

MULTIJURISDICTIONAL ADR PRACTICE: LESSONS FOR LITIGATORS

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I. INTRODUCTION

As everything else in life has become more global, so has the practice of law. Lawyers commonly have clients and conduct work in states other than the ones in which they reside and are licensed. Transactional lawyers commonly work for clients in different states or put together deals that close in states other than the ones in which they are licensed. Litigators, too, often have clients in other states, participate in court proceedings in other states, and engage in both formal and informal discovery in other states. The work of the litigator poses even more questions if that litigator is engaged in alternative dispute resolution (“ADR”) as opposed to traditional litigation.

Questions involving ADR and the unauthorized practice of law abound because of some fundamental distinctions between ADR and traditional litigation. For example, parties to ADR procedures may purposefully choose to conduct their dispute-resolution procedure in a neutral location,¹ while in traditional litigation the location of the suit must be in a location upon which jurisdic-

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¹ See ABA Comm’n on Multijurisdictional Practice, *Client Representation in the 21st Century*, 2002 A.B.A. COMM’N MULTIJURISDICTIONAL PRAC. REP. 10 (August 2002) (“In ADR proceedings as well, it is common for lawyers to render services outside the particular states in which they are licensed. Sometimes, the parties choose to conduct the ADR proceeding in a state that has no relation to the parties or the dispute, because they prefer a neutral site.”).

tion and venue are established.² In the case of a neutral-site ADR procedure, questions may arise as to where exactly the lawyers are practicing and whether the principles surrounding the rules relating to the unauthorized practice of law (“UPL”)—such as familiarity with local rules and customs—have any application to the situation.³ Even assuming the ADR procedure is related to the foreign jurisdiction (i.e., at least one of the parties is located in the foreign jurisdiction or the proceeding involves a claim under the law of the foreign jurisdiction), questions arise as to whether or not a lawyer could even receive temporary admission in another jurisdiction if the ADR procedure is not connected to a trial or administrative proceeding.

In other words, despite the fact that the practice of law has become a national—and international—practice, state law and ethical rules governing lawyers generally limits a lawyer’s practice to the states in which the lawyer is licensed. Although some strides have been made in the recognition of the global practice of law, the statutes and rules regarding the unauthorized practice of law, particularly as they relate to multijurisdictional practice, remain inconsistent.⁴ Because of the lingering inconsistencies, lawyers still need to be aware of whether their activities constitute the practice of law, where their activities are taking place, and what, if anything, the lawyers should do if they are practicing law in a jurisdiction in which they are not licensed.

This article attempts to give an overview of the problem facing litigators in their increasingly global practice, as well as the steps that litigators can take to act in compliance with legal and ethical guidelines. Accordingly, this article is divided into two broad ar-

² The principles set forward in *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) remain the foundations of personal jurisdiction law. Similarly, 28 U.S.C. § 1391 sets forth the general requirements of venue in the federal courts, while the individual states each have enacted long-arm statutes and venue requirements. Those state citations, however, are beyond the scope of this article and are not included here.

³ See ABA Comm’n on Multijurisdictional Practice, *supra* note 1, at 10–11 (“Because particular knowledge of state law and procedure is not necessary [in a neutral-site ADR procedure], the parties often select lawyers based on other considerations, such as the lawyers’ prior knowledge of the relevant facts or a preexisting client-lawyer relationship.”).

⁴ The biggest strides have been taken by the ABA Commission on Multijurisdictional Practice and the revisions to MODEL RULES OF PROF’L CONDUCT R. 5.5 (2009), which recognizes the balance between a state’s ability to regulate the unauthorized practice of law within its own jurisdiction and the increasingly global nature of the practice of law. Although the Commission adopted the model rule in 2002, at this time, only about half of the states in the United States have adopted this rule. Given the significant lack of uniformity more than five years later, the questions posed by the Commission in 2002 are still relevant today.

eas. First, this article will discuss what activities constitute the practice of law and which jurisdiction's law should govern, focusing on whether ADR practices constitute the practice of law.⁵ Second, if the litigator is engaged in the practice of law, this article considers what actions the litigator should take in order to comply with the applicable ethical rules.⁶

In 2002, the ABA proposed Model Rule of Professional Conduct 5.5 in an attempt to answer many of these questions relating to the unauthorized practice of law, including the questions related to multijurisdictional ADR practice. The proposed Model Rule would largely exempt ADR practice from the realm of the unauthorized practice of law.⁷ Nearly five years later, however, the states have not uniformly adopted Model Rule 5.5, particularly as that rule relates to ADR procedures.⁸ Because Model Rule 5.5 would answer many, if not all, of these questions, these authors recommend that the remaining states consider this rule and adopt the rule, or a similar rule, in order to create a more uniform national practice.

II. WHAT CONSTITUTES THE "PRACTICE OF LAW" "IN" A JURISDICTION?

A. When Does ADR Constitute the "Practice of Law"?

In addressing the question of whether a multijurisdictional attorney is engaging in the practice of law, the first logical questions are as follows: (1) does the attorney's conduct constitute the practice of law; and (2) where is the attorney practicing? The answers

⁵ See *infra* Part II.

⁶ See *infra* Part III.

⁷ See MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009). The rule provides: 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 . . . 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.

Id.

⁸ At the time of this article, roughly half of the states adopted the Model Rule's provision regarding ADR practice, and another couple of states, particularly Florida, Nevada, and New Jersey, adopted a rule regarding unauthorized practice of law that specifically speaks to ADR procedures.

to these apparently straightforward questions are strikingly complex and vary from jurisdiction to jurisdiction. Some states have addressed these questions in a methodical manner, while others take a results-oriented approach. Still more states have not addressed these issues at all. The ultimate moral of the story is that research may be necessary to determine, as best one can, whether particular activities in connection with ADR constitute the practice of law in a particular jurisdiction.

1. Situations Where It Does Not Matter

The first portion of this analysis, whether the attorney's conduct constitutes the practice of law, can be skipped in two situations. First, attorneys who practice in states that have adopted Model Rule 5.5(c)(3) verbatim can skip this question. The ADR provision of Model Rule 5.5(c) allows attorneys licensed by a U.S. jurisdiction to practice law in connection with an ADR proceeding on a "temporary basis" so long as the representation is "reasonably related" to the lawyer's practice in the jurisdiction in which they are licensed.⁹ An attorney in such a jurisdiction can presume that the conduct is the practice of law, and then look to whether the conduct is "temporary" and "reasonably related."

The second situation is when a statute or rule explicitly exempts the attorney's conduct in specific ADR proceedings from the state's UPL rules.¹⁰ For example, attorneys who are licensed to

⁹ See MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009); see *supra* note 6. Interestingly, R. 5.5(c) also contains a catch-all exception, which is R. 5.5(c)(4): "A lawyer admitted in another United States jurisdiction . . . may provide legal services on a temporary basis in this jurisdiction that . . . 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." Although section (c)(3) generally covers a lawyer's ADR practice in the forum jurisdiction, awareness of the catch-all provision is still helpful.

¹⁰ Non-attorneys and litigators licensed in other states must exercise caution even when a statute authorizes what would otherwise constitute the unauthorized practice of law. In some instances, courts have indicated that such statutes are unconstitutional. See *e.g.*, *Dayton Supply & Tool Co. v. Montgomery County Bd. of Revision*, 111 Ohio St. 3d 367 (2002). In *Dayton Supply*, the Ohio Supreme Court addressed a statute purporting to allow listed categories of non-attorneys to file complaints regarding valuation of real property for taxing purposes. The court allowed corporate officers, one of the statutory categories, to file complaints on behalf of their corporations on the basis that the public interest was not harmed, the corporation's interests were secured by the fiduciary duty owed by the officer to the corporation, and the issues in such cases tended to be factual rather than legal. *Id.* Notably, the court held that the right to file a complaint did not extend to the right to present evidence or testimony before the Board of Revisions. *Id.*

Importantly, three of the seven justices filed a strong dissent on the basis that filing complaints on behalf of a corporation was the practice of law, and that the statute violated the

practice law in a foreign country and wish to represent clients in “international commercial arbitrations” in the United States seem to be exempted from UPL rules by the Inter-American Convention on International Commercial Arbitration or by statute in several states.¹¹ For all other representations, though, attorneys licensed by a foreign country must be particularly mindful of UPL issues. Foreign-licensed attorneys do not fall within the language of Model Rule 5.5(c)(3), and the common foreign legal consultant rules involve their own strictures as to the scope of permissible representation within the United States.¹²

2. What is the “Practice of Law?”

If an attorney’s ADR representation involves actions or people in states that have not adopted Model Rule 5.5(c)(3) and does not come within some other exemption, the attorney needs to consider whether he or she is, indeed, practicing law. In the context of arbitration, these issues have been litigated in a number of jurisdictions and under many definitions of the practice of law.¹³ The answers, though, are not uniform across jurisdictions and can be seen to vary over time as multijurisdictional ADR practices have become more readily recognized and accepted.

Clearly, there are two views about whether actions taken in relation to arbitration constitute the practice of law. The difference of opinion seems to result, in part, from the court’s view on whether arbitration is truly different from traditional litigation. In some ways, both sides are correct, as the manner in which arbitrations are conducted vary widely according to the needs and agreements of the parties. Some arbitration proceedings are informal and are a far cry from traditional litigation. Other arbitrations, particularly large arbitrations where parties are represented by large litigation firms, look far more like traditional adversarial litigation and include discovery, depositions, and adversarial presentation of evidence. A court’s view on which manner of arbitration is more prevalent, combined with a court’s sometimes competing

separation of powers contained in the Ohio Constitution. The dissenters would have found the statute unconstitutional on the grounds that the legislature had no constitutional authority to dictate who was entitled to practice law in Ohio.

¹¹ 9 U.S.C. §§ 301–307(2006); Inter-American Convention on International Commercial Arbitration, art. 3 (1975); Rules of Procedure of the Inter-American Arbitration Commission, art. 4 (2002); CAL. CODE CIV. PRO. § 1297.11 *et seq.* (2009) (allowing non-lawyers to represent clients in international commercial disputes); CONN. GEN. STAT. § 51-88(d)(3) (2009).

¹² See, e.g., FLA. BAR REG. R. 16-1.3; TEX. R. GOV. B. ADMIS. XIV, § 3 (2009).

¹³ See *infra* notes 14–28 and accompanying text.

concern regarding consumer protection issues and providing maximum access to representation, may be unspoken factors leading to the divergent views on whether an advocate's actions in arbitration constitute the practice of law.

a. When Arbitration is Not the Practice of Law

The narrower definition of the practice of law often removes at least some aspects of arbitration from regulation. The rationales used to arrive at this result, though, are varied. One approach is that the advocate's actions in preparation for and during arbitration proceedings are not the practice of law because arbitration is sufficiently different from litigation, in that arbitration advocacy does not constitute the practice of law.¹⁴ Primarily, arbitration awards are not necessarily the product of the application of law to facts—arbitrators can decide disputes based on principles of equity, rather than by strictly following rules of law.¹⁵ Furthermore, arbitrators do not necessarily apply rules of procedure or evidence.¹⁶ As such, a non-lawyer or a lawyer from another jurisdiction may be able to represent an arbitration participant as effectively, or even more effectively, as a local lawyer.¹⁷

Yet another approach seems to be more results-oriented. Some courts have expressed concern about extending the defini-

¹⁴ *Colmar, Ltd. v. Fremantlemedia N. Am., Inc.*, 344 Ill. App. 2d 977, 991 (Ill. App. Ct. 2003) (noting that special experience with local rules of procedure or evidence are not required, as arbitrators are not required to apply such rules). See also *Donald J. Williamson, P.A. v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613, 616 (S.D.N.Y. 1982) (finding no UPL by attorney not admitted to the state hosting the arbitration); *Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct. of Santa Clara County*, 17 Cal. 4th 119, 143–46 (1998), *superseded by statute* (Kennard, J. dissenting) (reasoning that the practice of law involves those issues requiring legal knowledge and expertise; arbitration can be a more informal process that does not require such legal knowledge and expertise).

¹⁵ Revised Uniform Arbitration Act (“RUAA”) § 15 and cmt.1 (2000) (noting that the arbitrators gives an arbitrator “wide latitude” in conducting the proceedings and noting that the rules of evidence are generally inapplicable); see also *Donald J. Williamson, P.A.*, 537 F. Supp. at 616 (noting that arbitrators need not provide the reasons for their opinions), *citing* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57–58 (1973); United States [Federal] Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883, § 10–11 (1925) (not including failure to apply rule of law is not a basis for vacation or modification of the award) (codified as amended at 9 U.S.C. §§ 1–307 (2006)).

¹⁶ *Colmar*, 344 Ill. App. 3d at 991 (differentiating arbitration and trials because arbitration does not implicate traditional concerns of compliance and knowledge of local procedure and law); *Donald J. Williamson, P.A.*, 537 F. Supp. at 616 (refusing to invalidate arbitration award on the basis of UPL because, among other things, the fact-finding in arbitration is not equivalent to that in a trial) (*citing* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57–58 (1973)); Federal Arbitration Act, §§ 10–11 (not including failure to apply rule of law is not a basis for vacation or modification of the award).

¹⁷ *Colmar*, 344 Ill. App. 3d at 991.

tion of the practice of law so far that it allows locally admitted lawyers an effective monopoly over representations in arbitration proceedings.¹⁸ Other courts have held that arbitration representation is not conduct regulated by the UPL rules because opening arbitration to attorneys from other jurisdictions furthers public policy by optimizing both client choice of representatives and access to representation by having the maximum available pool of representatives.¹⁹

b. When Arbitration is the Practice of Law

Despite the various arguments in favor of a finding that ADR activities are outside the practice of law, many jurisdictions have come to the opposite conclusion. Whether these cases remain good law may be an open question, given the rapidly-developing nature of this area of law and of multijurisdictional practice in general.

Florida,²⁰ for example, adopted a relatively common definition of the practice of law as the giving of “specific legal advice” and the performance of “the traditional tasks of the lawyer.”²¹ In applying

¹⁸ See, e.g., *Prudential Equity Group v. Ajamie*, 538 F. Supp. 2d 605, 608 (S.D.N.Y. 2008) (rejecting UPL allegations in fee sharing dispute among attorneys who represented a client in arbitration).

¹⁹ See, e.g., *Colmar*, 344 Ill. App. 3d at 977 (finding no UPL in connection with arbitrations in Illinois).

²⁰ Florida has subsequently adopted MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009), effectively overruling the outcomes of *Florida Bar v. Rapoport*, 845 So.2d 874 (2003) (enjoining Washington D.C. attorney not licensed in Florida from representing clients in securities arbitrations before the AAA, NASD, and NYSE) and *Florida Bar re: Advisory Opinion on Nonlawyer Representation in Sec. Arbitration*, 696 So.2d 1178, 1180 (1997), discussed herein. The reasoning in *Rapoport*, however, has been cited by other courts and, in jurisdictions that have not adopted Model Rule 5.5(c)(3), may still be persuasive. For another definition of the “practice of law,” Tennessee defines it as:

the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services.

TENN. CODE. ANN. § 23-3-101(3).

²¹ *Rapoport*, 845 So.2d at 877. This definition grows out of the long-standing definition of the practice of law adopted by the Supreme Court of Florida in *State ex rel. Florida Bar v. Sperry*, 140 So.2d 587, 591 (1962), *vacated and remanded on other grounds*. The test adopted in *Sperry* states that an action is the practice of law if “the giving of such advice and performance of such services affect important rights of a person under the law” and “if the reasonable protection of the [person’s] rights and property . . . requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen.” See also *Ranta v. McCarney*, 391 N.W.2d 161, 163 (N.D. 1986) (holding that the practice of law includes

this definition to securities arbitration in 2003, the Florida Supreme Court concluded that the practice of law extends to “giving of legal advice, preparing and submitting claims, representing clients in proceedings, [and] advertising his ability to represent clients” in securities arbitration proceedings.²² The practice of law also encompasses actions taken before,²³ during,²⁴ and after²⁵ an arbitration.

not only appearances in court, but also “customary functions of an attorney or counsellor at law” that affect people’s legal rights and obligations; typically, these services require a high degree of legal skill) (internal quotes omitted); *see also* Ind. St. Bar Ass’n L. Ethics Op. No. 4 (1992) (noting that “filling out or helping the person fill out the forms or assisting in the execution of the forms would constitute the practice of law” in a situation involving a non-attorney financial entity potentially assisting an attorney involved in estate planning).

²² *Rapoport*, 845 So.2d at 877.

²³ Activities in preparation for arbitration that constitute the practice of law encompass advice and services rendered to determine:

- (1) whether the investor is compelled to arbitrate . . . ;
- (2) the effect of eligibility rules and statutes of limitations;
- (3) the scope of the arbitrator’s authority;
- (4) whether to arbitrate or settle the dispute before filing a claim;
- (5) the merits of specific claims or defenses;
- (6) whether attorneys or expert witnesses should be hired to assist in the arbitration;
- (7) whether the investor should file a petition to stay the arbitration; and
- (8) the possibility of related or alternative civil actions.

Florida Bar re: Advisory Opinion, 696 So.2d at 1180; *see also* *Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct. of Santa Clara County*, 17 Cal. 4th 119, 129 (1998) (finding, without discussion, that pre-arbitration case preparation constitutes the practice of law).

²⁴ Activities during an arbitration that constitute the practice of law involve actions relating to discovery, presentation of evidence, examination of witnesses, opening and closing statements, and written filings with the arbitration authority. *Florida Bar re: Advisory Opinion*, 696 So.2d at 1180.

Similarly, the Arizona Supreme Court focused on the adversarial nature of the arbitration proceedings in holding that a suspended attorney could not act as an advocate in arbitration over uninsured motorist coverage. *In re Creasy*, 198 Ariz. 539, 543 (2000). Arizona has since adopted MODEL RULES OF PROF’L CONDUCT R. 5.5(c)(3) (2009), but in jurisdictions that have not adopted R. 5.5(c)(3), this rationale may be persuasive.

The Uniform Revised Arbitration Act (“RUAA”) specifically provides that a “party to an arbitration proceeding *may be represented by a lawyer.*” RUAA § 16 (emphasis added). According to the comments, the drafting committee specifically considered, but rejected, a proposal to add the phrase “or any other person” after the word “lawyer.” RUAA § 16 cmt. 1. The comments, however, do provide that this section is not meant to limit “representation in an arbitration proceeding by individuals who are not licensed to practice law either generally *or in the jurisdiction in which the arbitration is held.*” RUAA § 16 cmt. 2 (emphasis added). In other words, the drafting committee recognized the potential that representation in arbitration does constitute the unauthorized practice of law in some jurisdictions; however, the committee wanted to retain for the parties the broadest possible right to representation provided that such representation does not violate the law of the forum jurisdiction.

²⁵ The Florida Supreme Court’s concerns about post-arbitration activities seem less well-founded, as the only post-arbitration UPL the court noted was the affirmation or vacation of an award by the courts or collection of the award. *Florida Bar re: Advisory Opinion*, 696 So.2d at 1180. Appearing before a court to affirm or vacate an award is clearly the traditional practice of

These actions constitute the practice of law and, thus, the unauthorized practice of law if they are undertaken by a non-attorney²⁶ or by an attorney licensed in a jurisdiction other than Florida.²⁷

One apparent reason for the *Rapoport* court's broad interpretation of the "practice of law" in an arbitration setting was its concerns for consumer protection. Specifically, the court relied upon testimony which stated that if arbitration advocates went unregulated: (1) there would be no recourse for clients if their advocate acted unethically or was incompetent; (2) non-lawyers representing consumers would be at a disadvantage and would not provide the level of representation necessary because the brokers are always represented by "well-resourced" attorneys; and (3) some non-lawyers or foreign-licensed lawyers may be improperly motivated to settle disputes because they cannot represent the client in any proceedings to enforce an arbitration award.²⁸ As noted above, these concerns seem more legitimate if one pictures arbitrations where litigation-type discovery and presentation of evidence are used and at least one party is represented by a team of litigators. On the other hand, these concerns may be less persuasive in the context of more informal arbitrations, or where both parties are sophisticated companies receiving advice from in-house counsel or lawyers with similar resources at their disposal.

c. Negotiation and Mediation as UPL

In addition to arbitrations, an advocate's actions in the context of negotiation and mediation of legal disputes may be considered the practice of law by some jurisdictions. The decisions in this area focus on the provision of legal advice regarding the validity of a party's claim, any procedural and evidentiary issues that would impact the outcome of pending or potential litigation, and the appro-

law. Collection efforts are either traditional practice of law to the extent they require court proceedings or are traditional out-of-court collections work that does not require an attorney.

²⁶ *Disciplinary Counsel v. Alexicole, Inc.*, 105 Ohio St. 3d 52, 53 (2004) (holding a non-lawyer was engaged in UPL by representing another in NASD arbitrations, including conducting discovery, settlement negotiations, and pretrial conferences).

²⁷ *Rapoport*, 845 So.2d at 877 (finding NASD arbitration conduct to be UPL for an attorney licensed in Washington D.C. but not in Florida); *Florida Bar re: Advisory Opinion*, 696 So.2d at 1178 (finding securities arbitration conduct to be UPL for non-licensed individuals being compensated for their services).

²⁸ *Florida Bar re: Advisory Opinion*, 696 So.2d at 1181. Although these concerns were addressed to non-lawyer representatives in arbitration, there is no indication that these concerns would apply any less to attorney representatives who are not licensed in the forum state.

priateness of settlement offers.²⁹ At least one court has held that an attorney acting as an advocate in a mediation engages in UPL if the attorney is not licensed in the state in which the mediation occurs, but the court did not provide any reasoning to support its conclusion.³⁰ In short, because negotiation and mediation activities

²⁹ *In re UPL Advisory Opinion 2003-1*, 280 Ga. 121 (2005); *see also* Cleveland Bar Assoc. v. Henley, 766 N.E.2d 130 (Ohio 2002) (holding a non-attorney engaged in UPL by issuing settlement demand including allegations of employment discrimination); Ohio State Bar Assoc. v. Kolodner, 817 N.E.2d 25 (Ohio 2004) (finding a non-lawyer committed UPL by negotiating settlements of his clients' debts and drafting settlement agreements); Kansas *ex rel.* Stovall v. Martinez, 996 P.2d 371 (Kan. App. 2000) (holding the respondent committed UPL by assembling settlement packages, sending demand letters to insurance companies on behalf of individuals, advising clients on whether to accept or reject settlements, and advertising his services as an alternative to legal representation).

Georgia and Ohio have, since these opinions, adopted MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009), but it is unclear if the states will interpret the "alternative dispute resolution proceeding" language of the rule to include negotiating resolutions to disputes where no formal mediation or arbitration proceedings have begun. If a problem arises because of the failure of the attorney to specifically institute proceedings, perhaps the catch-all provision found in Rule 5.5(c)(4) could be applied.

Kansas has not yet adopted R. 5.5(c)(3), but its existing rule is based on the old R. 5.5, which is silent as to ADR proceedings.

³⁰ *In re Dox*, 152 P.3d 1183, 1187 (Ariz. 2007) (reviewing the sanction of informal reprimand and concluding that the attorney negligently engaged in UPL because she believed, although erroneously, that her actions were authorized so long as they were confined to mediation and did not involve representation in litigation). Arizona has subsequently adopted MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009), which would effectively overrule the outcome in *Dox*. *See also* Fink v. Peden, 17 N.E.2d 95 (Ind. 1938) (holding that a non-attorney who negotiated and obtained a pre-litigation settlement on behalf of a widow against a railroad company constituted the unauthorized practice of law, and the non-lawyer could not recover fees against the widow).

Additionally, the Indiana Bar Association considered whether paralegals could engage in negotiations or act on behalf of clients in mediation, provided that the paralegals acted under the supervision of a licensed attorney. Ind. St. Bar Ass'n Ethics Op. No. 1 (1997). With respect to negotiations, the opinion cautions that a paralegal can conduct certain activities, if supervised by a lawyer, and provides that the "paralegal is not responsible for rendering any legal opinions to the client." *Id.* at 3. The bar association reasoned that given the normal timetable of negotiations, a paralegal could be trained and act in accordance with the client's authority, provided that the attorney actually conduct any legal analysis. *See id.* On the other hand, the bar association found that a paralegal could not ethically represent a client in a mediation. The opinion states:

The essence of mediation is decisional flexibility, in which the client must actively participate in the flow of demands and offers of settlement, often accompanied by consideration of the adversary's legal arguments and newly presented factual information, which may bear upon settlement value of the claim. There is the need for continual consultation between the lawyer and the client. As an advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications A paralegal cannot fulfill the advisory role of a lawyer in a mediation setting.

Id. at 4. If a paralegal cannot conduct these types of activities, then the bar association indirectly found that representation in mediation constitutes the practice of law.

are viewed as similar to pre-filing litigation activities, they are often deemed the practice of law.

B. Where is the Lawyer Practicing?

Once an attorney has determined if he or she is practicing law or has determined that the conduct is exempted, the attorney still needs to decide where the conduct is occurring in order to assess which state's UPL rules may apply. Although there seems to be endless law on what conduct constitutes the practice of law, there is very little law on where a lawyer is deemed to be practicing. With modern technology such as e-mail, videoconferencing, and on-line conferencing, finding a coherent and useful answer is increasingly difficult.

The decision in *Birbrower*³¹ as to where an attorney is practicing law is infamous and highly criticized. The California Supreme Court in *Birbrower* decided that the New York attorneys had practiced law in California on behalf of a California client when they were physically present in California, and also when they were "virtually" present.³² The court expressly stated, without further elaboration, that not all "virtual" presence is practice in the state.³³ In the end, the *Birbrower* court came to the highly unsatisfying resolution that each case must be decided "on its individual facts."³⁴ The court then remanded the case for a determination of the amount of fees legitimately earned for services provided to the California client "in New York" for which the New York firm would be permitted to recover.³⁵

³¹ *Birbrower*, 17 Cal. 4th at 119. California has subsequently adopted CAL. CIV. PROC. CODE § 1282.4(b), which would effectively overrule the outcome in *Birbrower*.

³² *Birbrower*, 17 Cal. 4th at 128–29.

³³ The *Birbrower* Court noted:

For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely . . . we do reject the notion that a person *automatically* practices law "in California" whenever the person practices California law anywhere, or "virtually" enters the state by telephone, fax, e-mail, or satellite.

Birbrower, 17 Cal. 4th at 128–29 (emphasis in original).

³⁴ *Id.* at 129.

³⁵ *Id.* at 139–40.

Later decisions have indicated that physical presence is less an indicator of practicing law in a specific jurisdiction.³⁶ The answer should be determined by looking at the totality of the connections with the foreign jurisdiction. For example, the California Court of Appeals in *Estate of Condon v. McHenry*³⁷ declined to find a Colorado attorney engaged in UPL by representing a Colorado co-executor of a California estate in proceedings involving real estate in Colorado and California. In making its decision, the court focused on the purpose of the UPL rules to protect California citizens. The court reasoned that this purpose was not served when the client was not a California citizen and that citizens of other states would not necessarily need to retain a California attorney to provide advice about California law.³⁸

The Hawaii Supreme Court found that an in-house counsel licensed and residing exclusively in Oregon had not committed UPL in Hawaii by consulting with, and assisting outside counsel licensed in Hawaii, in the course of representing a corporate client in litigation and mediation.³⁹ There, the court rejected the argument that the Oregon attorney “virtually” was practicing law in Hawaii by telephone and other technological means. Indeed, the *Fought* decision specifically deferred to the ever-increasingly multijurisdictional nature of legal practice and stated that such activity in the state is not automatically considered practicing “in” the state. This is, by far, the better rule regarding “virtual” presence.⁴⁰

³⁶ Although physical presence is not the end of the analysis, it is still an important factor when an attorney physically appears in front of a tribunal. The Massachusetts Supreme Court addressed that situation in the context of an action to vacate an arbitration award. *Superadio L.P. v. Winsar Radio Prods. LLC*, 446 Mass. 330 (2006). There, a New York lawyer represented a Florida corporation in a dispute against a Massachusetts customer. The arbitration was filed with the NASD office in New York, but the NASD ordered that the hearing occur in Boston for convenience of the customer. The court did not decide which UPL rules applied but reviewed the attorney’s authority to participate in the arbitration under Massachusetts rules. This case indicates that the physical location of the hearing is, at a minimum, a forum where the attorney is practicing law. *See also* *Mscisz v. Kashner Davidson Secs. Corp.*, 844 N.E.2d 614, 616 (Mass. 2006) (“[E]ven if an out-of-State attorney’s representation of a party at an arbitration proceeding in Massachusetts might constitute the practice of law, this conduct does not provide a basis to vacate the arbitration award, and, as such, the plaintiffs are not entitled to relief.”).

³⁷ 65 Cal. App. 4th 1138 (Cal Ct. App. 1998).

³⁸ *Id.* at 1145–46.

³⁹ *Fought & Co., Inc. v. Steel Eng’g & Erection, Inc.*, 951 P.2d 487 (Haw. 1998).

⁴⁰ *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (2000) (“It is also clearly permissible for a lawyer from a home-state office to direct communications to persons and organizations in other states (in which the lawyer is not separately admitted), by letter, telephone, telecopier, or other forms of electronic communication.”).

Plainly, the stronger the connection with the foreign jurisdiction, the more likely the state will deem an attorney to have practiced law in the jurisdiction. For example, in accordance with Section 3 of the Restatement (Third) of the Law Governing Lawyers, an attorney must be cognizant of those factors that bear on the connection between the licensing state and the client, the dispute, and the lawyer, such as the connection of the client with the licensing state or lawyer, the connection of the representation with the licensing state, the physical presence or absence of the lawyer from the licensing state, and the connection between the substantive law and the licensing state.⁴¹

This focus on a broad spectrum of facts and circumstances to determine if the conduct is sufficiently connected to a given state to justify regulation by that state has the clear benefit of regulating conduct that has a significant impact on the state's citizens, while allowing clients to select attorneys that the client believes will serve his or her interests. The balancing of these factors, though, may not provide much predictability or certainty, and are also prone to different weighing across jurisdictions. Indeed, some factors listed by the Restatement implicate factors that have little, if anything, to do with the actual services rendered by the attorney.⁴² As such, it seems that attorneys are still left with little concrete guidance on which jurisdictions may consider which of an attorney's ADR activities to be the practice of law occurring within their borders.

⁴¹ *Id.* The RESTATEMENT (THIRD) also notes:

[W]hether the lawyer's client is a regular client of the lawyer or, if a new client, is from the lawyer's home state, has extensive contacts with that state, or contacted the lawyer there; whether a multistate transaction has other significant connections with the lawyer's home state; whether significant aspects of the lawyer's activities are conducted in the lawyer's home state; whether a significant aspect of the matter involves the law of the lawyer's home state; and whether either the activities of the client involve multiple jurisdictions or the legal issues involved are primarily either multistate or federal in nature.

Id.

⁴² For example, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (2000) indicates that a long-standing client relationship may result in a finding of no practice in a non-licensing jurisdiction. According to the same commentary, though, a new attorney-client relationship may indicate that the representation is less connected to the licensing state and the attorney may, therefore, be engaging in UPL. *Id.* Similarly, the Restatement supports consideration of whether the lawyer was contacted by the client in the lawyer's home state. *Id.* These connections between the attorney and the client seem unconnected with the quality of the representation that would be provided or the interests of the regulating state. In some situations, it might be possible that the same conduct could be UPL for some clients but not for others, making the assessment of UPL liability even more difficult.

C. Pulling the Concepts Together: An Example

Given the differing tests in various jurisdictions, many questions remain unanswered for ADR lawyers. An example might be helpful in order to both illustrate how these questions arise in practice and to highlight those questions that lawyers should keep in mind throughout their practice. An increasingly common situation is an arbitration involving parties in different states (claimant is a California corporation, respondent is a Michigan individual) with lawyers in different states (claimant's attorneys are in California and Illinois, respondent's attorney is in Illinois). Frequently, the state specified as the situs of the arbitration in the agreement (New York), the state where the hearing actually occurs (Washington, D.C.), and the state where filings are submitted (New Jersey) may be different. In this situation, which state UPL regulations should the respondent's attorney review?

Two of the issues are relatively straightforward. First, the attorney must think about his pre-arbitration conduct. If the attorney advises the California client about its potential claims by telephone from his office in Chicago, that conduct is likely the authorized practice of law in Illinois. Does the analysis change if the substantive law at issue is California law? Does the analysis change if the California client is a long-standing client of the Chicago firm or if this is the first engagement?

Second, the Illinois attorney should review Washington D.C.'s UPL rules. Because the hearing is actually conducted in Washington D.C. and the Illinois attorney presents arguments and evidence in that jurisdiction, the Illinois attorney is likely practicing law (or some portion of law) in Washington D.C.⁴³ Does this analysis change if the location of the hearing is chosen because it is a neutral location, having no connection to the parties or the dispute?⁴⁴ What if the location is chosen because it is the most convenient location for one of the parties, as in a consumer arbitration?

In addition to these two obvious issues, there are two other lurking jurisdictions in which an aggressive opponent might claim the attorney is practicing law. Because the attorney has signed filings and submitted them to the arbitration authority for filing in New Jersey, does New Jersey have a basis to regulate the attorney's

⁴³ The Massachusetts Supreme Court addressed a similar situation in the context of an action to vacate an arbitration award. *Superadio L.P.*, 446 Mass. at 330. For a recitation of the facts and issues in *Superadio* see text in note 36.

⁴⁴ See ABA Comm'n on Multijurisdictional Practice, *supra* note 1.

conduct? In light of the move towards centralized offices for receiving filings or for case management services, such as AAA Case Management Centers, more and more arbitrations see filings in states that otherwise have no relationship with the parties or the dispute. The mere filing of papers with a national or international arbitral authority in a state in which the attorney is not licensed, seems to be a thin basis for claiming that the lawyer is practicing in that state, where there is no other connection between the state of filing and the dispute or parties.

Finally, is the Illinois attorney practicing in New York on the theory that the technical situs of the arbitration is New York, even though the attorney never sets foot there? This argument also seems to be an implausible stretch, particularly with the flexibility in the selection of the actual hearing site and New York's scant interest in regulating conduct that does not come within its borders or effect its citizens.

Once the Illinois attorney assesses which UPL rules to review, he must then determine whether he is engaging in UPL or if there are additional actions he must take to avoid committing UPL. For those states that have adopted Model Rule 5.5(c)(3) verbatim, if the above representation is temporary and sufficiently connected to the Illinois attorney's practice in Illinois, the conduct would be protected, so long as the attorney complies with any state law requirements for additional registration or association with local counsel. For all other states, independent research on UPL issues is warranted.

III. WHAT SHOULD THE LAWYER DO IF THE LAWYER IS PRACTICING IN A FOREIGN JURISDICTION?

Lawyers asked to represent a client in a state in which they are not licensed will likely start by checking the state's *pro hac vice* rules to determine what is required in order to legally provide services in that state. However, many times the *pro hac vice* rules only provide guidance if the lawyer knows whether or not her services constitute the practice of law. While all of the states have laws governing the "practice of law," they often differ as to its definition and require different procedures for searching for this definition. As a general matter, the UPL provisions prohibit a person from practicing law in a jurisdiction in which that person is not generally licensed and are applicable to non-attorneys as well as

attorneys licensed in a state other than the applicable forum state.⁴⁵

Because the definition of the practice of law varies among states, it can be difficult to determine how to legally provide representation in ADR processes in different states. Some states' pro hac vice rules do not explicitly require admission to perform services in ADR processes.⁴⁶ Other states' rules expressly mandate an attorney's pro hac vice admission to participate in a particular ADR process.⁴⁷ Unfortunately, as discussed in more detail later in this article, many states' pro hac vice rules do not directly address this issue. So, in many cases, a lawyer will need to become familiar with the state's standards for pro hac vice admission and then look elsewhere to determine if her particular ADR related services constitute the practice of law. Some states address this ADR repre-

⁴⁵ The UPL rules are written in a manner that prohibits anyone other than those who are licensed within the forum state from practicing law within the forum state. As a general matter, the prohibition affects both non-attorneys as well as attorneys from different states. *See, e.g.*, Quintin Johnstone, *Connecticut Unauthorized Practice Laws and Some Options for Their Reform*, 36 *CONN. L. REV.* 303, 310–16 (2004) (examining Connecticut case law regarding unauthorized practice relating to both non-attorneys and attorneys licensed in other states); *see also* ABA Comm'n on Multijurisdictional Practice, *supra* note 1, at 3 (“In the early twentieth century, states adopted ‘unauthorized practice of law’ (UPL) provisions that apply equally to lawyers licensed in other states and to nonlawyers. These laws prohibit lawyers from engaging in the practice of law except in states in which they are licensed or otherwise authorized to practice law.”).

Generally, however, the bar rules govern the conduct of lawyers, and questions may exist regarding whether non-lawyers may be subject to those rules. In order to remedy this potential loophole, many states, in addition to a UPL rule in the bar rules, also have statutes of general applicability limiting the practice of law to lawyers. For example, Arkansas adopted *MODEL RULES OF PROF'L CONDUCT* R. 5.5, but also addresses the unauthorized practice of law issue in *ARK. CODE ANN.* § 16-22-208 (2009) (unauthorized practice of law) and § 16-22-209 (2009) (unlicensed practice). Connecticut adopted R. 5.5 and also enacted *CONN. GEN. STAT.* § 51-88 (2009) (practice of law by persons not attorneys).

⁴⁶ An example of this type of state is South Carolina. *See infra* Part III.C.2 of this article for a discussion regarding states that do not require pro hac vice admission for out-of-state attorneys seeking temporary admission to participate in ADR procedures.

⁴⁷ An example of this type of state is Nevada, which requires pro hac vice admission for court annexed arbitration and mediation. *See infra* Part III.C.3 of this article for a discussion regarding states that do require pro hac vice admission for out-of-state attorneys seeking temporary admission to participate in ADR procedures. As noted below, these states often do not require court approval, but do require approval from the state bar association.

sentation issue in their professional rules of conduct,⁴⁸ while other states address it in their statutes, bar rules, and court rules.⁴⁹

What follows in Part III is a discussion regarding where states have chosen to address the issues surrounding the representation of clients in ADR processes and the unauthorized practice of law outside of their *pro hac vice* rules.⁵⁰ These sections do not provide specific instructions about how to legally provide ADR representation in each state; however, they hopefully provide a framework as to where to look and how to determine what to do in order to provide such representation.

A. UPL Rules Regarding ADR Services in the States' Rules of Ethics

A total of thirty-one states directly address the question of whether attorney services in ADR processes is the unauthorized practice of law in their rules of professional conduct. Twenty-nine of these states did so by adopting in principle the ABA's proposed Model Rule of Professional Conduct 5.5(c)(3), which states:

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 . . . (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* admission⁵¹

⁴⁸ The following states address whether ADR services constitute the unauthorized practice of law in their rules of professional conduct: Alabama, Alaska, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Washington, and Wisconsin.

⁴⁹ The following states address whether ADR services constitute the unauthorized practice of law outside their rules of professional conduct: California, Colorado, District of Columbia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Michigan, Mississippi, Montana, New York, North Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wyoming.

⁵⁰ See Part III.C. for a detailed discussion regarding how states have drafted their *pro hac vice* rules to address the issue of representation in ADR processes.

⁵¹ See *supra* note 48 and *infra* notes 58–59 for a list of these states. See also the Appendix for a chart compiling each state's multijurisdictional ethics requirements. The following states address this issue in their rules of professional conduct, but do so without adopting Model Rule 5.5:

Section 5.5(c) of the Model Rules identifies the legal services that an out-of-state attorney may provide in a jurisdiction where he or she is not licensed, on a temporary basis, without creating an unreasonable risk to the interests of clients, the public or the courts.⁵² The services an attorney provides as a representative in an ADR process were identified as one of these areas, however, Section 5.5(c)(3) was only intended to apply when participation in an ADR process was not governed by the state's pro hac vice provision.⁵³ This is evident by the fact that a majority of the states that adopted Model Rule 5.5(c)(3) adopted the official comment that "[t]he 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."⁵⁴

Also, the Section 5.5(c)(3) provision was not meant to address the work of arbitrators, mediators and others serving in ADR processes in comparable non-representative roles.⁵⁵ The section

AL. RULES OF PROF'L CONDUCT R. 5.5(B)(2) (2009) (unauthorized practice of law); N.J. CODE OF PROF'L CONDUCT R. 5.5(b)(3)(ii) (2008) (lawyers not admitted to the bar of this state and the lawful practice of law).

⁵² MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 5 (2009) (unauthorized practice of law; multijurisdictional practice of law).

⁵³ MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009); ABA Comm'n on Multijurisdictional Practice, *supra* note 1, at 24.

⁵⁴ MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 12 (2009) creates this requirement. The states that adopted this comment are: Alaska, Connecticut, Delaware, Florida, Georgia, Iowa, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Washington, and Wisconsin.

Despite the reference in the comment to "court-annexed arbitration or mediation," presumably a state has the power to require pro hac vice admission in any arbitration or mediation if that state has determined that advocacy in ADR procedures constitutes the practice of law. As a practical matter, obtaining pro hac vice admission is perhaps the easiest in an already-pending litigation matter; however, the rule itself does not necessarily limit the pro hac vice requirements to court-connected ADR. In fact, for the states that explicitly require some type of pro hac vice admission to act as an advocate in an ADR procedure, see Part III.C.3, *infra*; those rules do not turn on whether the proceeding is court-connected.

⁵⁵ *Id.* at 24–25. Some states, however, have created separate provisions that address a neutral's activities. Nevada, for example, creates an exception to its unauthorized practice of law rule in its rules of professional conduct for lawyers acting as neutrals. NEV. RULES OF PROF'L CONDUCT R. 5.5 (2008). The Nevada rule states:

(a) General. A lawyer shall not: (1) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (2) Assist another person in the unauthorized practice of law.

(b) Exceptions. A lawyer who is not admitted in this jurisdiction, but who is admitted and in good standing in another jurisdiction of the United States, does not engage in the unauthorized practice of law in this jurisdiction when . . . (7) The lawyer is acting as an arbitrator, mediator, or impartial third party in an alternative dispute resolution proceeding.

was drafted conservatively with the intent that the determination of what constitutes authorized conduct would require judgment and balancing, achieved through individual opinion and judicial interpretation.⁵⁶ So while Model Rule 5.5(c) provides a framework for the activities that the Commission thought should be authorized, the fact that a service is not identified does not imply it is not authorized.⁵⁷

Out of the twenty-nine states that adopted a form of the (c)(3) provision, twenty-three of them adopted it with no or only slight modifications.⁵⁸ The remaining six states made modifications that, on their face, appear to change the scope of the Model Rule.⁵⁹ What follows is a general discussion regarding the states that made substantial modifications when they adopted Model Rule 5.5(c)(3) and an examination of Model Rule 5.5(c)(3)'s requirements that the legal services provided be on a "temporary basis," "reasonably related" to a pending or potential ADR process, and that they "arise out of or are reasonably related" to an attorney's practice in a jurisdiction in which she is admitted to practice.⁶⁰

1. States That Made Substantial Modifications to Model Rule 5.5(c)(3)

Out of the states that made substantial modifications to Model Rule 5.5(c)(3), Connecticut, North Carolina, Ohio, and Wisconsin appear to have narrowed the rule's intended scope; Florida appears to have expanded it; and Georgia made a modification that is simply worth noting.

Connecticut Rule of Professional Conduct 5.5(c)(3) only applies to attorneys from states that apply similar privileges to Con-

Id.

⁵⁶ A.B.A. Comm'n on Multijurisdictional Practice, *supra* note 1, at 21.

⁵⁷ MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 5 (2009).

⁵⁸ The states that adopted MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009) with no or only slight modifications are: Arizona, Arkansas, Delaware, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Washington. New Jersey did not adopt the language from MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009), but N.J. RULES OF PROF'L CONDUCT R. 5.5(b)(3)(ii) (2009) (lawyers not admitted to the bar of this state and the lawful practice of law) addresses this issue. The six states that adopted MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009) with more significant modifications are discussed below.

⁵⁹ The states that made substantial modifications to MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009) when they adopted it are Connecticut, Florida, Georgia, North Carolina, Ohio, and Wisconsin.

⁶⁰ ABA Comm'n on Multijurisdictional Practice, *supra* note 1, at 17–20.

necticut lawyers and does not specifically address representing a party in arbitration.⁶¹ Perhaps the most interesting modification Connecticut made, however, is related to the standard of connectedness that an attorney's services must have to a jurisdiction she is licensed to practice. Both Model Rule 5.5(c)(3) and Connecticut Rule 5.5(c)(3) require the legal services provided by an out-of-state attorney to be reasonably related to a pending ADR proceeding.⁶² Where the model rule requires the services to also arise out of or be *reasonably related* to the *lawyer's practice* in the jurisdiction in which she is admitted, Connecticut Rule 5.5(c)(3) states legal services can only be provided if they are with respect to *a matter* that is *substantially related* to, or arises in, a jurisdiction in which the lawyer is admitted to practice.⁶³ While there is no case law to interpret whether this amounts to an actual difference, based on the common use of the words "reasonably" and "substantially," it appears Connecticut has a higher standard than the Model Rule.⁶⁴ Also, under the Connecticut rule a lawyer needs to establish a relationship between his or her legal services and a *matter* that is connected to his or her jurisdiction, instead of the Model Rule's test of establishing a relationship between the legal services and the lawyer's *practice* in the jurisdiction where he or she is licensed. These

⁶¹ CONN. RULES OF PROF'L CONDUCT. R. 5.5(c)(3) (2009):

(c) A lawyer admitted in another United States jurisdiction which accords similar privileges to Connecticut lawyers in its jurisdiction, and provided that the lawyer is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction, that: (3) are in or reasonably related to a pending or potential mediation or other alternative dispute resolution proceeding in this or another jurisdiction, with respect to a matter that is substantially related to, or arises in, a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission

Id. The state of Connecticut maintains a list of states that have afforded Connecticut attorneys the same privilege at the State of Connecticut Judicial Branch website. See Multi-Jurisdictional Practice Notification, <http://www.jud.state.ct.us/SGC/mjp/mjpmenu.htm> (last visited Oct. 9, 2009). Based on the authors' research to date, Connecticut is the only state to incorporate such reciprocity in its rule.

⁶² CONN. RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009); MODEL RULES OF PROF'L CONDUCT R 5.5(c)(3) (2009).

⁶³ CONN. RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009).

⁶⁴ Webster's defines substantial as follows: "Ample . . . Being of considerable importance, value, degree, amount, or extent . . ." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1336 (3d ed. 2008). Black's Law Dictionary does not define substantial, but Webster's does define reasonable as "fair, proper, or moderate under the circumstances," while Black's defines reasonable as "a) not extreme, immoderate, or excessive." BLACK'S LAW DICTIONARY 1272 (7th ed. 1999); WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1336 (3d ed. 2008). Based on the normal use of these words, and the absence of case law in Connecticut regarding this rule to suggest otherwise, it appears to these authors "substantial" is a higher standard than "reasonable."

two modifications make the Connecticut rule appear narrower than the Model Rule.

North Carolina Rules of Professional Conduct, Rule 5.5 also appears to narrow the standard in Model Rule 5.5(c)(3). North Carolina Rule 5.5 requires an out-of-state attorney to limit his legal services to those that arise out of or are reasonably related to the lawyer's representation of a *client* in a jurisdiction in which the lawyer is admitted to practice.⁶⁵ This wording gives the appearance that North Carolina requires an attorney wanting to practice under this rule to establish an existing attorney-client relationship, while the Model Rule's use of the word "practice" is broader and creates an image that it may not be necessary to establish an existing attorney-client relationship in every case.⁶⁶

Ohio requires that an out-of-state attorney not only be admitted in another jurisdiction, but also "regularly practices law."⁶⁷ This requirement to regularly practice law is not necessarily in the Model Rule. Its plain language only requires that an attorney be admitted in a United States jurisdiction and not be disbarred or suspended from practice in any jurisdiction. While Ohio has not

⁶⁵ N.C. RULES OF PROF'L CONDUCT R. 5.5(c)(2)(C) (2009). This rule provides that: (c) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and: (1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or (2) other than engaging in conduct governed by paragraph (1) . . . (C) the lawyer acts with respect to a matter that is in or is 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 representation of a client* in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission is required

Id. (emphasis added). As a practical matter, however, this distinction may be one of semantics as opposed to substance. Because the practice of law generally concerns a lawyer's representation of a client, *see supra* notes 8 through 29 and accompanying text, North Carolina's version of the rule may be co-extensive as the ABA Model Rule.

⁶⁶ *Id.*; MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009).

⁶⁷ According to the OHIO RULES OF PROF'L CONDUCT R. 5.5 (2007) (unauthorized practice of law, multijurisdictional practice of law):

(c) A lawyer who is admitted in another United States jurisdiction, is in good standing in the jurisdiction in which the lawyer is admitted, and *regularly practices law* may provide legal services on a temporary basis in this jurisdiction if one or more of the following apply: . . . (3) the services are *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

Id. (emphasis added).

defined what a regular practice is in this context, the addition of this language appears to raise the minimum requirements for providing services under this rule. This higher standard may prevent some groups of professionals outside of Ohio, with a legal license and active status in their home state, from representing clients in ADR proceedings in Ohio because their day-to-day job lacks the characteristics of a regular practice. Examples of these groups could include academics, such as law school professors, and neutrals.⁶⁸ Wisconsin explicitly prevents its rule from applying to out-of-state attorneys that are disbarred or suspended from practice in any jurisdiction for disciplinary reasons or for medical incapacity.⁶⁹ The Model Rule only excludes attorneys disbarred or suspended for disciplinary reasons.⁷⁰ Wisconsin's rule also restricts the practice of all out-of-state attorneys in ADR proceedings to an "occasional basis."⁷¹ Based on plain language definitions, this appears to be a narrower standard than the Model Rule's standard of a "temporary basis."⁷²

Florida, on the other hand, appears to have broadened the scope of Model Rule 5.5(c)(3) through its enactment. In Florida, a lawyer can provide legal services that are in or reasonably related to an ADR proceeding, 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, language identical to Model Rule

⁶⁸ For example, if a full-time mediator from Indianapolis were licensed and on active status in Indiana, he or she could theoretically represent a client in an ADR process in a state, like Iowa, that adopted MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009) verbatim. However, if the mediator were to try to represent a client in Ohio, he or she might be committing the unauthorized practice of law. This example assumes each state's pro hac vice rules and other rules of practice do not prohibit this type of representation.

⁶⁹ WIS. SUP. CT. R. 20:5.5 (2008) (unauthorized practice of law; multijurisdictional practice of law). This state provides that:

(c) Except as authorized by this rule, a lawyer who is not admitted to practice in this jurisdiction but who is admitted to practice in another jurisdiction of the United States and *not disbarred or suspended from practice in any jurisdiction for disciplinary reasons or for medical incapacity*, may not provide legal services in this jurisdiction except when providing services on an occasional basis in this jurisdiction that: (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

Id. (emphasis added).

⁷⁰ MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2009).

⁷¹ WIS. SUP. CT. R. 20:5.5 (2008).

⁷² To date, this provision has not been interpreted. Thus, whether the Wisconsin rule is different from the ABA in any significant practical manner has yet to be determined.

5.5(c)(3), *or* if the services are performed for a client who resides in or has an office in the lawyer's home state.⁷³ Based on this wording, it appears an attorney not licensed in Florida can represent a client in an ADR proceeding in Florida regardless if it is related to her practice in her home state, as long as the client is from her home state.⁷⁴

One modification worth noting is that of Georgia, which maintains the substance of Model Rule 5.5(c)(3), but codified it twice: once for "domestic lawyers" and again in a separate provision for "foreign lawyers."⁷⁵

While the above modifications are interesting to note, a majority of the states that have adopted Model Rule 5.5(c)(3) made little or no modifications. Regardless of whether a state made major or minor modifications, a practitioner reviewing a rule that includes Model Rule 5.5(c)(3)'s requirements that the legal services be provided on a "temporary basis," that they be "reasonably related" to a pending or potential ADR process, and that they "arise out of or are reasonably related" to an attorney's practice in a jurisdiction in which he or she is admitted to practice, will have questions as to whether her services meet these requirements. While the case law defining these requirements is scarce, the drafters did provide guidelines to help interpret these phrases.

⁷³ FLA. BAR REG. R. 4-5.5(c)(3)(A)–(B) (2009) (unlicensed practice of law; multijurisdictional practice of law) provides:

(c) Authorized Temporary Practice by Lawyer Admitted in Another United States Jurisdiction. A lawyer admitted and authorized to practice law in another United States jurisdiction who has been neither disbarred or suspended from practice in any jurisdiction, nor disciplined or held in contempt in Florida by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule, may provide legal services on a temporary basis in Florida that . . . (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction and the services are not services for which the forum requires *pro hac vice* admission: (A) *if the services are performed for a client who resides in or has an office in the lawyer's home state, or* (B) where 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

Id. (emphasis added).

⁷⁴ This rule, then, still leaves open questions relating to a lawyer's representation of out-of-state clients that do not otherwise fall within section (c)(3)(B).

⁷⁵ GA. RULES & REGS. ST. BAR R. 5.5(c)(3), (e)(3) (2001).

2. How Do You Determine Whether an Attorney's Services . . .

a. Are on a "temporary basis?"

The drafters did not recommend a black-letter test for determining what constitutes providing legal services on a "temporary basis," but Model Rule 5.5's Comments do provide some guidance as to how to make this determination.⁷⁶

Comment 6 to Model Rule 5.5 states that services may be temporary even though they are provided on a recurring basis or for an extended period of time, such as in a "single lengthy negotiation or litigation."⁷⁷ Comment 10 to Model Rule 5.5 lists specific examples of legal services that can be provided if they are performed temporarily and in anticipation of a proceeding or hearing, or connected to a pending litigation in a jurisdiction in which the lawyer was or reasonably expects to be authorized to appear.⁷⁸ Examples of the permissible legal services include: meeting with clients, interviewing potential witnesses, reviewing documents, and conducting depositions.⁷⁹ For example, it appears that a litigator licensed in Ohio—a state that has adopted Model Rule 5.5, Comment 10—could argue she has the ability to prepare for a pre-file mediation in Ohio by going to Indiana—another state that has adopted Model Rule 5.5, Comment 10—to interview her clients and review relevant documents prior to the mediation. It also appears that if the attorney filed a complaint on behalf of her clients in an Ohio court and the court referred them to mediation in Ohio, then the attorney could perform depositions in Indiana prior to the mediation without violating the unauthorized practice of law rules. This example assumes that Indiana's *pro hac vice* rules do not require admission for these types of services and that all of the tasks above were performed on a temporary basis. Litigators need to pay attention to this temporary requirement because many states have not clearly delineated when permitted activities transition from a

⁷⁶ MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 6 states in part: "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) . . ."

⁷⁷ *Id.*

⁷⁸ MODEL RULES OF PROF'L CONDUCT R. cmt. 10 states in part:

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*.

⁷⁹ *Id.*

“temporary” to a “regular” basis.⁸⁰ Overall, states that adopted some form of Model Rule 5.5(c)(3) also adopted Model Rule 5.5, Comments 6 and 10.⁸¹ A few of these states, however, modified and/or elaborated on these comments.

Florida’s comments create a specific limit to the number of times someone without a license can perform arbitration services in the state. In Florida, an out-of-state lawyer’s legal services in an arbitration are presumed to be temporary; however, this presumption is rebutted when she files more than three separate demands or responses in arbitration in a 365 day period.⁸² This determination does not apply to international arbitrations.⁸³ South Carolina also has determined that the presumption under Rule 5.5(c)(3) goes from a “temporary” to a “regular” basis if an attorney makes an application to perform legal services in more than three matters within a 365-day period.⁸⁴ Presumably, if an attorney practices law

⁸⁰ Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 - An Interim Assessment*, AKRON L. REV. (forthcoming 2010).

⁸¹ The states that adopted MODEL RULES OF PROF'L CONDUCT R. 5.5 cmts. 6, 10 with or without modification are: Alaska, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Washington, and Wisconsin.

⁸² FLA. BAR REG. R. 4-5.5 cmt. 12 (2009). This comment states:

Subdivisions (c)(3) and (d)(3) permit a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in Florida 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 are performed for a client who resides in or has an office in the lawyer's home state, or 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 if court rules or law so require. The lawyer must file a verified statement with The Florida Bar in arbitration proceedings as required by rule 1-3.11 unless the lawyer is appearing in an international arbitration as defined in the comment to that rule. A verified statement is not required if the lawyer first obtained the court's permission to appear pro hac vice and the court has retained jurisdiction over the matter. For the purposes of this rule, a lawyer who is not admitted to practice law in Florida who files more than 3 demands for arbitration or responses to arbitration in separate arbitration proceedings in a 365-day period shall be presumed to be providing legal services on a regular, not temporary, basis; however, this presumption shall not apply to a lawyer appearing in international arbitrations as defined in the comment to rule 1-3.11.

⁸³ *Id.*

⁸⁴ S.C. RULES OF PROF'L CONDUCT R. 5.5 cmt. 12 (2009). Comment 12 states:

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 pre-existing representation of a client

on a “regular” basis, that attorney would be required to gain permanent admission to that state’s bar.

A lawyer can also look for guidance as to what constitutes a “temporary” basis by reviewing a state’s comments regarding what constitutes a “systematic and continuous” presence, which comes from Model Rule 5.5(b)(1).⁸⁵ While states also do not adopt a black-line rule as to what is “systematic and continuous,” many states comment that a prohibited presence can occur even if the lawyer is not “physically present,” and a few give examples as to what this presence might look like.⁸⁶

Connecticut warns attorneys that the “repeated and frequent activities of a similar nature . . . such as the preparation and/or recording of legal documents (loans and mortgages) involving residents or property in this state [Connecticut] may be considered to have a systematic and continuous presence.”⁸⁷ The Indiana and Ohio ethics rules note that advertisements specifically targeted to residents in their respective states from attorneys outside the state could meet the “systematic and continuous” standard.⁸⁸ Massachusetts has determined that “placing a name on the office door or letterhead of another lawyer without qualification” can meet this standard.⁸⁹ In addition to determining what constitutes a temporary basis, attorneys who wish to practice in states that adopted a form of Model Rule 5.5(c)(3) may also have to determine if their

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. For the purposes of this rule, a lawyer who is not admitted to practice in South Carolina who seeks to provide legal services pursuant to Rule 5.5(c)(3) in more than three matters in a 365-day period shall be presumed to be providing legal services on a regular, not temporary, basis. A lawyer providing legal services pursuant to paragraph (c)(3) must comply with the requirements of Rule 404, SCACR.

⁸⁵ MODEL RULES OF PROF’L CONDUCT R. 5.5(b)(1) states:

(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

Id. (emphasis added).

⁸⁶ Examples of states that have a comment indicating that a prohibited presence can exist even if a lawyer is not physically present are: Alaska, Connecticut, Delaware, Florida, Georgia, Indiana, Iowa, Maine, Massachusetts, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Washington, and Wisconsin.

⁸⁷ CONN. RULES OF PROF’L CONDUCT R. 5.5 cmt. 3 (2009).

⁸⁸ IND. RULES OF PROF’L CONDUCT R. 5.5 cmt. 4 (2009); OHIO RULES OF PROF’L CONDUCT R. 5.5 cmt. 4 (2009).

⁸⁹ MASS. RULES OF PROF’L CONDUCT R. 5.5 cmt. 4 (2009).

legal services are “in or reasonably related” to an ADR proceeding.

- b. Are “in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding?”

Model Rule 5.5(c)(3), Comment 12 addresses what actions “are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction.”⁹⁰ A majority of the states that adopted a form of Model Rule 5.5(c)(3) also adopted this comment.⁹¹ While many states adopted it verbatim, there were some that made notable modifications.

Connecticut adopted Model Rule 5.5’s twelfth comment, but it did not include “arbitration.” It states that an attorney can temporarily provide legal services if they “are in or reasonably related to a pending or potential mediation or other alternative dispute resolution proceeding”⁹² Florida appears to have modified the comment to match its modified rule by stating that an attorney can temporarily provide legal services in an ADR process if they are reasonably related to the lawyer’s practice in the jurisdiction in which he or she is admitted or if they are for a client who resides in or has an office in the lawyer’s home state.⁹³ South Carolina’s

⁹⁰ MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 12 (2009) states:

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.

⁹¹ The states that adopted MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 12 (2009) verbatim or with only slight modification are: Alaska, Delaware, Georgia, Indiana, Iowa, Maine, Massachusetts, Missouri, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, Washington, and Wisconsin.

⁹² CONN. RULES OF PROF’L CONDUCT R. 5.5 cmt. 11 (2009). This modification was likely made to mirror the language in paragraph (c)(3) of the rule it is commenting on, which also does not mention arbitration. Rule 5.5(c)(3) reads in part:

(c) A lawyer admitted in another United States jurisdiction which accords similar privileges to Connecticut lawyers in its jurisdiction, and provided that the lawyer is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction, that . . . (3) are in or reasonably related to a pending or potential mediation or other alternative dispute resolution proceeding in this or another jurisdiction

⁹³ FLA. BAR REG. R. 4-5.5, Paragraph 12 of the comments states:

modification appears to have restricted its provision by not only requiring the services to be in or reasonably related to a pending or potential ADR process, but the services also have to arise out of or be reasonably related to the lawyer's pre-existing representation of a client and be in a jurisdiction in which the lawyer is licensed to practice.⁹⁴ As with the other comments, there is no case law yet to show the effect these modifications have on the application of the rules.

- c. "[A]rise out of or are reasonably related to a lawyer's practice in a jurisdiction in which she is admitted?"

In regards to whether an attorney's services "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted," the Commission on Multijurisdictional Practice recommends three ways this connection can be established, but it does not address whether all, some, or none of these factors have to exist.⁹⁵ A connection can be established

Subdivisions (c)(3) and (d)(3) permit a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in Florida 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 are performed for a client who resides in or has an office in the lawyer's home state, or 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.

⁹⁴ S.C. RULES OF PROF'L CONDUCT R. 5.5 cmt. 12 (2009).

⁹⁵ MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 14 (2009) states:

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. Lawyers desiring to provide *pro bono* legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [*Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*].

Id. (emphasis in original).

through the attorney's client, the matter being addressed, and/or the lawyer's work.⁹⁶ In regards to the client, a "reasonable" relationship might exist if the lawyer has previously represented the client, the client is a resident, or the client has "substantial contacts with the jurisdiction in which the lawyer is admitted."⁹⁷ In regards to the matter being addressed, a "reasonable" relationship might exist if the matter has significant connections to the jurisdiction in which the lawyer is admitted.⁹⁸ A "reasonable" relationship might also exist when a significant aspect of the matter involves the law of the jurisdiction.⁹⁹ In regards to the lawyer's work, a reasonable relationship might exist if significant aspects of the lawyer's work are conducted in the jurisdiction of his or her licensure.¹⁰⁰

The Model Rule does not define what qualifies as a "client," a "matter," or as "lawyer's work" for purposes of the rule, but it does give examples of situations where a reasonable relationship might exist. For example, a reasonable relationship could exist when a lawyer's requested legal services "draw on [her] 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."¹⁰¹ Thus, if a labor law attorney in Ohio commonly represents clients in Equal Employment Opportunity Commission ("EEOC") mediations in Ohio and has become recognized for the service she provides, a potential client from Indiana could, presumably, ask her to represent him in an EEOC mediation in Indiana without the attorney having to gain *pro hac vice* admission. Again, *this is assuming Indiana's pro hac vice rule does not require pro hac vice admission to represent a client in an EEOC mediation.* Consistent with other aspects of Model Rule 5.5(c)(3), there is no case law yet determining the effect of Comment 14 on the enforcement of Model Rule 5.5(c)(3). Several states have, however, adopted Comment 14 with modifications.

On its face, Connecticut's comment appears to be narrower than the Model Rule 5.5, Comment 14, as it adopted language to mirror the modifications in its rule discussed above.¹⁰² Connecticut requires a substantial relationship to exist between the matter for which the attorney wants to provide services and the jurisdiction in

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 14 (2009).

¹⁰¹ *Id.*

¹⁰² CONN. RULES OF PROF'L CONDUCT R. 5.5 cmts. ¶¶ 11, 13 (2009).

which the attorney is admitted; the Model Rule requires the attorney to establish a reasonable connection between the services she wants to provide and the jurisdiction in which she is admitted.¹⁰³ Connecticut also requires that the matter *must* have a significant connection with the jurisdiction in which the lawyer is admitted to practice, while the Model Rule only requires that the matter *may* have a significant connection with the jurisdiction.¹⁰⁴ Finally, the Model Rule states, “[t]he necessary relationship might arise when the client’s activities *or* the legal issues involve multiple jurisdictions,”¹⁰⁵ while Connecticut’s comment states: “[t]he necessary relationship might arise when the client’s activities *and* the resulting legal issues involve multiple jurisdictions.”¹⁰⁶

North Carolina and South Carolina also modified this comment when they adopted it. North Carolina states that a lawyer can act on a client’s behalf in other jurisdictions in matters arising “out of or otherwise reasonably related to the lawyer’s representation of [the] client,” which may involve negotiations and participation in ADR procedures.¹⁰⁷ South Carolina modified Model Rule 5.5, Comment 14 to read “Paragraph (c)(3) requires that the services arise out of or be reasonably related to the lawyer’s pre-existing representation of a client in a jurisdiction in which the lawyer is admitted.”¹⁰⁸

Although it remains to be seen how Model Rule 5.5(c)(3) will be interpreted, practitioners who want to provide legal services in

¹⁰³ MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 14 (2009); CONN. RULES OF PROF’L CONDUCT R. 5.5 cmt. ¶ 13 (2009). Paragraph 13 of the commentary states:

Subdivision (c) (3) requires that the services be with respect to a matter that is substantially related to, or arises out of, a jurisdiction in which the lawyer is admitted. A variety of factors may evidence such a relationship. However, the matter, although involving other jurisdictions, must have a significant connection with the jurisdiction in which the lawyer is admitted to practice. A significant aspect 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 and the resulting legal issues involve multiple jurisdictions. Subdivision (c) (4) requires that the services provided in this jurisdiction in which the lawyer is not admitted to practice be for (1) an existing client, i.e., one with whom the lawyer has a previous relationship and not arising solely out of a Connecticut-based matter and (2) arise out of or be substantially related to the legal services provided to that client in a jurisdiction in which the lawyer is admitted to practice. Without both, the lawyer is prohibited from practicing law in the jurisdiction in which the lawyer is not admitted to practice.

¹⁰⁴ CONN. RULES OF PROF’L CONDUCT R. 5.5 cmts., ¶¶ 11, 13 (2009).

¹⁰⁵ *Id.* (emphasis added).

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ N.C. RULES OF PROF’L CONDUCT R. 5.5 cmt. 5 (2003).

¹⁰⁸ S.C. RULES OF PROF’L CONDUCT R. 5.5 cmt. 14 (2003).

states that adopted the rule at least know they can look in the rules of professional conduct to find it. Some states, however, do not address the issue of multijurisdictional ADR practice in their respective rules of professional conduct, so an attorney is forced to look through a state's court rules and statutes.

B. UPL Rules Regarding ADR Representation Found in Other State Statutes and Court Rules

If a state does not address whether an attorney's services in an ADR proceeding are the practice of law in its *pro hac vice* rules or in its rules of professional conduct, a practitioner will likely have to search other provisions of the state statutes, bar rules, court rules, and case law.

There is a range of how states choose to deal with this issue outside of its rules of professional conduct. Some states, in their court rules and/or bar rules, explicitly address whether an out-of-state attorney's representation of a client in an ADR proceeding is UPL. For example, in California, the process for an out-of-state attorney not licensed in California to represent a client in a California mediation or arbitration is addressed in the California Rules of Court, where it says it is not UPL as long as certain requirements are met and the attorney is attempting to gain temporary authority to practice in California.¹⁰⁹ In Alaska, authority is given to the Alaska Bar Rules to define the practice of law.¹¹⁰

¹⁰⁹ CAL. CT. R. 9.47 (2009) (attorneys practicing law temporarily as part of litigation). This rule allows an out-of-state attorney that meets certain requirements to represent a client in an arbitration or mediation in California while going through the process of gaining more permanent authorization, like *pro hac vice* admission.

¹¹⁰ ALASKA STAT. § 08.08.210 (2009). This section explains who may practice law and states:

- (a) A person may not engage in the practice of law in the state unless the person is licensed to practice law in Alaska and is an active member of the Alaska Bar. A member of the bar in good standing in another jurisdiction may appear in the courts of the state under the rules the supreme court may adopt.
- (b) The practice of law shall be defined in the Alaska Bar Rules.
- (c) This section and AS 08.08.230 do not apply to the practice of law for the legislature by a person employed by or under contract with the legislature until the results are released of the third Alaska Bar examination following that person's employment.
- (d) Employees of the Department of Law, the Public Defender Agency, and the office of public advocacy, whose activities would constitute the practice of law under this chapter and under Alaska Bar Rules are required to obtain a license to practice law in Alaska no later than 10 months following the commencement of their employment.

Alaska Bar Rule 63 defines the practice of law. *See* ALASKA BAR R. 63.

Other states define what constitutes the practice of law or the “unauthorized” practice of law in statutes outside their rules of professional conduct. When a state leaves it up to the legislature to define the practice of law, the statutes are usually entitled, “Unlawful Practice of Law,” “Unauthorized Practice of Law,” or a title indicating a license to practice law is necessary. Often, but not always, these statutes are found under titles similar to “Courts” or “Judicial Proceedings,” “Professions and Occupations,” or “Attorneys.”

When a definition for the practice of law is found in these states, it is sometimes unclear whether “providing representation in ADR services” falls within the definition. Take the State of Tennessee, for example. The “practice of law” is defined in the Tennessee Annotated Code § 23-3-101(3) as:

the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services.¹¹¹

Based on this definition, while it is clear that a practitioner would be “an advocate in a representative capacity,” it is not clear whether an ADR process, like mediation for example, would be a “proceeding[s] pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies”¹¹² This lack of clarity may be troublesome for a practitioner heading to Tennessee, since there are criminal consequences for anyone that engages in the practice of law without a Tennessee license or proper authorization.¹¹³ So even when a definition of the practice of law is found, a practitioner often has to review case law and ethics opinions to see how the definition is applied in the state.

¹¹¹ TENN. CODE ANN. § 23-3-101(3) (2009). Please note, the Tennessee Bar Association petitioned the Supreme Court of Tennessee to amend section 5.5 of the Tennessee Supreme Court Rules addressing the unauthorized practice of law and multijurisdictional practice of law. The proposed amendments included section 5.5(c)(3) of the model rules. The Supreme Court created a comment period that expires December 16, 2009. For more information regarding this process, see Tennessee Bar Association (TBA), Rules of Professional Conduct, available at <http://www.tba.org/ethics/index.html> (last visited Aug. 21, 2009).

¹¹² *Id.*

¹¹³ TENN. CODE ANN § 23-3-103(a) (2009) (unlawful practice; crimes and offenses; fines and penalties).

The general ways in which states have defined the practice of law can be seen above in Section II of this article.

Finally, some states do not define the authorized or unauthorized practice of law statutorily, and leave the definition entirely up to the courts. For example, Hawaii's rule 605-14 prohibits UPL; it does not, however, define the practice of law.¹¹⁴ According to the legislative notes, the legislature purposely did not define the practice of law so that the application of the statute could change with the changes in society and the legal practice.¹¹⁵ The Hawaii Supreme Court has determined that the practice of law can occur outside the courtroom and includes, but is not limited to, "the giving of advice, the preparation of any document or the rendition of any service to a third party *affecting the legal rights . . . of such party*, where such advice, drafting or rendition of service requires the use of any degree of legal knowledge, skill or advocacy."¹¹⁶

So, an attorney trying to determine whether her services in an ADR process are the practice of law may have to look in several places in order to find an answer. Clearly, it is easier for attorneys to practice in states where the *pro hac vice* rules explicitly address whether services in ADR proceedings require *pro hac vice* admission. Unfortunately, very few states have done so. Below, is a more detailed discussion regarding how states have, or have not, addressed this issue in their existing *pro hac vice* rules.

C. When is Pro Hac Vice Admission Required?

Pro hac vice admission allows an attorney who is not licensed within the forum state to practice in a particular case or matter.¹¹⁷

¹¹⁴ HAW. REV. STAT. § 605-14 (unauthorized practice of law prohibited). The rule states: It shall be unlawful for any person, firm, association, or corporation to engage in or attempt to engage in or to offer to engage in the practice of law, or to do or attempt to do or offer to do any act constituting the practice of law, except and to the extent that the person, firm, or association is licensed or authorized so to do by an appropriate court, agency, or office or by a statute of the State or of the United States. Nothing in sections 605-14 to 605-17 contained shall be construed to prohibit the preparation or use by any party to a transaction of any legal or business form or document used in the transaction.

¹¹⁵ *Fought & Co., v. Steel Eng'g and Erection, Inc.*, 951 P.2d 487, 495 (Haw. 1998).

¹¹⁶ *Id.* (emphasis added).

¹¹⁷ According to BLACK'S LAW DICTIONARY, "Pro hac vice" is translated to mean "for this occasion or particular purposes," and the concept refers to "a lawyer who has not been admitted to practice in a particular jurisdiction but who is admitted there temporarily for the purpose of conducting a particular case." BLACK'S LAW DICTIONARY 1248 (8th ed. 2004); *see also* 7 AM. JUR. 2D *Attorneys at Law* § 22 (2008) ("In general, the practice of law in a state by any attorney

The standards for pro hac vice admission are governed by state law.¹¹⁸ Pro hac vice admission is generally given by a court¹¹⁹ to an attorney whose practice in the forum state is infrequent¹²⁰ and who pays the applicable fee.¹²¹ The usual situation involving a motion for admission pro hac vice involves an out-of-state litigation attor-

who is not a member of the state bar, and who has not been given prior pro hac vice permission to practice in the state, is unlawful, regardless of whether the attorney appears before any court, or before any municipal or state agency, board, or commission.”); Pamela A. McManus, *Have Law License; Will Travel*, 15 GEO. J. LEGAL ETHICS 527, 528 (2002) (“Lawyers may only practice law in jurisdictions in which they have been admitted or licensed.”).

As a practical matter, an attorney who properly obtains pro hac vice admission generally should be immune from an allegation that an attorney committed unauthorized practice of law in a later malpractice action and/or collection action brought between the attorney and client. See Leigh Babb, Comment, *Take Caution When Representing Clients Across State Lines: The Services Provided May Constitute the Unauthorized Practice of Law*, 50 ALA. L. REV. 535, 538 (1999) (“The client uses the unauthorized practice statutes as a defense for failure to compensate the attorney, and the courts must decide whether the attorney is entitled to his or her fee. Attorneys admitted pro hac vice by the state for litigation purposes are exempt from this threat.”); see also Christine R. Davis, Comment, *Approaching Reform: The Future of Multijurisdictional Practice in Today’s Legal Profession*, 29 FLA. ST. U. L. REV. 1339, 1352 (2002) (“Pro hac vice rules permit a lawyer simply to apply for admittance to practice in that jurisdiction for a particular case.”).

As described in more detail below, each state defines the matter for which pro hac vice admission may be granted in a different way. Statutes and rules refer to “cases,” “proceedings,” matters before “courts” and “tribunals,” and other ways of describing the action into which the lawyer may appear.

¹¹⁸ Just as the standards for the practice of law are governed by state law, the standards for pro hac vice admission are also governed by state law. As the Supreme Court noted:

Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.

Leis v. Flint, 439 U.S. 438, 442 (1979). The Court found that attorneys have no federal right to appear before a court under pro hac vice admission. *Id.* at 443–44.

¹¹⁹ Which court or tribunal has the authority to grant pro hac vice admission in relation to an ADR proceeding is an interesting question, but one that is outside the scope of this article. Some of the pro hac vice statutes specify which courts are permitted to entertain these motion and determine the admission of the attorney seeking temporary admission.

¹²⁰ If an attorney seeks pro hac vice admissions in the same jurisdiction too frequently, the court may deny a later admission on the basis that the attorney is actually engaged in a more systematic practice within the forum state and should seek permanent admission to the state bar. See, e.g., *S.C. Med. Malpractice Joint Underwriting Ass’n v. Froelich*, 377 S.E.2d 306, (S.C. 1989) (noting that seeking repeated pro hac vice admissions “is not a vehicle by which a South Carolina resident, who is a member of an out-of-state bar, may circumvent the rules for admission to practice in this State.”).

¹²¹ Not surprisingly, the fees associated with a motion for admission pro hac vice vary from state to state.

ney representing a client in a matter before a court.¹²² In those situations, a case already exists in the court, and the attorney seeking admission pro hac vice simply files a motion with the presiding judge seeking temporary admission.

Attorneys involved in ADR procedures in states in which they are not licensed, however, face a different challenge: if the attorney determines that she is engaged in the practice of law, can the attorney move for admission pro hac vice, and, if so, where?¹²³ If the ADR procedure is related to a pending legal case and the ADR procedure occurs in the same state as the rest of the action, the answer is easy: the attorney can move for admission in front of the presiding judge. But if the ADR procedure is in a different jurisdiction than the pending litigation, or if there is no other pending litigation, how would an attorney move for such admission?¹²⁴ Is the lawyer required to open a miscellaneous action in order to gain admission? Would a court entertain that motion? Which court

¹²² See, e.g., Charles W. Wolfram, "What Needs Fixing?": *Expanding State Jurisdiction to Regulate Out-of-State Lawyers*, 30 *HOFSTRA L. REV.* 1015, 1025 (2002) ("By tradition, the procedure is limited to representations involving already-filed litigation. It appears to have arisen out of the procedural mechanics of entering and recognizing appearances in litigation, rather than out of a general rulemaking exercise in which the courts of a state (or its legislature) considered broadly the situations in which it would be sensible to permit non-admitted lawyers to practice within the state.").

¹²³ Although well beyond the scope of this article, open questions remain regarding the practice of law and the multijurisdictional practice of law in the area of online dispute resolution. See Robert M. Bastress & Joseph D. Harbaugh, *Taking the Lawyer's Craft Into Virtual Space: Computer-Mediated Interviewing, Counseling, and Negotiating*, 10 *CLINICAL L. REV.* 115, 144-50 (2003) (discussing some ethical issues arising in the field of online dispute resolution). Multijurisdictional practice in the context of online dispute resolution pose even more questions than traditional ADR. If representing a client in traditional ADR contexts constitute the practice of law, see *supra* Part II(A), then representing clients in an online forum potentially also constitute the practice of law. If that is the case, then would rules, such as pro hac vice rules, also apply in online dispute resolution? At this time, requiring an attorney seek pro hac vice admission to participate in an online dispute resolution forum seems preposterous, but if the determination of whether an activity constitutes the practice of law does not turn on the forum, then presumably online dispute resolution could potentially fall within the multijurisdictional practice rules.

¹²⁴ In *Ranta v. McCarney*, 391 N.W.2d 161, 162 n.1 (N.D. 1986), the Supreme Court of North Dakota suggested that a Minnesota transactional lawyer could not receive pro hac vice admission to practice tax law in the state of North Dakota because that lawyer's practice did not involve the "limited purpose of appearing in relation to a particular matter before the court." *Id.* Ultimately, the court concluded, "According to our holding, an out-of-State lawyer not authorized to practice law in this State is prohibited from recovering any fees relating to the practice of law actually conducted in this State (unless that attorney falls within a recognized exception to the rule)." *Id.* at 166. To date, the *Ranta* decision has not been applied to lawyers participating in ADR procedures, but this decision suggests that an attorney could not receive pro hac vice admission regarding an ADR procedure not connected with a court case.

would entertain that motion—the Supreme Court of the state¹²⁵ or a lower court? If a lower court, which one?¹²⁶

These questions do not have easy answers—if there are answers at all. The following sections describe the types of pro hac vice rules found throughout the nation.¹²⁷ The categories of types of rules include: (1) rules that do not mention ADR procedures at all; (2) rules that specifically exempt ADR procedures from pro hac vice requirements; (3) rules that specifically require pro hac vice admission in ADR; and (4) rules that facially do not appear to have application to ADR but are ambiguous upon further reflection.¹²⁸ The way in which each of these rules affects out-of-state attorneys in ADR procedures is considered in the following subsections.

1. Pro Hac Vice Rules Not Mentioning ADR

Surprisingly, in the majority of states, the pro hac vice rules fail to address the issue of whether or not admission pro hac vice is required if an out-of-state lawyer participates in an in-state ADR procedure. For the reasons stated below, this failure likely *prohibits* the pro hac vice admission of attorneys upon closer reflection of the statutes.¹²⁹

¹²⁵ In *In re Ferrey*, 774 A.2d 62, 64 (R.I. 2001), the Rhode Island Supreme Court held that it was the only court that could rule on motions for admission pro hac vice in the State. *Id.* (“However, that permission can come only from this Court.”).

¹²⁶ Although not dealing with ADR issues, the 2003 student note, *Can I Conduct This Case in Another State? A Survey of Pro Hac Vice Admission*, surveyed pro hac vice rules nationwide. Clint Eubanks, Note, *Can I Conduct This Case in Another State? A Survey of Pro Hac Vice Admission*, 28 J. LEGAL PROF. 145 (2003). This article contains a description of many themes present in the various pro hac vice requirements, as well as discusses some of the particularities that do not fall within the main themes.

¹²⁷ This article, however, does not deal with the pro hac vice requirements in federal courts. Each federal court imposes its own rules for admission pro hac vice, but because the federal court rules deal with the cases presently before that court, the ADR issue considered in this article is moot because a lawyer should be covered by the federal court’s pro hac vice admission to conduct any ADR procedure associated with that federal case.

¹²⁸ See Stephen Gillers, *Lessons From the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 698 (2002). This piece discusses how the lack of clarity in the UPL rules

hurts lawyers in dispute resolution in several circumstances – when the form in which they expect to appear lacks power to admit them temporarily; for work they do before an action is filed a pro hac vice first becomes available; and for work in one jurisdiction ancillary to an action pending or impending elsewhere.

Id. See also *id.* at 710 (questioning whether ADR tribunals should be “empowered to allow the pro hac vice appearance of out-of-state lawyers and to allow those lawyers the same latitude to work in a jurisdiction in anticipation of applying for admission” in court).

¹²⁹ If the state in question, however, has adopted MODEL RULES OF PROF’L CONDUCT R. 5.5(c)(3), then the issue regarding pro hac vice admission is moot. For the reasons stated *supra*,

Rules governing the *pro hac vice* admission of attorneys are rules that bestow upon courts the right to allow an attorney to practice. Generally, statutes that do not mention ADR at all allow the court to grant admission into court or agency proceedings, with no similar ability to grant admission to practice before an arbitrator or mediator.¹³⁰ For instance, the Arkansas Supreme Court Rule XIV allows *pro hac vice* admission for attorneys “to appear, file pleadings and conduct the trial of cases in all courts of the State of Arkansas” if the court grants the motion.¹³¹ If the court only has the ability to grant *pro hac vice* admission to appear and practice in the “cases in all courts” in Arkansas, the plain language of the rule appears to *prohibit* the grant of authority to practice before something other than the “cases in all courts” in Arkansas—such as arbitrations or mediations.

The laws and rules of other states allow slightly more latitude as to where an attorney may practice, including work both before a court and an agency. For instance, the applicable North Carolina statute allows *pro hac vice* admission to represent “a party to any civil or criminal legal proceeding pending in the General Court of Justice of North Carolina, the North Carolina Utilities Commission, the North Carolina Industrial Commission, the Office of Administrative Hearings of North Carolina, or any administrative agency.”¹³² Again, the inclusion of court and agency actions suggests the *preclusion* of other types of procedures, including ADR procedures.

The Arkansas and North Carolina laws are just a sample,¹³³ and the lack of any mention of ADR procedures is troubling. The

if the state’s ethics rules allow an attorney from one state to conduct ADR procedures within the foreign jurisdiction, then the foreign attorney does not need to take the additional step and determine whether admission *pro hac vice* is required. See notes *supra* 51–60 and accompanying text for a discussion on the states adopting R. 5.5(c)(3).

¹³⁰ Taken to extremes, negotiation may constitute the practice of law. If that is the case, would an attorney be required to seek admission *pro hac vice* to engage in a negotiation in a state in which the attorney is not licensed? Practicing attorneys, particularly at large, multinational law firms, engage in this type of practice on a regular basis, and these attorneys—transactional attorneys and litigators alike—are assuredly not seeking *pro hac vice* admission in order to talk to other people in other states and negotiate with them. See *supra* notes 30–31 and accompanying text for additional discussion of negotiation as the practice of law.

¹³¹ ARK. SUP. CT. R. 14 (2009).

¹³² N.C. GEN. STAT. § 84-4.1 (2009).

¹³³ Other states with similar laws include: ALA. RULES GOV’G ADMIS. R. VII (2009) (allowing admission “before any court or administrative agency”); ALASKA R. CIV. P. 81(a)(2) (2009) (allowing admission “in a particular action or proceeding in a court of this state”); CONN. PRAC. BOOK § 2-16 (2009) (allowing admission “in the presentation of a cause of action or appeal in any court of this state”); GA. UNIF. SUPER. CT. R. 4.4(B)(1) (2009) (“A court of this state

problem is compounded when an attorney may be practicing law in another state and has no legitimate way to gain temporary admission into the forum state. Certainly, the lawyer should not have to limit his or her practice, but questions remain as to how to deal with this situation. If the forum state has enacted the revised Model Rule 5.5(c)(3), the situation does not pose a problem because there is no requirement to gain admission *pro hac vice*. However, if the forum state has not yet adopted such a rule, the lack of clarity and ability to obtain such admission puts the lawyer in an uncomfortable situation.

2. Rules Exempting Pro Hac Vice Admission

In a minority of states, the *pro hac vice* rules specifically exempt the out-of-state attorney from the temporary admission requirement, in order for that attorney to participate in an ADR

may, in its discretion, admit an eligible Domestic Lawyer retained to appear in a particular proceeding pending before such court to appear *pro hac vice* as counsel in that proceeding.”); ILL. SUP. CT. R. 707 (2009) (allowing admission “before the court in the trial or argument of any particular cause”); IND. RULES FOR ADMIS. TO THE BAR AND DISCIPLINE R. 3, § 2 (2009) (admission in a “proceeding” before the “Supreme Court, the Court of Appeals, the Tax Court, or a trial court, of this state”); IOWA CT. R. 31.14 (2009) (admission “in a court proceeding” and in “administrative agency proceedings”); KAN. SUP. CT. R. 1.10 (relating to “a particular case only”) and R. 116 (2009) (admission “for the purposes of a particular case only”); ME. REV. STAT. ANN. tit. 4, § 802 (2009) (admission “in any of the courts of this state”); MASS. GEN. LAWS ch. 221, § 46A (2009) (allowing admission “in any case pending”); MICH CT. R. 8.126 (2009) (allowing admission in “a specific case in a court or before an administrative tribunal or agency in this state”); MINN. STAT. § 481.02, subd. 6 (2009) (allowing admission “in the trial or proceedings of any action or proceedings there pending”); MISS. R. APP. 46 (2009) (allowing admission to “argue orally, or file briefs or any paper in any cause in” court); MO. SUP. CT. R. 9.03 (2009) (allowing admission in “a particular case in any court or administrative tribunal”); MONT. CODE ch. 19, R. 13 (2009) (allowing admission “in a district court in Montana”); NEB. CT. R. §3-106 (2009) (allowing admission for an attorney “having professional business in the courts of this state”); N.H. SUP. CT. R. 33 (2009) (allowing admission “in any case”); N.J. CT. R. 1:21-2 (2009) (allowing admission into the “court in which any matter is pending”); RULES GOV’G N.M. BAR R. 24-106 (2009) (allowing “admission to appear “in any civil proceeding pending before a court of this state”); N.Y. CT. OF APP. § 520.11 (2009) (allowing admission into “any court of record[] to participate in any matter in which the attorney is employed”); OHIO SUP. CT. PRAC. R. I, § 2 (2009) (allowing admission “to appear *pro hac vice* and file documents or participate in an oral argument”); OR. REV. STAT. § 9.241 (2009) (allowing admission to appear “before a court” or in an administrative proceeding); TENN. SUP. CT. R. 19 (2009) (allowing admission to “file pleadings, motions, briefs, and all other papers and to fully participate in a particular proceeding before a trial or appellate court of Tennessee”); TEX. GOV’T CODE ANN. § 82.0361 (Vernon 2009) (allowing admission “in proceedings in a court”); UTAH RULES JUDICIAL ADMIN. R. 14-806 (2009) (allowing admission “in a particular case” in court); VT. CIV. PRAC. R. 79.1 (2009) (admission in “an action”); WIS. SUP. CT. R. 10.03(4) (2009) (allowing admission in “a particular action” in court); WYO. SUP. CT. R. 11(c) (2009) (allowing admission to a court or administrative agency).

procedure. In these states, the pro hac vice rule should stand as sufficient guidance for an attorney to not worry about getting temporary admission, even if the state's UPL rule is ambiguous as to whether the practice of ADR would constitute the practice of law.

The ABA specifically recommended that ADR practice be exempt from the pro hac vice requirements of a state. The ABA Commission on Multijurisdictional Practice recommended that the ABA adopt a "Model Rule on Pro Hac Vice Admission" that would contain the following language: "[A]n out-of-state lawyer may render legal services to prepare for and participate in an ADR procedure regardless of where the ADR procedure is expected to take or actually takes place."¹³⁴ Under this rule, all lawyers may participate in ADR procedures within the forum state without pro hac vice admission. To date, Louisiana, South Carolina, Virginia, and the District of Columbia have adopted this rule.¹³⁵ If a lawyer is practicing in one of these states, the question about pro hac vice admission is easy—such admission is simply not required.

3. Rules Requiring Pro Hac Vice Admission

Diametrically opposed to the states that exempt ADR procedures from the pro hac vice requirements, some states mandate that the attorney be admitted via pro hac vice admission. For example, in Maryland, if an attorney represents a client "in an arbitration taking place" in Maryland "involving the application of Maryland law," the attorney may be admitted to appear pro hac vice in the arbitration.¹³⁶ The Maryland rule provides that the motion should be made in the "circuit court for the county in which the . . . arbitration hearing is located or in any other circuit to

¹³⁴ ABA Comm'n on Multijurisdictional Practice, *supra* note 1, at 42; *see also* La Tanya James & Siyeon Lee, *Adapting the Unauthorized Practice of Law Provisions to Modern Legal Practice*, 14 *GEO. J. LEGAL ETHICS* 1135, 1149-50 (2001) (suggesting that states adopt a pro hac vice rule exempting arbitration procedures from pro hac vice requirements).

¹³⁵ LA. SUP. CT. R., XVII, § 13; S.C. APP. CT. R. 404(g); VIR. SUP. CT. R. § 1A:4(10)(c); D.C. APP. R. 49(c)(12) (excepting from the bar license requirement an attorney "providing legal services in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution"). Interestingly, South Carolina also adopted MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3), including the ADR provision. Additionally, California allows any attorney to participate in an international ADR procedure without obtaining admission into the courts of California. *See* CAL. CODE CIV. PROC. § 1297.351 (2009) ("The parties may appear in person or be represented or assisted by any person of their choice. A person representing a party need not be a member of the legal profession or licensed to practice law in California."). Domestic arbitration in California, however, is governed by a different rule. *See infra* note 139 and accompanying text.

¹³⁶ MD. RULES GOV'G ADMIS. TO THE BAR R. 14(a).

which the action may be appealed.”¹³⁷ In other words, a lawyer appearing in a Maryland arbitration can obtain pro hac vice admission by applying for such admission to a court by motion.¹³⁸

Similar to Maryland, California and Florida also require admission pro hac vice for an attorney to practice in an arbitration, but the application is made to the arbitrator, not the court. In California, if a party is represented in an arbitration, the representative must be an attorney,¹³⁹ the attorney must be approved by the arbitrator, and the state bar of California must receive notice of the out-of-state attorney’s participation in the California arbitration.¹⁴⁰ Although the California rule is not technically a pro hac vice admission by a court, the admission is similar insofar as the arbitrator must approve the admission and the state of California is kept aware of the number of admissions that are granted to each particular attorney. A similar procedure is also in place in Florida.¹⁴¹

In at least one state, the rules differentiate between ADR that occurs within part of a filed case and that which occurs as a stand-alone procedure. For example, in Nevada, the Supreme Court Rule regarding pro hac vice admission applies, in part, to “[a]ll arbitration, mediation, or alternative dispute resolution procedures

¹³⁷ *Id.*

¹³⁸ The Maryland law is unclear whether the attorney can simply move for admission or if the lawyer must first open a miscellaneous action and then file the motion in the newly filed miscellaneous action.

¹³⁹ For domestic arbitration, the representative must be a licensed attorney in one of the states. See CAL. CIV. PROC. CODE § 1282.4(b) (“An attorney admitted to the bar of any other state may represent the parties in the course of, or in connection with, an arbitration proceeding in this state” provided certain conditions are met). This requirement is in stark contrast with CAL. CIV. PROC. CODE § 1297.351 (2009). See *supra* note 134 and accompanying text.

¹⁴⁰ See CAL. CIV. PROC. CODE § 1282.4. Presumably the reporting requirements are meant to give the State of California notice if a particular attorney is routinely requesting admission into the California arbitrations such that the attorney is continuously engaging in the practice of law in another state (which would require general bar admission) as opposed to more temporary practice (which would require a pro hac vice admission or similar admission).

¹⁴¹ Under FLA. BAR REG. R. 1-3.11, an out-of-state attorney may be admitted to practice before an arbitrator in the State of Florida, provided that certain criteria are met and provided that the Florida Bar receive notice of any attorney’s admission. *Id.* Florida’s traditional pro hac vice rule only applies to appearances in Florida court, see FLA. BAR REG. 1-3.10 (2009), so Florida law remains unclear as to an attorney’s duties in mediation or other ADR procedure. Additionally, if an out-of-state lawyer wishes to confirm, vacate, or modify an arbitration award in Florida court, that attorney must receive pro hac vice admission to appear in the Florida court on that matter. See Adam Feit, *Complex Litigation in California and Beyond: Tort Reform, One State at a Time: Recent Developments in Class Actions and Complex Litigation in New York, Illinois, Texas, and Florida*, 41 LOY. L.A. L. REV. 899, 956 (2008) (“However, out-of-state attorneys cannot appear in Florida courts to confirm or vacate the awards received in these international arbitrations without following the state’s procedures for pro hac vice admission.”).

in this state that are court annexed or court ordered, or that are mandated by statute or administrative rule.”¹⁴² In contrast, subsection (b) of the Rule states: “[t]his rule does not apply to arbitration, mediation, or alternative dispute resolution procedures in which the parties engage voluntarily or by private agreement.”¹⁴³ This type of rule is a compromise procedure in which court-connected ADR is treated differently than private ADR. Although the procedures set forth under Nevada law are clear, the policy is difficult to decipher. Presumably, if court-connected arbitration is the practice of law, private arbitration would also be the practice of law. Regardless of the policy reasons underlying the rule, at least the rule provides attorneys with guidance as to how they should approach the proceedings.

4. Rules that May or May Not Apply to ADR

Finally, some states have rules that would appear to apply solely to court proceedings, but the language of the rules are ambiguous as to their application. Generally speaking, these are rules that use terms such as “procedure,” “case,” or an action before a “tribunal,” without defining those terms or containing qualifying language explicitly limiting those *pro hac vice* rules to court actions.¹⁴⁴ Given that an arbitration may occur before a “tribunal,” or may be considered a “procedure” or “case,” the state *pro hac vice* rules have some potential application to ADR procedures—particularly arbitration.

¹⁴² NEV. SUP. CT. R. 42(1)(a)(3) (2009). The Oklahoma Rules Creating and Controlling the Oklahoma Bar specifically allow a lawyer to move for admission *pro hac vice* if the attorney is involved in court-connected arbitration or mediation. OKLA. STAT., tit. 5, ch. 1, appx. 1, art. II, § 5(B) (2009). The Oklahoma Rules do not specifically address private, i.e., ADR not associated with a court proceeding, ADR and whether or not an out-of-state attorney is required to apply for *pro hac vice* admission in that situation.

¹⁴³ NEV. SUP. CT. R. 42(1)(b) (2009).

¹⁴⁴ See, e.g., KY. SUP. CT. R. 3.030 (2009) (using the term “case” without any limitation to court proceedings); N.D. ADMIS. TO PRAC. R. 3 (2009) (applying to “actions filed in state courts, administrative agencies, or tribunals” without defining “tribunals”); PA. BAR ADMIS. R. 301(a) (2009) (limiting *pro hac vice* admission to “a particular matter” without defining that term); R.I. SUP. CT., art. II, R. 9(a) (2009) (using the term “tribunal” without defining the term); S.D. CODIFIED LAWS § 16-18-2 (pertaining to “hearings” without defining the term); WASH. ST. ADMIS. PRAC. R. 8 (2009) (applying to “any action or proceeding” with the permission of the “court or tribunal”); W. VA. ADMIS. TO THE PRAC. R. 8.0(a) (2009) (applying to “a particular action, suit, proceeding or other matter in any court of this State or before any judge, tribunal or body of this State”).

5. Pro Hac Vice Suggestions

As noted in the sections above, the vast majority of the states have not established any specific rules regarding pro hac vice admission in an ADR procedure. The states that have addressed the issue, while inconsistent, at least set forth the procedure required for out-of-state practitioners with sufficient detail. For practitioners, knowing the correct procedure to follow in a given state is more important than whether the procedure requires admission, exempts admission, or something in between.¹⁴⁵ Accordingly, these authors suggest that the states that have not yet addressed the issue should do so, in order to give increased guidance to out-of-state attorneys who wish to practice in the forum state.

IV. CONCLUSION

This article provided a survey of three areas relating to UPL issues, including the definitions of the practice of law in a forum, the implementation of UPL rules, and the requirements for pro hac vice admission. Surprisingly, these authors determined that when the answer is easy, the answer is very easy—but when the answer is hard, the answer is very hard. The easiest answers are found in the states that have actually addressed the issue of whether ADR is the practice of law and whether an attorney may practice ADR in a forum in which that attorney is not generally licensed. In the absence of such specific rules, attorneys have no clear guidance as to whether their conduct constitutes the practice of law or whether—and if—the attorneys can obtain pro hac vice admission to cover their actions within the forum state.

¹⁴⁵ Just one example of “something in between” might be a requirement that advocates in ADR procedures associate with local counsel, even if the advocates are not required to seek formal admission into a court. Case law suggests that under certain circumstances, association with local counsel is sufficient for an attorney to keep from engaging in the unauthorized practice of law, even if that attorney does not otherwise gain admission in a court. *See, e.g.*, *Spanos v. Skouras Theaters Corp.*, 364 F.2d 161, 170 (2d Cir. 1966) (holding that counsel was entitled to fees when counsel associated with local counsel in New York); *Estate of Condon v. McHenry*, 64 Cal. Rptr. 2d 789, 793 (Cal. Ct. App. 1997) (when a co-executor uses local counsel to make court appearances, both sets of counsel are entitled to fees); *In re Estate of Waring*, 221 A.2d 193, 199 (N.J. 1966) (out-of-state attorney who conferred with local counsel was permitted to recover fees in a fee action); *see also* Babb, *supra* note 117, at 550 (“In most instances, when an out-of-state attorney associates with local counsel to provide legal services, the attorney will not be engaged in the unauthorized practice of law.”); *see also* Eubanks, *supra* note 126, at 148–50 (surveying “local counsel” requirements associated with the nationwide pro hac vice rules).

These authors recommend that the states that have not specifically addressed ADR in their UPL and pro hac vice rules should answer those unanswered questions. Despite the ABA Model Rules and recommendations that were promulgated nearly five years ago, great disparity still exists among the states. Although these authors do not dispute each individual state's ability to regulate the practice of law, increased attention to these ADR issues would aid the community of practitioners as they engage in ADR procedures in foreign states.

V. APPENDIX

A. State Adoption of Model Rule ("MR") 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

<u>State/ Location of Unauthorized Practice of Law Rule in Professional Responsibility Rules</u>	<u>Adopted MR 5.5(c)(3)? (ADR Provision)</u>	<u>Adopted Rest of MR?</u>
Alabama Rules of Professional Conduct 5.5 – Unauthorized Practice of Law www.sunethics.com/al_rpc_index.htm .	No, but does have an ADR provision at 5.5(b)(2).	No, but provision contains the old MR 5.5.
Alaska Rules of Professional Conduct 5.5 – Unauthorized Practice of Law www.state.ak.us/courts/prof.htm#5.5 .	Yes.	Yes. In its entirety with modifications to 5.5(a).
Arizona Ethics Rules 5.5 – Unauthorized Practice of Law http://www.myazbar.org/Ethics/rules.cfm .	Yes.	Yes. In its entirety with additional provisions.
Arkansas Rule of Professional Conduct 5.5 – Unauthorized Practice of Law; Multijurisdictional Practice of Law http://courts.state.ar.us/rules/ .	Yes.	Yes. Verbatim.

<p>California Rules of Professional Conduct 1-300 – Unauthorized Practice of Law http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10158&id=3422.</p>	<p>No, but Code Civil Procedure § 1282.4 addresses admission for representation in arbitration; § 1297.351 discusses representation in conciliation; California Rules Of Court – Rule 9.47 allows attorney to provide services in arbitration and mediation without it being UPL.</p>	<p>No</p>
<p>Colorado Rules of Professional Conduct 5.5 – Unauthorized Practice of Law: Multi-jurisdictional Practice of Law www.cobar.org/page.cfm/ID/384/.</p>	<p>No.</p>	<p>No.</p>
<p>Connecticut Rules of Professional Conduct 5.5 – Unauthorized Practice of Law http://www.jud.ct.gov/Publications/PracticeBook/PB1.pdf.</p>	<p>Yes.</p>	<p>Yes. In its entirety with additional provisions.</p>
<p>Delaware Professional Conduct Rule 5.5 – Unauthorized Practice of Law; Multijurisdictional Practice of Law http://courts.delaware.gov/Rules/?FinalcDLRPCclean.pdf.</p>	<p>Yes.</p>	<p>Yes. Verbatim.</p>
<p>District of Columbia Rules of Professional Conduct 5.5 – Unauthorized Practice www.dcbbar.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/amended_rules/index.cfm.</p>	<p>No, but an ADR provision is found in District of Columbia Court of Appeals Rule 49(c)(12).</p>	<p>No, but does have old MR 5.5 in DC Court of Appeals Rule 49. DC Rule 49 also addresses many of the same issues as new MR 5.5.</p>

<p>Florida Rules Regulating the Florida Bar Rule 4-5.5 – Unlicensed Practice of Law; Multijurisdictional Practice of Law http://www.floridabar.org/divexe/rrtffb.nsf/fb/b0807903c28c5e7485256bbc00530531.</p>	<p>Yes. Adds additional requirement that the services are performed for a client that resides in or has an office in the lawyer’s home state. 4-5.5(c)(3).</p>	<p>Partly. Adopts MR 5.5 provisions: (a); (b)(1) and (2); (c)(1), (2), (3), and (4). Adopted provisions have some wording modifications.</p>
<p>Georgia Rule of Professional Conduct 5.5 – Unauthorized Practice of Law and Multijurisdictional Practice of Law http://www.gabar.org/handbook/rules_index/.</p>	<p>Yes.</p>	<p>Yes, in regards to “Domestic lawyers.” Has separate provision for “Foreign lawyers.”</p>
<p>Hawaii Hawaii Rule of Professional Conduct 5.5 www.state.hi.us/jud/ctrules/hrpcond.htm.</p>	<p>No.</p>	<p>No, but existing provision is old MR 5.5 with additional provisions.</p>
<p>Idaho Rule of Professional Conduct 5.5 – Unauthorized Practice of Law www.isc.idaho.gov/rules/IRPC_ALL.pdf.</p>	<p>No.</p>	<p>Partly. Adopts MR 5.5 (a), (c)(1), (c)(2), (d)(1) with modifications.</p>
<p>Illinois Rule of Professional Conduct 5.5 – Unauthorized Practice of Law http://www.state.il.us/court/supremecourt/rules/art_viii/artviii.htm.</p>	<p>No</p>	<p>No, but existing provision is old MR 5.5.</p>
<p>Indiana Rules of Court Rules of Professional Conduct 5.5 – Unauthorized Practice of Law; Multijurisdictional Practice of Law http://www.in.gov/judiciary/rules/prof_conduct/#_Rule_5.5_Unauthorized_Practice%20of.</p>	<p>Yes.</p>	<p>Yes. Verbatim.</p>
<p>Iowa Rule 32:5.5 – Unauthorized Practice of Law; Multijurisdictional Practice of Law http://www.iowabar.org/information.nsf Go to: All Documents > 14 Attorney Ethics > Download Iowa Court Rules.</p>	<p>Yes.</p>	<p>Yes. Verbatim.</p>

<p>Kansas Rules of Professional Conduct – Rule 226:5.5 – Law Firms and Associations: Unauthorized Practice of Law; Rules Relating to Discipline http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+RelatingTMoDiscipline.</p>	No.	No, but existing provision is old MR 5.5.
<p>Kentucky Kentucky Rules of Professional Conduct SCR 3.130(5.5) – Unauthorized Practice of Law http://www.kybar.org/documents/scr/scr3/scr_3.130_(5.5).pdf.</p>	No.	No, but existing provision is old MR 5.5.
<p>Louisiana Rules of Professional Conduct 5.5 – Unauthorized Practice of Law; Multi-jurisdictional Practice of Law http://www.ladb.org/Publications/rules_of_prof_conduct.pdf.</p>	Yes.	Yes. In its entirety with additional provisions.
<p>Maine Code of Professional Responsibility Rule 3; 3.2 – Admission, Disclosure and Misconduct http://www.mebaroverseers.org/Home/Code%20of%20Professional%20Responsibility.html.</p>	No, prior to August 1, 2009. Yes, as of August 1, 2009.	No, prior to August 1, 2009. Yes, as of August 1, 2009. Verbatim.
<p>Maryland Rules of Professional Conduct 5.5 – Unauthorized Practice of Law; Multi-jurisdictional Practice of Law http://michie.com/maryland/lpext.dll/mdrules/8/11fa/1278/1285?f=templates&fn=document-frame.Htm&q=5.5&x=Advanced&2.0#LPHit1.</p>	Yes.	Yes. Verbatim.
<p>Massachusetts Rules of Professional Conduct 5.5 – Unauthorized Practice of Law; Multi-jurisdictional Practice of Law http://www.mass.gov/obcbbo/rpc5.htm#Rule%205.5.</p>	Yes.	Yes. Verbatim.
<p>Michigan Rules of Professional Conduct 5.5 http://coa.courts.mi.gov/rules/documents/5MichiganRulesOfProfessionalConduct.pdf.</p>	No.	No, but existing provision is old MR 5.5.

<p>Minnesota Rules of Professional Conduct 5.5 – Unauthorized Practice of Law; Multi-jurisdictional Practice of Law http://www.courts.state.mn.us/lprb/05mrpc.html#r55.</p>	Yes.	Partly. Adopted MR 5.5 provisions: (a), (b)(1) and (2); (c)(1), (2), (3), and (4); and (d)(2). Adopted MR 5.5 (a) with modifications and the other provisions without modification.
<p>Mississippi Rules of Professional Conduct Rule 5.5 – Unauthorized Practice of Law http://www.mslawyer.com/mssc/profcond.html.</p>	No.	No, but existing provision is old MR 5.5.
<p>Missouri Rules of Professional Conduct Rule 4-5.5 http://www.courts.mo.gov/page.asp?id=707Click: 4-5.5.</p>	Yes.	Yes. In its entirety, with modifications to MR 5.5(c)(4). Also added additional provisions.
<p>Montana Rules of Professional Conduct 5.5 – Unauthorized Practice of Law http://www.montanabar.org/associations/7121/files/rpc.pdf.</p>	No.	No, but existing provision is old MR 5.5.
<p>Nebraska Rules of Professional Conduct 3-505.5 – Unauthorized Practice of Law; Multi-Jurisdictional Practice of Law www.supremecourt.ne.gov/rules/html/Ch3/art5/3-505.5.shtml.</p>	Yes.	Yes. Verbatim.
<p>Nevada Rules of Professional Conduct 5.5 – Unauthorized Practice of Law www.leg.state.nv.us/courtrules/RPC.html.</p>	No. Does have an ADR provision allowing a person to act as a neutral, but does not mention representation in ADR processes. 5.5(b)(7).	No, but existing provision is old MR 5.5 with additional provisions.
<p>New Hampshire Rules of Professional Conduct 5.5 – Unauthorized Practice of Law; Multi-jurisdictional Practice of Law http://www.courts.state.nh.us/rules/pcon/pcon-5_5.htm.</p>	Yes.	Yes. Verbatim.

<p>New Jersey Rules of Professional Conduct 5.5 – Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law http://www.judiciary.state.nj.us/rules/ apprpc.htm.</p>	<p>No. Does have an ADR provision 5.5(b)(3)(ii).</p>	<p>No, but existing provision is old MR 5.5 with additional provisions.</p>
<p>New Mexico Rules of Professional Conduct 16-505 – Unauthorized Practice of Law; Multi-jurisdictional Practice of Law http://www.conwaygreene.com/nmsu/ lpext.dll?f=templates&fn=main-hit-h. htm&2.0.</p>	<p>Yes.</p>	<p>Yes. In its entirety with additional provisions.</p>
<p>New York New York Lawyer’s Code of Professional Responsibility until March 31, 2009 – DR – 3-101; Rules of Professional Conduct April 1, 2009 – 5.5 – Unauthorized Practice of Law www.nycourts.gov/rules/jointappellate/ NY%20Rules%20of%20Prof%20 Conduct.pdf</p>	<p>No.</p>	<p>No.</p>
<p>North Carolina Rules of Professional Conduct 5.5 – Unauthorized Practice of Law www.ncbar.com/rules/rpcsearch.asp.</p>	<p>Yes.</p>	<p>Yes. In its entirety, but with modifications to MC 5.5(a) and (c) and added additional provisions.</p>
<p>North Dakota Rules of Professional Conduct Rule 5.5 – Unauthorized Practice of Law www.court.state.nd.us/rules/conduct/ frameset.htm.</p>	<p>No.</p>	<p>No.</p>
<p>Ohio Rules of Professional Conduct 5.5 – Unauthorized Practice of Law; Multi- jurisdictional Practice of Law http://www.supremecourt.ohio.gov/ LegalResources/Rules/ProfConduct/ profConductRules.pdf.</p>	<p>Yes.</p>	<p>Partly. Adopts: (a); (b)(1) and (2); (c) with slight modifications, (c)(1), (2), and (3); (d)(1) and (2). Also adds an additional provision</p>
<p>Oklahoma Rules of Professional Conduct 5.5 – Unauthorized Practice of Law; Multi- jurisdictional Practice of Law www.okbar.org/ethics/ORPC.htm.</p>	<p>Yes.</p>	<p>Yes. In its entirety with modification to MR 5.5(d)(1).</p>

<p>Oregon Rules of Professional Conduct 5.5 – Unauthorized Practice of Law; Multi-Jurisdictional Practice http://www.osbar.org/_docs/rulesregs/orpc.pdf.</p>	Yes.	Yes. In its entirety with slight modifications to MR 5.5(d)(2).
<p>Pennsylvania Rules of Professional Conduct 5.5 – Unauthorized Practice of Law; Multi-jurisdictional Practice of Law www.padisciplinaryboard.org/documents/Pa%20RPC.pdf.</p>	Yes.	Yes. In its entirety with slight modifications to MR 5.5(d)(1).
<p>Rhode Island Rules of Professional Conduct 5.5 – Unauthorized Practice of Law and Multi-jurisdictional Practice of Law http://www.courts.ri.gov/supreme/pdf-files/Rules_Of_Professional_Conduct.pdf.</p>	Yes.	Yes. Verbatim.
<p>South Carolina Rules of Professional Conduct – Rule 407 – Rule 5.5 – Unauthorized Practice of Law; Multi-jurisdictional Practice of Law http://www.judicial.state.sc.us/courtReg/.</p>	Yes.	Yes. Verbatim.
<p>South Dakota Rules of Professional Conduct 5.5 – Unauthorized Practice of Law; Multijurisdictional Practice of Law http://www.sdbar.org/rules/rules.shtm.</p>	Yes.	Yes. In its entirety with an additional provision and slight modification to MR 5.5(d)(2).
<p>Tennessee Rules of Professional Conduct 5.5 – Unauthorized Practice of Law http://www.tba.org/ethics/index.html.</p>	No, but TN Bar Association submitted recommendation on May 13, 2009 to TN Supreme Court to adopt this provision.	No, but existing provision is old MR 5.5 with slight modification.
<p>Texas Disciplinary Rules of Professional Conduct 5.05 – Unauthorized Practice of Law http://www.txethics.org/Chapter.aspx?id=95&rid=3.</p>	No.	No, but existing provision is old MR 5.5.

<p>Utah Rules of Professional Conduct 5.5 – Unauthorized Practice of Law; Multi-jurisdictional Practice of Law http://www.utahbar.org/rules_ops_pols/rules/rpc_5_5.html.</p>	Yes.	Yes. Verbatim.
<p>Vermont Rules of Professional Conduct http://www.michie.com/vermont (Click: Vermont Court Rules > Supreme Court Administrative Orders > Vermont Rules of Professional Conduct > Terminology > Rule 5.5.)</p>	No.	No, but existing provision is old MR 5.5.
<p>Virginia Rules of Professional Conduct 5.5 – Unauthorized Practice of Law http://www.vsb.org/docs/2008-09_pg.pdf.</p>	No.	No, but existing provision is old MR 5.5 with additional provisions. Also has a set of rules called <i>Unauthorized Practice Rules</i> .
<p>Washington Rules of Professional Conduct 5.5 – Unauthorized Practice of Law; Multi-jurisdictional Practice of Law http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=rpc&ruleid=garpc5.5.</p>	Yes.	Yes. In its entirety with an additional provision.
<p>West Virginia Rules of Professional Conduct 5.5 – Unauthorized Rules of Professional Conduct http://www.wvbar.org/BARINFO/rulesprofconduct/rules5.htm.</p>	No.	No, but existing provision is old MR 5.5.
<p>Wisconsin Rules of Professional Conduct (SCR) 20:5.5 – Unauthorized Practice of Law; Multijurisdictional Practice of Law http://www.wicourts.gov/supreme/sc_rules.jsp.</p>	Yes.	Yes. In its entirety with modifications and additional provision.
<p>Wyoming Rules of Professional Conduct for Attorneys at Law Rule 5.5 – Unauthorized Practice of Law http://courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=attorneysConduct.xml.</p>	No.	Partly. Adopts MR 5.5 (a), (b)(1) and (2), (c), (d)(1) and (2).

B. Categories of Adoption

1. State Adoption of ADR Provision (MR 5.5(c)(3)) in Professional Responsibility Rules

Adopted verbatim	Adopted w/ modifications	Not adopted	Not adopted, but has existing ADR provision(s) in rules of professional conduct
Alaska Arizona Arkansas Delaware Indiana Iowa Louisiana Maine (as of 8/01/09) Maryland Massachusetts Minnesota Missouri Nebraska New Hampshire New Mexico Oklahoma Oregon Pennsylvania Rhode Island South Carolina South Dakota Utah Washington	Connecticut Florida Georgia North Carolina Ohio Wisconsin	California Colorado District of Columbia Hawaii Idaho Illinois Kansas Kentucky Michigan Mississippi Montana New York North Dakota Tennessee Texas Vermont Virginia West Virginia Wyoming	Alabama Nevada (addresses providing services as a neutral, not an advocate) New Jersey

2. State Adoption of MR 5.5 in Professional Responsibility Rules

Adopted MR 5.5 verbatim	Adopted all provisions of MR 5.5 but with modifications/additions	Adopted some but not all provisions of MR 5.5	Not Adopted	Not adopted, but existing provision contains old MR 5.5
Arkansas Delaware Indiana Iowa Maine (as of 8/01/09) Maryland Massachusetts Nebraska New Hampshire Rhode Island South Carolina Utah	Alaska Arizona Connecticut Georgia Louisiana Missouri New Mexico North Carolina Oklahoma Oregon Pennsylvania South Dakota Washington Wisconsin	Florida Idaho Minnesota Ohio Wyoming	California Colorado District of Columbia Maine New York North Dakota	Alabama Hawaii Illinois Kansas Kentucky Michigan Mississippi Montana Nevada New Jersey Tennessee Texas Vermont Virginia West Virginia