, as well as all foreign nation lawyers, the limited exceptions under Model Rules 5.5(c) and 5.5(d) that, as indicated below, provide some relief from the prohibitions, apply only to United States and United States territory lawyers. *See* Comment 7 to Model Rule 5.5, quoted in Appendix A.

or otherwise represent[ing] that the lawyer is admitted to practice law in this jurisdiction.” Under Comment 4 to Model Rule 5.5, one does not need to be physically present in a state to have a systematic and continuous presence. Among other issues, the Gould case discussed in Part III.B.3 below, which was decided based on Florida’s version of the new Model Rule 5.5, addressed whether an attorney was holding himself out to the public in a manner that suggested he was admitted to practice in a state in which he was not admitted.

Section 5.5(c) of the new Model Rules allows a lawyer admitted in any United States jurisdiction that has not been disbarred or suspended from practice in any jurisdiction to provide legal services on a “temporary basis” in the jurisdiction that adopts the Model Rule under four circumstances. Those are: (1) those services are undertaken in association with a lawyer that is admitted in the jurisdiction who actively participates in the matter; or (2) the services are in or reasonably related to a pending or potential proceeding before a tribunal that has authorized the lawyer to appear in such proceeding (or in assisting someone who is so admitted) – the so-called “*pro hac vice*” exception; or (3) the services are in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution, and the services are reasonably related to the lawyer’s practice in a jurisdiction where the lawyer is admitted to practice and *pro hac vice* admission is not required; or (4) the lawyer’s services are not covered by either (2) or (3) but arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

Real estate practitioners engaged in a transactional practice involving properties in a state that has adopt Model Rule 5.5 but is not a state in which they are licensed or have an office are most likely to rely on exceptions (1) and (4) as the basis for not being held to be engaged in the unauthorized practice of law. Most real estate lenders who engage local counsel or whose client’s borrowers engage local counsel to render an opinion on the loan documents would be relying on exception (1). If the borrower’s counsel is not engaging local counsel, exception (4) would most likely apply to the borrower’s counsel, if that counsel is not issuing an opinion on aspects of loan documents governed by the laws of a jurisdiction other than his or her own, and instead is issuing an opinion based on laws of the jurisdiction in which his or her client was formed, has its principal place of business or resides.

What constitutes rendering legal services on a “temporary basis” that “arise out of or are reasonably related to the lawyer’s practice in the jurisdiction in which the lawyer is admitted to practice” is not particularly clear. Comment 6 to Model Rule 5.5 provides only:

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.

Likewise, Comment 14 to Model Rule 5.5 provides a few examples of what type of practice outside the state could be reasonably related to the jurisdiction in which the lawyer is licensed to practice, such as a previous representation of the client by the lawyer, residency or substantial contacts within the state. However there is no “bright line” or “safe harbor” on which

an out-of-state attorney may rely. Although it was decided before California adopted a rule similar to Model Rule 5.5, the Condon case cited in Part II.B above could be instructive in interpreting the exception in Model Rule 5.5(c)(4). The Condon court held the Birbrower precedent of denying fees to an out-of-state lawyer did not apply where the out-of-state attorney was assisting a client residing in the attorney's home state in a matter in California. It distinguished the Birbrower decision on the basis that in Birbrower the out-of-state attorneys were representing a California client. 76 Cal. Rptr. at 927-28.

Model Rule 5.5(d) provides for similar rights to a United States jurisdiction admitted attorney to provide legal services in jurisdictions in which the attorney is not admitted that apply to in-house counsel (*i.e.*, "services provided to an employer or its organizational affiliates") as long as the nature of the services does not require *pro hac vice* admission to a forum;¹⁸ or services the attorney is authorized to provide by federal law or the laws of the jurisdiction (*e.g.*, patent bar attorneys pursuing a patent prosecution matter in the District of Columbia).

2. Model Rule 8.5 Disciplinary Authority; Choice of Law.

The full text of Model Rule 8.5, which shows the changes to both the Rule itself and to the Comments are contained in Appendix B. Proposed Model Rule 8.5 is a logical result of the broadening of the multijurisdictional practice rules contained in the new Model Rule 5.5. Model Rule 8.5(a) provides that any lawyer admitted to practice in the jurisdiction that has adopted the rule is subject to that jurisdiction's disciplinary authority regardless of where the lawyer's conduct occurs. Similarly, a lawyer not admitted in the jurisdiction that has adopted the rule is nevertheless subject to the authority of the jurisdiction if the lawyer provides or offers to provide any legal services in the jurisdiction. Finally, the same conduct can subject the lawyer to the disciplinary authority of both the jurisdiction and another jurisdiction (*i.e.*, the jurisdiction in which one is admitted and the one in which the provision of legal services occurs).

Model Rule 8.5(b) addresses the choice of law (*i.e.*, the rules of professional conduct) to be applied by the disciplinary authority of the jurisdiction in exercising its authority. For conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in

¹⁸ Effective July 1, 2004, the Illinois Supreme Court adopted Rule 716 that created a limited license to practice for Illinois based in-house attorneys working exclusively for employers whose offices are located in Illinois but who are not admitted to practice in Illinois, as long as they are admitted to practice in another state (or the District of Columbia). Section (e)(2) of Rule 716 does not permit the in-house counsel to appear in court or any "administrative tribunal, agency or commission" in Illinois "unless the rules governing such court or body shall otherwise authorize or the lawyer is specially admitted by such court or body in a particular case or matter." However, the in-house attorney so licensed is permitted to give "advice to the directors, officers, employees and agents of the employer with respect to its business and affairs" as well as to negotiate document and consummate transactions to which the employer is a party. *See* Rule 716(e)(1). The full text of the most current Illinois Supreme Court Rules is available on its website at www.state.il.us/court/SupremeCourt/Rules/default.asp. Note that the precise language of Rule 716(e)(1) only refers to advice to or transactions in which the lawyer's employer is a party (as opposed to the employer, parent, subsidiary or affiliate of the employer being a party). It is unclear whether this was intentional or an oversight. The inclusion of paragraph (d)(1) in Model Rule 5.5 as adopted in Illinois, which allows a non-Illinois licensed in-house lawyer to provide legal services to his or her "employer or organizational affiliates" would appear to clarify the intent of Rule 716(e)(1) to allow in-house counsel to also provide services for entities affiliated with the lawyer's employer.

which the tribunal sits are to be applied, unless the tribunal's rules provide otherwise. For any other conduct, the rules of the jurisdiction in which the conduct occurred will be applied, unless the predominant effect of the conduct is in a different jurisdiction. If so, the rules of the jurisdiction in which the predominant effect occurs will apply.

Model Rule 8.5(b)(2) goes on to state the following overarching principle:

A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comments 2 and 3 to Model Rule 8.5 shed some light on what the intent is behind this new Model Rule 8.5. Because a lawyer's conduct may involve significant contacts with more than one jurisdiction, the intent is to provide "protection from discipline for lawyers who act reasonably in the face of uncertainty." See comment 3 on page B-3 of Appendix B. Also, where the lawyer's conduct involves significant contacts with more than one jurisdiction, Comment 5 indicates the intent (or perhaps hope) that if two different jurisdictions were to proceed against a lawyer, they should, under Model Rule 8.5, apply the same governing ethical rules.

These changes clarify any ambiguity and eliminate the arguments that have sometimes been made by lawyers not admitted in a particular jurisdiction that they are not subject to discipline within that jurisdiction. Thus, Model Rule 8.5 should be viewed as an appropriate *quid pro quo* for relying on Model Rule 5.5 when engaged in a real estate or other transaction related to or involving property located in a state other than the one in which the attorney is admitted.

B. State Responses to New Model Rules.

1. All State Summary.

Two charts attached as Appendix C and Appendix D to this paper, which can be found on the ABA website, contain an update as of October 26, 2009 as to the status of the consideration and adoption of Model Rule 5.5 and as of January 25, 2010 as to the status of the consideration and adoption of Model Rule 8.5, in all 50 states and the District of Columbia.¹⁹ As of October 26, 2009, 43 jurisdictions had adopted Model Rule 5.5 in the same or a similar form, and one more had a recommendation pending in its highest court to adopt the same or a similar rule. This means the ABA Model Rule 5.5 is likely to be the new rule applicable in almost all jurisdictions very soon. As of January 25, 2010, 44 jurisdictions had adopted rules that are the same or similar to the ABA form of Model Rule 8.5, and two states had recommendations pending before their highest court to adopt the same or a similar rule. This means Model Rule 8.5 is also likely to be the rule in almost all jurisdictions. All but two of those states that have not yet adopted the new Model Rules 5.5 and 8.5 either have study committees that are studying these two new Model Rules or their study committees have recommended that new Model Rule 5.5 and 8.5 be

¹⁹ See http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf for the summary information on the adoption by the states of Model Rule 5.5, and http://www.abanet.org/cpr/mjp/quick-guide_8.5.pdf for the summary information on the adoption by the states of Model Rule 8.5.

adopted in their states, but no final action has yet been taken. The two exceptions are the states of Kansas and New York. See Appendix C and Appendix D. In Kansas, no study is underway, the prior version of Model Rule 5.5 remains in place and the Kansas Rule 8.5 merely states: “A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.” In New York, despite recommendations from the New York Bar Association Study Committee to adopt new Rules 5.5 and 8.5 in a form substantially similar to the Model Rules, the Appellate Divisions of the New York Supreme Court jointly adopted rules substantially similar to the prior Model Rules 5.5 and 8.5 which became effective April 1, 2009. The New York Rules are discussed in greater detail in Part III.B.4 below. The chart entitled “State Implementation of ABA MJP Policies” that can be found on the ABA website at <http://www.abanet.org/cpr/mjp/recommendations.pdf> contains other more detailed information on all of the states.

2. Illinois.

After the appointment of the ABA Ethics 2000 Commission, the Illinois State Bar Association (“ISBA”) appointed a Special Committee on Ethics 2000 to monitor and consider work of that Commission. In November 2002, following the adoption of the recommendations of the Ethics 2000 Commission and the MJP Report by the ABA House of Delegates, the ISBA and The Chicago Bar Association (“CBA”) agreed to form a joint ISBA/CBA Committee on Ethics 2000 to continue and complete the work of the original ISBA Committee. Robert A. Creamer, a Vice President of Attorneys Liability Assurance Society, Inc., was appointed the ISBA Co-Chair and Thomas P. Luning, a partner at Schiff Hardin LLP (then known as Schiff Hardin & Waite), was appointed the CBA Co-Chair.

The ISBA/CBA Committee on Ethics 2000 reviewed the substance of the changes to the ABA Model Rules proposed by the Ethics 2000 Commission as adopted by the ABA House of Delegates in February 2002. It also reviewed the changes proposed by the MJP Commission, including the proposed changes to Model Rules 5.5 and 8.5 that were adopted in August 2002 by the ABA House of Delegates, as well as the changes proposed by the Task Force on Corporate Responsibility to Model Rules 1.6 and 1.13 that were approved by the ABA House of Delegates in August 2003.

As of January 8, 2004, the ISBA/CBA Committee on Ethics 2000 issued its own report which, among other things, recommended to the ISBA House of Delegates and the CBA Board of Managers that they recommend the new ABA Model Rules 5.5 and 8.5 be adopted in Illinois.²⁰ The CBA Board of Managers approved the report in January 2004, and in March 2004 the ISBA Board of Governors reviewed the report and recommended the new rules contained in the Illinois Report be adopted by the ISBA Assembly, which adopted the Revised Final Report

²⁰ According to the ISBA/CBA Report, the ISBA/CBA Committee on Ethics 2000 determined early in the process that it would recommend adoption of all of the new ABA Model Rules unless there was some “compelling reason not to do so.” ISBA/CBA Report, p. 5. This decision was made because the Model Rules are the “*de facto* national standard for ethical rules,” and adopting the ABA Model Rules Illinois would help “achieve a higher level of uniformity and consistency with the rules of other jurisdictions,” particularly because “[t]he practice of law is no longer a purely local matter,” and “unnecessary changes will cause confusion” and may have “significant unintended consequences.” *Id.* at 5-6, 8.

dated April 1, 2004 (the “ISBA/CBA Report”) in June 2004.²¹ After both the ISBA and the CBA approved the ISBA/CBA Report, it was submitted to the Illinois Supreme Court for consideration.

The ISBA/CBA Report recommendations were reviewed by the Supreme Court’s Committee on Professional Responsibility, which issued its report (with a few proposed changes, none to Model Rule 5.5 or Model Rule 8.5) in May 2007. However, the Supreme Court Committee on Professional Responsibility suggested, consistent with the intent of Model Rule 5.5, that the following be added at the end of current Rule 751(a):²²

Any lawyer admitted in another United States jurisdiction who provides legal services on a temporary basis in Illinois pursuant to Rule 5.5 of the Illinois Rules of Professional Conduct shall be subject to the administrative supervision of the Attorney Registration and Disciplinary Commission to the same extent as a lawyer licensed to practice law in this state.

The Supreme Court Rules Committee conducted a public hearing in September 2007, at which there were no negative comments received on the proposed versions of Model Rule 5.5, Model Rule 8.5 and the changes to Rule 751(a).²³ On July 1, 2009, the Illinois Supreme Court adopted, with only minor differences, the vast majority of the recommendations of the ISBA/CBA report, including new Model Rules 5.5 and 8.5, and adopted the recommended addition to Rule 751(a) from the Supreme Court Committee on Professional Responsibility. Appendix A and Appendix B note the differences between Model Rules 5.5 and 8.5 as adopted by the ABA and as adopted by the Illinois Supreme Court, which consist of only minor differences in the comments. The new Illinois Rules of Professional Conduct became effective on January 1, 2010.

²¹ The full text of the ISBA/CBA Report is available on the Illinois Supreme Court’s website at http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/ISBACBAFinalReport.pdf.

²² The recommendations of the Supreme Court Committee on Professional Responsibility (Proposal 04-18 (cons. w/Proposal 04-19)) can be found on the Illinois Supreme Court website at www.state.il.us/court either by clicking on “Supreme Court” under the “Courts” tab and then clicking on “Supreme Court Rules Committee Public Hearings” and then clicking on “Click here for the Public Hearings Archive” or by using the following direct link: http://www.state.il.us/court/SupremeCourt/Public_Hearings/2007/Rules_Comm/091407.asp.

²³ Of all of the proposed changes to the Illinois Rules proposed in the ISBA/CBA Report, those proposed for Rule 5.7 related to law-related services have generated the most concern among those real estate attorneys – at least those who also act as agents for title insurance companies. These concerns and objections resulted in a decision by the Illinois Supreme Court Rules Committee to hold a public hearing on Rule 5.7 in October 2008, and another hearing specifically on the proposed changes to Rule 5.7 in March 2009. Ultimately, the Illinois Supreme Court did not adopt proposed Rule 5.7 in connection with its adoption of the other ABA Model Rules on July 1, 2009. Adoption of new ABA Model Rule 5.7 is currently being studied, but no decision has been made, nor is a decision imminent. The proposed changes to Rule 5.7 are beyond the scope of this paper but are discussed in the ISBA/CBA Report on page 34. For another ethics issue impacting real estate attorneys who also act as agents for title insurance companies, *see* Illinois State Bar Association, ISBA Advisory Opinion on Professional Conduct No. 10-02, dated October 2009, which advised that a referral arrangement with a real estate company that would require the lawyer to use the real estate company’s affiliated title insurer for the lawyer’s clients as a condition of receiving referrals from the real estate company would violate Illinois Rules of Professional Conduct 1.7, 2.1, 5.4(c), and 7.2(b).

3. Florida.

Florida is a state that has long been aggressively guarding the practice of law in its state and has regularly issued ethics opinions and pursued cases to prevent the unauthorized practice of law in Florida by out-of-state attorneys.²⁴ Based on the detailed guidance in the Savitt case, cited at footnote 24 *supra*, although not specifically dealing with real estate transactional matters involving Florida real estate, preparing deeds to convey property in Florida might well have been considered the practice of law in Florida. Many out-of-state firms have not prepared them unless a Florida admitted attorney in their office or local counsel admitted in Florida has reviewed and is prepared to sign onto the deed as the preparer.

Florida is one of the states that has now adopted a rule similar to Model Rule 5.5 and 8.5.²⁵ Following Florida's adoption of the equivalent of these new Model Rules in 2005, a New York admitted attorney residing in Florida filed a declaratory judgment suit against the Director of The Florida Bar and its counsel, claiming he anticipated The Florida Bar Association would initiate an enforcement action against him for being engaged in the unauthorized practice of law if he advertised his legal services in Florida and that such an action would violate his First Amendment free speech rights. Gould v. Harkness, 2006 U.S. Dist. LEXIS 66487 (S. D. Fla. August 2, 2006). The Federal District Court in Florida's Southern District reviewed the Florida multijurisdictional practice rules, including its equivalent to Model Rule 5.5, and held that the New York attorney was indeed engaged in the unauthorized practice of law in Florida when he had resided in Florida for 29 years, had established an office in Florida, and in his advertising for clients in Florida did not indicate he was admitted to practice only in New York. Id. at *8, 10.

Furthermore, the fact that his practice was limited to Federal administrative matters did not excuse Mr. Gould from being admitted to the Florida bar. Mr. Gould argued the Administrative Procedures Act, 5 U.S.C. §500(b), which provides that “[a]n individual who is a member in good standing of the bar of the highest court of a state may represent a person before

²⁴ For example, in Florida Bar Ass'n v. Savitt, 363 So.2d 559 (Fla. 1978), the firm of Strook & Strook & Lavan and its partners and associates were enjoined by agreement with The Florida Bar from allowing any members, associates or employees not admitted to The Florida Bar to engage in any professional activities in Florida except for “participation as co-counsel in litigation before state and federal courts in Florida only to the extent permitted by applicable rules of temporary admission; transitory professional activities ‘incidental’ . . . to essentially out-of-state transactions; and professional activities that constitute ‘coordinating–supervisory’ activities in essentially multi-state transactions in which matters of Florida law are being handled by members of The Florida Bar” 363 So. 2d at 560. The agreement between the parties approved by the Savitt court also required the firm to operate as an interstate law firm according to a partnership agreement that did not “provide that profits and losses are shared among its members solely on the basis of the proportionate business either generated or handled by its Florida office;” and prohibited the firm from allowing lawyers “who were not members of The Florida Bar to exercise supervisory control over any associate operating on a permanent basis” out of the firm’s Florida office involved in Florida matters “for persons residing in Florida or business enterprises having their principal place of business in Florida.” Id. The case is very instructive on the activities that could be conducted in and outside the State of Florida and how they could be conducted in accordance with the Florida unauthorized practice rules.

²⁵ See footnote 2 to Appendix A for some of the differences between Florida’s Rule 4-5.5 and Model Rule 5.5, and footnote 2 to Appendix B for some of the differences between Florida’s Rules 3-4.1 and 3-4.6 and Model Rule 8.5. The full text of the changes to Florida’s Rules can be found on the website for the Florida Bar at www.floridabar.org under the tabs “Lawyer Regulation” and “Rules Regulating The Florida Bar.”

an agency,” provided a basis for him to reside in Florida and handle Federal administrative law matters without being admitted to practice in Florida. The Florida Supreme Court held this provision of the Administration Procedures Act only served to prohibit Federal agencies from adopting their own admission requirements. *Id.* at *11-13. As a result, this Florida resident was unable to continue his legal practice in Florida without being admitted to practice in Florida.²⁶

The Gould case does not assist in determining what is providing legal services “on a temporary basis” under Model Rule 5.5(c), of course, because Mr. Gould had been present in the State of Florida for 29 years and had established an office there. Model Rule 5.5(b) specifically prohibits a lawyer not admitted in a jurisdiction from establishing an office, which Mr. Gould undeniably had done. Rule 4-5.5(c) as adopted in Florida makes it clear, however, that in addition to not having an office in Florida, one of two safe harbors must be met in order for a non-Florida admitted transactional attorney involved in preparing a deed to transfer title to real estate, for example, to avoid violating the Florida multijurisdictional ethical rules. Those two safe harbors require either the non-Florida admitted attorney’s client must reside in the state in which the attorney is admitted to practice or have an office in that state, or the need to prepare the deed must have arisen out of or be reasonably related to the non-Florida admitted attorney’s practice in a state in which that attorney is licensed to practice. Thus, a Birbrower type situation, involving an out-of-state attorney who seeks to prepare a deed to transfer Florida real estate for a Florida-based client that has no office or residence in a jurisdiction in which the attorney is licensed would constitute the unauthorized practice of law in Florida if, as in Birbrower,²⁷ the non-Florida licensed attorney’s need to prepare the deed did not arise out of a transaction in which the Florida-based client was seeking legal services in the state in which the non-Florida licensed attorney was admitted. Perhaps one example of such a transaction that might satisfy the Florida Rule is a transaction in which an Illinois attorney is representing a Florida-based corporation in the acquisition of an Illinois corporation’s assets when one of the assets being

²⁶ Similarly, a Florida resident attorney admitted in the District of Columbia was held to be engaged in the authorized practice of law in Florida when he represented parties in securities arbitrations in Florida. See The Florida Bar v. Rapoport, 845 So. 2d 874, 877 (Fla. 2003). The attorney also advertised his arbitration experience to Florida residents in a Florida newspaper. *Id.* at 875. The court enjoined Mr. Rapoport from engaging in the practice of law in Florida until he was duly licensed. *Id.* at 878. Florida’s new Rule of Professional Conduct 4-5.5, which became effective January 1, 2006, and is similar to the ABA’s Model Rule 5.5, but must be read in conjunction with Florida Rules of Judicial Administration 2.510(a). Florida’s Rule 2.510(a) prohibits a lawyer authorized to practice in a state other than Florida from appearing in court if he or she is engaged in a “general practice” before the Florida courts. “[M]ore than 3 appearances within a 365-day period in separate representations” is presumed to be a “general practice.” In Morrison v. West, 2010 WL 532792 (Fla. Dist. Ct. App., 2010) a Florida appellate court held that Florida’s new Rule of Professional Conduct 4-5.5 can not be applied retroactively. The complete set of Florida Rules of Judicial Administration can be found online at [www.floridabar.org/TFB/TFBResources.nsf/Attachments/F854D695BA7136B085257316005E7DE7/\\$FILE/Judicial1.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/F854D695BA7136B085257316005E7DE7/$FILE/Judicial1.pdf?OpenElement). Rule 2.510(a) also applies to arbitration proceedings. See Florida Rule Regulating the Florida Bar 1-3.11, including 1-3.11(b)(6). Rule 1-3.11(b)(6) may be found online at <http://www.floridabar.org/divexe/rrtfb.nsf/FV/60A2F6198D8AD63C852570DF0052D642>.

²⁷ See footnote 13 *supra* and related text discussing Birbrower. In Birbrower, while not involving a transactional matter, the New York attorneys were representing a California client in a California dispute and there were no facts that suggested the California client had any prior connection to the New York attorneys or to New York. California has addressed the Birbrower situation by its own new Rule 9.48 of the California Rules of Court dealing with non-litigating attorneys temporarily in California. Rule 9.48 is discussed *infra* in Part III.B.7.

acquired from the Illinois corporation is a parcel of Florida real estate. Otherwise, there will be no other option than engaging local counsel to be actively engaged in the matter to prepare a deed under Florida's Rule 4-5.5(c)(1).²⁸

4. New York.

In June 2003, the New York State Bar Association ("NYSBA") House of Delegates approved the report issued by the NYSBA Special Committee on Multi-Jurisdictional Practice ("NYSBA Report") that recommended certain modifications to the MJP Report issued by the ABA, with some additional modifications. At the time of the NYSBA Report, New York was only one of four states (California, Maine and Ohio being the three others) that had not adopted the ABA Model Rules format for its governance of attorney conduct. Also at that time, New York was only one of two states that had adopted the older ABA Rules of Professional Responsibility (at the time of the NYSBA Report Ohio was the other state, but by 2008 Ohio had adopted the Model Rules format).

By December 2008, New York was the only state that still adhered to the older Model Code of Professional Responsibility and only one of three remaining states that did not subscribe in large part to the ABA Model Rules (California has its own unique rules of professional conduct and Maine had its own unique rules of professional conduct but did adopt the Model Rules Format in 2009). The initial recommendations in the NYSBA Report issued after study of Model Rules 5.5 and 8.5 were to adopt them as additions to New York's Disciplinary Rules ("DR") 3-101²⁹ and 1-105, and to recommend those portions of the commentary adopted by the NYSBA House of Delegates be added to the Ethical Considerations ("EC") portions of the New York Code. Model Rule 5.5 as initially proposed for adoption in New York in the NYSBA Report would have applied only to lawyers not admitted to practice in New York. Model Rule 8.5 was recommended for adoption with only minor non-substantive word differences as a rewritten DR 1-105(A) and (B). The comments were recommended for adoption as new EC 1-19 through EC 1-22.

In 2003, the Committee on Standards of Attorney Conduct ("COSAC") of the NYSBA undertook a comprehensive evaluation of the entire revised Model Rules of Professional Conduct for the purpose of determining the desirability of changing to the Model Rules structure, as well as a review of the Model Rules themselves. In September 2005, the COSAC issued its report recommending a proposed set of Rules of Professional Conduct for adoption in New York.³⁰ That proposed set followed the ABA Model Rules fairly closely.

²⁸ See footnote 2 to Appendix A and footnote 25, *supra*.

²⁹ In New York, if these new Rules were adopted as changes to the New York Disciplinary Rules, the changes based on Model Rule 5.5 would be included as new paragraphs C and D to the New York Disciplinary Rule 3-101 found in the Code of Professional Responsibility in § 1200.16 of Part 1200 of Title 22 of the New York Codes, Rules and Regulations.

³⁰ The final COSAC Report can be found on the NYSBA website at <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=11807>.

In June 2006, the COSAC began presenting its proposed Rules of Professional Conduct to the NYSBA House of Delegates, with the anticipation that once that process was completed, the Rules would be forwarded to the Appellate Division of the New York Supreme Court for consideration.³¹ This schedule was based on a resolution adopted by the NYSBA House of Delegates on November 5, 2005 that resulted in addressing each of the new proposed Rules of Professional Conduct in segments over the period of June 2006 through November 2007. After all of the new proposed New York Rules of Professional Conduct were reviewed, NYSBA House of Delegates on November 3, 2007 voted unanimously to approve the final report, and on February 1, 2008 the NYSBA issued its final report on the Proposed Rules of Professional Conduct (“Final New York Report”).³² The Final New York Report was then transmitted to the Appellate Division of the New York Supreme Court for consideration.

The Final New York Report recommended the State of New York “join the 47 states and the District of Columbia that have already endorsed the Model Rules,” including adoption of Rules 5.5 and 8.5 in almost an identical form to the Model Rules. On December 16, 2008 the Appellate Divisions of the New York Supreme Court jointly adopted new rules of professional conduct, which are substantially similar to the ABA Model Rules, all of which became effective April 1, 2009. However, the New York version of Model Rule 5.5 is the same as the old ABA Model Rule 5.5 and does not address the multijurisdictional practice of law. The New York version of Rule 8.5 is similar to the prior ABA Model Rule 8.5.³³ Appendix A highlights the very minor differences between Rule 5.5 as recommended for adoption in New York but not adopted, and Rule 5.5 as adopted in New York. Appendix B describes the very minor differences between Model Rule 8.5 as adopted in New York and the prior Model Rule 8.5.

5. Georgia.

Georgia’s highest court adopted rules similar to Model Rules 5.5 and 8.5 on June 8, 2004.³⁴ Georgia has added a separate Rule 5.5(e) that applies to “Foreign Lawyers” and all of Rules 5.5(a) through 5.5(d), as adopted in Georgia, apply only to “Domestic Lawyers.” “Domestic Lawyers” are those admitted in a state or territory of the United States or the District of Columbia, and “Foreign Lawyers” are any lawyers admitted in any other foreign nation. The wording of Model Rules 5.5(c) and 5.5(d) would apply only to all United States and United States territory admitted lawyers, while Georgia allows both Domestic Lawyers and Foreign

³¹ See NYSBA 2006-2007 Report to the Membership, p. 25. This report is no longer available on the NYSBA website.

³² The Final New York Report can be found on the NYSBA website at <http://www.nysba.org/AM/Template.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=11807>.

³³ The complete set of New York Rules of Professional Conduct, which became effective April 1, 2009 can be found on the New York State Unified Court System website at http://www.courts.state.ny.us/rules/jointappellate/NY%20Rules%20of%20Prof%20Conduct_09.pdf.

³⁴ The Georgia Rules of Professional Conduct can be found on the website of the State Bar of Georgia at http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/, and the State Bar of Georgia Committee on Multijurisdictional Practice Final Report (January 2003) can be found at http://www.gabar.org/news/multijurisdictional_practice_report/.

Lawyers to engage in the temporary practice of law in the State of Georgia under a new paragraph (e) added to its version of Rule 5.5 that applies very similar rules to those contained in Model Rule 5.5(c) and 5.5(d) (Georgia’s Rules 5.5(c) and 5.5(d)) to Foreign Lawyers. Georgia’s Rule 8.5 is identical to Model Rule 8.5, except that it carries through the use of the terminology with respect to both “Domestic Lawyers” and “Foreign Lawyers.”

6. District of Columbia.

When the District of Columbia adopted its most recent amendments to its Rules of Professional Conduct that became effective February 1, 2007,³⁵ rather than adopting new Model Rule 5.5, it left its Rule 5.5 unchanged from the prior version of the ABA’s Model Rules. Instead, it added a reference to Rule 49 of the Rules of the District of Columbia Court of Appeals that were revised effective March 1, 2007. Rule 49 had already been in place prior to the adoption by the ABA of its new Model Rule 5.5, and minor changes were made that became effective March 20, 2008.³⁶ Under the current District of Columbia Rule 49(a):

No person shall engage in the practice of law in the District of Columbia or in any manner hold out as authorized or competent to practice law in the District of Columbia unless enrolled in an active member of the District of Columbia Bar, except as otherwise permitted by these Rules.

The “practice of law” is defined in Rule 49(b)(2) to include, in those parts most relevant to real estate, the following:

the provision of professional legal advice or services where there is a client relationship of trust or reliance. One is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

(A) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect interests in real or personal property . . . ;

(B) Preparing or expressing legal opinions;

* * *

(E) Providing advice or counsel as to how any of the activities described in subparagraph (A) through (D) might be done, or whether they were done, in accordance with applicable law;

(F) Furnishing an attorney or attorneys, or other persons, to render the services described

³⁵ For the text of all of the D.C. Rules of Professional Conduct that became effective as of February 1, 2007, *see* http://www.dcbbar.org/new_rules/rules.cfm.

³⁶ For the full text of the current Rules of the District of Columbia Court of Appeals, including Rule 49, *see* http://www.dcappeals.gov/dccourts/docs/DCCA_Rules.pdf.

“In the District of Columbia” means, under Rule 49(b)(3), “conduct in, or conduct from an office or location within, the District of Columbia, where the person’s presence in the District of Columbia is not of incidental or occasional duration.”

The exceptions to the general rule prohibiting one from practicing law in the District of Columbia unless admitted to the Bar are in Rule 49(c) and include United States or District of Columbia government employees or practitioners before a federal or District of Columbia government special court, department or agency; practice before federal courts once admitted to that court; practicing as internal counsel by “[p]roviding legal advice only to one’s regular employer, where the employer does not reasonably expect that it is receiving advice from a person authorized to practice in the District of Columbia” (*see* Rule 49(c)(6)); and persons practicing under *pro hac vice* admissions, which are limited to 5 applications per year and with other stated requirements or limitations (*see* Rule 49(c)(7)). In addition, there are separate limits for practice for up to 360 days prior to admission to applicants for admission to the District of Columbia Bar, as long as the individual “has submitted application for admission within ninety (90) days of commencing practice in the District of Columbia,” and is supervised by a District of Columbia admitted attorney who “takes responsibility for the quality of the work and complaints concerning the services” *See* Rule 49(c)(8).

Another exception is provided for those “[p]roviding legal services in the District of Columbia on an incidental and temporary basis, provided the person is authorized to practice law by the highest court of a state or territory or by a foreign country, and is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or our.” *See* Rule 49(c)(13). The commentary to Rule 49(b)(3) and 49(c)(13) provide a number of clarifying examples of what constitutes the practice of law in the District of Columbia. With respect to transactions in general and real estate transactions, the comments to Rule 49(b)(3) state:³⁷

A lawyer is engaged in the practice of law in the District of Columbia when the lawyer provides legal advice from an office or location within the District. That is true if the lawyer practices in a residence or a commercial building, if all of the lawyer’s clients are located in other jurisdictions, if the lawyer provides legal advice only by telephone, letter, email or other means, if the lawyer provides legal advice only concerning the laws of jurisdictions other than the District of Columbia, or if the lawyer informs the client that the lawyer is not authorized to practice law in the District of Columbia and does not provide advice about District of Columbia law. A lawyer in the District of Columbia who advises clients or otherwise provides legal services in another jurisdiction may be subject to the rules of that jurisdiction concerning unauthorized practice of law.

Rule 49 applies only if a lawyer is physically present in the District of Columbia at least once during the course of a matter. Even if a matter involves a client, and a dispute or transaction, in the District, the Rule does not apply if a

³⁷ *See* Commentary to § 49(c)(13), p.85, Rules of the District of Columbia Court of Appeals revised effective March 1, 2007, found online at http://www.dccapeals.gov/dccourts/docs/DCCA_Rules.pdf.

lawyer located outside the District advises a client in-person only when the client visits the lawyer in the lawyer's office, or if the lawyer advises the client only telephone, regular mail, or electronic mail. However, if a lawyer is physically present in the District even once during the course of a matter, the lawyer may be engaged in the District of Columbia in the practice of law with respect to the entire matter, even if the lawyer otherwise operates only from a location outside the District.

One of the exceptions outlined in Rule 49(c)(13) must apply for a lawyer providing legal services within a law firm even if he or she is acting under the supervision of, or in association with, a member of the District of Columbia Bar. The commentary to Rule 49(c)(13) goes on to say:

The exception requires the lawyer's presence in the District to be both incidental and temporary. Whether the lawyer's presence in the District is "incidental" to the District of Columbia and to the lawyer's authorized practice in another jurisdiction depends on a variety of factors. For example, there is no intent to prohibit a lawyer based outside the District from . . . closing a transaction relating to another jurisdiction, at a location in the District of Columbia, where the person performing the legal services is duly authorized to practice law in another jurisdiction and the person does not suggest to any client or other persons involved in the matter that the lawyer is licensed in the District.

Where, however, an attorney provides legal services concerning a transaction related to the District from a location within the District of Columbia, the attorney may be engaged in the practice of law in the District of Columbia because the attorney's presence is not incidental. Whether a transaction is related to the District of Columbia depends on the location of the parties, the location of the property and interests at issue, and the law to be applied. Another relevant factor is whether the lawyer not admitted to the D.C. Bar is the only lawyer for a party, or whether the lawyer is co-counsel or the lawyer's role is limited to one aspect of the transaction with respect to which a D.C. Bar member is lead counsel. For example, where a transaction concerns real estate located in the District of Columbia, a lawyer based outside the District who comes to the city to provide legal services to a client located inside or outside the District relating only to the federal tax aspects of the transaction may qualify for this exception. However, a lawyer based outside the District who comes to the city to be primary counsel to a District-based client with respect to all aspects of the real estate transaction may not qualify for this exception. Whether the lawyer who is not admitted to the D.C. Bar and whose principal office is outside the District is associated with or supervised by a member of the D.C. Bar is a relevant, but not controlling, factor in determining whether the lawyer's practice in the District is "incidental."

Section (c)(13) also requires that the lawyer's presence in the District be "temporary." There is no absolute limit on the number or length of a lawyer's visits to the District that makes the lawyer's presence "temporary." . . . If a lawyer's principal place of business is in the District, the lawyer is not practicing

law in the District on a temporary basis and must be a member of the D.C. Bar unless another exception in section (c) applies.

Thus, the only relief for an attorney admitted only in another jurisdiction falling under the definition in Rule 49(b)(3) by being “in the District of Columbia” (*i.e.*, if one is in a D.C. location but more than only temporarily and on an “incidental” basis) is to be admitted, as there is no specific exception like those in Model Rule 5.5(c) for association with an admitted attorney or for services arising out of or reasonably related to practice in a jurisdiction where one is admitted.

The District of Columbia’s equivalent to Model Rule 8.5 is similar to Model Rule 8.5 but does not include the second sentence of Rule 8.5(a) or the changes to Model Rule 8.5(a) adopted by the ABA. Thus, it continues to read as the ABA Model Rule 8.5(a) formerly read (*see Appendix B*). The District of Columbia did adopt the proposed changes to Model Rule 8.5(b)(1), but its Rule 8.5(b)(2) reads as follows (*italics added*):

(2) For any other conduct,

(i) *If the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and*

(ii) *If the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.*³⁸

Thus, the District of Columbia’s Rule 8.5(b) does not address the choice of law where the lawyer is admitted *only* in a jurisdiction *other than the District of Columbia*. In such instances, one must resort to the second sentence of its Rule 8.5(a) which states:

A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction *where the lawyer is admitted* for the same conduct. (*Italics added*)³⁹

In adopting its equivalent of Model Rule 8.5, the District of Columbia did not adopt the amendments to Model Rule 8.5 comments, which means the District of Columbia comments to its Rule 8.5 still remain close to the prior form Model Rule 8.5 Comments. According to the Report of the Rules of Professional Conduct Review Committee of the D.C. Bar (the “D.C.

³⁸ The entire text of the Rules of Professional Conduct adopted in the District of Columbia can be found at http://www.dcb.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/amended_rules/index.cfm#board.

³⁹ *Id.*

Report”),⁴⁰ the “Committee concluded that the new Model Rule would subject lawyers to substantial burden in trying to determine (a) where the predominant effect of the lawyer’s conduct occurs and (b) whether and how the jurisdiction’s ethics rules differ from the D.C. Rules of Professional Conduct, and that any countervailing benefits do not outweigh this burden.” *See* D.C. Report, p. 196.

7. California.

California is presently the only state that has not adopted some version of the ABA Model Rules. *See* Part IV.B.4 above. In 2002, the Supreme Court of California formed a Multijurisdictional Practice Implementation Committee that was given the responsibility to draft “rules that would expand the circumstances under which attorneys licensed to practice law in jurisdictions in the United States other than California . . . are permitted to practice law in California.” Report of the California Supreme Court Multijurisdictional Practice Implementation Committee, Final Report and Proposed Rules (March 10, 2004) (“California Report”), p. 3.⁴¹

The California Report followed the recommendations of an earlier task force that had studied the issues and recommended rules be drafted to permit four categories of out-of-state lawyers to provide legal services in California, only two of which are discussed here.⁴² The first category includes in-house counsel “providing out-of-court legal services exclusively for a single, full-time employing entity (e.g., a corporation or partnership) that does not provide legal services to third parties.” California Report, p. 3. The second category includes “transactional and other non-litigating lawyers providing legal services in California on a temporary and occasional basis.” California Report, p. 3. The rules recommended in these two categories were adopted by the California Supreme Court effective November 15, 2004.⁴³ As of this date, these two rules are codified in the California Rules of Court, Rule 9.46 and Rule 9.48.⁴⁴ These California Rules (like almost all of the California Rules) are worded quite differently from the Model Rules, but substantively are consistent with the intent of Model Rules 5.5 and 8.5.

Rule 9.46 allows for registration in California of in-house attorneys holding an active membership to the bar of another United States state or territory and employed by a qualifying institution on an annual basis, and within 30 days of leaving or changing his or her place of employment. Attorneys registered under this Rule are “[p]ermitted to provide legal services in California only to the qualifying institution that employs him or her.” Rule 9.46(b)(1). A

⁴⁰ The full text of the D.C. Report may be found online at http://www.dcbarr.org/inside_the_bar/structure/reports/rules_of_professional_conduct_review_committee/rpcreport.cfm.

⁴¹ The California Report can be found online at <http://www.courtinfo.ca.gov/courts/supreme/comm/#mjdp>.

⁴² The other two categories, legal services attorneys and litigating attorneys, are dealt with in the California Rules of Court 9.45 and 9.47, which can be found online at http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10156&id=1241.

⁴³ *See Id.* at p. 14; *see also* April 8, 2004 News Release issued by the Public Information Office of the Judicial Council of California, Administrative Offices of the Courts, which can also be found online at <http://www.courtinfo.ca.gov/courts/supreme/comm/#mjdp>.

⁴⁴ These two Rules can be found online at http://www.courtinfo.ca.gov/rules/index.cfm?title=nine&linkid=rule9_46 and http://www.courtinfo.ca.gov/rules/documents/pdfFiles/title_9.pdf, respectively.

“qualifying institution” is “a corporation, a partnership, an association, or other legal entity, including its subsidiaries and organizational affiliates” but it must “[e]mploy at least 10 employees full time in California,” or “[e]mploy in California an attorney who is an active member in good standing of the State Bar of California.” Rule 9.46(b)(1); 9.46(a)(1).

Rule 9.48 allows attorneys who maintain an office in another United States jurisdiction (other than California) where the attorney is licensed to practice law to conduct some limited activities (described in the next paragraph). Rule 9.48(a), (b)(1). The attorney must already have been retained by a client in the matter involving legal services in California, provide in any web site or other advertising in California that the person is not admitted in California (or list the states where he or she is admitted), and be an active member in good standing of the bar of a United States state or jurisdiction. Rule 9.48(b)(2)-(4).

Permissible activities under Rule 9.48(c) for an attorney not licensed in California include activities in which the attorney:

- (1) Provides legal assistance or legal advice in California to a client concerning a transaction or other nonlitigation matter, a material aspect of which is taking place in a jurisdiction other than California and in which the attorney is licensed to provide legal services;
- (2) Provides legal assistance or legal advice in California on an issue of federal law or of the law of a jurisdiction other than California to attorneys licensed to practice law in California; or
- (3) Is an employee of a client and provides legal assistance or legal advice in California to the client or to the client’s subsidiaries or organizational affiliates.

In order to qualify to practice law in California under Rule 9.48, the attorney cannot hold himself or herself out to the public as admitted to practice in California; cannot “[e]stablish or maintain a resident office or other systematic or continuous presence in California for the practice of law;” be a resident of or regularly employed in California; “[r]egularly engage in substantial business or professional activities in California;” or “[h]ave been disbarred, resigned with charges pending or be suspended from practicing law in any other jurisdiction.” Rule 9.48(d).

By practicing law in California under Rule 9.48, an attorney agrees to be subject to the jurisdiction of the State Bar of California, the courts and all laws relating to the practice of law, as well as the California Rules of Professional Conduct. Rule 9.48(e). Rule 9.48 applies only to “legal assistance or legal services concerning only a transaction or other nonlitigation matter.” Rule 9.48(f). Transactions or other nonlitigation matters are defined under Rule 9.48(a)(1) as “any legal matter other than litigation, arbitration, mediation, or a legal action before an administrative decision-maker.” California Rules 9.43 and 9.47 address attorneys engaged in

litigation matters or other matters involving arbitrations or litigation in California by attorneys not admitted in California.⁴⁵

C. Practical Tips for Real Estate Practitioners.

As the number of multi-state transactions increases and the number of clients seeking to buy, develop, lease or otherwise deal with real estate in other jurisdictions increases, real estate practitioners admitted in a particular state need to be mindful of the laws governing the unauthorized practice of law in the states in which their clients are doing business.⁴⁶ How then is an attorney to efficiently and properly deal with these laws? The answer is clearly one that will vary from client to client, state to state and matter by matter.

1. Advise Your Client You Are Not Admitted in the Jurisdiction.

The first step to take is for the lawyer to advise his or her client if the lawyer is not admitted to practice in the jurisdiction in which the client is planning a transaction. The prudence of informing the client that the lawyer is not licensed in a particular jurisdiction is reinforced by Comment 20 to amended Model Rule 5.5: “In some circumstances, a lawyer who practices in this 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 laws of this jurisdiction. See Rule 1.4(b).”⁴⁷

2. Recommend Engagement of Local Counsel.

Whenever a client wishes to engage a lawyer for a significant transaction in a state in which the lawyer is not admitted to practice, unless the lawyer’s firm has an office in that jurisdiction with experienced real estate practitioners admitted to practice in the jurisdiction in which his or her client’s transaction will occur, the lawyer should seriously consider engaging local counsel to work with him or her on the transaction. Under Model Rule 1.4, this recommendation should be made to and discussed with the client. See Appendix H, p. H-2.

In a paper prepared for the October 1999 meeting of the American College of Real Estate Lawyers entitled “*Ethical and Other Issues for Counsel in Multi-State Real Estate Transactions*” (“ACREL 1999 Paper”), authors Alan Wayte, then of Dewey Ballantine LLP in Los Angeles, Steven M. Alden, of Debevoise & Plimpton in New York City, and Diane MacPherson then of Robinson & Cole LLP in Hartford, Connecticut, posed the following questions that are still relevant today:

⁴⁵ For the text of these and other relevant California Rules of Court, see either the California Courts website at <http://www.courtinfo.ca.gov/rules/> or The State Bar of California website at http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10156&id=1241.

⁴⁶ The ABA website contains links to the websites and unauthorized practice guidelines, as well as adopted rules and ethics opinions for all other states. See www.abanet.org/cpr/links.html#States.

⁴⁷ See Model Rule 1.4(b), p. H-1 of Appendix H. The current full text of the Illinois Rules of Professional Conduct and comments are available online from the Illinois Supreme Court website at http://www.state.il.us/court/SupremeCourt/Rules/Art_VIII/default_NEW.asp.

Is it malpractice per se not to use local counsel? Would the fact that many real estate lawyers do not use local counsel help to establish a standard of practice? What if a partner is licensed in the other state but is not active in the practice or does not have expertise in the area? Can a lawyer rely upon advice on the laws of the foreign state from the title insurance company? There are no definitive answers to these questions but it would be dangerous to ignore the implications of these questions and the consequences of a claim relating to the unauthorized practice of law.

ACREL 1999 Paper, pp. 1-2. As a practical matter, the ACREL 1999 Paper goes on to state (*see* p. 2):

The client often objects to hiring local counsel because of the additional cost and possible delay in the closing. Unfortunately, the client may not recall these objections if problems later arise.

It is certainly good practice to confirm with the client [in writing] that local counsel will not be used in a transaction and receive the client's consent to the procedure. The letter should itemize the risks that this procedure would entail.

Particularly if development entitlements are involved, which are very localized, or some other aspects of the transaction are particularly sensitive to the local nature of the transaction and property, the lawyer and his or her client will be "penny wise and pound foolish" not to engage local counsel. However, that local counsel must be actively involved to meet the Model Rule 5.5(c)(1) exception. In other words, engaging local counsel, while recognized in Model Rule 5.5(c)(1) as a legitimate safe harbor, still requires that local counsel "actively participate in and share responsibility for the representation of the client." *See* Model Rule 5.5 Comment 8. Because not all states have adopted Model Rule 5.5 or have adopted it with some alterations, it would be prudent also to verify the ethical rules of the jurisdiction in which the transactions or portions of the transactions will take place or have an effect.

If local counsel is to be engaged, Appendix E contains a laundry list from the ACREL 1999 Paper of services that are often provided by local counsel in loan transactions or in purchase or sales involving real estate outside the jurisdiction in which lead counsel for the transaction is located. Where there are multiple states involved, the magnitude of information needed is even more difficult to manage. Appendix F contains a sample local counsel retainer letter, and Appendix G contains a sample confirmation letter from local counsel. Both of these documents are forms suggested by the authors of the ACREL 1999 Paper as samples to consider when engaging or accepting an engagement to act as local counsel so that there are no misunderstandings as to the role of the local counsel. Although not tested by any courts under Model Rule 5.5(c)(1), the significant number of items listed in which local counsel would be involved would appear to be a basis for active participation by local counsel.

Another, related but slightly different, role "local" counsel may be asked to play is "transaction counsel" engaged to respond to questions from both lender and borrower. While the local counsel may be engaged by only one party in these situations, it is with the understanding

that the other party will have “free access for questions and assistance.” See ACREL 1999 Paper, p. 8. This role raises other ethical issues addressed as follows in the ACREL 1999 Paper, pp. 8-10, 12-13:

The model rules may differ from each state’s rules, however, counsel must consider and resolve issues such as Conflicts of Interest (Model Rule 1.7), Duty Not to Reveal Client Confidences (Rule 1.9(c)(2)), Evaluation of Use by Third Party (Rule 2.3), Communication Between Lawyer and Client (Consent) (Rule 1.4), Prohibited Transactions (Concurrent Transactions) (Rule 1.8), and disciplinary rules such as 5.105 concerning Maintenance of Independent Professional Judgment in the Circumstances of Oversight by a Third Party.

* * *

Representing multiple parties presents ethical issues of loyalty. The Model Rules of Professional Conduct and the ABA Model Code of Professional Responsibility both state that a lawyer may represent multiple parties but only if certain preconditions are met.

First, the lawyer must ascertain whether he or she can adequately represent all clients fairly and to the best of the lawyer’s ability. “An attorney who undertakes to represent at the same time adverse parties in any type of legal relationship, whether contractual or otherwise, does not obligate himself to adhere to any higher duty or standard of care than if he endeavored to represent only one of those parties. On the other hand, he clearly owes no lesser duty to each of his clients, and he must protect the interests of each as zealously as if their interests were his sole responsibility.” Hill v. Okay Construction Company, Inc., 312 Minn. 324, 338, 252 N.W.2d 107 (1977). Comment 5 to Rule 1.7 of the Model Rules of Professional Conduct explains, “[W]hen a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.”⁴⁸

Second, there must be full disclosure to all parties. The attorney should explain all the facts and indicate in specific detail all the areas of potential conflict that foreseeably might arise. Further, the attorney should also make the client aware that if indeed any of these contingencies arise and not prove susceptible of ready solution in a manner fair and agreeable to all parties, it would then be his professional duty to cease immediately acting for all parties. See In the Matter of Lanza, 65 N.J. 347, 351 (1974). Further, comment 6 to Rule 2.2 of the Model Rules of Professional Conduct says that, “With regard to [the] attorney-client

⁴⁸ The current version of Comment 14 to Model Rule 1.7 (formerly part of Comment 5) now reads: “some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client’s consent.”

privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach.”⁴⁹ This too should be disclosed to the client.

Third, the attorney must obtain the client’s consent after the client has been fully informed about the nature of the representation and all relevant facts. Comment 3 to Rule 1.7 of the Model Rules of Professional Conduct states, “As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client’s consent.”⁵⁰ All relevant sources require that the attorney obtain the client’s consent before attempting to represent multiple parties in the same transaction.

However, it is important to remember that such consent “does not relieve an attorney of the duty to warn his client of dangers” and “is not a waiver of that client’s right to complain” about an attorney’s representation. Schlesinger v. Herzog, 672 So. 2d 701, 709-10 (La. Ct. App. 1996).

Representing multiple parties also presents ethical issues of conflict of interest. The Model Rules of Professional Conduct and the ABA Model Code of Professional Responsibility both state that a lawyer may represent multiple parties as in the issues of loyalty discussed above, however, the conflicts of interest rules emphasize the importance of the client’s consent and the consultation and explanation leading up to such consent. Ultimately, it is up to the lawyer to make a professional decision about the effect on that lawyers’ representation of each client in representing multiple clients.

* * *

What do these rules suggest?

- ◆ The conflict waiver should be in writing and signed by all clients, probably not through their attorneys.
- ◆ The conflict waiver should be in sufficient detail that the clients can understand the potential for a conflict in loyalty.

⁴⁹ The entire Model Rule 2.2 referred to in the ACREL 1999 Paper has been omitted in the amendments to the Model Rules as adopted by the ABA pursuant to the Ethics 2000 Report. The concepts contained in Model Rule 2.2 with respect to the representation of multiple clients are now part of Model Rule 1.7 and the current version of Comment 30 to Model Rule 1.7 states: “A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.”

⁵⁰ The current version of a portion of Comment 6 to Model Rule 1.7 (formerly part of Comment 3) now reads: “Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent.”

- ◆ The local attorney should consider that in some cases a request to represent both sides is not appropriate.

The solutions themselves raise issues, including, respectively:

- ◆ But what if client fails to return the signed letter? Is the waiver still valid?
- ◆ Can one rely on the client's signature as evidence that they read and understand this waiver?
- ◆ Is this different from a borrower's counsel being asked to give a lender an opinion that the loan documents are enforceable?

In general, [under Model Rule 2.3,] to the extent [the issuance of an opinion letter to a third party is] specifically directed by the attorney's client, the issuance of an opinion letter on enforceability of loan documents should not adversely affect a lawyer's independent professional judgment on behalf of the client.

The ACREL 1999 Paper was written before the ABA Ethics 2000 Commission 2001 and 2002 Reports were issued. Thus, as noted in the footnotes above, the text of some of the ABA Model Rules cited in the ACREL 1999 paper and associated comments have changed, but the analysis has not. The current versions of the ABA Model Rules referred to in the portions of the ACREL 1999 Paper quoted above are attached as Appendix H. The differences between the ABA Model Rules and the rules as adopted by the Illinois Supreme Court are also noted in Appendix H.

As the ACREL 1999 Paper suggests, the lead counsel in a multijurisdictional transaction should consider engaging local counsel familiar with the issues or questions customarily raised or asked by purchasers, sellers and lenders in such transactions. If a lawyer does not know to whom to refer local matters or engage as local counsel, consider joining the ABA or another legal or real estate trade associations that offers continuing legal education credits and provides the opportunity to develop a network of attorneys in other jurisdictions that may be called on for local counsel assistance and from whom the lawyer might receive reciprocal referrals.

3. Consider Foreign Admission in Other Jurisdictions.

If an Illinois lawyer's clients are engaged in significant transactions on a repeat basis in another jurisdiction, the lawyer may need to look into whether he or she should seek to be admitted in that jurisdiction. How difficult or possible that will be depends on whether or not the state has reciprocity with Illinois. Illinois' current reciprocity rules allow any attorney in good standing in his or her state of admission to be admitted in Illinois if the attorney's state of admission admits Illinois attorneys by reciprocity.⁵¹ Now that mandatory continuing legal

⁵¹ For a list of the requirements of all jurisdictions for admission to practice law in that jurisdiction, *see* item (4) in the Chart on the ABA website at <http://www.abanet.org/cpr/mjp/recommendations.pdf>. It may not be up-to-date, but it does provide citations for finding the actual requirements of the particular jurisdiction.

education has been adopted in Illinois, the fact that another state had adopted mandatory continuing legal education may not be as much of a burden to becoming licensed in another state.⁵² However, if the other state requires separate ethics hours or state-specific continuing legal education courses as part of its continuing legal education requirements, the out-of-state admitted attorney may need to travel to the other state to attend local continuing education courses.

IV. Conclusion

Multijurisdictional real estate practice is here to stay. Ethical rules associated with such a practice are also here to stay, and will require each lawyer to seriously evaluate his or her competency and ethical obligation not to practice law in a jurisdiction in which he or she is not authorized to practice each time the lawyer represents a client in real estate transaction for the first time in the different state or only intermittently represents clients in another state. Although most states have adopted all or some portions (or the equivalent) of the new ABA Model Rules 5.5 and 8.5, it may be several more years before the full consequences of these new rules are understood or addressed by case law or ethical opinions issued by state disciplinary or regulatory authorities.

As further evidence of the shifting landscape of ethical rules impacting multijurisdictional practice, the ABA Commission on Ethics 20/20 is reviewing the multijurisdictional practice issue as part of its charge to address the legal ethics challenges arising out of advances in technology and increasing globalization.⁵³ Thus, frequent revisiting of the subject may be required.

⁵² The ISBA/CBA Report noted that as of September 2003 the Illinois ARDC records showed there were more than 9,300 lawyers resident in Illinois who reported another admission outside of Illinois, and almost 14,000 non-resident lawyers registered in Illinois and outside Illinois. This is a significant percentage of the over 75,000 registered lawyers in Illinois. ISBA/CBA Report, p. 6.

⁵³ James Podgers, *Ethics 20/20 Eyes Global Change*, ABA JOURNAL, March 2010, at 67. The Ethics 20/20 Commission is scheduled to begin bringing recommendations to the ABA House of Delegates at the ABA 2011 midyear meeting. As an example of a multijurisdictional practice ethics challenge posed by advances in technology, consider a situation in which an Illinois licensed attorney answers a client's question about an issue in a loan transaction that is governed by New York law using the attorney's smart phone or other personal data assistant while in an airport in North Carolina. Does this constitute practicing law in North Carolina as well as in New York? Under Model Rule 5.5, a lawyer is permitted "to provide legal services on a temporary basis" in a 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." New York's version of Rule 5.5 does not include the Model Rule version of 5.5(b) and thus does not specifically address the activities in New York of lawyers not admitted to practice in New York. Thus one is left with Rule 5.5(a) which, like Model Rule 5.5(a) prohibits a lawyer from practicing law in a jurisdiction "in violation of the regulation of the legal profession in that jurisdiction." The comments to the New York version of Rule 5.5(a) make it clear that "A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice." North Carolina's version of Rule 5.5(a) is similar to the Model Rule, and North Carolina's version of Rule 5.5(b) is similar in many respects to that of the Model Rule 5.5, but does not contain the same provision found in Model Rule 5.5(c)(4) that permits a lawyer to perform services on a temporary basis in another jurisdiction where (Con't)

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.” Instead, North Carolina Rule 5.5(c)(2)(B) only allows a lawyer admitted in another jurisdiction to provide legal services on a temporary basis in North Carolina if “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.” Does it make a difference if the client is a Delaware entity with offices in Illinois? Or, if it is a North Carolina entity with its primary offices in Illinois? What if the loan is secured by properties in North Carolina, Illinois and Florida? Should the services should be considered as being performed in the attorney’s home state or on a temporary basis in North Carolina when the only connection to North Carolina is use of a Blackberry, for example, in a North Carolina airport? Does it make a difference what the nature of the questions answered by the attorney were while he was in North Carolina? There is no clear answers to these questions in the current Model Rules or any of the rules adopted by the states that have adopted the Model Rules or some form of them.

Appendix A

Model Rule 5.5

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW¹

(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.²

¹ This version of Model Rule 5.5 excerpted from the ABA MJP Report shows the differences between the Model Rule 5.5 prior to the adoption of the ABA MJP Report and the current version of Model Rule 5.5 as adopted by the ABA House of Delegates on August 12, 2002.

² As an example of how certain states might deviate from Model Rule 5.5 as adopted by the ABA House of Delegates, Florida's Report of the Special Commission on the Multijurisdictional Practice of Law 2002 dated October 24, 2003 (the "Florida Report"), recommended Florida Rule 4-5.5(c)(4) read as follows (differences from Model Rule 5.5(c)(4) are noted by underlining or strikeouts):

(4) are not within subdivisions (c)(2) or (c)(3) and

(A) are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice or

(B) arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(Con't)

(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.

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*.

Thus, Florida requires the client have a local connection to the lawyer representing him or her, such as being a resident of or having an office in the state in which the attorney is admitted. This is more restrictive than the ABA Model Rule 5.5(c)(4), as are the comments to this Section as adopted in Florida. Florida also did not adopt Section (d)(1) of Model Rule 5.5, which means there is no safe harbor for in-house counsel that is not admitted in Florida. Instead, in-house counsel must be admitted to practice under the Florida Rule 17, the "Authorized House Counsel Rule," which allows "authorized house counsel" who are "licensed to practice in jurisdictions other than Florida to be permitted to undertake [specified] activities in Florida while exclusively employed by a business organization without the requirement of taking the bar examination." Rule 17-1.1 of the Rules Regulating The Florida Bar. This rule may be found online at <http://www.floridabar.org/divexe/rrtfb.nsf/FV/F6468C6A2888B6F485256BBB004C85A2>. The definitions of "authorized house counsel" and "business organization" are in Rule 17-1.2 (<http://www.floridabar.org/divexe/rrtfb.nsf/FV/6B0BB79732FDACE585256BC0006C7F92>) and "authorized activities" are described in Rule 17-1.3 (<http://www.floridabar.org/divexe/rrtfb.nsf/FV/00821B7A46A9975C85256BC0006C8B47>). The Florida Report, including an explanation of how the rules adopted in Florida differ from the ABA Model Rules, is available online from The Florida Bar website at <http://www.floridabar.org/tfb/TFBComm.nsf/840090c16eedaf0085256b61000928dc/c0b5c0f13119379185256ee1004ab2d1?OpenDocument>. All of the Rules Regulating the Florida Bar are available online at <http://www.floridabar.org/divexe/rrtfb.nsf/WContents?OpenView>.

[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.

* * *

The above version of Model Rule 5.5 as adopted by the ABA House of Delegates is identical to the version adopted by the Illinois Supreme Court, except for Comment 17, which was revised to add the following at the end of Comment 17 as it appears in the ABA MJP Report quoted above:

See Illinois Supreme Court Rules 706(f), (g), 716, and 717 concerning requirements for house counsel and legal service program lawyers admitted to practice in other jurisdictions who wish to practice in Illinois.

The reference was required in the Illinois version of Model Rule 5.5 because of the earlier adoption in Illinois of Rule 716 allowing for registration of in-house counsel not otherwise admitted to practice law in Illinois.

* * *

New York had previously included the equivalent of the prior Model Rule 5.5(a) in its Disciplinary Rule DR 3-101(B). When it adopted the ABA Model Rules format, no changes to the text were recommended in the NYSBA Report. Thus, the current New York 5.5(a) reads as follows:

(a) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

The Final New York Report recommended the above version of Model Rule 5.5(b) be adopted by the New York Appellate Division of its Supreme Court, except that the words "in New York

State” or “in this state” were to have been substituted for “in this jurisdiction” throughout most of Rule 5.5 and in the comments. The Court declined to adopt the current Model Rule 5.5(b), which means the New York Rule 5.5(b), as jointly adopted by the Appellate Divisions of the New York Supreme Court effective April 1, 2009, reads as follows:

- (b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.

1
2 **Appendix B**

3
4 **Model Rule 8.5**

5 **RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW¹**

6 (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to
7 the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A
8 lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this
9 jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A
10 lawyer may be subject to the disciplinary authority of both this jurisdiction and another
11 jurisdiction ~~where the lawyer is admitted~~ for the same conduct.²

12 (b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the
13 rules of professional conduct to be applied shall be as follows:

14 (1) for conduct in connection with a ~~proceeding in~~ matter pending before a court
15 ~~before which a lawyer has been admitted to practice (either generally or for purposes of~~
16 ~~that proceeding)~~ tribunal, the rules ~~to be applied shall be the rules of the jurisdiction in~~
17 ~~which the court tribunal sits, unless the rules of the court tribunal provide otherwise; and~~

18 (2) for any other conduct, the rules of the jurisdiction in which the lawyer's
19 conduct occurred, or, if the predominant effect of the conduct is in a different
20 jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall
21 not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction
22 in which the lawyer reasonably believes the predominant effect of the lawyer's conduct
23 will occur

24 (i) ~~if the lawyer is licensed to practice only in this jurisdiction, the rules to be~~
25 ~~applied shall be the rules of this jurisdiction, and~~

26 (ii) ~~if the lawyer is licensed to practice in this and another jurisdiction, the rules to~~
27 ~~be applied shall be the rules of the admitting jurisdiction in which the lawyer principally~~
28 ~~practices; provided, however, that if particular conduct clearly has its predominant effect~~

¹ This version of Model Rule 8.5 excerpted from the ABA MJP Report shows the differences between Model Rule 8.5 prior to the adoption of the ABA MJP Report and the comment versions of Model Rule 8.5 as adopted by the ABA House of Delegates on August 12, 2002.

² As an example of how certain states may deviate from Model Rule 8.5 as adopted by the ABA House of Delegates, the Florida Report recommended some changes to Florida's then existing Rules 3-4.1 and 3-4.6. Florida Rule 3-4.1 now reads as follows (changes to rule as it existed in Florida prior to the Florida Report are shown stricken or underlined):

Every member of The Florida Bar and every attorney of another state or foreign country who is admitted to practice for the purpose of a specific case before a court of record of this state provides or offers to provide any legal services in this state is within the jurisdiction and subject to the disciplinary authority of this court and its agencies under this rule and is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by this court. Jurisdiction over an attorney of another state who is not a member of The Florida Bar shall be limited to conduct as an attorney in relation to the business for which the attorney was permitted to practice in this state and the privilege in the future to practice law in the state of Florida.

29 ~~in another jurisdiction in which the lawyer is licensed to practice, the rules of that~~
30 ~~jurisdiction shall be applied to that conduct.~~³

31 **Comment**

32 Disciplinary Authority

33 [1] ~~Paragraph (a) restates~~ It is longstanding law that the conduct of a lawyer
34 admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction.
35 Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer
36 to provide legal services in this jurisdiction is for the protection of the citizens of this
37 jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will
38 further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer
39 Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this
40 jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive
41 service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary
42 authority of this jurisdiction may be a factor in determining whether personal jurisdiction may
43 be asserted over the lawyer for civil matters.

44 **Choice of Law**

45 [2] A lawyer may be potentially subject to more than one set of rules of professional
46 conduct which impose different obligations. The lawyer may be licensed to practice in more than
47 one jurisdiction with differing rules, or may be admitted to practice before a particular court with
48 rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to
49 practice. ~~In the past, decisions have not developed clear or consistent guidance as to which rules~~
50 ~~apply in such circumstances.~~ Additionally, the lawyer's conduct may involve significant contacts
51 with more than one jurisdiction.

52 [3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing
53 conflicts between rules, as well as uncertainty about which rules are applicable, is in the best

³ The changes to Florida Rule 3-4.6 as adopted based on the recommendation in the Florida Report now reads as follows (changes to rule as it existed in Florida prior to the Florida Report are shown stricken or underlined):

(a) Disciplinary Authority. An attorney admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the attorney's conduct occurs. An attorney may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct. A final adjudication in a disciplinary proceeding by a court or other authorized disciplinary agency of another jurisdiction, state or federal, that an attorney licensed to practice in that jurisdiction is guilty of misconduct in a disciplinary proceeding under this rule.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the attorney's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.

The key differences between Florida Rule 3-4.6 and Model Rule 8.5 lie in paragraph (a) of both rules, although Florida also declined to adopt the last sentence of Model Rule 8.5(b)(2).

54 interest of both clients and the profession (as well as the bodies having authority to regulate the
55 profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a
56 lawyer shall be subject to only one set of rules of professional conduct, ~~and~~ (ii) making the
57 determination of which set of rules applies to particular conduct as straightforward as possible,
58 consistent with recognition of appropriate regulatory interests of relevant jurisdictions, ~~and~~ (iii)
59 providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

60 [4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding ~~in~~
61 pending before a court before which the lawyer is admitted to practice (either generally or pro
62 hae vice) tribunal, the lawyer shall be subject only to the rules of professional conduct of that
63 court the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its
64 choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation
65 of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer
66 ~~licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct~~
67 ~~of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the~~
68 ~~rules of the jurisdiction where he or she (as an individual, not his or her firm) principally~~
69 ~~practices, but with one exception: if particular conduct clearly has its predominant effect in~~
70 ~~another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is~~
71 ~~for the latter exception to be a narrow one. It would be appropriately applied, for example, to a~~
72 ~~situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted~~
73 ~~in State B, handled an acquisition by a company whose headquarters and operations were in~~
74 ~~State B of another, similar such company. The exception would not appropriately be applied, on~~
75 ~~the other hand, if the lawyer handled an acquisition by a company whose headquarters and~~
76 ~~operations were in State A of a company whose headquarters and main operations were in State~~
77 ~~A, but which also had some operations in State B shall be subject to the rules of the jurisdiction~~
78 in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another
79 jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in
80 anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such
81 conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

82 [5] When a lawyer's conduct involves significant contacts with more than one
83 jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will
84 occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's
85 conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the
86 predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

87 [5] [6] If two admitting jurisdictions were to proceed against a lawyer for the same
88 conduct, they should, applying this rule, identify the same governing ethics rules. They should
89 take all appropriate steps to see that they do apply the same rule to the same conduct, and in all
90 events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

91 [6] [7] The choice of law provision is not intended to apply to applies to lawyers engaged
92 in transnational practice, unless international law, treaties or other agreements between
93 competent regulatory authorities in the affected jurisdictions provide otherwise. Choice of law in
94 this context should be the subject of agreements between jurisdictions or of appropriate
95 international law.

96 * * *

97 Illinois Supreme Court adopted Model Rule 8.5, with the following revisions to
98 Comment 1 as recommended in the ISBA/CBA Report (underlining and strike throughs show

99 differences between ABA Model Rule 8.5 Comment 1 and Rule 8.5 as adopted by the Illinois
100 Supreme Court):

101 [1] It is longstanding law that the conduct of a lawyer admitted to
102 practice in this jurisdiction is subject to the disciplinary authority of this
103 jurisdiction. Extension of the disciplinary authority of this jurisdiction to other
104 lawyers who provide or offer to provide legal services in this jurisdiction is for the
105 protection of the citizens of this jurisdiction. Reciprocal enforcement of a
106 jurisdiction's disciplinary findings ~~and sanctions will further advance the~~
107 ~~purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer~~
108 ~~Disciplinary Enforcement. may advance the purposes of this Rule, subject always~~
109 ~~to the need to avoid unjust results. For purposes of reciprocal discipline,~~
110 suspension of the privilege to provide legal services on a temporary basis,
111 pursuant to Rule 5.5(c) shall not necessarily be considered equivalent to
112 suspension of licensure for a lawyer admitted to practice in this jurisdiction. A
113 ~~lawyer who is subject to the disciplinary authority of this jurisdiction under Rule~~
114 ~~8.5(a) appoints an official to be designated by this Court to receive service of~~
115 ~~process in this jurisdiction. The fact that the lawyer is subject to the disciplinary~~
116 ~~authority of this jurisdiction may be a factor in determining whether personal~~
117 ~~jurisdiction may be asserted over the lawyer for civil matters.~~

118 * * *

119 The Final New York Report recommended the ABA Model Rule 8.5 be adopted is a form
120 identical to Model Rule 8.5, except for some minor substitutions of the word "state" or "New
121 York State" for "jurisdiction." The Final New York Report also recommended the Comments to
122 Model Rule 8.5 be adopted in a form substantially the same as the Model Rule 8.5 Comments
123 with the same minor word substitutions in the Comments as indicated in the Rules. However,
124 the final version of Rule 8.5 as jointly adopted by the Appellate Divisions of the New York
125 Supreme Court effective April 1, 2009 is substantially the same as the prior ABA Model Rule
126 8.5, with the same minor substitutions proposed in the Final New York Report. Further study
127 and recommendations at a future date may be forthcoming from the NYSBA. However, given
128 that so many commercial real estate loan transactions are governed by New York law, a clear
129 understanding of the impact of the New York Rules of Professional Conduct on a non-New York
130 admitted attorney's role in a particular transaction and the differences between the rules in effect
131 in the non-New York admitted attorney's jurisdiction and the New York Rules of Professional
132 Conduct could be very important for the non-New York admitted attorney.

133

Appendix C

State Implementation of ABA Model Rule 5.5
(Multijurisdictional Practice of Law)

	Highest Court has adopted a rule identical to ABA Model Rule 5.5	Highest Court has adopted a rule similar to ABA Model Rule 5.5	Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 5.5	Recommendation pending in highest Court to adopt a rule similar to ABA Model Rule 5.5	States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5	States whose MJP study committees have recommended adoption of a rule similar to ABA Model Rule 5.5	States that have created committees to study ABA MJP recommendations
	(14)	(29)	(1)	(0)	(1)	(0)	(4)
AL		X					
AK	X						
AZ		X					
AR	X						
CA		X					
CO		X					
CT		X					
DE		X					
DC		X ¹					
FL		X					
GA		X					
HI							X
ID		X					

¹ Rule 49, D.C. Ct. of Apps.

	Highest Court has adopted a rule identical to ABA Model Rule 5.5 (14)	Highest Court has adopted a rule similar to ABA Model Rule 5.5 (29)	Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 5.5 (1)	Recommendation pending in highest Court to adopt a rule similar to ABA Model Rule 5.5 (0)	States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (1)	States whose MJP study committees have recommended adoption of a rule similar to ABA Model Rule 5.5 (0)	States that have created committees to study ABA MJP recommendations (4)
IL	X						
IN	X						
IA	X						
KS							
KY		X					
LA		X					
ME		X					
MD	X						
MA	X						
MI			X				
MN		X					
MS					X		
MO		X					
MT							
NE	X						
NV		X					
NH	X						
NJ		X					
NM		X					
NY							X
NC		X					
ND		X					

	Highest Court has adopted a rule identical to ABA Model Rule 5.5 (14)	Highest Court has adopted a rule similar to ABA Model Rule 5.5 (29)	Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 5.5 (1)	Recommendation pending in highest Court to adopt a rule similar to ABA Model Rule 5.5 (0)	States whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 5.5 (1)	States whose MJP study committees have recommended adoption of a rule similar to ABA Model Rule 5.5 (0)	States that have created committees to study ABA MJP recommendations (4)
OH		X					
OK		X					
OR	X						
PA		X					
RI	X						
SC		X					
SD		X					
TN		X					
TX							X
UT	X						
VT	X						
VA		X					
WA	X						
WV				Does not address MJP http://www.wvdc.org/ropc.htm			
WI		X					
WY		X					

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Appendix D

State Implementation of ABA Model Rule 8.5
(Disciplinary Authority; Choice of Law)

	Highest Court has adopted a rule identical to ABA Model Rule 8.5	Highest Court has adopted a rule similar to ABA Model Rule 8.5	Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 8.5	Recommendation pending in highest Court to adopt a rule similar to ABA Model Rule 8.5	State whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 8.5	State whose MJP study committees have recommended adoption of a rule similar to ABA Model Rule 8.5	States that have created committees to study ABA MJP recommendations
	(23)	(21)	(1)	(1)	(1)	(0)	(3)
AL							X
AK	X						
AZ	X						
AR	X						
CA		X					
CO		X					
CT	X						
DE	X						
DC		X					
FL		X					
GA		X					
HI							X
ID	X						
IL	X						
IN		X					
IA	X						
KS							
KY	X						
LA	X						

	Highest Court has adopted a rule identical to ABA Model Rule 8.5	Highest Court has adopted a rule similar to ABA Model Rule 8.5	Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 8.5	Recommendation pending in highest Court to adopt a rule similar to ABA Model Rule 8.5	State whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 8.5	State whose MJP study committees have recommended adoption of a rule similar to ABA Model Rule 8.5	States that have created committees to study ABA MJP recommendations
	(23)	(21)	(1)	(1)	(1)	(0)	(3)
ME	X						
MD		X					
MA		X					
MI			X				
MN	X						
MS					X		
MO	X						
MT		X					
NE	X						
NV		X					
NH		X					
NJ		X					
NM		X					
NY		X					
NC		X					
ND		X					
OH	X						
OK	X						
OR	X						
PA	X						
RI	X						
SC		X					
SD	X						
TN		X					

	Highest Court has adopted a rule identical to ABA Model Rule 8.5	Highest Court has adopted a rule similar to ABA Model Rule 8.5	Recommendation pending in highest Court to adopt a rule identical to ABA Model Rule 8.5	Recommendation pending in highest Court to adopt a rule similar to ABA Model Rule 8.5	State whose MJP study committees have recommended adoption of a rule identical to ABA Model Rule 8.5	State whose MJP study committees have recommended adoption of a rule similar to ABA Model Rule 8.5	States that have created committees to study ABA MJP recommendations
	(23)	(21)	(1)	(1)	(1)	(0)	(3)
TX							X
UT	X						
VT	X						
VA		X					
WA	X						
WV				X http://www.wvdc.org/ropc.htm			
WI		X					
WY		X					

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Appendix E

Services to be Performed by Local Counsel¹

Loan Transactions and Purchase or Sale Transactions:

- ◆ Reviewing documents prepared by lead counsel to determine conformity with and enforceability under the law of the local counsel's jurisdiction.
- ◆ Providing information regarding local customs, closing mechanics, and recording requirements.
- ◆ Performing local due diligence by giving general advice with respect to the property, comments on reliability of the surveyor, title insurer and other parties to the transaction, local market conditions and other items giving the lead counsel and the client the local flavor of the transaction.
- ◆ Assisting in the preparation of forms customarily used in the jurisdiction for real estate transactions such as mortgages, deeds of trust and other security instruments, deeds, affidavits of title, lease assignments and bills of sale for personal property.
- ◆ Providing advice on local customs regarding title insurance policies and endorsements, premiums, and ancillary services.
- ◆ Providing information on statutory disclosures required by laws in the jurisdiction.
- ◆ Providing advice concerning lease requirements under local law such as required segregation of security deposits, the availability of landlord's liens, use of memorandum of lease, landlord remedies, and lease priorities.
- ◆ Providing advice concerning local income, franchise and other taxes applicable to the buyer and/or lender, servicer and other parties to the transaction.
- ◆ Rendering opinions on legal (and sometimes factual) issues.
- ◆ Determining whether a buyer or lender is required to qualify to do business or to obtain the consent of any governmental authorities in the local state as a condition to buying property or making and enforcing its loan or taking title to the property upon a valid exercise of its remedies.

¹ Source: ACREL 1999 Paper, pp. 5-8.

- ◆ Determining whether a choice of law clause in the purchase and sale agreement or loan documents will prevail under the law of the local state and what particular factors will militate against such choice of law provision.

Mortgage loan transactions are particularly tied to local law since the security documents are generally governed by the laws of the state where the real property is located. This makes it essential that lead counsel have some certainty that the documents are enforceable. Many times local laws will force a restructuring of the basic transaction. Some of the common issues raised by local counsel in mortgage loan transactions are:

- ◆ Whether the local state has an anti-deficiency statute or a unity of action (“one action”) rule that might affect the order of foreclosure or sale of real or personal property; the ability of the lender to recover any deficiency against the borrower, or the availability of recourse to a guaranty; and what effect the lender’s recourse against collateral or a note outside of the local state will have on the rights of the lender to exercise remedies within the local state.
- ◆ The applicability of usury laws to the transaction and the effectiveness of usury savings clauses.
- ◆ Whether there is a requirement that the mortgage or deed of trust state the loan amount or the maturity date.
- ◆ The priority of future advances; and the statutory scheme for mechanics’ and materialmen’s liens.
- ◆ Evidence lenders typically receive in the local state to assure themselves as to compliance with zoning and other land use laws and/or that the collateral complies with local environmental laws and regulations.
- ◆ Whether foreclosure of the mortgage or deed of trust automatically terminates any subordinate tenant leases, or whether any such termination is at the option of the lender by joinder of such tenant in a foreclosure action.
- ◆ Whether it is possible to obtain a valid leasehold mortgage or deed of trust if the underlying lease or a memorandum thereof has not been recorded.
- ◆ The applicability of recording and mortgage taxes, the allocation of such taxes among jurisdictions and counties within a jurisdiction, and the ramifications of the failure to pay.
- ◆ Whether it is necessary to file UCC-1 Financing Statements in a jurisdiction other than the county in which the real estate is located, and whether such statements must be re-filed and re-recorded after any period of time.
- ◆ Whether future advances are explicitly authorized by statute; and what, if any, provision for additional advances is required to be executed or recorded in

order for such advances to be secured or to have priority over other liens filed subsequent to the recording of the mortgage or deed of trust but prior to such advances. In addition, determining whether a series of repayments and re-borrowings have any effect on the priority of term loans that are also secured by the mortgage or deed of trust; and whether there are any tax, priority or enforceability implications in providing for future advances.

- ◆ Whether a mechanic's lien recorded *after* a mortgage or deed of trust for work done prior to or after the recordation of the mortgage or deed of trust affects the priority of the mortgage or deed of trust.

Issues in purchase and sale transactions are very similar but more emphasis is often placed on due diligence issues and less on enforceability of the documents. Services that are customarily requested in purchase and sale transactions include the following:

- ◆ Advising on local customs regarding apportionment of taxes, rents, security deposits and the like and on closing expenses (including title charges and transfer taxes).
- ◆ Providing advice regarding assignments of names, copyrights and intellectual property, licenses, permits, guarantees, and warranties and tangible and intangible property.
- ◆ Providing advice regarding representations and warranties to be provided by the seller.
- ◆ Providing specific information to facilitate preparation of documents and closing the transaction.
- ◆ Reviewing and clearing title matters and satisfying existing liens.
- ◆ Providing assistance with real property taxes, exemptions, abatements, challenge and certiorari proceedings.
- ◆ Providing advice regarding local environmental and other laws applicable to the property and violations thereof.
- ◆ Providing advice regarding enforcement of remedies, particularly retention of the deposit as liquidated damages.
- ◆ Providing advice on the customary form of deed used in the jurisdiction.

Appendix F

Local Counsel Retainer Letter¹

[LEAD COUNSEL LETTERHEAD]

_____, 20__

VIA TELECOPY

RE: Client; Property; City; State

Dear _____:

We would like you to act as our local counsel in connection with the acquisition by _____ (“Client”) of _____, located in _____, as more particularly described in Exhibit A attached hereto (the “Property”). The seller is _____, a _____.

Based on the following summary outline of the basic scope of engagement, please confirm that you will act as our local counsel in this matter by executing a copy of this letter and returning for our files. In addition, please prepare a written estimate of the total cost (including a summary estimate of the costs associated with each of the separate issues outlined below), and a timetable within which you estimate delivery of your final work product. As the transaction progresses toward closing, additional legal services may be required as new issues arise. Similarly, upon your review of the transaction you may determine that it is advisable in your professional judgment to recommend additional research to fully understand matters to resolve legal issues you uncover that impact this transaction. In either of these events, before any additional work is commenced, this engagement letter must be formally amended in writing to reflect our agreement respecting the additional services to be rendered.

We have selected you for this local counsel assignment because of your current expertise in local land use matters and our assumption is that, given that expertise, you will not need to do original legal research or other substantial work to provide most of the non-property specific information for the memorandum discussed below. To the extent this is not true, please contact us in advance of undertaking any such research or other substantial work not contemplated in your initial estimate.

¹ Source: ACREL 1999 Paper, Exhibit A.

In connection with this transaction, after review of appropriate governmental files (where you consider such review to be necessary and appropriate) and conversations with appropriate persons, we would like you to prepare a self-contained memorandum together with pertinent portions of reference materials or internal memoranda used in connection with this matter that covers the following issues and questions:

1. Deeds/Holding Title:

(a) Determine the necessity of qualifying Client to conduct business in the State of _____.

(b) Determine whether Client can hold title in the name of _____, a _____.

(c) Determine whether the Property is a Torrens property or under any other unique recording system and briefly outline the prerequisites to recordation of the deeds that may be imposed by the title examiner. Advise us of any recordation taxes and/or fees associated with the recordation of deeds (see Paragraph 4).

(d) Advise us to the typical form of deed accepted by prudent institutional purchasers of real property in _____ and provide a blank copy of standard form of such deed.

2. Zoning and Land Use Regulations.

(a) Prepare a brief summary of applicable land use controls, including zoning and subdivision regulations bearing on the Property, and attach relevant sections of applicable codes, ordinances and statutes.

(b) Determine whether the city, or such other local governing body having appropriate jurisdiction, will issue certificates or other evidence of property zoning and/or compliance with land use requirements (and if so, obtain same), including a certification that the existing parking meets zoning requirements and the use requirements of the tenants of the Property, that all height and setback restrictions have been complied with and that the tenant's use of the Property complies with applicable zoning regulations. If no such certificate is obtainable, propose an alternative to establishing compliance with zoning and other land use regulations.

(c) Prepare a brief summary of the administrative process with respect to the issuance of variances, building permits and other discretionary approvals, if any, that may arise in connection with (i) Client's acquisition of the Property, and (ii) if an Exhibit B is attached hereto describing contemplated improvements after closing, as respects such contemplated improvements and specify the applicable statute of limitation for appeals.

3. Compliance With Local Building Codes.

(a) Through telephone or in person conversation with people in the local governing body offices, and without doing legal research (except to the extent you feel it required), confirm

what form evidence of final occupancy approval must take (e.g., certificate of occupancy), and which city departments (e.g., fire, planning, engineering, public works) must sign the certificate. Specify any additional final approvals that may be needed (e.g., parking approvals, traffic approvals, use approvals) for the Property that have not yet been issued.

(b) Through telephone or in person conversation with people in the local governing body offices, and without doing legal research (except to the extent you feel it required), determine if it is possible to acquire from the local governing body a certification that the improvements are in compliance with local building codes and regulations.

4. Taxes.

(a) Determine whether bulk sales requirements or other personal property taxes are applicable to the transaction.

(b) Determine whether transfer taxes and documentary stamp taxes are applicable to this transaction. Additionally, determine how the transfer and stamp taxes are calculated and whether there are any other taxes applicable to this transaction generally.

(c) Without doing any legal research (except to the extent you feel it required) whether real property taxes are affected by the transfer of the Property, and, if so, whether the impact of any additional taxes can be avoided or minimized. Additionally, determine how and when real property taxes are assessed and paid.

(d) Determine whether there are any rent taxes or gross receipt taxes applicable to the collection of rent. Additionally, determine whether a predecessor's nonpayment of any such taxes is binding upon successors in interest.

(e) Without doing any legal research (except to the extent you feel it required) whether there are any transit impact fees or other similar taxes, assessments or fees planned or projected for the Property.

5. Purchase and Sale Agreement.

(a) Describe any implied warranties that may be part of the standard conveyancing documents used in the State of _____.

(b) Outline the requirements, if any, for a valid liquidated damages provision.

(c) Provide the statute of limitations for claims respecting design defects and construction defects, contract claims and tort claims in the State of _____. If there is a statute governing same, furnishing a copy of the statute is sufficient and an analysis of the case law interpreting the statute is not required.

(d) Set forth the customary allocation between buyer and seller of all closing costs and tax apportionments.

6. Development Activity. Without doing any legal research (except to the extent you feel it required) briefly describe the development activity, development potential and regulatory climate respecting development in the locality as they pertain to the undeveloped land in the general area of the Property.

With respect to each of the foregoing, please append any information you may have respecting proposed rules, laws, regulations or plans to your Memorandum, referencing the attachments where appropriate. Client's objective is to become familiar with those factors relevant to acquiring and operating property in the location of the Property that, generally speaking, would be known to local developers and investors. For example, planned special assessments that do not appear on preliminary title reports, planned road widenings, planned condemnations, planned rent control ordinances, special taxes that may affect the acquisition, ownership of management of the Property and other matters pertaining to similar properties that may bear upon the ownership of the Property and of which you may have knowledge because of your involvement with similar transactions in the same general location.

We will forward any documents or due diligence materials we think might assist you in your preparation of the requested memorandum.

By execution and return of this letter you represent that there are no client conflicts posed by your representation of Client. Upon receipt of your signed copy of this letter, I will forward all relevant materials to you together with a timeline for completion of the final memorandum. During the course of this project, please forward all documents, correspondence, memoranda and billings to my attention. As we have discussed, all fees and disbursements for this transaction will be paid through the closing escrow.

Thank you.

Very truly yours,

[Lead Counsel]

ACCEPTED AND AGREED TO
THIS ____ DAY OF _____

By: _____
By: _____
Its: _____

Appendix G

Form of Local Counsel Confirmation¹

[LOCAL COUNSEL LETTERHEAD]

[Date]

Via Facsimile and Regular Mail

Re: [Name of Transaction]

Dear _____:

Thank you for contacting us regarding the pending _____ transaction. We are pleased to be able to act as local counsel to _____ for the State of _____ in connection with this transaction. We understand that the scope of our services will include review and comments on [State] matters relating to the loan documents, response to questions regarding [State] tax matters for structuring purposes, preparation and issuance of our firm's opinion relating to enforceability in [State] of the [lease and mortgage/deed of trust] loan documents, providing such opinion to borrower's lenders, and other incidental matters related to the closing transaction as you may request.

I will act as the primary partner on this transaction and as appropriate will involve other partners or associates. I have asked _____ to respond to [tax] matters and s/he has already been contacted by _____. My hourly rate is \$ _____. _____'s hourly rate is \$ _____. To the extent that it increases efficiency and economy, I may delegate work to or otherwise involve other partners or associates (whose hourly rates range from \$ _____ to \$ _____). We will be prepared to present our statement for services at closing.

[I enclose a copy of my letter to lender's lead counsel, clarifying at their request, our firm's position on representation in the captioned transaction.]

Please let me know if this letter does not reflect your understanding of this engagement, otherwise, I would appreciate the return of a signed copy for my file. I look forward to working with you on this matter.

Very truly yours,

[Local Counsel]

¹ Source: ACREL 1999 Paper, Exhibit B.

THE ABOVE LETTER IS ACKNOWLEDGED
AND ACCEPTED.

By: _____
Its: _____

Date: _____

Appendix H

Selected ABA Model Rules of Professional Conduct¹

Client – Lawyer Relationship

Rule 1.1 Competence²

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

* * *

Rule 1.4 Communication

(a) A lawyer shall:³

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e),⁴ is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

* * *

Rule 1.7 Conflict Of Interest: Current Clients⁵

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

¹ The full text of all of the ABA Model Rules (only portions of which are quoted here) can be found online at http://www.abanet.org/cpr/mrpc/mrpc_toc.html.

² Following the recommendations contained in the ISBA/CBA Report, the Illinois Supreme Court adopted the new ABA Model Rule 1.1 and related comments on July 1, 2009.

³ The Illinois Supreme Court adopted the new ABA Model Rule 1.4(a) and related comments on July 1, 2009.

⁴ Informed consent is defined in Model Rule 1.0(e) and Illinois Rule 1.0(e) as follows:

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

⁵ The Illinois Supreme Court adopted the new ABA Model Rule 1.7 and related comments on July 1, 2009, except that Model Rule 1.7(b)(4) and the comments were revised to eliminate the requirement that conflict waivers be in writing (*i.e.*, the words “, confirmed in writing” were deleted from Section 1.7(b)(4)). Similar deletions were made from the ABA Model Rule Comments.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules⁶

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

⁶ The Illinois Supreme Court adopted the new ABA Model Rule 1.8 and related comments on July 1, 2009, except for: (a) replacing the text in section 1.8(a)(2) with "the client is informed in writing that the client may seek the advice of independent legal counsel on the transaction, and is given a reasonable opportunity to do so; and"; (b) the deletion of the sentence in Comment 12 referring back to the requirements of Model Rule 1.7(b) that consents be in writing; and (c) other changes that are noted in the ISBA/CBA Report. *See* ISBA/CBA Report, pp. 16-17, 80-86.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
- (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Rule 1.9 Duties To Former Clients⁷

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

⁷ The Illinois Supreme Court adopted the new ABA Model Rule 1.9 and related comments on July 1, 2009 except for deleting the words "confirmed in writing" from Section 1(a) and 1(b)(2) and certain other changes identified in the ISBA/CBA Report. *See* ISBA/CBA Report, pp. 17-18, 87-89.

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

* * *

Counselor

Rule 2.3 Evaluation For Use By Third Persons⁸

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

* * *

Law Firms and Associations

Rule 5.7 Responsibilities Regarding Law-Related Services⁹

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person

⁸ The Illinois Supreme Court adopted the new ABA Model Rule 2.3 and related comments on July 1, 2009.

⁹ The ISBA/CBA Report recommended that the new ABA Model Rule 5.7 be adopted. However, the Illinois Supreme Court did not adopt the new ABA Model Rule 5.7 in connection with its adoption of the other ABA Model Rules on July 1, 2009. Adoption of new ABA Model Rule 5.7 is currently being studied, but no decision has been made, nor is a decision imminent. Model Rule 5.7 is especially relevant to real estate lawyers who also serve as title agents since issuing title insurance might be considered a "law-related service" subject to the rule if Model Rule 5.7 were adopted. Extensive lobbying by the title insurance companies primarily offering services through lawyers acting as member agents caused the Illinois Supreme Court to defer adoption of Model Rule 5.7, although it did adopt the language in Comment 1 to Rule 1.8 that identifies the sale of title insurance as an example of a business transaction with a client that is the type of law-related service contemplated in proposed Rule 5.7. For a summary of the testimony opposing the language in Comment 1 to Rule 1.8 by John O' Brien, a Director of Attorneys' Title Guaranty Fund, Inc. and the then Chairman of the Illinois Real Estate Lawyers Association ("IRELA") (Mr. O'Brien is also the 2009-10 President of the Illinois Bar Association), Hank Shulruff, Senior Vice President - Business Development of Attorneys' Title Guaranty Fund, Inc., and Ralph Schumann, a member attorney of Attorneys' Title Guaranty Fund, Inc. and the then President of IRELA, before the Illinois Supreme Court at its October 24, 2008 hearing on the ISBA/CBA Report's proposed revised Rules 1.8 and 5.7, see <http://www.atgf.com/AboutATG/ATGInTheNews/SupremeCourtTestimony102408/tabid/771/Default.aspx>. The full text of Mr. Schumann's testimony opposing proposed Rule 5.7 can be found on the website for IRELA at <http://www.irela.org/PDFs/2008/October%202008/Schumann%20Testimony%2010242008.pdf>.

obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term “law-related services” denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

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