2006-2008 Rules Cycle

Report of the New Jersey Supreme Court Professional Responsibility Rules Committee

January 15, 2008

TABLE OF CONTENTS

INTRODUCTION 1
I. MULTIJURISDICTIONAL PRACTICE OF LAW 2
A. Overview 2
B. Background 4
C. Committee's Further Evaluation of RPC 5.5 7
D. Recommendations 12
E. Text of Proposed Amendments Relating to Multijurisdictional Practice 19
II. OTHER PROPOSED RULE AMENDMENTS AND NEW RULE RECOMMENDED 22
A. Proposed Amendment to RPC 1.8(c), Conflict of Interest 22
B. Proposed Amendment to RPC 1.11, Successive Government and Private Employment 23
C. Proposed Amendment to Rule 1:27-2, In-House Counsel 28
D. Proposed Rule Regarding Provision of Legal Services Following a Determination of Major Disaster (New Rule 1:21-10) 34
E. 2007 Office of Attorney Ethics Proposed Rule Amendments 38
1. Rule 1:20-1 – Annual Registration Statement 38
2. Rule 1:20-2 – Office of Attorney Ethics 40
3. Rule 1:20-3 – District Ethics Committees 43
4. Rule 1:20-4 – Formal Pleadings 45
5. Rule 1:20-5 – Prehearing Procedures 46
6. Rule 1:20-6 – Hearings 50
7. Rule 1:20-9 – Confidentiality 51
8. Rule 1:20-16 – Action by the Supreme Court 55
9. Rule 1:20-19 – Attorney-Trustee 56
10. Rule 1:20-20 – Future Activities 61
11. Rule 1:20-22 – Resignation Without Prejudice 66
12. Rule 1:21-6 – Trust Accounts 68
13. Rule 1:20A-2(b) and (c) – Jurisdiction 72
14. Rule 1:20A-3 – Arbitration 74
15. RPC 3.4 – Fairness to Opposing Party and Counsel 78
III. PROPOSED RULE AMENDMENTS CONSIDERED BUT REJECTED 84
IV. NON-RULE RECOMMENDATIONS 85
Guidelines for Media Coverage of District Ethics Committee Hearings 85
V. MID-RULES CYCLE ACTIVITY PREVIOUSLY REPORTED TO COURT 89
A. Rule 1:20A-5, Confidentiality in Fee Arbitration Proceedings 89
B. Rule 1:21-1(a), Bona Fide Office 89
C. Rule 1:21-6(a), In-State Trust and Business Accounts. 89
D. RPC 4.4(b), Respect for Rights of Third Person 90
E. *Tax Authority v. Jackson Hewitt*; RPC 1.8(g) – Aggregate Settlements. 91
F. *Borteck v. Riker, Danzig, Scherer, Hyland & Perretti, LLP*; RPC 5.6 – Bona Fide Retirement Plans 91
VI. MATTERS HELD FOR CONSIDERATION 94
A. ABA Model Court Rule on Insurance Disclosure 94
B. RPC 1.8(g)/Aggregate Settlements. 95
LIST OF ATTACHMENTS 97

INTRODUCTION

The Professional Responsibility Rules Committee (the "PRRC" or the "Committee") recommends the proposed amendments and new rules contained in this report. Issues relating to the multijurisdictional practice of law are addressed separately in Part I. Part II contains proposed rule amendments, including several submitted by the Office of Attorney Ethics, and one recommended new rule. Part III summarizes proposals not recommended for adoption. The Committee's "non-rule recommendations" are contained in Part IV. Part V describes recommendations that the Committee previously presented to the Court during the current rules cycle. Finally, Part VI identifies issues the Committee has held for further consideration.

In the proposed amendments and new rules, added text is underlined as such. Deleted text is bracketed [as such]. New paragraph designations and captions are indicated by double underscoring (1). As Such. No change in the text is indicated by ". . . no change."

I. MULTIJURISDICTIONAL PRACTICE OF LAW

A. Overview

As amended in 2004, RPC 5.5 allows attorneys who are not admitted to the New Jersey bar, but who are licensed and in good standing in another jurisdiction, to engage in multi-jurisdictional practice (also referred to as "MJP" or "cross-border practice") in New Jersey under certain circumstances. During the Court's 2007 rules cycle, the PRRC proposed clarifications to the existing registration and assessment requirements contained in RPC 5.5(c). Instead of adopting the proposals, the Court asked the Committee "for an overall review and evaluation of the provisions" of current RPC 5.5.

This part of the report explains the results of the Committee's further deliberations. The Committee considered whether and to what extent RPC 5.5 should be amended to be more consistent with the less restrictive Rule 5.5 of the American Bar Association's *Model Rules of Professional Conduct*. Eleven states have adopted a rule identical to Model Rule 5.5; and twenty-four states, including New Jersey, have adopted a more limited rule that nonetheless permits some form of cross-border practice. *See* http://www.abanet.org/cpr/mjp/home.html (Dec. 4, 2007) (follow "Quick Guide Chart on State Adoption of Rule 5.5" hyperlink). Some states, including New Jersey, require cross-border attorneys, at least in certain instances of cross-border practice, to register and pay an assessment. *See, e.g., Fla. Bar Reg. R. 1-3.11(d) & (e)* (requiring $250 fee and verified statement for each matter per year that cross-border attorney seeks to provide representation in alternative dispute resolution process; attorney engaging in more than three such matters per year deemed to be engaging in practice of law on regular basis); *Nev. Rule of Prof'l Conduct R.* 5.5A(c) (requiring cross-border attorneys representing Nevada clients in transactional and other extra-judicial matters to file $150 fee and annual report

describing nature of client and work); *N.D. Admission to Practice R.* 3(B)(1) (requiring nonresident attorney representing client in alternative dispute resolution process to annually register and pay fee required of licensed attorneys); *S.C. App. Ct. R.* 404(g), (h) & (i) (requiring $250 fee and verified statement for each matter per year that cross-border attorney seeks to provide representation in alternative dispute resolution process; attorney engaging in more than three such matters per year deemed to be engaging in practice of law on regular basis).

On certain critical issues, the Committee is closely divided. On others, it is unanimous. In summary, all members of the Committee favor proposing amendments to eliminate the annual registration and assessment requirements for cross-border attorneys engaging in alternative dispute resolution pursuant to RPC 5.5(b)(3)(ii), or engaging in activities connected to litigation in jurisdictions other than New Jersey pursuant to RPC 5.5(b)(3)(iii). Another unanimous proposal would add a provision similar to Model Rule 5.5(c)(1), creating a new safe harbor for a cross-border attorney who "associates" with a New Jersey lawyer who will be responsible for the conduct of the cross-border attorney. The Committee also has agreed to recommend that the Court retain the requirement that cross-border practice undertaken pursuant to the catchall provision, RPC 5.5(b)(iv), be "occasional."

The Committee is closely divided (the vote was six to five) on whether to remove registration and assessment requirements for all forms of cross-border practice. The majority favors retaining those requirements in circumstances other than those involving alternative dispute resolution or preparation for non-New Jersey litigation. This report contains the diverging views on that issue.

Finally, without making specific recommendations at this time, the Committee observes that other amendments to RPC 5.5 would make it more consistent with the Model Rule.

B. Background

History of RPC 5.5's Cross-Border Practice Provisions

In August 2002, the ABA House of Delegates adopted the recommendations of the Commission on Multijurisdictional Practice ("ABA Commission") to amend Model Rule 5.5 to identify circumstances in which a lawyer admitted in a United State jurisdiction may practice in a jurisdiction in which the lawyer is not licensed. The "guiding principle" informing the ABA Commission's recommendations was its search for "a proper balance between the interests of a state in protecting its residents and the justice system, on the one hand; and the interests of clients in a national and international economy in the ability to employ or retain counsel of choice efficiently and economically." ABA Ctr. for Prof'l Responsibility, *Client Representation in the 21st Century: Report of the Comm'n on Multijurisdictional Prac.*, at 4 (Aug. 12, 2002), *available at* http://www.abanet.org/cpr/mjp.

In the meantime, in 2001, the New Jersey Supreme Court created an *ad hoc* Commission on the Rules of Professional Conduct, chaired by Retired Justice Stewart G. Pollock ("Pollock Commission") to review the existing RPCs in the light of the work of the ABA's Commission on Evaluation of the Rules of Professional Conduct. The Pollock Commission considered the work of the ABA Commission, as well as the reports and comments of several organizations and individuals. In its 2002 Report, the Pollock Commission embraced the recommendations of the ABA Commission and recommended the adoption of multijurisdictional practice amendments identical to those approved by the ABA.

Also in 2001, the Supreme Court established an *ad hoc* Committee on Bar Admissions, chaired by Justice John E. Wallace, Jr. ("Wallace Committee"). The Court directed the Wallace Committee to undertake several tasks, including reviewing the issues and proposals then being

made in connection with the MJP initiatives of the ABA and the New Jersey State Bar Association ("NJSBA"). In its 2002 Report, the Wallace Committee proposed amendments to RPC 5.5 that were largely consistent with the amendments advocated by the NJSBA.

The Court adopted the version of RPC 5.5 recommended by the Wallace Committee. In adopting that version, "the Court's intent was to establish a multijurisdictional practice rule that is both realistic and enforceable. It viewed the more conservative NJSBA approach as the preferable method of formally introducing the concept of multijurisdictional practice into our Rules of Professional Conduct. Further, it is hoped that the more specific categories contained in the adopted version will aid the Court in evaluating the effects of the RPC's operations." New Jersey Supreme Court, *Admin. Determinations in Response to Rep. & Recommendation of Sup. Ct. Comm'n on Rules of Prof. Conduct* (hereinafter "*Administrative Determinations 2003*"), at 84 (Sept. 10, 2003), *available at* http://www.judiciary.state.nj.us/notices/n030910a.htm. RPC 5.5 was accordingly amended, effective January 1, 2004. In July 2004, the Court added subparagraphs (c)(5) and (c)(6), effective September 1, 2004, to require cross-border attorneys to maintain a bona fide office and comply with the annual assessment and registration rules "during the period of practice."

Committee's 2007 Proposal to Clarify RPC 5.5

The Court's Official Statement accompanying the amendments to RPC 5.5 directed the Committee to undertake, in 2007, a "comprehensive evaluation of the experience gained in multijurisdictional practice to determine whether any modifications" to RPC 5.5 "are necessary or desirable." As part of its review, the Committee received reports from the Office of Attorney Ethics ("OAE") and the New Jersey Lawyers' Fund for Client Protection ("Fund"). The OAE reported that it was not aware of any disciplinary incidents relating to cross-border attorneys.

The Fund noted it may be too early to determine the effects of the 2004 amendment. Indeed, as of February 5, 2007, only seventeen attorneys had registered as cross-border attorneys. That fact was viewed as indicative of the difficulties inherent in monitoring and enforcing the RPC's requirements.

In February 2007, the Committee proposed technical amendments to RPC 5.5(c)'s registration and annual assessment requirements. The proposed amendments would have clarified that an out-of-state attorney seeking to engage in cross-border practice must take certain affirmative steps: register with and consent in writing to the appointment of the Clerk of the Supreme Court as agent for service of process; annually register with the Fund during the period of practice; and comply with the annual assessment rules during the period of practice. The Committee also endorsed the OAE's suggestion to re-publicize the requirements of RPC 5.5.

After the Committee's proposed clarifications to RPC 5.5(c) were published for comment, objections were received from the Executive Director of the New Jersey State Bar Association ("NJSBA"); the President of the New Jersey Chapter of the Corporate Counsel Association ("CCA"); and the Chancellor of the Philadelphia Bar Association ("PBA") (*see Attachments A, B* & *C*). Their comments are summarized in the next section.

In May 2007, the Court held a hearing on the rule amendments proposed by several of its Committees. In respect of this Committee's proposals, the Court heard testimony from Wayne Positan, Esq., past-President of the NJSBA and Chair of the ABA Commission on MJP. He noted that of the more than thirty states that had adopted some form of multijurisdictional rule to recognize the reality of legal practice across state borders, New Jersey was among the most restrictive by requiring a connection to an existing home-state client, payment of annual assessments, and registration with the client protection fund. Mr. Positan expressed the

NJSBA's position that requiring cross-border attorneys to register and pay the assessments is unnecessary and unduly burdensome. According to the NJSBA, the better approach is for states to adopt the *ABA Model Rules for Lawyers' Funds*, allowing both jurisdictions (i.e.., New Jersey and the attorney's home state) to pay claims and thus ensure the public is protected.

On July 16, 2007, the Court declined to adopt the Committee's proposals and asked the Committee "for an overall review and evaluation" of current RPC 5.5.

C. Committee's Further Evaluation of RPC 5.5

In response, the Committee reviewed the history of the RPC; the prior comments from the NJSBA, CCA and PBA; numerous background materials on multijurisdictional practice; an October 2007, memorandum from the Director, New Jersey Lawyers' Fund for Client Protection (*see Attachment D*); and suggestions from the President of the NJSBA, which were submitted by letter dated November 1, 2007 (*see Attachment E*). Those positions are detailed below.

In addition, the OAE confirmed that no grievances have been filed in connection with a cross-border attorney. When such a matter does arise, it will be difficult to investigate and prosecute because the attorney, and likely some witnesses, will be located out-of-state. The OAE also expressed the thought that it would be beneficial to direct publicity to other states' bars, as well as to New Jersey attorneys who would come in contact with cross-border attorneys, about the existence of the MJP provisions and what steps must be taken to comply with them.[1] Finally, the OAE agreed with the Fund's position, discussed below, that opponents of the RPC's requirements have overstated the burden of compliance and understated the risk of harm associated with cross-border practice.

[1] Indeed, the public debate over the Committee's 2007 proposals apparently spurred many cross-border attorneys into compliance with the existing RPC. The number of registered cross-border attorneys has leapt from 17 to 260 as of December 2007.

Opponents of Registration and Assessments Requirements

Commenters (the NJSBA, CCA and PBA) who objected to the Committee's 2007 proposals urge repeal of RPC 5.5(c)(6)'s assessment and registration requirements for all forms of cross-border practice permitted pursuant to RPC 5.5(b)(3)(i) through (iv) (namely, arbitration or mediation for the attorney's home-state client; work related to litigation pending in the attorney's home state; and other occasional practice arising out of the representation of the attorney's home-state client). They contend that registration and assessment requirements make sense only in respect of attorneys who maintain a continuous, systematic presence in New Jersey as *pro hac vice* or in-house counsel. The opponents argue that, in respect of cross-border practice permitted by subparagraph (b)(3), registration and fees address no specific risk and serve only to increase revenue. Further, because RPC 5.5(b)(3) limits a cross-border attorney to activities on behalf of an "existing client in a jurisdiction in which the lawyer is admitted to practice," no New Jersey client needs the protections afforded by the Fund. Thus, the opponents contend that the minimal contact with New Jersey residents does not justify requiring registration and assessment in this State.

Moreover, opponents argue that registration and assessment requirements are unduly burdensome and unworkable in the reality of today's commercial world, unjustifiably increase clients' costs, and create an incentive to conduct business elsewhere. As an example, the NJSBA described a hypothetical Arizona attorney who stops at Newark airport for a twenty-minute meeting with a New Jersey lawyer concerning a transaction between the Arizona client and a New Jersey corporation. In such circumstances, imposition of registration and fees will add to the cost of doing business here. Concern also has been expressed that neighboring states may retaliate by imposing fees on New Jersey attorneys engaging in cross-border practice there.

On the issue of harm to potential victims of the dishonest conduct of cross-border attorneys, opponents argue that the client protection fund of the attorney's home jurisdiction can pay such claims, irrespective of where the offending conduct occurs. *See ABA Model Rules for Lawyers' Funds for Client Protection* R. 10 (permitting claim to be paid by jurisdiction where loss occurred, jurisdiction where offending attorney is admitted to practice, or both), *available at* http://www.abanet.org/cpr/clientpro/rules.html.

In addition, the NJSBA has asked the Committee to propose amendments specifically eliminating the registration and fee requirements in circumstances in which the cross-border attorney is engaged in alternative dispute resolution proceedings in New Jersey. *See Attachment E*. The NJSBA also seeks clarification that entities providing private ADR forums have no duty to ensure compliance with RPC 5.5. That request is, in part, a response to the Unauthorized Practice of Law Committee's *Opinion 43: Out-of-State Attorney Representing Party Before Panel of the American Arbitration Association in New Jersey* (Jan. 2007), *available at* http://www.judiciary.state.nj.us/notices/ethics (follow "UPLC_Opinion43" hyperlink). In *Opinion 43*, the UPLC concluded that out-of-state attorneys may represent parties in arbitration proceedings in New Jersey provided the representation complies with RPC 5.5. The UPLC also recommended that ADR forums monitor compliance with the RPC -- particularly the requirement that cross-border attorneys register with the Clerk of the Supreme Court and pay the required fees.

The NJSBA explains that it has been widely accepted for decades that any person, including non-attorneys, may represent a party in a private ADR setting. According to the NJSBA, requiring cross-border attorneys to register and pay fees to engage in ADR conflicts with that practice and with Section 10 of the *Uniform Mediation Act*, N.J.S.A. 2A:23C-10, which

permits "an attorney or other individual" to accompany a party and participate in mediation. The NJSBA also contends that RPC 5.5, as interpreted by *Opinion 43*, imposes enforcement responsibilities on private ADR forums that may be unconstitutional. The opinion also leaves New Jersey attorneys uncertain about their ethical obligation not to assist others in the unauthorized practice of law and to report ethical misconduct and makes New Jersey a less hospitable place for private ADR proceedings.

The Position of the New Jersey Lawyers' Fund for Client Protection

The Fund takes no position on how permissive the Court should be in allowing lawyers not licensed in New Jersey to practice law within the State. Rather, the Fund continues to urge the Court to require cross-border attorneys to identify themselves, be subject to discipline, and pay the annual assessments. In return, the Fund should have jurisdiction to consider claims filed against them for the same reasons it covers the misconduct of members of the New Jersey bar: promoting the primary goal of protecting the public from harm caused by dishonest attorneys.

The Fund views multijurisdictional practice as analogous to *pro hac vice* practice; lawyers not admitted to practice in New Jersey are allowed to handle transactional, rather than litigated, matters in New Jersey. The Fund's position is that the greatest difference between *pro hac vice* and multijurisdictional practice – the lack of supervision by a judge – argues more strongly for regulation, payment of the assessment, and protection by the Fund in the case of multijurisdictional practice.

According to the Fund, resistance to the regulation of cross-border attorneys overstates the burden of regulation and understates the potential harm and exposure. As the Fund see it, the actual burden imposed on cross-border attorneys consists of (1) completing a 1-½ page form that requires the attorney's name, jurisdictions admitted, contact information, and a signature

appointing the Clerk as agent for service of process (*see* "Form – Designation of Clerk as Agent for Service of Process – Multi-jurisdictional Practice," *available at http://www.judiciary.state.nj.us/supreme*); and (2) payment of the annual assessments (currently $186[2]) once per calendar year, no matter how many matters are handled, for any year in which a matter is handled in New Jersey – just as *pro hac vice* lawyers have been required to do for decades. A cross-border attorney is not required to have a sponsoring New Jersey lawyer, obtain judicial permission to handle a given matter, or identify what work is being done in New Jersey.

Turning to the potential exposure, the Fund observes that transactional matters handled by cross-border attorneys are at least as sizeable and significant as litigated matters. Some of the largest claims faced by client protection funds involve transactional matters, including the purchase and sale of businesses or real estate in New Jersey, or matters of estate administration. Although the cross-border attorney's client is from the attorney's home jurisdiction, that attorney may owe a fiduciary duty to a New Jersey resident (e.g., escrowing deposits or administering estate funds). *See* R. 1:28-3(a) (allowing Fund to consider claims resulting from dishonest conduct of lawyer "acting either as an attorney or fiduciary").

The Fund maintains that reliance on other states' funds to compensate individuals harmed by the dishonest conduct of out-of-state lawyers practicing in New Jersey matters is misplaced for at least two reasons: (1) most states' client protection funds (including New Jersey's) require, in the transaction that is the subject of a claim, a nexus to the fund's state; and (2) despite considerable progress, most jurisdictions' funds have lower reserves for losses and lower maximum awards than does the Fund. To protect against the added exposure, the Fund needs a

[2] Of that amount, $50 is apportioned to the Fund; $10 goes to the Lawyers' Assistance Program; and $126 is provided to the Disciplinary Oversight Committee to fund the fee arbitration and attorney discipline systems.

corresponding revenue stream; hence, the need for the cross-border attorney to pay a fee.[3] Cross-border attorneys also would be subject to discipline and be able to avail themselves of the Lawyers' Assistance Program, which is funded by a portion of the annual assessment.

Finally, the Fund recommends that inconsequential forms of cross-border practice, such as conducting activities in New Jersey in preparation for litigation in another forum pursuant to RPC 5.5(b)(3)(iii), should be defined out of the discussion.

D. Recommendations

Recommendation 1: *Eliminate Registration and Assessment Requirements Imposed on Cross-Border Attorneys Engaged in Alternative Dispute Resolution*

The Committee unanimously recommends that an out-of-State lawyer who is practicing law in New Jersey pursuant to RPC 5.5(b)(3)(ii) need not file the annual registration statement or pay the annual assessments as currently required by subparagraph (c)(6), and need not register with the Clerk as agent for service of process pursuant to subparagraph (c)(3) (although consent should continue to be deemed given).

Subparagraph (b)(3)(ii) permits an attorney who is not admitted to the bar of this State, who is admitted to practice and is in good standing in another United States jurisdiction, to practice in New Jersey if:

> the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program, the representation is on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice[.]

As commenters noted, even laypersons may assist a party in a private alternative dispute

[3] When the multijurisdictional practice amendments were made to RPC 5.5, Rule 1:20-1, and Rule 1:28-2 to require cross-border attorneys to register and pay the annual assessments, the Fund understood that it would have the corresponding jurisdiction to cover losses caused by the dishonest conduct of cross-border attorneys. The Fund accordingly recommends clarifying language to Rule 1:28-3(a)(1), which defines eligible claims. *See Recommendation 5, infra*.

setting. The Committee agrees that out-of-State attorneys seeking to represent existing clients should not face greater obstacles than do laypersons. Further, the costs of registration and assessment requirements will be shifted to the client, resulting in the unintended consequence of deterring parties from selecting New Jersey as a forum in which to mediate or arbitrate their disputes. If parties resolve their disputes elsewhere, they may forgo retaining New Jersey-based mediators and arbitrators to avoid incurring their added travel expenses.

On the issue of risk of harm, a cross-border attorney assisting a client with mediation or other alternative or complementary dispute resolution generally will not be acting in a fiduciary capacity in respect of the property of another. Even if a cross-border attorney is doing so, the underlying dispute "originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice." Thus, the cross-border attorney's home jurisdiction will have authority over any secondary dispute that may arise in connection with any dishonest disposition of property by the cross-border attorney. The low probabilities of risk of harm, and of corresponding loss to the Fund, do not justify imposing assessment and formal registration requirements upon cross-border attorneys engaging in ADR pursuant to subparagraph (b)(3)(ii).

The proposed amendments to subparagraphs (c)(3) and (c)(6) are contained in Part I.E.

<u>*Recommendation 2*</u>: *Eliminate Registration and Assessment Requirements Imposed on Cross-Border Attorneys Engaged Preparation for Non-New Jersey Proceedings*

The Committee unanimously recommends that an out-of-State lawyer who is practicing law in New Jersey pursuant to RPC 5.5(b)(3)(iii) need not file the annual registration statement or pay the annual assessments as currently required by subparagraph (c)(6), and need not register with the Clerk as agent for service of process pursuant to subparagraph (c)(3) (although consent should continue to be deemed given).

Subparagraph (b)(3)(iii) permits a cross-border attorney to practice here if "the lawyer

investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice[.]" In such circumstances, the occurrence of the attorney's work in New Jersey is coincidental to the out-of-State proceeding. New Jersey is selected as a place to conduct a deposition or interview merely for convenience. The forum in which the matter is (or is anticipated to be) pending has jurisdiction over both the proceeding and the professional conduct of the attorneys involved therein.

The proposed amendments to subparagraphs (c)(3) and (c)(6) are contained in Part I.E.

<u>Recommendation 3</u>: *Retain Requirement that Practice Pursuant to Current Subparagraph (b)(iv) be "Occasional" Rather than "Temporary"*

The Committee recommends retaining the requirement that cross-border practice undertaken pursuant to the catchall provision, RPC 5.5(b)(iv), be "occasional." In contrast, the Model Rule requires that all forms of cross-border practice be conducted on a "temporary basis," thus allowing recurring cross-border practice. *See* Model Rule 5.5, cmt. 6 (services "may be 'temporary' even though the lawyer provides services . . . on a recurring basis, or for an extended period of time . . ."). The Committee understands "occasional" to mean occurring infrequently or from time to time; thus, "recurring" practice is not "occasional." The Committee views the term "occasional" as better suited to preventing attorneys from establishing a systematic, continuous presence in New Jersey unless they are admitted to practice here.

<u>Recommendation 4</u>: *Add Safe Harbor Provision to Permit Cross-Border Attorney to "Associate" with New Jersey Lawyer Responsible for the Matter*

The Committee unanimously recommends that the Court adopt a new safe harbor provision similar to Model Rule 5.5(c)(1). The proposed new subparagraph would allow a cross-border attorney to associate in a matter with an attorney admitted to practice in New Jersey, who

shall be held responsible for the conduct of the cross-border attorney in the matter.

The proposed new safe harbor would not require that the representation be on behalf of an existing client from a jurisdiction where the attorney is admitted to practice. Thus, the cross-border attorney may be retained by a new client from New Jersey to provide services in New Jersey, provided that the requirements of the new provision are met. *See* Model Rule 5.5, cmt. 8 (explaining that interests of clients and public are protected when out-of-state attorney associates with lawyer admitted to practice in jurisdiction, and admitted attorney actively participates in and shares responsibility for representation of client). Although the proposed text of the amendment does not explicitly require the New Jersey lawyer to "actively participate" in the matter, the New Jersey lawyer will be held accountable for the cross-border attorney's conduct.

The Committee recommends that the amendment contain language similar to Rule 1:21-2(b)(1)(B) (requiring *pro hac vice* applicant to certify that applicant is "associated in the matter with New Jersey counsel of record qualified to practice pursuant to R. 1:21-1") and (c)(4) (requiring order granting *pro hac vice* admission to require that New Jersey counsel "shall be held responsible . . . for the conduct of the cause and of the admitted attorney therein"). The proposed amendment may be added as a new subparagraph (b)(iv), after renumbering existing subparagraph (b)(iv) to (b)(v). The text of the proposed amendment is contained in Part I.E.

Recommendation 5 (by Six-to-Five Vote): *Retain Registration and Fee Requirements for All Forms of Cross-Border Practice (other than Alternative Dispute Resolution or Preparation for Non-New Jersey Proceedings)*

The Committee is closely divided on whether to propose amendments that would remove the registration and assessment requirements for all permitted forms of cross-border practice. Little data is available on the issues, making it difficult to quantify the risks and benefits of either position. *Cf.* Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The*

Art of Making Changes, 44 ARIZ. L. REV. 685, 701 (2002) (noting that ABA Commission accepted "anticipated added cost of discipline and client protection" as prediction that was "possible though unproved and perhaps unprovable"). Both sides assume that cross-border attorneys are no more or less likely to engage in dishonest conduct than are New Jersey attorneys. Ultimately, the conclusions are based on policy judgments requiring predictions of behavior and determinations of the appropriate weight to ascribe each consideration in the analysis.

A slim majority of the Committee favors retaining the registration and assessment requirements in all circumstances other than alternative dispute resolution or activities relating to non-New Jersey proceedings (discussed *supra*, *Recommendations 1 & 2*). Thus, under the majority's recommendation, those requirements would continue to be a prerequisite to cross-border practice under current subparagraph (b)(3)(i) (transactional matters); current subparagraph (b)(3)(iv) (catchall provision allowing representation on behalf of existing client from attorney's home state that is "occasional" and is undertaken only when lawyer's disengagement "would result in substantial inefficiency, impracticality or detriment to the client"); and proposed new subparagraph (b)(3)(iv) (association with New Jersey attorney who remains responsible for cross-border attorney's conduct).

The majority agrees that cross-border attorneys granted the privilege of practicing law in New Jersey, like New Jersey attorneys, should identify themselves and pay attorney assessments. The Fund should have the authority and financial ability to pay claims to individuals injured by the dishonest conduct of cross-border attorneys, just as it does in respect of claims arising from the dishonest conduct of New Jersey attorneys. Likewise, disciplinary authorities should continue to receive funding to cover the cost of monitoring and enforcing professional conduct

rules in respect of multijurisdictional practice. The majority's view is that the minimal burdens associated with registering and paying attorney assessments are justified by the corresponding increase in exposure occasioned by the increased number of attorneys permitted to practice here. In the absence of contributions from cross-border attorneys, Fund claims paid as a result of cross-border attorneys' dishonest conduct effectively will be subsidized by New Jersey attorneys.

The majority also recommends technical amendments to Rule 1:28-3 to match the Fund's ability to pay claims with existing source funds. At the time of the 2004 amendments to RPC 5.5, there was no corresponding amendment to the Fund's claims-payment rules. In present form, Rule 1:28-3 defines an eligible claim as one resulting from the dishonest conduct of a member of the bar of this state or an attorney admitted pro hac vice. The proposed amendment would clarify that the Fund may consider claims resulting from the dishonest conduct of attorneys authorized to practice pursuant to RPC 5.5(b), Rule 1:21-2, Rule 1:21-9, or Rule 1:27-2. That would include claims relating to attorneys admitted *pro hac vice*, in-house counsel, foreign legal consultants and attorneys engaged in multijurisdictional practice. The proposed amendments are contained below in Part I.E.

A minority of the Committee favors elimination of the registration and fee requirements. Those members are of the view that, although intended to protect the New Jersey public, the requirements are unworkable, almost impossible to monitor and enforce, and unjustified in light of the minimal contact cross-border attorneys actually have with the New Jersey public. Except under the circumstances contemplated by the proposed new safe harbor provision (association with New Jersey lawyer), the attorney will be representing an existing client from the attorney's home jurisdiction in a matter originating in or relating to that jurisdiction. Given the reduced contact with the New Jersey public, the risk of harm relating to cross-border practice is low. In

the four years since RPC 5.5 was amended, there have been no grievances alleging that a cross-border attorney engaged in unethical conduct in New Jersey and no claims made to the Fund for a cross-border attorney's dishonest conduct. If a New Jersey resident suffers financial harm at the hands of dishonest cross-border attorney, that person can seek recovery either by instituting a civil action in the attorney's home state or filing a claim with that state's client protection fund.

Recommendation 6: *Review Whether to Further Expand Safe Harbor Provisions*

Finally, the Committee notes that other aspects of RPC 5.5 are narrower than Model Rule 5.5. Although the Committee has not received any comments urging relaxation of these requirements, the Court may want to amend them to be more consistent with the Model Rule.

For example, the Model Rule's catchall provision and its safe harbors relating to ADR or preparation for non-New Jersey proceedings require that the legal services "arise out of" or "reasonably relate" to a pending proceeding or to the lawyer's home-jurisdiction practice. Model Rule 5.5(c)(2), (3) & (4). There are no client-specific restrictions; under the Model Rule, the client may be a new client and can be located anywhere. On the other hand, except for the safe harbor relating to non-New Jersey proceedings (and the proposed new safe harbor allowing association with a New Jersey lawyer), RPC 5.5 requires that the representation be on behalf of an "existing client in a jurisdiction in which the lawyer is admitted to practice." RPC 5.5(b)(i), (ii) and (iv). In addition, cross-border practice under New Jersey's catchall provision, current subparagraph (b)(iv), requires that the practice be undertaken "only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client."

E. Text of Proposed Amendments Relating to Multijurisdictional Practice

Proposed Amendments to RPC 5.5

RPC 5.5. Lawyers not admitted to the bar of this state and the lawful practice of law

(a) 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 a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

(1) the lawyer is admitted to practice pro hac vice pursuant to R. 1:21-2 or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or

(2) the lawyer is an in-house counsel and complies with R. 1:27-2; or

(3) under any of the following circumstances:

(i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program, the representation is on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, and the dispute originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice; [or]

(iv) the lawyer associates in a matter with a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-State lawyer in the matter; or

(v) [(iv)] the lawyer practices under circumstances other than (i) through [(iii)] (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to

practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to [sub-]paragraph (b) above shall:

(1) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;

(2) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;

(3) consent in writing on a form approved by the Supreme Court to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction, except that a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above shall be deemed to have consented to such appointment without completing the form;

(4) not hold himself or herself out as being admitted to practice in this jurisdiction;

(5) maintain a bona fide office in conformance with R. 1:21-1(a), except that, when admitted pro hac vice, the lawyer may maintain the bona fide office within the bona fide law office of the associated New Jersey attorney pursuant to R. 1:21-2(a)(1)(B); and

(6) except for a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above, annually register with the New Jersey Lawyers' Fund for Client Protection and comply [complies] with R. 1:20-1(b) and (c), R. 1:28-2, and R. 1:28B-1(e) during the period of practice.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, former text designated as paragraph (a), and new paragraphs (b) and (c) adopted November 17, 2003 to be effective January 1, 2004; paragraph (c) amended July 28, 2004 to be effective September 1, 2004; subparagraph (b)(3)(iii) amended, former subparagraph (b)(3)(iv) designated as subparagraph (b)(3)(v) and new subparagraph (b)(3)(iv) adopted, and paragraph (c) and subparagraphs (c)(3) and (c)(6) amended _____, 2008 to be effective _____, 2008.

Proposed Amendments to Rule 1:28-3

Rule 1:28-3. Payment of Claims

(a) Eligible Claims. The Trustees may consider for payment all claims resulting from the dishonest conduct of a member of the bar of this state or an attorney [admitted pro hac vice] authorized to practice law in New Jersey pursuant to Rule 1:21-2, Rule 1:21-9, Rule 1:27-2 or RPC 5.5(b) acting either as an attorney or fiduciary, provided that:

(1) Said conduct was engaged in while the attorney was a practicing member of the Bar of this State or [admitted Pro Hac Vice]authorized to practice law in New Jersey pursuant to Rule 1:21-2, Rule 1:21-9, Rule 1:27-2 or RPC 5.5(b) in a matter pending in this State;

(2) . . . no change.

(3) . . . no change.

(4) . . . no change.

(5) . . . no change.

(b) . . . no change.

(c) . . . no change.

(d) . . . no change.

(e) . . . no change.

(f) . . . no change.

Note: Source-R.R. 1:22A-3(a) (b) (c) (d) (e) (f). Paragraph (a)(2) amended June 24, 1974 to be effective immediately; paragraph (a) amended and paragraph (a)(5) adopted January 31, 1984 to be effective February 15, 1984; paragraph (a)(1), (2), and (5) amended, former paragraph (a)(4) deleted, paragraph (a)(3) redesignated as paragraph (a)(4), new paragraph (a)(3) adopted; paragraph (b) amended and paragraph (b)(5) adopted June 29, 1990 to be effective September 4, 1990; paragraphs (a) and (a)(1) amended July 14, 1992 to be effective September 1, 1992; introductory paragraph and paragraphs (a)(4) and (f) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) and subparagraph (a)(1) amended _____, 2008 to be effective _____, 2008.

II. OTHER PROPOSED RULE AMENDMENTS AND NEW RULE RECOMMENDED

A. Proposed Amendment to RPC 1.8(c), Conflict of Interest

Consistent with the Civil Practice Committee's forthcoming recommended amendments to various Rules to reflect the rights accorded to civil unions, the Committee recommends a conforming amendment to RPC 1.8(c). The proposed amendment follows.

RPC 1.8. Conflict of Interest: Current Clients; Specific Rules

(a) . . . no change

(b) . . . no change

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

(d) . . . no change

(e) . . . no change

(f) . . . no change

(g) . . . no change

(h) . . . no change

(i) . . . no change

(j) . . . no change

(k) . . . no change

(l) . . . no change

Note: Adopted September 10, 1984 to be effective immediately; paragraph (e) amended July 12, 2002 to be effective September 3, 2002; caption amended, paragraphs (a), (b), (c), (f), (g), (h) amended, former paragraph (i) deleted, former paragraph (j) redesignated as paragraph (i), former paragraph (k) deleted, and new paragraphs (j) , (k) and (l) added November 17, 2003 to be effective January 1, 2004; paragraph (c) amended _____, 2008 to be effective _____, 2008.

B. Proposed Amendment to RPC 1.11, Successive Government and Private Employment

In *In re ACPE Opinion 705*, 192 N.J. 46 (2007), the Court held that the post-government employment restrictions imposed by the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-17 (the "Act"), apply to former State attorneys. The Court also directed the PRRC to propose an amendment to RPC 1.11. *Id.* at 58 & n.1 (noting that pending rule amendment, former federal government attorneys must continue to comply with mandates of RPC 1.11 only and not more restrictive statutory requirement).

N.J.S.A. 52:13D-17 provides that no former "State officer or employee or special State officer or employee" may represent, "whether by himself [or herself] or through any partnership, firm or corporation in which he [or she] has an interest or through any partner, officer or employee thereof," any client other than the State in connection with a matter that the former employee was "substantially and directly involved" with as a State employee. The statute thus "imputes the conflict of interest of a former State government employee – including an attorney – to the entire partnership, firm, or corporation in which the former employee obtains an 'interest,' as statutorily defined." *In re ACPE Opinion 705*, *supra*, 192 N.J. at 52.

The Act defines "interest," in part, as:

> the ownership or control of more than 10% of the profits or assets of a firm, association, or partnership, or more than 10% of the stock in a corporation for profit other than a professional service corporation organized under the "Professional Service Corporation Act" [N.J.S.A. 14A:17-1 et seq.] . . . . The provisions of this act governing the conduct of individuals are applicable to shareholders, associates or professional employees of a professional service corporation regardless of the extent or amount of their shareholder interest in such a corporation.
>
> [N.J.S.A. 52:13D-13(g).]

Current RPC 1.11 would allow the firm of a disqualified former State attorney to undertake the representation provided that the screening and notice requirements of RPC 1.11(c) are satisfied. The Committee proposes an amendment to RPC 1.11(c) to continue to allow screening "absent contrary law." The Committee has determined that such an amendment is the most effective way to implement the Court's directive in *In re ACPE Opinion 705*, *supra*, while recognizing that instances remain in which the screening of a disqualified former government attorney will not violate the Act.

The Committee has not addressed the consequences on attorneys employed by the State who subsequently seek employment in the private sector or on the State's ability to attract qualified attorneys. Those considerations are better addressed by the Court and the Legislature.

The Committee also notes the following issues. The Act applies only to a former "State officer or employee or special State officer or employee," N.J.S.A. 52:13D-17. The Act's restrictions do not apply to former federal attorneys or to former county or municipal attorneys. *See* N.J.S.A. 52:13D-13(a) (excluding "county or municipality" from definition of "State agency" for purposes of defining "State officer or employee"). Whether RPC 1.11 should be amended to render it unethical for former municipal, county, and federal attorneys to be screened from their firms' representation, where such representation is not precluded by the Act and is currently permitted by RPC 1.11, is an issue beyond the Committee's present assignment.

In addition, when a law firm is organized as a "professional service corporation," the disqualification of a former State attorney employed by the firm extends to the entire firm, even where the attorney has no ownership interest in the firm. N.J.S.A. 52:13D-13(g)(1). The Act, however, would not be violated by the screening of disqualified attorneys who are employed by partnerships or other forms of law firms. The Court is best suited to make the policy

determination whether it should be deemed unethical, pursuant to RPC 1.11, to prohibit screening that now is permitted pursuant to both the RPC and the Act.

Finally, the Act disqualifies a former State attorney and his or her firm (other than a professional service corporation) when the attorney "owns" or "controls" more than 10% of the profits, assets or stock of the firm. That raises the potentially complicated enforcement issue of determining whether an attorney "controls" more than 10% of a firm. Also, the greater the number of owners of a firm, the less likely any one individual will own more than 10%. If the RPC is amended to track the Act, the burden, as a practical matter, would fall more heavily on small firms.

The text of the proposed amendment and a suggested Official Comment follows below.

RPC 1.11. Successive government and private employment

(a) Except as law may otherwise expressly permit, and subject to RPC 1.9, a lawyer who formerly has served as a government lawyer or public officer or employee of the government shall not represent a private client in connection with a matter:

(1) in which the lawyer participated personally and substantially as a public officer or employee, or

(2) for which the lawyer had substantial responsibility as a public officer or employee; or

(3) when the interests of the private party are materially adverse to the appropriate government agency, provided, however, that the application of this provision shall be limited to a period of six months immediately following the termination of the attorney's service as a government lawyer or public officer.

(b) Except as law may otherwise expressly permit, a lawyer who formerly has served as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party or information that the lawyer knows is confidential government information about a person acquired by the lawyer while serving as a government lawyer or public officer or employee of the government, and

(2) shall not represent a private person whose interests are adverse to that private party in a matter in which the information could be used to the material disadvantage of that party.

(c) In the event a lawyer is disqualified under (a) or (b), the lawyer may not represent a private client, but absent contrary law a firm with which that lawyer is associated may undertake or continue representation if:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom, and

(2) written notice is given promptly to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(d) Except as law may otherwise expressly permit, a lawyer serving as a government lawyer or public officer or employee of the government:

(1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party acquired by the lawyer while in private practice or nongovernmental employment,

(2) shall not participate in a matter (i) in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, or (ii) for which the lawyer had substantial responsibility while in private practice or nongovernmental employment,

or (iii) with respect to which the interests of the appropriate government agency are materially adverse to the interests of a private party represented by the lawyer while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter or unless the private party gives its informed consent, confirmed in writing, and

(3) shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially or for which the lawyer has substantial responsibility, except that a lawyer serving as a law clerk shall be subject to RPC 1.12(c).

(e) As used in this Rule, the term:

(1) "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of the appropriate government agency;

(2) "confidential government information" means information that has been obtained under governmental authority and that, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended, text of paragraph (b) deleted and new text adopted, new paragraph (c) adopted, former paragraphs (c) and (d) amended and redesignated as paragraphs (d) and (e), and former paragraph (e) merged into redesignated paragraph (e) November 17, 2003 to be effective January 1, 2004; paragraph (c) amended _____, 2008 to be effective _____, 2008.

Official Comment. In *In re ACPE Opinion 705*, 192 N.J. 46 (2007), the Court deferred to the Legislature in the spirit of comity and held that the post-government employment restrictions imposed by the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-17, apply in the context of former State attorneys. The 2008 amendment to paragraph (c) implements that decision.

C. Proposed Amendment to Rule 1:27-2, In-House Counsel[4]

Current Rule 1:27-2 permits in-house counsel to perform legal services "solely for the identified employer." The Committee recommends an amendment to allow in-house counsel to represent the employer's constituents when the legal services are performed for the employer and constituents in respect of the same regulatory or administrative proceeding or claim.

The Committee considered comments from Lee Braem, Esq., Senior Corporate Counsel of Degussa Corporation and President of the New Jersey Corporate Counsel Association. *See Attachment F*. Mr. Braem submitted his comments in his capacity as a member of the faculty that developed and delivers, under the auspices of the New Jersey Institute of Continuing Legal Education, the ethics and professionalism course mandated for in-house counsel. Mr. Braem suggested that an appropriate view of current Rule 1:27-2 is that it reaffirms the principles of RPC 1.13(a): only the "organization" is "the client"; and a limited-license attorney, just as an attorney admitted to practice in New Jersey, may have certain interactions with constituents of the organization pursuant to RPC 1.13(a), (d) and (e).

The Committee also considered a request from Anne M. Patterson, Esq., of Riker Danzig Scherer Hyland Perretti LLP, submitted on behalf of UBS Financial Services, Inc. *See Attachment G*. The request seeks a circumscribed amendment expressly permitting in-house counsel to represent employees as well as the company itself in certain regulatory settings not involving New Jersey law, such as federal securities matters. The request states that it was prompted by a 2006 letter to the requestor from the Advisory Committee on Professional Ethics, which determined that as currently written, Rule 1:27-2 does not permit an attorney with a limited in-house counsel license to represent agents or employees of the employer under any

[4] Justice Pollock recused himself from the Committee's consideration of the proposal to amend the in-house counsel rule. Justice Handler chaired the Committee's review of the issue.

circumstance.

The Committee agrees that constituents (employees, officers, directors, partners, shareholders, and members of the employer), faced with inquiries and claims bearing a direct nexus to the employer, may be served most effectively by lawyers who are versed in the relevant law and the factual context in which the inquiries and claims arose. That is true whether that lawyer is a New Jersey attorney retained or employed by the entity, or an out-of-State attorney employed by the entity as in-house counsel and having a limited license pursuant Rule 1:27-2.

The ABA Model Rule implicitly permits such dual representation. Model Rule 5.5(d)(1) allows an out-of-state lawyer to render legal services that are provided "to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission." Comment 16 to the Model Rule explains that the rule "does not authorize the provision of *personal* legal services to the employer's officers or employees." (Emphasis added). *See, e.g., Cal. Ct. R.* 9.46(b)(3) (prohibiting in-house counsel from providing "personal or individual representation" to constituents of employer). The proposed amendment would not alter that recognized proposition. It would clarify that in-house counsel are permitted to dually represent the employer and constituents of the employer in the same circumstances as New Jersey-licensed corporate counsel pursuant to RPC 1.13.

The Committee recognizes that the proposed expansion of Rule 1:27-2 raises concerns relating to protected communications, conflicts-of-interest and informed consent. Current RPC 5.5(c)(2) subjects in-house counsel to the Rules of Professional Conduct and the disciplinary authority of this State. Current Rule 1:27-2 provides that the "rules, rights and privileges governing the practice of law in this State shall be applicable to" in-house counsel. The Committee nonetheless suggests that the proposed amendments include specific references to

RPC 1.7 and RPC 1.13, as discussed below, to address the conflict and consent concerns.

First, paragraph (a) of RPC 1.13, "Organization as the client," provides that a lawyer "*employed* or retained to represent an organization *represents the organization* as distinct from its directors, officers, employees, members, shareholders or other constituents." (Emphasis added). However, for purposes of RPC 4.2 (protected communications) and RPC 4.3 (dealing with unrepresented persons and employees of organization), RPC 1.13(a) provides that such a lawyer shall be "deemed to represent not only the organizational entity but also the members of its litigation control group." That group includes certain agents and employees, such as those responsible for the organization's legal position in the matter. Mr. Braem expressed concern that the communications between the litigation control group and the employer's lawyer should receive the same protections irrespective of whether the lawyer is a New Jersey attorney or an out-of-State attorney serving as in-house counsel. RPC 1.13(a) would provide such protections.

Second, paragraph (d) of RPC 1.13 provides that when the lawyer deals with an organization's constituents, the lawyer must "explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstanding on their part." That requirement would apply equally to in-house counsel.

Third, paragraph (e) of RPC 1.13 allows a lawyer representing an organization to "also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of RPC 1.7." RPC 1.7 requires full disclosure and informed consent in conflict-of-interest situations. The RPC 1.13(e) permission, subject to RPC 1.7's limitations, should apply equally to in-house counsel when the constituents are represented in the same matter as the employer.

Finally, current Rule 1:27-2(d) prohibits in-house counsel from appearing as attorney of

record in a matter pending before the courts of this State except when admitted pro hac vice. An in-house counsel's representation of the employer's constituents should be similarly limited.

The text of the proposed amendment follows.

R. 1:27-2. Limited license; in-house counsel

To be eligible to practice law in New Jersey as an in-house counsel, a lawyer must comply with the provisions of this Rule. A limited license issued by the Supreme Court pursuant to this Rule shall authorize the lawyer to practice solely for the designated employer in New Jersey or eligible constituents of the designated employer as set forth in subparagraph (b)(iii) of this Rule. Except as specifically limited herein, the rules, rights and privileges governing the practice of law in this State shall be applicable to a lawyer admitted under this Rule.

(a) In-House Counsel Defined. In-House Counsel is a lawyer who is employed in New Jersey for a corporation, a partnership, association, or other legal entity (taken together with its respective parents, subsidiaries, and affiliates) authorized to transact business in this State that is not itself engaged in the practice of law or the rendering of legal services outside such organization, whether for a fee or otherwise, and does not charge or collect a fee for the representation or advice other than to entities comprising such organization.

(b) Requirements. All applications under this Rule are to be submitted to the Secretary to the Board of Bar Examiners. An in-house counsel who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may receive a limited license to practice law in this State under the following conditions:

(i) The applicant certifies that he or she is a member in good standing of the bar of the highest court of each United States jurisdiction in which the applicant is licensed to practice law and provides a certificate of good standing from each United States jurisdiction in which the applicant is admitted;

(ii) The applicant certifies that: (a) no disciplinary proceedings are pending against the applicant and that no discipline has previously been imposed on the applicant in any jurisdiction; or (b) if discipline has been previously imposed, the certification shall state the date, jurisdiction, nature of the violation, and the sanction imposed. If proceedings are pending, the certification shall specify the jurisdiction, the charges, and the likely time of their disposition. A lawyer admitted under this Rule shall have the continuing obligation during the period of such admission promptly to inform the Director of the Office of Attorney Ethics pursuant to Rule 1:20-14(a) of a disposition made of disciplinary proceedings. Any questions concerning the character or fitness of a lawyer may be referred to the Supreme Court Committee on Character for review and recommendation (Rule 1:25). The submission of an application for an In-House Limited License shall be a consent to such investigation as the Committee on Character deems appropriate;

(iii) The applicant certifies that he or she performs legal services in this State solely for the identified employer, or that he or she performs legal services in this State solely for the identified employer and its constituents (employees, directors, officers, members, partners, shareholders) in respect of the same proceeding or claim as the employer, provided that the performance of such services is consistent with RPC 1.13 and RPC 1.7; and

(iv) The employer certifies through an officer, director or general counsel that the applicant is employed as a lawyer for said employer, that the applicant is of good moral character, and that the nature of the employment conforms to the requirements of this Rule.

(c) Compliance. A lawyer admitted pursuant to this Rule shall comply with the annual assessments pursuant to R. 1:20-1(b) (Disciplinary Oversight Committee), R. 1:28-2 (New Jersey Lawyers' Fund for Client Protection), and R.1:28B-1(e) (Lawyers Assistance Program).

(d) Limitation. In-house counsel shall not appear as Attorney of Record for his or her employer, its parent, subsidiary, [or] affiliated entities or any of their constituents in any case or matter pending before the courts of this State, except pursuant to R. 1:21-1(c) and R. 1:21-2.

(e) Duration. The limited license to practice law in this State shall expire if such lawyer is admitted to the Bar of this State under any other rule of this Court, or if such lawyer ceases to be an employee for the employer or its parent, subsidiary, or affiliated entities, listed on such lawyer's application, whichever shall first occur; provided, however, that if such lawyer, within ninety days of ceasing to be an employee for the employer or its parent, subsidiary, or affiliated entities listed on such lawyer's application, becomes employed by another employer for which such lawyer shall perform legal services as in-house counsel, such lawyer may maintain his or her admission under this Rule by promptly filing with the Secretary to the Board of Bar Examiners a certification to such effect, stating the date on which his or her prior employment ceased and his/her new employment commenced, identifying his or her new employer and reaffirming that he or she shall not provide legal services, in this State, to any [other] individual or entity other than as described in (b)(iii). The lawyer shall also file a certification of the new employer as described in (b)(iv). In the event that the employment of a lawyer admitted under this Rule shall cease with no subsequent employment by a successor employer within ninety days, such lawyer shall promptly file with the Secretary to the Board of Bar Examiners a statement to such effect, stating the date that such employment ceased.

(f) Fee. Each applicant for a limited license shall pay the required fees as established by the Board of Bar Examiners and approved by the Supreme Court.

Note: New R. 1:27-2 adopted November 17, 2003 to be effective January 1, 2004; paragraph (e) amended November 29, 2006 to be effective immediately; subparagraphs (b)(iii) and paragraphs (d) and (e) amended _____, 2008 to be effective _____, 2008.

D. Proposed Rule Regarding Provision of Legal Services Following a Determination of Major Disaster (New Rule 1:21-10)

The Committee unanimously recommends that the Court adopt, with technical amendments, the ABA Model Court Rule on Provision of Legal Services Following a Determination of Major Disaster (the "Katrina Rule").

The Katrina Rule, sponsored by numerous ABA sections and several bar associations including the NJSBA, was adopted by the ABA in early 2007. The Regional Task Force on Emergency Preparedness and Disaster Planning (represented by the bar associations of Delaware, the District of Columbia, Maryland, New Jersey, New York and Pennsylvania, and their major cities) also has examined the issues and their impact on the citizens, lawyers and governments of its member states. As the NJSBA recently reported, the Task Force has concluded that it need not recommend any group-specific changes to the Katrina Rule. *See Attachment H*. As of December 17, 2007, two states have adopted the Katrina Rule (IA and MO) and twelve other jurisdictions are considering it (AL, AZ, CA, DE, DC, FL, GA, MD, NY, ND, TX and WA). *See* ABA Standing Comm. on Client Protection, *State Implementation of ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*, *available at* http://www.abanet.org/cpr/clientpro/katrina_chart.pdf.

The NJSBA urges the Court to adopt the Katrina Rule. The Katrina Rule recognizes that lawyers from a disaster-affected area:

> may need to provide legal services to their clients, on a temporary basis, from an office outside their home jurisdiction. In addition, lawyers in an unaffected jurisdiction may be willing to serve residents of the affected jurisdiction who have unmet legal needs as a result of the disaster or whose legal needs temporarily are unmet because of disruption to the practices of local lawyers.
>
> [ABA Standing Comm. on Client Protection, *Report to the House of Delegates*, at 10 (Jan. 29, 2007), *available at*

> http://www.abanet.org/cpr/jclr/home.html (follow "Report to House of Delegates" hyperlink under "Katrina Rule").]

To address those issues, the Katrina Rule creates a mechanism for a jurisdiction's highest court to allow expeditiously out-of-state attorneys to provide pro bono legal services to residents of disaster-affected areas. Such pro bono services would be assigned and supervised through an established pro bono program, legal services program, or other organization specifically designated by the court. The Katrina Rule also allows displaced out-of-state attorneys to relocate temporarily to the jurisdiction to provide limited legal services that arise out of and are reasonably related to that lawyer's practice in the affected area.

Although the Katrina Rule permits a form of multijurisdictional practice, the Committee agrees with the determination of the ABA that "the issues to be addressed [are] administrative matters involving the temporary practice of law" during "urgent situations[.] . . . [B]ecause the creation of a mechanism for making legal services available is not an ethical, but essentially an administrative and operational concern . . ., it is appropriate that the subject be addressed by a [] Court Rule, rather than a Rule of Professional Conduct." *Ibid.* The Committee also recommends that, if approved, the Katrina Rule should be adopted effective immediately.

One logical placement for the Katrina Rule in the Court Rules is Chapter III, Practice of Law, as new Rule 1:21-10. With one addition, the recommended text of the new Rule tracks the Model Rule. Proposed subparagraph (f)(4) is a New Jersey-specific provision clarifying that attorneys practicing pursuant to the Katrina Rule are not required to comply with the annual assessment and registration requirements. The proposed new Rule also would assign subparagraph identifiers not contained in the Model Rule.

The text of the proposed new Rule follows.

1:21-10. Provision of Legal Services Following Determination of Major Disaster

(a) Determination of existence of major disaster. Solely for purposes of this Rule, the Supreme Court shall determine when an emergency affecting the justice system, as a result of a natural or other major disaster, has occurred:

(1) in New Jersey and whether the emergency caused by the major disaster affects all or only a part of the State, or

(2) in another jurisdiction, but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction. The authority to engage in the temporary practice of law in New Jersey pursuant to paragraph (c) of this Rule shall extend only to lawyers who principally practice in the area of such other jurisdiction determined to have suffered a major disaster causing an emergency affecting the justice system and the provision of legal services.

(b) Temporary practice in New Jersey following major disaster. Following the determination of an emergency affecting the justice system in New Jersey pursuant to paragraph (a) of this Rule, or a determination that persons displaced by a major disaster in another jurisdiction and residing in New Jersey are in need of pro bono services and the assistance of lawyers from outside of New Jersey is required to help provide such assistance, a lawyer authorized to practice law in another United States jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Such legal services must be provided on a pro bono basis without compensation, expectation of compensation or other direct or indirect pecuniary gain to the lawyer. Such legal services shall be assigned and supervised through an established not-for-profit bar association, pro bono program or legal services program or through such organization(s) specifically designated by the Court.

(c) Temporary practice in New Jersey following major disaster in another jurisdiction. Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in New Jersey on a temporary basis. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.

(d) Duration of authority for temporary practice.

(1) The authority to practice law in New Jersey granted by paragraph (b) of this Rule shall end when the Court determines that the conditions caused by the major disaster in New Jersey have ended except that a lawyer then representing clients in New Jersey pursuant to paragraph (b) of this Rule is authorized to continue the provision of legal services for such time as is reasonably necessary to complete the representation, but the lawyer shall not thereafter accept new clients.

(2) The authority to practice law in New Jersey granted by paragraph (c) of this Rule shall end 60 days after the Court declares that the conditions caused by the major disaster in the affected jurisdiction have ended.

(e) Court appearances. The authority granted by this Rule does not include appearances in court except:

(1) pursuant to R. 1:21-2 (appearances pro hac vice) and, if such admission is granted, the fees for such admission shall be waived; or

(2) if the Court, in any determination made under paragraph (a) of this Rule, grants blanket permission to appear in all or designated courts of this jurisdiction to lawyers providing legal services pursuant to paragraph (b) of this Rule. If such permission is granted, any pro hac vice admission fees shall be waived.

(f) Disciplinary authority, registration, lawful practice of law. Lawyers providing legal services in New Jersey pursuant to this Rule:

(1) are subject to the Court's disciplinary authority and the Rules of Professional Conduct;

(2) shall, within 30 days from the commencement of the provision of legal services in New Jersey, file a registration statement with the Clerk of the Supreme Court. The registration statement shall be in a form prescribed by the Court;

(3) shall not be considered to be engaged in the unlawful practice of law in New Jersey; and

(4) shall not be required to comply with R. 1:20-1(b) or (c), R. 1:28-2 or R. 1:28B-1 (payment of annual assessments and filing of annual registration statement with New Jersey Lawyers' Fund for Client Protection).

(g) Notification to clients. Lawyers who provide legal services pursuant to this Rule shall inform clients in New Jersey of the jurisdiction in which they are authorized to practice law, any limits of that authorization, and that they are not authorized to practice law in New Jersey except as permitted by this Rule. They shall not state or imply to any person that they are otherwise authorized to practice law in New Jersey.

Note: Adopted _____, 2008 to be effective immediately.

E. 2007 Office of Attorney Ethics Proposed Rule Amendments

In September 2007, the Office of Attorney Ethics submitted fifteen proposed rule changes for the Committee's consideration. The following subsections include the OAE's explanation for and the proposed text of each amendment. Except in respect of the OAE's proposed amendments to Rule 1:20-20, Rule 1:20-22, Rule 1:21-6, and RPC 3.4 (explained in sections 10, 11, 12 and 15, respectively, of this Part II.E), the Committee recommends that the Court adopt the OAE's proposals.

Also, note that during this rules cycle, the Court approved the OAE's proposal to amend Rule 1:20-3 regarding appointments to District Ethics Committees. That proposal and the amendment as adopted are included for completeness (subsection E.3, below).

1. Rule 1:20-1 – Annual Registration Statement

<u>OAE Comment to Proposed R. 1:20-1</u>

A revision is proposed to paragraph (c), titled "Annual Registration Statement," specifically to include changes in the "financial institution or the account numbers for the primary trust and business accounts" to those items already required to be reported to the Office of Attorney Ethics. The existing rule provides that all changes are to be reported "either prior to such change or within thirty days thereafter." The text of the proposed amendment follows.

1:20-1. Disciplinary Jurisdiction; Annual Fee and Registration

(a) ... no change.

(b) ... no change.

(c) Annual Registration Statement. To facilitate the collection of the annual fee provided for in paragraph (b), every attorney admitted to practice law in this state, including all persons holding a plenary license, those admitted pro hac vice, those holding a limited license as in-house counsel, those registered as multijurisdictional practitioners, and those certified as Foreign Legal Consultants, shall, on or before February 1 of every year, or such other date as the Court may determine, pay the annual fee and file a registration statement with the New Jersey Lawyers' Fund for Client Protection (hereinafter referred to as the Fund). The registration statement shall be in a form prescribed by the Administrative Director of the Courts with the approval of the Supreme Court. As part of the annual registration process, each attorney shall certify compliance with Rule 1:28A. All registration statements shall be filed by the Fund with the Office of Attorney Ethics, which may destroy the registration statements after one year. Each lawyer shall file with the Fund a supplemental statement of any change in the attorney's billing address and shall file with the Office of Attorney Ethics a supplemental statement of any change in the home and primary bona fide law office addresses, as well as the main law office telephone number previously submitted and the financial institution or the account numbers for the primary trust and business accounts, either prior to such change or within thirty days thereafter. All persons first becoming subject to this rule shall file the statement required by this rule prior to or within thirty days of the date of admission.

The information provided on the registration statement shall be confidential except as otherwise directed by the Supreme Court.

(d) ... no change.

Note: Adopted February 23, 1978, to be effective April 1, 1978. Any matter pending unheard before a County Ethics Committee as of April 1, 1978 shall be transferred, as appropriate, to the District Ethics Committee or the District Fee Arbitration Committee having jurisdiction. Any matter heard or partially heard by a County Ethics Committee by April 1, 1978 shall be concluded by such Ethics Committee and shall be reported on in accordance with these rules; amended July 16, 1981 to be effective September 14, 1981. Caption amended and first two paragraphs amended and redesignated as paragraph (a); new paragraphs (b), (c) and (d) adopted January 31, 1984 to be effective February 15, 1984; paragraph (c) amended November 5, 1986 to be effective January 1, 1987; paragraph (d) amended June 29, 1990 to be effective September 4, 1990; paragraph (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended September 15, 1992, to be effective January 1, 1993; caption added to all paragraphs and paragraphs (a), (b), (c), and (d) amended February 8, 1993 to be effective immediately; paragraphs (a), (b) and (c) amended January 31, 1995, to be effective March 1, 1995; paragraph (a) amended July 10, 1998, to be effective September 1, 1998; paragraph (b) amended July 12, 2002 to be effective September 3, 2002; paragraphs (a), (b), (c) and (d) amended July 28, 2004 to be effective September 1, 2004; paragraph (c) amended , 2008 to be effective , 2008.

2. Rule 1:20-2 – Office of Attorney Ethics

OAE Comment to Proposed R. 1:20-2

A change is proposed to subparagraph (b)(17), which currently authorizes the Director, OAE to select former ethics committee members (attorneys and non-attorney members) to act as hearing panel members when the need arises. The proposed modification would also give the Director, OAE the flexibility to do so in the case of fee arbitration committees. Such additions are occasionally necessary due to increased caseloads in given district committees. The text of the proposed amendment follows.

1:20-2. Office of Attorney Ethics

(a) ... no change.

(b) Authority. The Director shall have the discretion and the authority to:

(1) exercise exclusive jurisdiction over the investigation and prosecution of the following:

(A) any case in which the Director determines the matter involves serious or complex issues that must be immediately addressed or one that requires emergent action;

(B) all cases in which an attorney is a defendant in any criminal proceedings;

(C) any case in which the Ethics Committee requests intervention;

(D) any case in which an Ethics Committee has not resolved a matter within one year of the filing of a grievance;

(E) any case in which the Board or the Supreme Court determines the matter should be assigned to the Director;

(F) any case involving multijurisdictional practice or practice as in-house counsel.

(2) investigate any information coming to the Director's attention, whether by grievance or otherwise, which, in the Director's judgment, may be grounds for discipline or transfer to disability-inactive status;

(3) dispose of, by investigation or dismissal, all matters involving alleged unethical conduct , by transfer to disability-inactive status, by agreement in lieu of discipline in minor unethical conduct cases, or by the prosecution of formal charges before a duly constituted hearing panel or special ethics master, all in accordance with these Rules;

(4) prosecute ethics proceedings before the Disciplinary Review Board;

(5) prosecute all ethics proceedings before the Supreme Court, unless the Court or the Director requests the assistance of Board Counsel to do so;

(6) seek from the Supreme Court judicial review of any final determination of the Board within the time and in the manner prescribed by the Rules of the Court;

(7) transfer any matter pending before an Ethics Committee or Fee Committee to another district;

(8) maintain records of all ethics and fee arbitration matters;

(9) administer the programs of the Fee Committees in accordance with R. 1:20A-1 et seq., of the Ethics Committees in accordance with R. 1:20-3 et seq., and to render to both of them appropriate legal and administrative advice;

(10) administer the Random Audit Compliance Program in accordance with R. 1:21-6(c);

(11) prepare annually, jointly with Counsel for the Disciplinary Review Board, a proposed budget for the attorney disciplinary system of the state;

(12) hire and discharge secretaries of Ethics Committees and Fee Committees and recommend and pay their compensation;

(13) recommend to the Supreme Court the appointment and replacement of members of Ethics Committees and Fee Committees;

(14) recommend the creation of new Ethics Committees and Fee Committees and the reorganization and termination of existing Ethics Committees and Fee Committees;

(15) recommend to the Supreme Court rules and guidelines governing the procedures to be followed in all ethics and fee arbitration proceedings in this state;

(16) hire and discharge all staff of the Office of Attorney Ethics consistent with personnel policies of the judiciary and subject to the approval of the Chief Justice, and to recommend the hiring of all ethics counsel to the Supreme Court; and

(17) select attorneys and non-attorneys from among former Ethics and Fee Committee members to act as hearing panel members; and

(18) approve additional volunteer attorneys who are not members of an Ethics Committee to act as investigators or presenters.

In all actions the Director shall exercise all of the investigative and prosecutorial authority of an Ethics Committee in addition to any authority invested in the Director under these rules.

(c) ... no change.

(d) ... no change.

Note: Former rule redesignated R. 1:20-3 and new rule adopted January 31, 1984 to be effective February 15, 1984; paragraph (b)(15) amended and new paragraph (16) adopted November 5, 1986 to be effective January 1, 1987; paragraph (b)(8) amended June 29, 1990 to be effective September 4, 1990; paragraphs (a) and (b) amended, subparagraphs (b)(1) (i) (ii) (iii) (iv) (v) amended and redesignated (b)(1) (A) (B) (C) (D) and (E), new subparagraph (b)(17) added, paragraphs (c) and (d) adopted January 31, 1995 to become effective March 1, 1995; paragraph (b)(1) amended, subparagraph (b)(1)(E) amended, new subparagraph (b)(1)(F) adopted, new subparagraph (b)(2) added, former subparagraphs (b)(2) and (b)(3) renumbered as (b)(3) and (b)(4) and amended, former subparagraphs (b)(4) to (b)(9) renumbered as (b)(5) to (b)(10), former subparagraphs (b)(10) and (b)(11) renumbered as (b)(11) and (b)(12) and amended, former subparagraph (b)(12) renumbered as (b)(13), former subparagraph (b)(13) renumbered as (b)(14) and amended, former subparagraphs (b)(14) to (b)(17) renumbered as (b)(15) to (b)(18), and new last sentence added to paragraph (b) July 28, 2004 to be effective September 1, 2004; subparagraph (b)(17) amended _____, 2008 to be effective _____, 2008.

3. Rule 1:20-3 – District Ethics Committees

Committee Comment

In June 2007, the Court approved the OAE's proposal to amend Rule 1:20-3, effective September 1, 2007. The amendment as adopted is included below for completeness.

OAE Comment to Proposed R. 1:20-3

Paragraph (b) of the present rule, titled "Appointments," provides that a DEC member whose full four-year term expires may not be reappointed. Yet there are a number of productive, experienced members on ethics committees who, at the end of their term, may wish to continue for one additional term. The OAE Director may recommend that it is in the best interest of a committee to reappointment a member.

There is precedent for reappointment to Supreme Court committees. Many ethics-related Supreme Court committee members have the potential to serve multiple terms. For example, members of the Disciplinary Oversight Committee, the ACPE, the CAA, and the UPL all are eligible for reappointment to successive terms by Court rule. *See* R.1:20B-2; R.1:19-1; R.1:19A-1(a); and R.1:22-1. While it is always good to allow new members the opportunity to participate, given the time goals imposed and the time demands involved with modern service on DEC's, the Court is best served by retaining experienced members who wish to be reappointed. The proposed rule change allows for only one additional four-year term.

[*The following is the text of the amendment as adopted.*]

1:20-3. District Ethics Committees; Investigations

(a) ... no change.

(b) Appointments. Members of Ethics Committees shall be appointed by, and shall serve at the pleasure of the Supreme Court for a term of four years. With the approval of the Supreme Court a [A] member who has served a full term may [shall not] be [eligible for] reappointed[ment] to [a] one successive term [, except that a member appointed to fill an unexpired term shall be

eligible for reappointment to a full successive term]. A member serving in connection with an investigation pending at the time the member's term expires may continue to serve in such matter until its conclusion. In order that, as nearly as possible, the terms of one-quarter of the members shall expire each year, the Supreme Court may, when establishing a new Ethics Committee, appoint members for terms of less than four years and members so appointed shall be eligible for reappointment to a full successive term.

(c) ... no change.

(d) ... no change

(e) ... no change

(f) ... no change.

(g) ... no change.

(h) ... no change.

(i) ... no change.

(j) ... no change.

Note: Former Rule redesignated as Rule 1:20-4 January 31, 1984 to be effective February 15, 1984. Source-Former Rule 1:20-2 adopted February 23, 1978, to be effective April 1, 1978; paragraphs (a), (h), (l) and (m) amended January 17, 1979, which were superseded on March 2, 1979, to be effective April 1, 1979; and paragraphs (n) and (o) restored on March 22, 1979, to be effective April 1, 1979; subparagraph (l)(3) deleted and new paragraph (p) adopted June 19, 1981, to be effective immediately; paragraphs (c), (h), (j) and (l)(1)(i) amended July 16, 1981, to be effective September 14, 1981; Rule redesignated as Rule 1:20-3; paragraphs (a) through (e) amended; paragraphs (f), (g) and part of (k) deleted; paragraphs (h), (i), (j), (k), (l), (m), (n), (o) and (p) amended and redesignated (f), (h), (i), (j), (k), (l), (m), (n) and (o) and new paragraphs (g)and (p) adopted January 31, 1984, to be effective February 15, 1984; paragraphs (f), (g), (h), (i), (l), (n), (o) and (p) amended November 5, 1986, to be effective January 1, 1987; paragraphs (e) and (m) amended June 26, 1987 to be effective July 1, 1987; paragraphs (i), (j) and (o) amended November 7, 1988 to be effective January 2, 1989; paragraphs (f) and (i) amended, and paragraph (n)(3) caption and text amended June 29, 1990 to be effective September 4, 1990; paragraph (f) amended July 13, 1994 to be effective September 1, 1994; paragraph (g) and (n)(2) captions and text amended August 8, 1994 to be effective immediately; paragraphs (a), (b), (c) and (d) amended, paragraphs (e) through (p) deleted and new paragraphs (e) through (j) adopted January 31, 1995 to be effective March 1, 1995; paragraphs (f), (g)(5), and (h) amended July 5, 2000 to be effective September 5, 2000; paragraph (g)(1) amended July 12, 2002 to be effective September 3, 2002; paragraphs (a), (b), (c), (e), (f), (g), (h), (i) (text and caption), and (j) amended July 28, 2004 to be effective September 1, 2004; paragraph (b) amended June 15, 2007 to be effective September 1, 2007.

4. Rule 1:20-4 – Formal Pleadings

OAE Comment to Proposed R. 1:20-4

A modification is proposed to delete the third sentence from paragraph (b) that states that the caption of a complaint must indicate whether "unethical conduct or minor unethical conduct" is alleged. The concept of "minor" unethical conduct in hearings was eliminated some years ago. That term has since been reserved solely to describe the type of conduct that is eligible for diversion during the investigative stage under R. 1:20-3(i).

The text of the proposed amendment follows.

1:20-4. Formal Pleadings

(a) ... no change.

(b) Contents of Complaint. Every complaint shall be in writing, designated as such in the caption, and brought against the respondent in the name of either the District Ethics Committee or the Office of Attorney Ethics. The complaint shall be signed by the chair, secretary or any Ethics Committee member, the Director, or the Director's designee. [The caption shall indicate if the complaint concerns unethical conduct or minor unethical conduct.] The complaint shall state the name of the grievant, if any, and the name, year of admission, law office or other address, and county of practice of the respondent, and shall set forth sufficient facts to constitute fair notice of the nature of the alleged unethical conduct, specifying the ethical rules alleged to have been violated. It shall also state above the caption the name, address and phone number of the presenter assigned to handle the matter.

(c) ... no change.

(d) ... no change.

(e) ... no change.

(f) ... no change.

(g) ... no change.

Note: Text and former R. 1:20-4 redesignated R. 1:20-15. New text to R. 1:20-4, adopted January 31, 1995 to be effective March 1, 1995; paragraph (e) amended July 5, 2000 to be effective September 5, 2000; paragraphs (e) and (f)(2) amended July 12, 2002 to be effective September 3, 2002; paragraphs (a), (b), (d), (e), (f), and (g) amended July 28, 2004 to be effective September 1, 2004; paragraph (d) amended August 1, 2006 to be effective September 1, 2006; paragraph (b) amended _____, 2008 to be effective _____, 2008.

5. Rule 1:20-5 – Prehearing Procedures

OAE Comment to Proposed R. 1:20-5

Subparagraph (a)(3) is revised to clarify that materials relating to any "confidential" matter under R. 1:20-9, including dismissals and diversions are not discoverable. Recent applications by respondents have included requests to the OAE to produce files in cases similar to a respondent's matter in which other respondents have been or are being investigated, including the dispositions thereof. R. 1:20-9(a) provides that, except for formal complaints and other charging documents, all other "disciplinary matter(s) and all written records gathered and made pursuant to these rules shall be kept confidential." As to diversions, R. 1:20-3(i)(2)(A) provides that "Classification of unethical conduct as minor unethical conduct shall be in the sole discretion of the Director." Moreover, R. 1:20-3(i)(2)(B)(ii) states that "There shall be no appeal from the Director's decision (to grant or deny diversion)." The proposed revision also highlights the confidentiality that applies to all confidential disciplinary matters (R. 1:20-9) and avoids time-consuming applications that simply are fishing expeditions intended to divert attention from the issue of the subject respondent's facts, culpability or sanction.

After a complaint has been filed against a respondent, the disciplinary system has experienced a lack of communication from and an inability to communicate with a number of respondents. Some may do so in an attempt to avoid the consequences of their actions. Such tactics unduly delay disciplinary proceedings. A change is proposed to subparagraph (b)(2) titled "Prehearing Report" to require respondents to set forth in their prehearing report "his or her own office and home address (including a street address) and telephone number where the attorney can be reached at all times." This is so whether the respondent is currently represented or pro se. Experience has demonstrated that respondents may terminate their counsel at any time and

become pro se. In order to avoid unnecessary delay, it is important to have available current contact information. Of course, communications will be with counsel for any respondent who is represented. The rule proposal also places an "an absolute and continuing duty to promptly advise the hearing panel chair, special ethics master, presenter, secretary of any district committee and the Director updated on the change in any of the (above) items."

The text of the proposed amendment follows.

1:20-5. Prehearing Procedures

(a) Discovery.

(1) Generally. Discovery shall be available to the presenter. Discovery shall also be available to the respondent, provided that a verified answer in compliance with R. 1:20-4(e) has been filed. All such requests shall be in writing.

(2) Scope. On written request the following information, if relevant to the investigation, prosecution, or defense of a matter, and if within the possession, custody or control of the presenter, the respondent or counsel, is subject to discovery and shall be made available for inspection and copying as set forth in this rule:

(A) a writing as defined by N.J.R.E. 801(e) or any other tangible object, including those obtained from or belonging to the respondent;

(B) written statements, if any, including any memoranda reporting or summarizing oral statements, made by any witness, including the respondent;

(C) results or reports of mental or physical examinations and of scientific tests or experiments made in connection with the matter;

(D) names, addresses and telephone numbers of all persons known to have relevant knowledge or information about the matter, including a designation by the presenter and respondent as to which of those persons will be called as witnesses;

(E) police reports and any investigation reports;

(F) name and address of each person expected to be called as an expert witness, the expert's qualifications, the subject matter on which the expert will testify, a copy of all written reports submitted by the expert or, if none, a statement of the facts and opinions to which the expert will testify and a summary of the grounds for each opinion; and

(G) any final disciplinary investigative report.

(3) Documents Not Subject to Discovery. This rule does not require discovery of a party's work product consisting of internal reports, memoranda or documents made by that party or that party's attorney or agents in connection with the investigation, prosecution or defense of the matter. Nor does it require discovery of statements, signed or unsigned, made by respondent to respondent's attorney or that attorney's agents. Any materials relating to any matter deemed "confidential" under R. 1:20-9, including dismissals and diversions are not discoverable. This rule does not authorize discovery of any internal manuals or materials prepared by the Office of Attorney Ethics or the Disciplinary Review Board.

(4) Type of Discovery Not Permitted. Neither written interrogatories, nor requests for admissions, nor oral depositions shall be permitted in any matter, except that depositions to preserve the testimony of a witness likely to be unavailable for hearing due to death, incapacity or otherwise, may be taken in accordance with the procedure (modified as appropriate to disciplinary proceedings) set forth in R. 3:13-2.

(5) Timeliness of Discovery; Continuing Duty. Initial discovery shall be made available

within 20 days after receipt of a written request therefor. A party's obligation to provide discovery is a continuing one. If, subsequent to compliance with a request for discovery, a party discovers additional names or statements of witnesses or other information reasonably encompassed by the initial request for discovery, the original discovery response shall be promptly supplemented accordingly.

(6) Failure to Make Discovery. Any discoverable information that is not timely furnished either by original or supplemental response to a discovery request may, on application of the aggrieved party, be excluded from evidence at hearing. The failure of the presenter or respondent to disclose the name and provide the report or summary of any expert who will be called to testify at least 20 days prior to the hearing date shall result in the exclusion of the witness, except on good cause shown.

(7) Discovery Applications. All discovery applications shall be made on notice to the hearing panel chair or special ethics master, if one has been appointed. An interlocutory appeal may be sought only pursuant to R. 1:20-16(f)(1).

(b) Prehearing Conference.

(1) ... no change.

(2) Prehearing Report. At least five business days before the date scheduled for the prehearing conference, both the presenter and the respondent shall file a report with the hearing panel chair or special ethics master, and with the adversary, disclosing the name, address and telephone numbers of each person expected to be called at hearing, including any person who will testify as to the character or reputation of the respondent, and all experts. With respect to an expert witness, the report shall state the person's name, address, qualifications, and the subject matter on which the expert is expected to testify. A copy of the expert's report, if any, or, if no written report is prepared, a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, shall be attached. Every respondent shall also include his or her own office and home address (including a street address) and telephone number where the attorney can be reached at all times. The respondent shall have a continuing duty to promptly advise the hearing panel chair, special ethics master, presenter, secretary of any district committee and the Director of any changes in any of the items required above.

(3) ... no change.

(4) ... no change.

(5) ... no change.

(c) ... no change.

(d) ... no change.

Note: Former R. 1:20-5 redesignated R. 1:20-16 adopted January 31, 1995 to be effective March 1, 1995; paragraph (b)(6) amended July 5, 2000 to be effective September 5, 2000; paragraph (a)(7) amended July 12, 2002 to be effective September 3, 2002; paragraphs (a) and (b) amended, former subparagraph (b)(c) redesignated as paragraph (c), former paragraph (c) redesignated as paragraph (d) and amended July 28, 2004 to be effective September 1, 2004; subparagraphs (a)(3) and (b)(2) amended _____, 2008 to be effective _____, 2008.

6. Rule 1:20-6 – Hearings

OAE Comment to Proposed R. 1:20-6

A change is proposed to subparagraph (b)(1) governing the appointment of special ethics masters to permit a former member of the Disciplinary Oversight Committee to serve in this capacity with his or her consent. The text of the proposed amendment follows.

1:20-6. Hearings

(a) ... no change.

(b) Special Ethics Masters.

(1) Qualifications. A retired or recalled judge of this state, a former member of the Disciplinary Review Board, Disciplinary Oversight Committee, a former officer of a district ethics committee, or a former chair of a hearing panel may be appointed, with his or her consent, to serve as a special ethics master.

(2) ... no change.

(3) ... no change.

(4) ... no change.

(c) ... no change.

(d) ... no change.

(e) ... no change.

Note: Adopted January 31, 1995 to be effective March 1, 1995; paragraph (c) amended July 25,1995, to be effective immediately; paragraph (b)(2) amended July 5, 2000 to be effective September 5, 2000; paragraphs (a)(1), (a)(2), and (c)(2)(E)(i) amended July 12, 2002 to be effective September 3, 2002; paragraphs (a) and (b) amended, paragraph (c) caption and text amended, former paragraph (d) deleted and new paragraph (d) adopted July 28, 2004 to be effective September 1, 2004; new paragraph (e) adopted July 27, 2006 to be effective September 1, 2006; subparagraph (c)(2)(F) amended August 1, 2006 to be effective September 1, 2006; subparagraph (b)(1) amended _____, 2008 to be effective _____, 2008.

7. Rule 1:20-9 – Confidentiality

OAE Comment to Rule 1:20-9

Current Rule 1:20-9(f)(1) allows the OAE Director to refer matters to law enforcement when a formal complaint is filed against the respondent, as that event makes the matter public. As noted in paragraphs (a), (d) and (k) however, other events can cause a disciplinary matter to be a matter of public record. Paragraph (d) uses these additional terms to describe those documents: "a disciplinary stipulation waiving the filing of a formal complaint, a motion for final or reciprocal discipline or the approval of a motion for discipline by consent." For uniformity, we propose that paragraphs (a) and (k) be modified to use the same additional language. This proposal would also add that same language to subparagraph (f)(1).

Subparagraph (d)(1) is amended to make it clearer that both "inspection and copying" are available at the office where the matter is then pending. Both are mentioned in one sentence but not in the succeeding sentence. This amendment corrects this omission.

The text of the proposed amendment follows.

1:20-9. Confidentiality; Access to and Dissemination of Disciplinary Information

(a) Confidentiality by the Director. Prior to the filing and service of a complaint [in a disciplinary matter], a disciplinary stipulation waiving the filing of a formal complaint, [or] a motion for final or reciprocal discipline, or the approval of a motion for discipline by consent, the disciplinary matter and all written records gathered and made pursuant to these rules shall be kept confidential by the Director, except that the pendency, subject matter, and status of a grievance may be disclosed by the Director if:

(1) the respondent has waived or breached confidentiality; or

(2) the proceeding is based on allegations of reciprocal discipline, a pending criminal charge, or a guilty plea or conviction of a crime, either before or after sentencing; or

(3) there is a need to notify another person or organization, including the Lawyers' Fund for Client Protection, in order to protect the public, the administration of justice, or the legal profession; or

(4) the Supreme Court has granted an emergent disciplinary application for relief; or

(5) the matter has become common knowledge to the public.

(b) ... no change.

(c) ... no change.

(d) Public Records.

(1) Subject to paragraphs (a) and (c), on the filing and service of a complaint, a disciplinary stipulation waiving the filing of a formal complaint, a motion for final or reciprocal discipline or the approval of a motion for discipline by consent (except for documents submitted in connection with confidential prehearing conferences), those documents, as well as the documents and records filed subsequent thereto, shall be available for public inspection and copying. Inspection and copying shall be available by appointment at the office of the body where the matter is then pending. Transcripts shall be available to the public in accordance with R. 1:20-7(m) at their pre-paid expense. Where, in the opinion of the district secretary or the Director, the documentation to be copied is voluminous, a commercial photocopy service may be used for reproduction at the prepaid expense of the person requesting them.

(2) In the event an attorney has been temporarily suspended for disciplinary reasons, the motion papers, any response and any orders issued by the Board or the Court shall be available to the public by their respective offices. Unless the Court otherwise orders, all other records regarding emergent applications, including but not limited to those for temporary suspension (either for disciplinary reasons, failure to pay disciplinary costs, failure to pay fee arbitration determinations or settlements or otherwise), license restrictions, conditions of practice, transfer

to temporary disability-inactive status, shall be confidential, except for orders issued by the Supreme Court.

(3) There shall be no private discipline. Private reprimands issued prior to the effective date of this rule shall remain confidential.

(4) Ethics Committees, Office of Attorney Ethics or the Board may impose a reasonable charge for the actual cost of reproducing public documents.

(5) The following records are also public for purpose of inspection: District Ethics Committee Manual and District Fee Arbitration Manual. These manuals may be inspected at the Office of Attorney Ethics, the Disciplinary Review Board and the secretaries of the respective Ethics Committees and Fee Committees.

(e) ... no change.

(f) Disclosure of Evidence of Criminal Conduct; All Other Disclosure Including Subpoenas.

(1) Subsequent to the filing of a complaint, a disciplinary stipulation waiving the filing of a formal complaint, a motion for final or reciprocal discipline or the approval of a motion for discipline by consent, the Director may refer any matter to law enforcement authorities without prior notice to respondent if criminal conduct may be involved. Prior to the filing and service of a complaint, the Director may refer a matter to law enforcement authorities if criminal conduct may be involved and the respondent has been temporarily suspended. In both cases, a copy of the letter of referral shall be sent to the respondent and any known counsel. Where criminal conduct may be involved but where the respondent has not been temporarily suspended or served with a complaint, the Director shall, prior to such referral, give ten days written notice to the respondent and any known counsel of the intention to make a referral. The respondent may, within said period, apply to the Board for a protective order based on good cause shown.

(2) In all other cases, including cases where civil or criminal subpoenas have been issued to disciplinary personnel, the Board may authorize the referral of any confidential documentary information to the appropriate authority only for good cause shown. When a requesting authority shall seek such information, it shall issue its subpoena, which shall be transmitted to the Board or shall file a motion seeking disclosure with the Board, on ten days notice to the respondent and any known counsel, and the Director, both of whom shall be given an opportunity to be heard.

(g) ... no change.

(h) ... no change.

(i) ... no change.

(j) ... no change.

(k) Law Firm/Public Agency Notice of Public Action. Unless the respondent is the sole proprietor of a law firm, an Ethics Committee or the Office of Attorney Ethics shall send promptly to the law firm of which the respondent is known to be a member or by which the respondent is known to be employed, or the public agency by which the respondent is known to be employed, a copy of every complaint filed and served by that entity, disciplinary stipulation waiving the filing of a formal complaint, motion for final or reciprocal discipline or approved motion for discipline by consent.

(l) ... no change.

(m) ... no change.

(n) ... no change.

(o) ... no change.

(p) ... no change.

Note: Former R. 1:20-9 redesignated R. 1:20-12, new text adopted January 31, 1995 to be effective March 1, 1995; paragraph (k) amended July 10, 1998 to be effective September 1, 1998; paragraphs (d) and (g) amended July 5, 2000 to be effective September 5, 2000; paragraphs (a), (b), (c), (f), (g), (i), (k), (l), (m), and (n) amended, and paragraphs (e) and (j) caption and text amended July 28, 2004 to be effective September 1, 2004; paragraph (a) caption and text amended, new paragraph (b) adopted, former paragraphs (b), (c), and (h) amended and redesignated as paragraphs (c), (d), and (i), former paragraphs (d), (e), (f), (g), (i), (j), (k), (l), (m), (n), and (o) redesignated as paragraphs (e), (f), (g), (h), (j), (k), (l), (m), (n), (o), and (p) July 27, 2006 to be effective September 1, 2006; corrective amendment to paragraph (b) adopted September 26, 2006, to be retroactive to September 1, 2006; paragraph (a), subparagraphs (d)(1) and (f)(1), and paragraph (k) amended _____, 2008 to be effective _____, 2008.

8. Rule 1:20-16 – Action by the Supreme Court

OAE Comment to Proposed R. 1:20-16

The proposed revision to paragraph (i) simply adds references to the second half of the sentence to make clear that an attorney may not practice law after disbarment or during a period of suspension, in addition to after being transferred to disability. As written, the reference only to a "disability" is incomplete. The text of the proposed amendment follows.

1:20-16. Action by the Supreme Court
(a) …no change.
(b) …no change.
(c) …no change.
(d) …no change.
(e) …no change.
(f) …no change.
(g) …no change.
(h) …no change.
(i) Practice of Law Prohibited. No attorney who has been ordered disbarred, suspended, or transferred to disability-inactive status shall practice law after such disbarment or during the period of such suspension or disability, and every order of disbarment shall include a permanent injunction from such practice.
(j) …no change.
(k) …no change.

Note: Former rule redesignated as R. 1:20-8, R. 1:20-10 and R. 1:20-11. Source--Former Rule 1:20-4 adopted February 23, 1978, to be effective April 1, 1978; paragraph (a) amended January 10, 1979 to be effective immediately; new paragraph (d) adopted and paragraphs (d) and (e) redesignated (e) and (f) July 16, 1981 to be effective September 14, 1981; paragraphs (a) and (b) amended; paragraph (c) deleted; paragraphs (d), (e) and (f) amended and redesignated (c), (d) and (e) January 31, 1984 to be effective February 15, 1984; new paragraph (d) adopted and former paragraphs (d) and (e) redesignated (e) and (f) November 6, 1989, to be effective January 2, 1990; paragraph (a) amended June 29, 1990 to be effective September 4, 1990; paragraph (d) amended August 8, 1994 to be effective immediately; former R. 1:20-5 redesignated R. 1:20-16, caption and text of paragraph (a) amended, paragraphs (b) and (d) deleted, new paragraphs (b)(c)(d)(e) and (i) adopted, former paragraphs (c)(e)(f) amended and redesignated (f)(g) and (h) January 31, 1995 to be effective March 1, 1995; paragraph (b) amended March 24, 1995, to be effective immediately; former paragraphs (h) and (i) redesignated as paragraphs (i) and (j) and new paragraph (h) adopted July 10, 1998 to be effective September 1, 1998; paragraphs (f), (i), and (j) amended and new paragraph (k) adopted July 28, 2004 to be effective September 1, 2004; paragraph (i) amended _____, 2008 to be effective _____, 2008.

9. Rule 1:20-19 – Attorney-Trustee

OAE Comment to Proposed R. 1:20-19

The proposed amendment divides paragraph (a) into two subparagraphs. Subparagraph (1) remains the same and a caption of "Regular Attorney-Trustee" is added. A new subparagraph (2) is added with the title "Temporary Attorney-Trustee" to deal with the situation in which a temporary "medical disability" occurs that requires action to maintain the lawyer's practice and protect clients. The new subparagraph therefore gives the Assignment Judge the authority to appoint a temporary attorney-trustee in such a situation.

The OAE reports that in recent years, there have been increasing numbers of instances in which an attorney has suffered an emergent medical condition, a stroke, for example, or other serious condition that renders the attorney (almost invariably a sole practitioner) "otherwise unable to carry on the attorney's practice temporarily so that clients' matters are at risk." In these cases the attorney is not before the disciplinary system, so that the usual predicates under subparagraph (a)(1) to appoint a regular attorney-trustee do not apply. For example, use of the existing term "abandonment" in paragraph (a) is not appropriate because that connotes a voluntary desertion of the practice. Furthermore, time usually is of the essence and it often is unreasonably difficult to marshal the evidence necessary to attempt to have the Supreme Court first transfer the attorney to "disability-inactive" status. In several cases that came to the attention of the disciplinary system, there was no close family to assist in securing necessary authorization for otherwise privileged medical information.

Subparagraph (a)(2) vests authority in the discretion of the Assignment Judge (or his or her designee) to deal expeditiously with these unusual situations by taking any immediate necessary action, subject to due process, to create a temporary attorney-trusteeship to protect the

practice and clients of the attorney. One or more temporary trustees may be appropriate depending on the workload.

During a limited period, which should not exceed six months, the temporary attorney-trustee shall not have the broad authority appropriate in subparagraph (a)(1) regular attorney-trustee proceedings. Rather than winding down the practice, the temporary attorney-trustee's primary purpose is to maintain the practice to the maximum extent possible until the circumstances giving rise to his or her appointment can develop and be ascertained. In some cases, the attorney whose practice has been assumed will be able to return to practice. With the consent of the client, the temporary attorney-trustee may handle matters in place of the attorney or the temporary trustee may seek reasonable postponements of cases. On the other hand, the temporary attorney-trustee must recognize the fact that clients always have the right to terminate the attorney-client relationship. In such event, they must be given their file and any appropriate refunds of unearned retainers.

The temporary attorney-trustee does not have the powers of paragraph (f) to accept clients because that would be inconsistent with the purpose of maintaining the practice. Paragraph (d) shall also not apply, except that the reports required therein shall be filed. Paragraph (g) shall not apply as well because of the fact that the trusteeship arose not out of a disciplinary matter and is, therefore, inappropriate.

With regard to costs, the temporary attorney-trustee may apply to the Assignment Judge in accordance with paragraph (h) at any time for reasonable costs and expenses as stated under that paragraph, including the right to satisfy those costs and expenses from the attorney's business or personal accounts as directed by the Assignment Judge.

In respect of legal fees, the temporary attorney-trustee shall not seek any fees during the

first thirty days of appointment. Thereafter, the temporary attorney-trustee may apply to the Assignment Judge for reduced legal fees below the normal hourly rate pursuant to paragraph (h). A reduced fee only is appropriate here because the practice that is being assisted arose from a totally non-disciplinary circumstance. Therefore, special consideration is necessary and appropriate.

The attorney whose practice is subjected to a temporary trusteeship has the right to apply at any time for an order vacating the temporary trusteeship on notice to all interested parties.

The text of the proposed amendment follows.

1:20-19. Appointment of Attorney-Trustee to Protect Clients' Interest

(a) Jurisdiction; Appointment.

(1) Regular Attorney-Trustee. If an attorney has been suspended or disbarred or transferred to disability-inactive status and has not complied with R. 1:20-20 (future activities of disciplined or disability-inactive attorneys), or has abandoned the law practice, or cannot be located, or has died, and no partner, shareholder, executor, administrator or other responsible party capable of conducting the respondent's affairs as stated hereinafter is known to exist, the Assignment Judge, or designee, in the vicinage in which the attorney maintained a practice may, on proper proof of the fact and on the application of any interested party, appoint one or more members of the bar of the vicinage where the law practice is situate as attorney-trustee. Where a responsible party capable of conducting respondent's affairs is known to exist, and where that person is a New Jersey attorney or has retained a New Jersey attorney, that attorney may be appointed and directed to take appropriate action. Notice of an order of appointment shall be given to the Director of the Office of Attorney Ethics and the secretaries of the appropriate Ethics Committee and Fee Committee and county bar association in the vicinage.

(2) Temporary Attorney-Trustee. When, in the opinion of the Assignment Judge, an attorney is otherwise unable to carry on the attorney's practice temporarily so that clients' matters are at risk, the Assignment Judge, or designee, in the vicinage in which the attorney maintained a practice may, on proper proof of the fact and on the application of any interested party, appoint a temporary attorney-trustee for a period of up to six months following the same conditions and procedures set forth in subparagraph (a)(1) of this Rule. The purposes of the temporary attorney-trustee shall be to preserve, in so far as practical, the practice of the attorney and all attorney-client relationships pending a report to the Assignment Judge at 150 days after appointment as to the attorney's condition and ability to resume the practice. The Assignment Judge may then either dissolve the temporary attorney-trusteeship or convert it to a regular attorney-trusteeship as if created under subparagraph (a)(1) of this Rule.

The temporary attorney-trustee shall have the powers and responsibilities authorized by the Assignment Judge, as well as those specifically granted above and those in paragraphs (c), (e) and (h). The temporary attorney-trustee shall not have the powers granted under paragraph (d), (f) and (g), except that the reports required by paragraph (d) shall be filed.

The temporary attorney-trustee shall not apply for legal fees within the first thirty days after appointment, but may at any time be awarded reasonable costs and expenses as stated under paragraph (h), including the right to satisfy those costs and expenses from the attorney's business or personal accounts as directed by the Assignment Judge. After thirty days from appointment, the temporary attorney-trustee may apply to the Assignment Judge for reduced legal fees below the normal hourly rate in accordance with paragraph (h).

The attorney whose practice is subjected to a temporary trusteeship shall have the right to make application at any time for an order vacating the temporary trusteeship on notice to all interested parties.

(b) ... no change

(c) ... no change

(d) ... no change

(e) ... no change

(f) ... no change

(g) ... no change

(h) ... no change

Note: Adopted November 5, 1986 to be effective January 1, 1987; former R. 1:20-12 redesignated 1:20-19, paragraphs (a) and (b) amended and paragraph (f) adopted January 31, 1995 to be effective March 1, 1995; paragraph (a) amended, former paragraphs (b), (c), and (f) redesignated as (c), (d), and (h) and captions and text amended, former paragraphs (d) and (e) redesignated as (e) and (f) and amended, and new paragraphs (b) and (g) adopted July 28, 2004 to be effective September 1, 2004; paragraph (a) amended July 27, 2006 to be effective September 1, 2006; paragraph (a) amended to designate existing paragraph as subparagraph (a)(1) and add caption, and new subparagraph (a)(2) adopted _____, 2008 to be effective _____, 2008.

10. Rule 1:20-20 – Future Activities

OAE Comment to Proposed R. 1:20-20

A change is proposed to subparagraph (b)(8) to require that the disciplined attorney remove his or her name from any websites. That subparagraph already contains the requirement that his or her name be removed from "Martindale-Hubbell Law Directory, the New Jersey Lawyers Diary and Manual, and any other law list in which the attorney's name appears." Paragraph (c) states that the requirement of (b)(8) does not apply to attorneys who have been the subject of definite suspensions of six months or less. However, (b)(8) does apply to longer suspensions or disbarment.

Subparagraph (b)(5) is also amended to clarify that (a) a temporary suspension that lasts over six months long is covered by the rule's requirement and (b) if the attorney fails to take action to transfer funds within the time period required, the attorney will not violate the rule if he or she wishes to come into compliance thereafter.

Committee Comment to OAE Proposal

The Committee agrees with the changes proposed by the OAE. The Committee also recommends changing the word "require" to "request" as used in subparagraphs (b)(7) and (b)(8). As a practical matter, publication deadlines may make it impossible for a publisher to remove the attorney's name from hard copy versions of telephone and lawyer directories immediately upon the attorney's demand. That proposed change recognizes that it should be sufficient for the attorney to "promptly request" the publishers to remove the attorney's name.

The text of the OAE's proposed amendment and the additional modifications recommended by the Committee follow.

1:20-20. Future Activities of Attorney Who Has Been Disciplined or Transferred to Disability-Inactive Status

(a) ... no change.

(b) Notice to Clients, Adverse Parties and Others. An attorney who is suspended, transferred to disability-inactive status, disbarred, or disbarred by consent or equivalent sanction:

(1) shall not practice law in any form either as principal, agent, servant, clerk or employee of another, and shall not appear as an attorney before any court, justice, judge, board, commission, division or other public authority or agency;

(2) shall not occupy, share or use office space in which an attorney practices law;

(3) shall not furnish legal services, give an opinion concerning the law or its application or any advice with relation thereto, or suggest in any way to the public an entitlement to practice law, or draw any legal instrument;

(4) shall not use any stationery, sign or advertisement suggesting that the attorney, either alone or with any other person, has, owns, conducts, or maintains a law office or office of any kind for the practice of law, or that the attorney is entitled to practice law;

(5) shall, except for the purposes of disbursing trust monies for the 30-day period stated in this subparagraph, cease to use any bank accounts or checks on which the attorney's name appears as a lawyer or attorney-at-law or in connection with the words "law office". If the suspension is for a period greater than six months, or involves a temporary suspension that lasts for more than six months, or involves transfer to disability-inactive status, disbarment, disbarment by consent or their equivalent sanction, the attorney shall, within the 30 day period prescribed in subparagraph (15), disburse all attorney trust account monies that are appropriate to be disbursed and shall arrange to transfer the balance of any trust monies to an attorney admitted to practice law in this state and in good standing for appropriate disbursement, on notice to all interested parties, or dispose of the balance of funds in accordance with R. 1:21-6(j), "Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners"; however, it shall not be a violation of this subparagraph for an attorney to take appropriate action to comply after the stated 30 day period;

(6) shall, from the date of the order imposing discipline (regardless of the effective date thereof), not solicit or procure any legal business or retainers for the disciplined attorney or for any other attorney;

(7) shall promptly request [require] the telephone company to remove any listing in the telephone directory indicating that the attorney is a lawyer, or holds a similar title;

(8) shall promptly request [require] the publishers of Martindale-Hubbell Law Directory, the New Jersey Lawyers Diary and Manual, and any other law list in which the attorney's name appears, including all websites on which the attorney’s name appears to remove any listing indicating that that attorney is a member of the New Jersey Bar in good standing;

(9) shall notify the admitting authority in any jurisdiction to whose bar the attorney has been admitted of the disciplinary action taken in the State of New Jersey;

(10) shall, except as otherwise provided by paragraph (d) of this rule, promptly notify all clients in pending matters, other than litigation or administrative proceedings, of the attorney's suspension, transfer to disability-inactive status, disbarment, or disbarment by consent, and of the attorney's consequent inability to act as an attorney due to disbarment, suspension, or disability-inactive status, and shall advise said clients to seek legal advice elsewhere and to obtain another attorney to complete their pending matters. Even if requested by a client, the attorney may not recommend another attorney to complete a matter. When a new attorney is selected by a client, the disciplined or former attorney shall promptly deliver the file and any other paper or property of the client to the new attorney or to the client if no new attorney is selected, without waiving any right to compensation earned as provided in paragraph (13) below;

(11) shall, except as otherwise provided by paragraph (d) of this rule, as to litigated or administrative proceedings pending in any court or administrative agency, promptly give notice of the suspension, transfer to disability-inactive status, disbarment, or disbarment by consent and of the consequent inability to act as an attorney due to disbarment, suspension, or disability-inactive status, to: (1) each client; (2) the attorney for each adverse party in any matter involving any clients; and (3) the Assignment Judge with respect to any action pending in any court in that vicinage, or the clerk of the appropriate appellate court or administrative agency in which a matter is pending. The notice to clients shall advise them to obtain another attorney and promptly to substitute that attorney for the disciplined or former attorney. Even if requested by a client, the disciplined or former attorney may not recommend an attorney to continue the action. The notices to opposing attorneys and the Assignment Judge or Court Clerk shall clearly indicate the caption and docket number of the case or cases and name and place of residence of each client involved. In the event a client involved in litigation or a pending proceeding does not obtain a substitute attorney within 20 days of the mailing of said notice, the disciplined or former attorney shall move pro se in the court or administrative tribunal in which the action or proceeding is pending for leave to withdraw therefrom. When a client selects a new attorney, the disciplined or former attorney shall promptly deliver the file and any other paper or property of the client to the new attorney or to the client if no attorney is selected, without waiving any right to compensation earned, as provided in paragraph (13), below;

(12) shall, in all cases in which the attorney is then acting, or who thereafter attempts to obtain letters of appointment from a Surrogate to act, in any specified fiduciary capacity, including, but not limited to, executor, administrator, guardian, receiver or conservator, promptly notify in writing all (1) co-fiduciaries, (2) beneficiaries, (3) Assignment Judges and Surrogates of any vicinage and county out of which the matter arose, of the attorney's suspension, transfer to disability-inactive status, disbarment, or disbarment by consent. Such notice shall clearly state the name of the matter, any caption and docket number, and, if applicable, the name and date of death or current residence of the decedent, settlor, individual or entity with respect to whose assets the attorney is acting as a fiduciary;

(13) shall not share in any fee for legal services performed by any other attorney following the disciplined or former attorney's prohibition from practice, but may be compensated for the reasonable value of services rendered and disbursements incurred prior to the effective date of the prohibition, provided the attorney has fully complied with the provisions of this rule and has filed the required affidavit of compliance under subparagraph (b)(15). The reasonable value of services for the disciplined or former attorney and the substituted attorney shall not exceed the amount the client would have had to pay had no substitution been required. If an

attorney-trustee has been appointed under R. 1:20-19, all fees for legal services and other compensation due the attorney shall be paid solely to the attorney-trustee for disbursement as directed by the court in accordance with the provisions of that rule. Compensation shall include any monies or other thing of value paid for legal services due or that is related to any agreement, sale, assignment or transfer of any aspect of the attorney's share of a law firm;

(14) shall maintain:

(A) files, documents, and other records relating to any matter that was the subject of a disciplinary investigation or proceeding;

(B) files, documents, and other records relating to all terminated matters in which the disciplined or former attorney represented a client prior to the imposition of discipline;

(C) files, documents, and other records of pending matters in which the disciplined or former attorney had responsibility on the date of, or represented a client during the year prior to, the imposition of discipline or resignation;

(D) all financial records related to the disciplined or former attorney's practice of law during the seven years preceding the imposition of discipline, including but not limited to bank statements, time and billing records, checks, check stubs, journals, ledgers, audits, financial statements, tax returns, and tax reports; and

(E) all records relating to compliance with this rule.

(15) shall within 30 days after the date of the order of suspension (regardless of the effective date thereof) file with the Director the original of a detailed affidavit specifying by correlatively numbered paragraphs how the disciplined attorney has complied with each of the provisions of this rule and the Supreme Court's order. Signed copies of that affidavit shall be provided at the same time to the Clerk of the Supreme Court and to the Disciplinary Review Board. The affidavit shall be accompanied by a copy of all correspondence sent pursuant to this rule and shall also set forth the current residence or other address and telephone number of the disciplined or former attorney to which communications may be directed. The disciplined or former attorney shall thereafter inform the Director of any change in such residence, address, or telephone number. The affidavit shall also set forth whether the attorney maintained malpractice insurance coverage for the past five years and, for each policy maintained, the name of the carrier, the carrier's address, the policy number, and the dates of coverage. The affidavit shall also attach an alphabetical list of the names, addresses, telephone numbers, and file numbers of all clients whom the attorney represented on the date of discipline or transfer to disability-inactive status.

(c) ... no change.

(d) ... no change.

(e) ... no change.

Note: Adopted February 23, 1978, to be effective April 1, 1978; amended January 31, 1984 to be effective February 15, 1984; amended July 13, 1994 to be effective September 1, 1994; paragraph (a) was former R. 1:21-8, new paragraphs (b), (c) and (d) adopted January 31, 1995 to

be effective March 1, 1995; paragraph (d) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a), (b)(10), (b)(11) and (d) amended, paragraphs (b)(12), (b)(13), and (b)(14) amended and redesignated as paragraphs (b)(13), (b) (14), and (b)(15), and new paragraph (b)(12) adopted July 5, 2000 to be effective September 5, 2000; caption of rule amended, paragraphs (a) and (b) amended, former paragraph (c) redesignated as (d), former paragraph (d) redesignated as (e) and amended, and new paragraph (c) adopted July 28, 2004 to be effective September 1, 2004; subparagraphs (b)(5), (b)(7) and (b)(8) amended _____, 2008 to be effective _____, 2008.

11. Rule 1:20-22 – Resignation Without Prejudice

OAE Comment to Proposed R. 1:20-22

Two changes are proposed to paragraph (a). The first change is needed to alleviate a situation that has occurred on at least three recent occasions in which an attorney, facing serious criminal charges that have not been reported to the OAE or the disciplinary agency in any other jurisdiction in which the attorney is admitted, tenders a resignation without prejudice, certifying that no disciplinary proceedings are pending against the attorney. Although disbarment proceedings can be initiated once the OAE learns of a criminal conviction, under 1:20-22(c), the proposed amendment is intended to deter attorneys facing criminal proceedings from attempting to utilize a resignation without prejudice as a means of withdrawing from the bar.

The second change limits the requirement of notice to clients to those attorneys who practice "New Jersey law," which is the overwhelming majority of attorneys. The term "New Jersey law" is a term of recent vintage and is currently used on the Annual Attorney Registration and Billing due to a change in the bona fide office rule, which allows attorneys to practice "New Jersey law" even though they are located in and have a bona fide office in another jurisdiction. In addition, attorneys who have exclusively practiced in immigration or patent law, but not "New Jersey law," should not have to comply with the notice requirements.

Committee Comment to OAE Proposal

The Committee disagrees with the OAE's second proposed change to Rule 1:20-22, which would limit the notice-to-clients requirement to only those attorneys who have "actively engaged in the practice of New Jersey law in this state in the preceding two years . . . ." Such an amendment may cause confusion, and it is not clear what overriding purpose it would serve. For example, it does not seem unduly burdensome to continue to require all attorneys resigning

without prejudice to notify clients served in New Jersey – regardless of which jurisdiction's law was involved in the representation – of the attorney's resignation.

The text of the proposed amendment follows. The portion of the OAE proposal that the Committee does not endorse is indicated by underscore and strikethrough, ~~as such~~.

1:20-22. Resignation Without Prejudice

(a) Generally. A resignation without prejudice from the bar of this state of a member in good standing shall be submitted through the Director and may be accepted by the Supreme Court, provided that at the time of its submission, the member presents satisfactory proof that no disciplinary or criminal proceedings are pending in any jurisdiction [to which the member has been admitted] and that, if the attorney has actively engaged in the practice of ~~New Jersey~~ law in this state in the preceding two years, all clients for whom the attorney has performed any professional services or by whom the attorney has been retained during that time in this state have been notified of the resignation.

(b) Form. A resignation without prejudice submitted pursuant to this rule shall be in a form approved by the Director, Office of Attorney Ethics, and shall set forth the reason for the resignation. It shall be accompanied by an affidavit in the form approved by the Director.

(c) Effect. On acceptance of the resignation, which shall be by order of the Supreme Court, the membership in the bar of this state shall cease, and any subsequent application for membership shall be in accordance with the provisions of R. 1:24. An attorney whose resignation without prejudice from the bar is accepted by the Supreme Court shall cease the practice of law in this state as of the effective date of the order of acceptance. A resignation shall not affect the jurisdiction of the disciplinary system with regard to any unethical conduct that occurred prior to resignation.

Note: Adopted January 31, 1995 to be effective March 1, 1995; paragraphs (a) and (c) amended July 28, 2004 to be effective September 1, 2004; paragraph (a) amended _____, 2008 to be effective _____, 2008.

12. Rule 1:21-6 – Trust Accounts

OAE Comment to Proposed R. 1:21-6

A change is proposed to relocate the last three sentences of paragraph (b) of this rule, titled "Account Location; Financial Institution's Reporting Requirements," to a new unnumbered paragraph for purposes of clarity. For emphasis, the phrase "including, but not limited to, when images are provided to the attorney with a monthly statement or otherwise or when subpoenaed by the Office of Attorney Ethics" has also been added to that paragraph. The relocation and addition will eliminate the confusion expressed by a number of financial institutions with respect to the applicability of the Court's requirements for maintaining digital records. Currently, these requirements are situated in a single unnumbered paragraph where the initial sentence deals with the institution's obligation to comply with subpoenas. Several financial institutions have misconstrued the following three sentences setting forth the Court's requirements allowing the use of digital images only when the institution produces subpoenaed documents to the Office of Attorney Ethics (OAE).

To the contrary, the Supreme Court's requirements that institutions may maintain only digital images provided "(a) imaged copies of checks shall, when printed, be limited to no more than two checks per page (front and back) and (b) all digital records shall be maintained for a period of seven years," apply anytime those images are generated, whether they are provided to the attorney with a monthly statement or when subpoenaed by the OAE. Otherwise the purpose of insuring legibility of important trust account records is substantially undercut. Some financial institutions place as many as 20 check images on one page without any image of the reverse side of the check. Such images are illegible and are the very reason for the rule's current requirements limiting digital images to no more than "two checks per page (front and back)."

Committee Comment to OAE Proposal

The Committee endorses the proposed amendment and suggests additional clarifying language to better effectuate the intent of the proposal. The phrase "front and back" refers to the requirement that digital images show the front and back "of each check," not simply that images may be printed on the front and back of each sheet of paper.

The text of the OAE's proposed amendment follows. The additional text suggested by the Committee is indicated by double underscore, as such.

1:21-6. Recordkeeping; Sharing of Fees; Examination of Records

(a) …no change.

(b) Account Location; Financial Institution's Reporting Requirements. An attorney trust account shall be maintained only in New Jersey financial institutions approved by the Supreme Court, which shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Supreme Court an agreement, in a form provided by the Court, to report to the Office of Attorney Ethics in the event any properly payable attorney trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty days' notice in writing to the Office of Attorney Ethics. The agreement shall further provide that all reports made by the financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (2) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

In addition, each financial institution approved by the Supreme Court must co-operate with the IOLTA Program, and must offer an IOLTA account to any attorney who wishes to open one, and must from its income on such IOLTA accounts remit to the Fund the amount remaining after providing such institution a just and reasonable return equivalent to its return on similar non-IOLTA interest-bearing deposits. These remittances shall be monthly unless otherwise authorized by the Fund.

Nothing herein shall prevent an attorney from establishing a separate interest-bearing account for an individual client in accordance with these rules, providing that all interest earned shall be the sole property of the client and may not be retained by the attorney.

In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Office of Attorney Ethics and to produce any attorney trust account or attorney business account records on receipt of a subpoena therefor. [Digital images of these records may be kept and produced by financial institutions provided that: (a) imaged copies of checks shall, when printed, be limited to no more than two checks per page (front and back) and (b) all digital records shall be maintained for a period of seven years. Nothing herein shall preclude a financial institution from charging an attorney or law firm for the reasonable cost of producing the reports and records required by this Rule. Every attorney or law firm in this state shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.]

Digital images of these records may be maintained by financial institutions provided that: (a) imaged copies of checks shall, when printed (including, but not limited to, when images are provided to the attorney with a monthly statement or otherwise or when subpoenaed by the Office of Attorney Ethics), be limited to no more than two checks per page (showing the front and back of each check) and (b) all digital records shall be maintained for a period of seven

years. Nothing herein shall preclude a financial institution from charging an attorney or law firm for the reasonable cost of producing the reports and records required by this Rule. Every attorney or law firm in this state shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule.

(c) …no change.

(d) …no change.

(e) …no change.

(f) …no change.

(g) …no change.

(h) …no change.

(i) …no change.

(j) …no change.

Note: Source-R.R. 1:12-5A(a)(b)(c). Caption amended and paragraph (d) adopted July 1, 1970 effective immediately; paragraph (c) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended April 2, 1973 to be effective immediately; paragraph (c) amended July 17, 1975 to be effective September 8, 1975; caption and paragraph (a) amended July 29, 1977 to be effective September 6, 1977. Paragraphs (a) and (b) amended, new paragraph (c) adopted and former paragraphs (c), (d), (e), (f) and (g) redesignated and amended February 23, 1978 to be effective April 1, 1978; paragraphs (b), (c) and (h) amended November 22, 1978 to be effective January 1, 1979; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (b) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a), (b), (c), (g) and (h) amended January 31, 1984 to be effective February 15, 1984 except that the amendments to paragraph (a)(2) regarding designations to be placed on trust and business accounts shall not be effective until July 1, 1984; effective date of amendment to paragraph (a)(2) deferred on June 15, 1984 from July 1, 1984 to September 1, 1984; paragraphs (a)(1) and (2), (e)(1) and (h) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a), (e) and (f) amended November 1, 1984 to be effective March 1, 1985; paragraphs (b) and (c) amended and paragraph (i) adopted November 5, 1986 to be effective January 1, 1987; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (a)(2) amended September 15, 1992, to be effective January 1, 1993; former paragraph (e) deleted and new paragraph (e) adopted November 18, 1996, to be effective January 1, 1997; paragraph (a) amended, new paragraph (b) added, former paragraphs (b) through (i) redesignated as paragraphs (c) through (j), and redesignated paragraphs (c), (d), (e), (h), and (i) amended July 12, 2002 to be effective September 3, 2002; caption of Rule and paragraphs (a) and (b) amended February 6, 2003 to be effective March 1, 2003; paragraph (c) , (e), (f), (g), and (j) amended July 28, 2004 to be effective September 1, 2004; paragraph (b) amended _____, 2008 to be effective _____, 2008.

13. Rule 1:20A-2(b) and (c) – Jurisdiction

OAE Comment to Proposed R. 1:20A-2

A change is proposed to delete subparagraph (b)(1) governing the discretionary jurisdiction of fee committees to decline to arbitrate fee disputes involving a matter in which no attorney's services have been rendered for at least two years. The new subparagraph (c)(4) provides that fee committees have no jurisdiction to decide "a fee in which no attorney's services have been rendered for more than six years from the last date services were rendered." These changes would expand the period of mandatory jurisdiction of fee committees to be consistent with the six-year statute of limitations in contract actions pursuant to *N.J.S.A.* 2A:14-1.

Such modification is necessary to eliminate an abuse by some attorneys who wish to sue the client in court for the fee in lieu of fee arbitration. Such attorneys simply allow the two-year period from last services to expire and then, for the first time give the client Pre-Action Notice (R. 1:20A-6). Because more than two years have passed after last services were rendered, when the client applies for fee arbitration, the Fee Committee almost universally declines jurisdiction under existing subparagraph (b)(1). This has the effect of depriving the client from ever taking advantage of the fee arbitration process without any fault of the client. The purpose of fee arbitration is to avoid court actions, which are less fair and more costly to the client. Additionally, the Disciplinary Review Board has consistently remanded appeals of such declinations for hearing, when the timing of the attorney's final billing and Pre-Action Notice to the client made it impossible for the client to request fee arbitration within two years of the last rendered attorney's services. The proposed rule change puts the client's right to seek fee arbitration on par with the attorney's right to bring civil suit to resolve collection of the fee, which is the correct result. The text of the proposed amendment follows.

1:20A-2. Jurisdiction

(a) … no change.

(b) Discretionary Jurisdiction. A Fee Committee may, in its discretion, decline to arbitrate fee disputes:

[(1) involving a matter in which no attorney's services have been rendered for at least two years;]

(1) [(2)] in which persons who are not parties to the arbitration have an interest that would be substantially affected by the arbitration;

(2) [(3)] in which the primary issues in dispute raise substantial legal questions in addition to the basic fee dispute;

(3) [(4)] in which the total fee charged exceeds $100,000, excluding out-of-pocket costs and disbursements;

(4) [(5)] involving multijurisdictional practitioners where it appears that substantial services involving the practice of law in New Jersey have not been rendered in the matter.

(c) Absence of Jurisdiction. A Fee Committee shall not have jurisdiction to decide:

(1) a fee which is allowed or allowable as of right by a court or agency pursuant to any applicable rule or statute.

(2) claims for monetary damages resulting from legal malpractice, although a fee committee may consider the quality of services rendered in assessing the reasonableness of the fee pursuant to RPC 1.5.

(A) Submission of a matter to fee arbitration shall not bar the client from filing an action in a court of competent jurisdiction for legal malpractice.

(B) No submission, testimony, decision or settlement made in connection with a fee arbitration proceeding shall be admissible evidence in a legal malpractice action.

(3) a fee for legal services rendered by the Office of the Public Defender, pursuant to N.J.S.A. 2A:158A-1 et seq[.] ; and

(4) a fee in which no attorney's services have been rendered for more than six years from the last date services were rendered.

(d) … no change.

Note: Adopted February 23, 1978 to be effective April 1, 1978; amended January 31, 1984 to be effective February 15, 1984; amended June 29, 1990 to be effective September 4, 1990; text deleted, new paragraphs (a)(b)(c) and (d) adopted January 31, 1995 to be effective March 1, 1995; new paragraph (c)(3) added July 12, 2002 to be effective September 3, 2002; paragraphs (a) and (b) amended July 28, 2004 to be effective September 1, 2004; paragraph (b)(1) deleted and paragraphs (b)(2) through (5) renumbered (b)(1) through (4), and new paragraph (c)(4) added _____, 2008 to be effective _____,2008.

14. Rule 1:20A-3 – Arbitration

OAE Comment to Proposed R. 1:20A-3

The first modification proposed to subparagraph (b)(2) requires that all parties promptly report changes of address to the secretary of the fee committee, the hearing panel chair or single member arbitrator, and other parties.

Next, the proposal clarifies that only service "on attorneys" is in accordance with R. 1:20A-7(h). Similarly, the further barring reference to "a party" has been eliminated in favor of reference to "an attorney," as only attorneys can be barred from participation. *See* R. 1:20-(a)(2)(i) and (ii). The modification further clarifies that if an attorney has filed an updated address with the committee, service shall be made to that address.

Another new amendment provides for service on non-attorneys at their last known address by regular mail unless the address has been updated as stated above in which event it shall be sent to the updated address.

The phrase "a party" is deleted from the second sentence of the rule. Only an attorney can be "barred" from the proceedings for failing to file an Attorney Fee Response and pay the required administrative fee under as stated near the end of the entire subparagraph (b)(2). Clients cannot be barred. Subparagraph (b)(2) was divided into two unnumbered paragraphs to separate the part dealing primarily with notice from the part dealing with the Attorney Fee Response.

Finally, subparagraph (b)(4) governing the "Conduct of Hearing; Determination," is modified to give the fee hearing panel the same flexibility that ethics hearing panels do to permit testimony by telephone or videotape. The new sentence added is from R. 1:20-6(c)(2) and provides that "If special circumstances dictate, the trier of fact may accept testimony of a witness by telephone or videotape." The text of the proposed amendment follows.

1:20A-3. Arbitration

(a) …no change.

(b) Procedure.

(1) Hearing Panel; Burden of Proof. All arbitration proceedings shall be heard before a hearing panel of at least three (3) members of the fee committee, a majority of whom shall be attorneys, except that in all cases in which the amount of the total fee charged is less than $3,000, the hearing may be held before a single attorney member at the direction of the chair. A quorum for the hearing of any matter in which the fee charged is $3,000 or more shall consist of at least three (3) members of the fee committee. The determination of a matter shall be made by a majority of the membership sitting on the hearing panel, provided a quorum is present. When by reason of absence, disability, or disqualification the number of members of the panel able to act is fewer than a quorum, with the consent of the client and the attorney the hearing may proceed before two members of the panel. The secretary of the Fee Committee shall not be eligible to sit on any hearing panel. The determination of a matter shall be made in accordance with R.P.C. 1.5. The burden of proof shall be on the attorney to prove the reasonableness of the fee in accordance with R.P.C. 1.5 by a preponderance of the evidence. Within thirty (30) days after the docketing of a request for fee arbitration a client may, in writing, notify the secretary of a withdrawal from the proceeding; thereafter a client shall have no right of withdrawal. After a matter has been withdrawn by the client, the client shall not be permitted to resubmit it to fee arbitration.

(2) Notice; Attorney Response. The Fee Committee shall notify the parties at least 10 days in advance, in writing, of the time and place of hearing, and shall have the power, at a party's request and for good cause shown, or on its own motion, to compel the attendance of witnesses and the production of documents by the issuance of subpoenas in accordance with *R.* 1:20-7(i). All parties shall promptly report changes of address to the secretary of the fee committee, the hearing panel chair or single member arbitrator and other parties. All service on attorneys required by fee arbitration rules shall be made in accordance with Rule 1:20-7(h), except that service by mail may be made by regular mail, unless the letter will result in barring an attorney [a party] from further participation or unless the attorney updates an address as stated above in which event service will be made at that address. Service on non-attorney parties shall be made at their last known address by regular mail unless the address has been updated as stated above in which event it shall be sent to the updated address.

The secretary of the Fee Committee shall serve on the attorney a copy of the client's written request for fee arbitration, and any supplemental documentation supplied to the panel; the secretary shall also forward to the attorney for completion an Attorney Fee Response form in a form approved by the Director. The secretary shall also serve a copy of the client's request for fee arbitration and an Attorney Fee Response on the law firm, if any, of which the original attorney is a member. The attorney shall specifically set forth in the Attorney Fee Response the name of any other third party attorney or law firm which the original attorney claims is liable for all or a part of the client's claim. The attorney shall file with the secretary the completed Attorney Fee Response, together with any supplemental documentation, within 20 days of receipt of the client's written request for fee arbitration; the attorney shall certify that a true copy

of the Attorney Fee Response has been served on the client. Failure to file the Attorney Fee Response shall not delay the scheduling of a hearing. If the attorney fails to timely file an attorney fee response, the secretary shall inform the attorney that unless an attorney fee response is filed, and the filing fee paid, within 20 days of the date that the attorney is notified in writing, the attorney shall be barred from further participation, and the matter will proceed uncontested. Nothing in this section shall preclude the panel or arbitrator in its discretion from refusing to consider evidence offered by the attorney which would reasonably be expected to have been disclosed on the Attorney Fee Response.

(3) Third Party Practice. In the event that the attorney has named a third party attorney or law firm as potentially liable in whole or part for the fee, the original attorney shall, within the time for filing the Attorney Fee Response with the secretary, serve a copy of the client's Request For Fee Arbitration and a copy of the Attorney Fee Response on the third party attorney or law firm, stating clearly in a cover letter that a third party fee dispute claim is being made against them. A copy of such letter shall be filed with the secretary, who shall forward to the third party attorney or law firm for completion an Attorney Fee Response form, which shall be filed with the secretary and served by the third party attorney on the client and the original attorney as provided for in the case of the original attorney. A third party attorney or law firm so noticed shall be deemed a party with all of the rights of and obligations of the original attorney.

(4) Conduct of Hearing; Determination. All arbitration hearings shall be conducted formally and in private, but the strict rules of evidence need not be observed. All witnesses including all parties to the proceeding shall be duly sworn, and no stenographic or other similar record shall be made except in exceptional circumstances at the direction of the Board or the Director. Both the client and the attorney whose fee is questioned shall have the right to be present at all times during the hearing with their attorneys, if any. If special circumstances dictate, the trier of fact may accept testimony of a witness by telephone or videotape. The written determination of the hearing panel or the single member arbitrator shall be in the form approved by the Director and shall have annexed a brief statement of reasons therefor. If a stay of a proceeding pending in court has been entered prior to the Fee Committee's determination, when the determination is rendered the secretary of the Fee Committee shall, if requested by either party, send a copy of the determination to the Clerk of the Court who is to vacate the stay and relist the matter. Where a third party attorney or law firm has been properly joined the arbitration determination shall clearly state the individuals or entities liable for the fee, or to whom the fee is due and owing. It shall be served on the parties and filed with the Director by ordinary mail within thirty (30) days following the conclusion of the hearing or from the end of any time period permitted for the supplemental briefs or other materials. Both the attorney and the client shall have 30 days from receipt to comply with the determination of the Fee Committee. Enforcement of arbitration determinations and stipulations of settlement shall be governed by paragraph (e).

(c) … no change.

(1) … no change.

(2) … no change.

(3) … no change.

(4) … no change.

(d) … no change.

(e) … no change.

Note: Adopted February 23, 1978 to be effective April 1, 1978; paragraph (c) amended, new paragraph (d) adopted and paragraph (d) redesignated (e) July 15, 1982 to be effective September 13, 1982; paragraphs (a) through (e) amended January 31, 1984 to be effective February 15, 1984; paragraph (b) amended November 1, 1985 to be effective January 2, 1986; paragraphs (a) and (b) amended November 5, 1986 to be effective January 1, 1987; paragraphs (d) and (e) amended November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (b) amended and subheadings (1), (2), (3) and (4) added June 29, 1990 to be effective September 4, 1990; paragraph (a) amended February 8, 1993, to be effective March 1, 1993; paragraphs (a)(b)(c)(d) and (e) amended, new paragraph (c)(4) adopted January 31, 1995 to be effective March 1, 1995; paragraph (e) amended June 28, 1996 to be effective September 1, 1996; paragraph (d) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a)(1), (a)(2), (b)(2), (b)(3), (d), and (e) amended July 5, 2000 to be effective September 5, 2000; paragraph (c) amended July 28, 2004 to be effective September 1, 2004; subparagraphs (b)(2) and (b)(4) amended _____, 2008 to be effective _____, 2008.

15. RPC 3.4 – Fairness to Opposing Party and Counsel

As discussed in the Committee Comment below, the Committee does not recommend the OAE's proposed amendments to RPC 3.4 at this time. The Committee recommends further consideration of the proposals and supports a referral by the Court to the Advisory Committee on Professional Ethics ("ACPE").

OAE Comment to Proposed RPC 3.4

A modification to paragraph (g) is proposed and a new paragraph (h) is added. Amended paragraph (g) prohibits threatening disciplinary charges to achieve an improper advantage in a civil matter. New paragraph (h) deals with issues of negotiation, settlement or discussion that attempts to limit reporting unethical attorney conduct or the cooperation of any person or entity with the disciplinary process.

Paragraph (g) already recognizes the impropriety of using criminal charges to obtain an improper advantage in a civil case. The proposed modification adds disciplinary charges to that existing prohibition. The civil process is designed primarily for the settlement of disputes between parties to the litigation. The criminal and disciplinary processes, however, are vested with the public interest. They protect society, not simply private interests. Using or attempting to leverage the disciplinary and criminal processes to effectively coerce private civil results, whether by settlement or otherwise, is a misuse and abuse of those processes. The proposed rule clearly states, however, that it is not a violation for a lawyer or law firm to notify another that the lawyer or law firm reasonably believes that an attorney's conduct may violate disciplinary rules. A simple factual statement bringing to a lawyer's or law firm's attention that their conduct may have crossed the bounds of ethical propriety is unobjectionable and may help to stop the conduct.

Decisions concerning litigation should be made based on the merits of the matter – the

disciplinary system is not to be used as leverage for the benefit of the parties. A number of these situations may not be reported to the disciplinary system because the parties are uncertain whether or not this conduct is unethical. Placing this prohibition in the Rules of Professional Conduct will help to insure that all lawyers involved in a matter are unequivocally on notice that this conduct is prohibited. Attorneys who participate or acquiesce in such conduct are also committing unethical conduct for which they may be sanctioned. This rule will give adversaries a tool to thwart improper actions in the first instance by simply referencing the rule. Moreover, the proposed rule also gives anyone who finds out that such violation has occurred clear authority to report such conduct to disciplinary authorities.

Paragraph (h) is new. It prohibits any agreement, or the offering or making or discussing of the same, regarding limiting any person from (1) reporting unethical conduct, (2) pursuing a disciplinary grievance, or (3) cooperating with the attorney disciplinary process. Lawyers have been disciplined in this State for similar conduct on several occasions. In *In re Wallace*, 104 *N.J.* 589 (1986), an attorney grossly neglected a matter, failed to maintain adequate bookkeeping records and also entered into an agreement with unrepresented grievants and paid them $3,000 to withdraw ethics charges already filed. In an unpublished decision, the Disciplinary Review Board condemned the conduct and recommended a six-month suspension from practice, holding that "(r)espondent's attempt to thwart an ethics investigation and limit his liability for malpractice must be severely condemned." (DRB Decision at 11). The Court agreed, stating that "(p)ublic confidence in the legal profession would be seriously undermined if we were to permit an attorney to avoid discipline by purchasing the silence of complainants." *In re Wallace*, *supra*, 104 *N.J.* at 594. The respondent was suspended for a term of six months.

In *In re Saypol*, 142 *N.J.* 556 (1995), an attorney was reprimanded when, during the

course of his pending ethics matter, he persuaded the grievant to sign a document purporting to release him from all ethics charges. In *In re Silber*, 139 *N.J.* 605 (1995), a respondent was reprimanded for improperly communicating with a party whom he knew to be represented by counsel, as well as conduct prejudicial to the administration of justice. In the latter regard, the respondent drafted a release that attempted to insulate him from any disciplinary proceedings. The release covered "any civil or criminal right, claim or action, as well as any ethics or disciplinary right, claim or action…." The attorney's assertion that the party's attorney did not object to the language in the release was held not to excuse his unethical conduct.

The Court imposed a public reprimand in *In re Mella*, 153 *N.J.* 35 (1998) for conduct that was prejudicial to the administration of justice. The attorney had mishandled a lawsuit and was subject to a malpractice suit. The client filed an ethics grievance arising out of that same matter. Respondent negotiated a $12,500 settlement of the malpractice claim directly with the client. The agreement was also designed to prevent the grievant from testifying in the ethics proceeding.

Nevertheless, only the *Wallace* matter is a reported decision of the Supreme Court. As a result, these prohibitions are hardly known by the Bar. Proposed paragraph (h) gives broad notice that this misconduct is prohibited. Moreover, the OAE believes that such conduct occurs more frequently than evidenced by the few cases described above.

Unethical conduct occurs in the negotiation stage of civil litigation whenever similar attempts are made to limit access to or participation in attorney disciplinary processes in order to reach settlements. Such actions are against public policy and must be broadly denounced.

This new paragraph (h) does not impose additional duties to report information acquired while confidentiality counseling, mentoring, or advising another attorney under RPC 8.3(d). The general duty to report unethical conduct remains as stated in RPC 8.3. Nor does the proposed

rule prevent a lawyer or law firm from notifying another person (including the offender, disciplinary authorities or other person or entity) that they reasonably believe another attorney had committed unethical conduct as stated above in the comment to paragraph (g).

Committee Comment to OAE Proposal

The Committee has determined that it has insufficient information to recommend the OAE's proposed amendments to RPC 3.4. The proposals raise concerns that warrant further deliberations. Alternatively, the Committee supports a referral to the ACPE to consider whether existing RPCs and case law sufficiently address the concerns that the proposals seek to resolve.

The Committee is concerned that the proposed amendment to paragraph (g), even with the proposed exception, would have a chilling effect on attorneys who otherwise would report that they know, or reasonably have perceived, that another attorney has engaged in unethical conduct. There is a public interest in having unethical conduct reported; indeed, in some instances an attorney is required to notify disciplinary authorities of another attorney's misconduct. *See* RPC 8.3(a) (obligating lawyer to notify disciplinary authorities when lawyer "knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"). Thus, issues are raised in respect of the interplay between RPC 8.3(a) and the proposed amendment to RPC 3.4(g).

In addition, improper threats to present attorney disciplinary charges may be sufficiently addressed by existing rules, such as RPC 8.4(d) (providing that it is professional misconduct for lawyer to "engage in conduct that is prejudicial to the administration of justice"). *Cf.R.* 1:4-8 (providing for sanctions when, *inter alia*, attorney presents motion or other paper for improper purpose); *Fed. R. Civ. P.* 11 (same). Moreover, when the "civil matter" referred to in RPC 3.4(g)

is pending before a court, the court will resolve allegations of unethical conduct before such issues proceed through the attorney disciplinary process.

In respect of the OAE's proposed new paragraph (h), the Committee does not have enough information to make a recommendation at this time. The Committee notes that an attorney who improperly attempts to impair a person's ability to file a grievance or participate in an ethics investigation against that attorney already may be exposed to discipline pursuant to RPC 8.4(d) (conduct prejudicial to administration of justice). Proposed paragraph (h) is much more expansive. For example, an attorney representing a client (who happens also to be a lawyer) in the settlement of contentious litigation (unrelated in any respect to the party's status as a lawyer) reasonably may wish to include a provision preventing the other party from filing a grievance against the lawyer-client, when there would be no legitimate basis for such grievance. All attorneys involved in drafting such an agreement would be in violation of proposed new subparagraph (h)(2).

The OAE's proposed amendments to RPC 3.4 follow below. As explained above, the Committee has concluded that the proposals raise issues warranting further deliberations by the Committee or a referral to the ACPE.

RPC 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) … no change.

(b) … no change.

(c) … no change.

(d) … no change.

(e) … no change.

(f) … no change.

(g) present, participate in presenting, or threaten to present criminal or attorney disciplinary charges to obtain an improper advantage in a civil matter. It shall not be a violation of this paragraph for a lawyer or law firm to notify any lawyer, other person or attorney disciplinary authority that the lawyer or law firm reasonably believes that a lawyer's or law firm's conduct may violate disciplinary rules.

(h) participate in offering, making or having any discussion or agreement in order to limit the ability of any other person to:

(1) report unethical conduct to attorney disciplinary authorities;

(2) file or pursue an attorney disciplinary grievance against any lawyer or law firm; or

(3) cooperate with a disciplinary investigation or proceeding.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990; paragraph (g) amended and new paragraph (h) added _____, 2008 to be effective _____, 2008.

III. PROPOSED RULE AMENDMENTS CONSIDERED BUT REJECTED

As described in other Parts of this report, the Committee considered, but determined not to recommend, a few proposed rule amendments. *See* Part I.D, *Recommendation 5* (determining not to recommend elimination of assessment and registration requirements for all forms of multijurisdictional practice); Part II.E, sec. 11 (determining not to recommend one aspect of proposal to amend Rule 1:20-22); Part II.E, sec. 15 (determining not to recommend proposed amendments to RPC 3.4 at this time); and Part V, *supra* (certain matters previously reported to the Court). The Committee did not reject any other proposed rule amendments considered during the 2006-2008 rules cycle.

IV. NON-RULE RECOMMENDATIONS

Guidelines for Media Coverage of District Ethics Committee Hearings

The Court referred to the Committee the issue of developing guidelines for responding to media requests to photograph, videotape or broadcast District Ethics Committee ("DEC") hearings. The Committee recommends that the *Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey* (approved Oct. 2003), *available at* www.judiciary.state.nj.us/rules/appcamera.htm (hereinafter "*Cameras in the Courtroom Guidelines*" or "*Guidelines*"), apply to disciplinary proceedings, with appropriate consideration given to the unique features of the disciplinary system discussed below.

With the Court's approval, the Committee requested information from the OAE and DECs about the practical considerations presented by disciplinary proceedings that do not exist in the context of court proceedings. *See Attachment I*.

In recent years, the media has sought to cover disciplinary hearings in only two instances. One request was approved by the Court in 1997, when New Jersey Network sought to televise a hearing for educational purposes. The second incident occurred more recently and prompted this referral. A newspaper photographer arrived unannounced at the private law office where the hearing was being conducted. The grievant did not wish to be photographed and ran out of the office. The photographer took pictures of her as she left the building and proceeded through the parking lot and into the street. The grievant, who was the main witness in the ethics proceeding, did not return. The hearing continued without her. Ultimately, the disciplinary matter concluded with a finding of insufficient evidence to establish a violation of the RPCs.

In balancing the importance of having guidelines to ensure open, fair access to disciplinary proceedings with the infrequency of media coverage requests, the Committee

recommends, to the extent possible, that the *Cameras in the Courtroom Guidelines* apply to disciplinary proceedings. Although the current *Guidelines* expressly apply only to courtroom proceedings, *see Guideline* 1(b), they are used in other settings, such as proceedings before the Advisory Committee on Judicial Conduct. With some modifications, they could apply equally well to disciplinary proceedings.

Like other judicial processes, disciplinary hearings are open proceedings. *See R.* 1:20-9(c) (providing that "[a]ll proceedings shall be public," with certain enumerated exceptions); *cf. R.M. v. Supreme Court of New Jersey*, 185 N.J. 208 (2005) (holding that grievant may discuss publicly fact that he or she filed grievance, content of grievance, and result of disciplinary process). However, as reported by the OAE and DECs, unique features of the disciplinary system impact the ability to accommodate the media's request to photograph, record or broadcast. Those features arise from the nature of the attorney disciplinary system, which functions with the efforts of a significant number of volunteers. Most DEC hearings are conducted in the private law offices of volunteer committee members. Only some districts have ready access to courtrooms or administrative rooms to conduct disciplinary hearings. In the rare case when a grievant or respondent is incarcerated, the hearing is conducted at the facility and thus is subject to rules and restrictions of the Department of Corrections.

The Committee agrees with the OAE and DECs that some minimum advanced written notice is necessary for disciplinary authorities to assess facilities and, if necessary, find suitable alternative accommodations when the media plans to attend a specific disciplinary proceeding. *Cf. Guideline* 2(a) (requiring "reasonable advance notice" by media representative seeking to photograph, record or broadcast specific court proceedings). The Committee endorses the recommendation of a DEC Secretary that at least ten business days' notice be given to the

Secretary. The OAE proposes that notice also be provided to the DEC Chair and Vice Chair, the presenter, the hearing panel chair, and the respondent or respondent's counsel.

Media representatives should be permitted to take sound recordings at hearings consistent with the *Guidelines.* However, the Committee agrees with recommendations that the media not be permitted to televise hearings or take video recordings or still photographs at the hearing site. Cameras may be particularly distracting and intimidating in the generally small rooms where disciplinary proceedings are conducted. Also, the attorney in whose office the hearing is held has a legitimate interest in not having photographs or video recordings made where there may be confidential or privileged information. *Cf. Guideline* 6(a) (prohibiting photographs and audio or video recording in corridors outside courtroom without express advance written authorization).

Media coverage should not be permitted when all or part of a proceeding is deemed non-public pursuant to Rule 1:20-9(c). Such proceedings include those subject to a protective order or alleging disability, as well as prehearing conferences or deliberations that may take place in the hearing room during breaks. *Guideline* 2(c) also would prohibit media coverage of proceedings involving, among other things, charges of sexual contact.

The Committee also recognizes that there are procedural issues to address when a member of the media, a grievant, the respondent, or the presenter disagrees with a decision concerning media coverage of a disciplinary hearing. The Committee recommends that the initial decision be made by the Chair of the DEC, with a right to appeal to the Chair of the Disciplinary Review Board. Pursuant to Rule 1:20-16(f), an "aggrieved party" may seek further interlocutory review by the Supreme Court of constitutional issues "when necessary to prevent irreparable injury." Individuals aggrieved by coverage decisions, including members of the media, also may choose to initiate litigation as they deem appropriate.

Finally, the media should be made aware of the notice requirements and any restrictions placed on the ability to record disciplinary hearings. It also has been suggested that a “press kit” be developed to explain the disciplinary process and the volunteer system. The intended purpose would be to educate media representatives so that, in the reporting process, they have a better understanding of and greater sensitivity to the rights of the grievant and respondent attorney.

V. MID-RULES CYCLE ACTIVITY PREVIOUSLY REPORTED TO COURT

This section includes items previously reported to the Court and the disposition, if any, during the 2006-2008 rules cycle.

A. Rule 1:20A-5, Confidentiality in Fee Arbitration Proceedings

In December 2006, the Committee recommended an amendment to the provisions of Rule 1:20A-5 dealing with confidentiality in fee arbitration proceedings, in light of *R.M. v Supreme Court*, 185 N.J. 208 (Oct. 2005) (holding that grievant in disciplinary matter may speak publicly regarding fact that grievance was filed, content of grievance, and result of process). In July 2007, the Court determined not to adopt the Committee's recommendations.

B. Rule 1:21-1(a), Bona Fide Office

In February 2007, the Committee recommended no modification to the 2004 amendment to Rule 1:21-1(a), which eliminated the requirements that an attorney's bona fide office be located in New Jersey. The Committee reported that it was unaware of any problems caused by the amendment, and recommended another evaluation of the effect of the rule change after a further review period.

C. Rule 1:21-6(a), In-State Trust and Business Accounts.

In February 2007, the Committee reported on a referral from the Civil Practice Committee. A commenter had requested a proposed rule amendment to relax the requirements of Rule 1:21-6, in light of the removal of the in-State requirement from the bona fide office rule. Rule 1:21-6 and Rule 1.15(a) require attorneys practicing in New Jersey to maintain trust accounts in Court-approved New Jersey financial institutions. The commenter requested the ability to maintain those accounts in institutions located outside of the State. The Committee declined to make such a recommendation, endorsing the views of the Office of Attorney Ethics

and the Lawyers' Fund for Client Protection that the in-State requirement for attorney trust accounts served to protect the public. Allowing trust accounts to be maintained elsewhere would impede disciplinary authorities' ability to oversee the proper maintenance of trust funds; and with no subpoena power, disciplinary authorities would be unable to secure essential records or freeze assets in emergent situations.

D. RPC 4.4(b), Respect for Rights of Third Person

In February 2007, the Committee reported on an issue raised in a New Jersey Law Journal editorial, "Preventing Metadata Disclosure," Nov. 29, 2006, opining that the spirit and text of RPC 4.4(b) prohibits the recipient's use of confidential information embedded in an electronic document's "metadata" (generally, information about the document, hidden from view). The ABA reached the opposition conclusion in respect of Model Rule 4.4(b). ABA Standing Comm. on Ethics & Prof. Resp., *Formal Opinion 06-442, "Review and Use of Metadata"* (August 5, 2006). RPC 4.4(b) states: "A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender." The Model Rule is not as strict as New Jersey's RPC 4.4(b), requiring only notification to the sender.

The Committee recognized that the sender bears responsibility for not disclosing confidential information, RPC 1.6(a); and that RPC 4.4(b) generally imposes a duty on the recipient to not mine electronic documents for privileged and confidential information. *See also* RPC 4.4(a) ("In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of . . . a [third] person."). Ultimately, the Committee concluded that the issue of whether it is ethical to mine electronic documents for hidden information is primarily

one of interpretation of existing rules. The Committee supported either referring the issue to the ACPE or allowing the issue to be raised and resolved in the courts.

E. *Tax Authority v. Jackson Hewitt*; RPC 1.8(g) – Aggregate Settlements.

In January 2007, the Committee reported on the Court's referral in *Tax Authority, Inc. v. Jackson Hewitt*, 187 N.J. 4 (2006). In its opinion, the Court held that RPC 1.8(g) forbids an attorney from obtaining advance consent from multiple clients to abide by the decision of a majority of clients about the merits of an aggregate settlement in a non-class-action (mass litigation) case. The Court noted that certain concerns arise from permitting less than unanimous agreement and referred the issues to the Committee for review and recommendation.

The Committee reviewed scholarly articles and other materials on the issue. At the invitation of the Committee, Professor Howard M. Erichson of Seton Hall Law School expressed his view that current RPC 1.8(g) works well in practice, serves its purpose as a disclosure and informed consent rule, and ultimately helps to ensure that proposed settlements actually are fair. The Committee reported that it was unaware of data suggesting that cases are failing to settle because of the RPC's constraints. The Committee also noted that the American Law Institute has been considering the issue as part of a civil procedure study project, "Principles of the Law of Aggregate Litigation." Concluding there is no immediate need for any rule change, the Committee determined to resume its discussion when more information comes to light.

F. *Borteck v. Riker, Danzig, Scherer, Hyland & Perretti, LLP*; RPC 5.6 – Bona Fide Retirement Plans[5]

In *Borteck v. Riker, Danzig, Scherer, Hyland & Perretti, LLP*, 179 N.J. 246 (2004), the Court was faced with the issue of whether the retirement provisions of a law firm's partnership agreement violated RPC 5.6. That RPC provides: "A lawyer shall not participate in offering or

[5] Because Justice Pollock recused himself, Justice Handler chaired the Committee's consideration of the issues referred in *Borteck*.

making: (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement[.]" RPC 5.6(a).

One provision of the subject agreement addressed the criteria for entitlement to retirement benefits, defining "retirement" as the "permanent retirement" of a partner "from the private practice of law, whether or not due to disability, subject to" certain qualifications, including that the partner is at least 55 years of age. The provision allowed for a withdrawing partner to continue with the firm in an "of counsel" position, or to practice law in a public service position, and still meet the agreement's definition of "retirement" from the private practice of law. The Court held that the agreement "sufficiently operates as a retirement plan within the contemplation of RPC 5.6" and as such "does not offend the public policies underlying the rule. Hence, the agreement's eligibility requirements, including the age threshold and conditions concerning the private practice of law, are enforceable against plaintiff." *Borteck, supra*, 179 N.J. at 254-55.

In its opinion, the Court referred to the Committee the following questions: (1) whether RPC 5.6 requires any revision to provide clearer guidance to the bar concerning the elements necessary to establish a bona fide retirement plan under the rule; and (2) whether there is need for an express rule or more explicit guidance in respect of a partnership agreement's notice-departure provisions. With the Court's approval, the Committee canvassed legal scholars and attorneys with experience in law firm management on the questions posed by the Court. In its 2006 report, *available at* http://www.judiciary.state.nj.us/reports2006/profesrules.pdf, the Committee expressed its view that in respect of notice-departure provisions, enforceability necessarily will be determined under the circumstances of each specific contractual agreement on

a case-by-case basis, and thus explicit guidance in rule form would not be helpful. The Committee also reported that it was still in the process of obtaining informed views on the remaining issues and was actively reviewing whether RPC 5.6 should be amended or modified.

In 2007, the Committee informed the Court that it had received comments reflecting some difference in opinion whether rule amendments were desirable or appropriate. The Committee ultimately agreed with those responders expressing the view that both issues raised in *Borteck* are better left to case law development, to avoid creating definitions or restrictions that may prove to be confusing or not sufficiently flexible. One major reason expressed by commenters for retaining RPC 5.6 in its current form was that the *Borteck* analysis of itself is "quite sound," "gives firms considerable guidance in determining what is permissible in crafting a retirement plan consistent with the ethics rules," "and provides a blueprint that firms such as ours can follow in crafting retirement plans to comply with the rule."

VI. MATTERS HELD FOR CONSIDERATION

A. ABA Model Court Rule on Insurance Disclosure

At present, individual New Jersey lawyers need not obtain professional liability insurance[6] or inform their clients or the Supreme Court whether they carry such insurance.

In August 2004, the ABA adopted a Model Court Rule on Insurance Disclosure (the "Model Rule"), *available at* http://www.abanet.org/cpr/clientpro/malprac_disc_rule.pdf. The Model Rule requires lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The purpose of such a rule is "to provide a potential client with access to relevant information related to a lawyer's representation in order to make an informed decision about whether to retain a particular lawyer." ABA Standing Comm. on Client Protection, *Report to the House of Delegates*, at 1, (Aug. 2004), *available at* http://www.abanet.org/cpr/clientpro/malprac_disc_report.pdf. The Model Rule does not mandate that attorneys maintain professional liability insurance. It also does not impose an affirmative obligation to disclose to clients whether they maintain insurance.

The Model Rule was patterned after disclosure requirements that, at the time, had been in place in five states. *See id.* at 2. Now, eighteen states require disclosure on the annual registration statements; five states require lawyers to disclose the information directly to their clients; one state, Oregon, remains the only jurisdiction requiring attorneys to maintain insurance as a condition of practicing law; two states have voted not to adopt a disclosure rule; and four states are considering a reporting requirement. *See* ABA Standing Comm. on Client Protection, *State Implementation of ABA Model Court Rule on Insurance Disclosure* (Oct. 15, 2007), *available at* http://www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf.

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[6] A law firm organized as a professional corporation, limited liability company, or limited liability partnership is required to maintain professional liability insurance pursuant to Rule 1:21-1A, Rule 1:21-1B, or Rule 1:21-1C, respectively.

As consideration of insurance disclosure requirements gains momentum across the country, the Committee preliminarily has observed that the issues requiring consideration include: whether there should be an affirmative obligation to make the disclosure only on the annual registration statement rather than to clients at the inception of the representation; whether a disclosure rule would encourage more attorneys to obtain insurance; whether it would be misleading to require disclosure of the fact of insurance to clients without also requiring disclosure of the amount of insurance; and whether a disclosure requirement would unfairly burden small firms and solo practitioners.

The Committee is not in a position to make a recommendation at this time. The Committee reserves the matter for further consideration during the 2008-2010 rules cycle and, with the Court's permission, may seek comments from the Bar and other interested parties.

B. RPC 1.8(g)/Aggregate Settlements.

As explained above (*see* Part V.E, *supra*), the Committee will resume discussion of this subject following the issuance of a final report from the American Law Institute.

The Committee thanks the Court for this opportunity to be of service.

Respectfully submitted,

Hon. Stewart G. Pollock (Ret.), Chair
Hon. Alan B. Handler (Ret.), Vice Chair
Kenneth J. Bossong, Esq.
Joseph A. Bottitta, Esq.
Cynthia A. Cappell, Esq.
Barry S. Goodman, Esq.
Raymond S. Londa, Esq.
Melville D. Miller, Jr., Esq.
William O'Shaughnessy, Esq.
Sherilyn Pastor, Esq.
Michael S. Stein, Esq.

Supreme Court Staff:
Holly M. Barbera, Esq.

LIST OF ATTACHMENTS

A: Excerpts of 4/24/07 letter from Harold L. Rubenstein, Esq., Executive Director, NJSBA (relating to multijurisdictional practice and ABA Model Court Rule on the Provision of Legal Services Following Determination of Major Disaster)

B: 4/16/07 letter from Lee Braem, Esq., President of the New Jersey Chapter of the Association of Corporate Counsel (ACC America)

C: 4/16/07 letter from Jane Leslie Dalton, Esq., Chancellor, Philadelphia Bar Association

D: 10/26/07 memorandum from Kenneth J. Bossong, Director & Counsel, New Jersey Lawyers' Fund for Client Protection

E: 11/1/07 letter from Lynne Fontaine Newsome, Esq., President, NJSBA

F: 4/16/07 letter from Lee Braem, Esq., Senior Corporate Counsel and Deputy Compliance Officer, Degussa Corporation

G: 4/16/07 letter from Anne M. Patterson, Esq., Riker Danzig Scherer Hyland Perretti LLP, on behalf of UBS Financial Services, Inc.

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Attachment A

NEW JERSEY STATE BAR ASSOCIATION
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April 24, 2007

RECEIVED
APR 26 2007
PHILIP S. CARCHMAN, JAD
ACTING ADMIN. DIRECTOR

Philip S. Carchman, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

RE: NJSBA 2007 Supreme Court Rules Report Comments

Dear Judge Carchman:

On behalf of the New Jersey State Bar Association, please find the State Bar's written comments on the published reports of the Court's various rules committees.

As always, we appreciate the opportunity to comment on these reports, and particularly to the Court's extension of the time for responding so as to enable our Board of Trustees to consider and adopt the recommendations below. Also, our Supreme Court Family Practice Committee Rule Report Comments will follow under separate cover within a week per a conversation with Steve Bonville.

I. Supreme Court Complementary Dispute Resolution Committee Rules Report

The NJSBA fully supports the Supreme Court Complementary Dispute Resolution Committee Rules report except as noted below.

A. Proposed Amendments to *Rule* 1:40-1 — Purpose, Goals

First, the NJSBA determined that the rule represented a an impermissible intrusion of the court premised on the underlying assumption that attorneys will not fulfill their professional responsibility to advance a case in their client's best interest. The presumption that a lawyer will not in the ordinary course of his representation recommend, advise or otherwise seek to utilize the complementary dispute resolution system without a court rule

* * * * *

While this is not a matter proposed for comment, the NJSBA believes that the New Jersey State Bar Association should be among the groups listed above, and be listed in any reference to bar associations on a particular rule proposal. This is particularly important since the NJSBA is the only bar association which represents a balanced position on criminal practice issues considering both the interests of the prosecutor and defense counsel.

IV. Supreme Court Committee on Municipal Courts Rules Report

The NJSBA supports the proposed rule changes to Part VII of the Rules Governing the Courts of New Jersey with one exception. The Section believes that the proposed amendments to R. 7:8-7. Appearance; Exclusion of the Public – Appearance for the Prosecution and Video Links should be opposed insofar as they would eliminate private prosecution for cross-complaints, subject to judicial discretion, as is done now. It was pointed out that under State v. Clark, municipal prosecutors are prohibited from doing defense work in their own county. When a complainant is also a defendant on a related complaint, the rule proposal is setting up the prosecutors for an ethics violation under the present framework. As a result, an exception should be incorporated into the rule proposal.

V. Supreme Court Professional Responsibility Rules Committee Report

The New Jersey State Bar Association Board of Trustees has reviewed the report of the Professional Responsibility Rules Committee (PRRC). From the outset, the Board recognized that it was dealing with difficult issues touching on the ability of the Supreme Court to regulate the practice of law in New Jersey. We were also cognizant of the practical realities of today's increasingly interstate law practice, reflected in RPC 5.5. In the final analysis, the Board determined that the registration and fee requirements recommended by the PRRC are unworkable, burdensome to lawyers and costly to clients, and should therefore be eliminated.

The NJSBA further recommends that the Supreme Court consider adoption of the ABA Model Rules for Lawyers Funds for Client Protection, even though these rules were not considered by the PRRC. We believe adoption of the Model Rules will ameliorate concerns about the potential payment of claims against lawyers practicing here under RPC 5.5.

Finally, the NJSBA sees no need to require New Jersey admitted lawyers who have bona fide offices in other states, and trust and business accounts in those states, to also maintain trust accounts in New Jersey. Our position on these matters is set forth below in more detail.

Background:

The Supreme Court's Professional Responsibility Rules Committee (PRRC) was asked to evaluate the impact of the Court's 2004 adoption of a multi-jurisdictional practice rule (RPC 5.5), the elimination of the bona fide office rule (R. 1:21-1(a)), and whether the rule requiring in-state trust accounts should be relaxed as a result of the bona fide office rule change.

The so-called "MJP rule" (RPC 5.5), lists the ways lawyers admitted to practice in other jurisdictions may engage in the practice of law in New Jersey. The most recognized of these is by pro hac vice admission in litigated matters. Another category of permissible practice is by in-house counsel who receive limited licenses to practice from the Supreme Court. Pursuant to MJP rule amendments affective in 2004 the Supreme Court also permits out-of-state lawyers to engage in transactions, or represent a party in adr/cdr proceedings, if the matter involves an existing client and originates in the jurisdiction where the lawyer is admitted to practice. The MJP rule also permits a lawyer from another state to come to New Jersey to perform investigations, discovery and other pre-litigation work on a matter that will be the subject of a lawsuit in the lawyer's home jurisdiction. Finally, a catch-all provision in the MJP rule permits other "occasional" practice here, for an existing client, in any matter that arises out of a lawyer's representation of a client in a jurisdiction where the lawyer is admitted to practice.

RPC 5.5 also imposes on out-of-state lawyers a number of conditions including consenting to the appointment of the Clerk of the Supreme Court as agent for service of process (RPC 5.5(c)(3)), and the payment of annual fees to the Lawyers Fund for Client Protection, disciplinary system and Lawyers Assistance Program (RPC 5.5(c)(6)).

The PRRC has found that the bona fide office rule change has resulted in "no known problems" being reported by either the Office of Attorney Ethics (OAE) or the Lawyers Fund for Client Protection (the Fund). The PRRC therefore recommends no further amendments to R.1:21-1(a) and suggests that another evaluation of the bona fide office rule be conducted at a future (unspecified) date.

The report of the PRRC also indicates that the MJP rule has generated no disciplinary problems from the perspective of the OAE and the Fund. However, the PRRC found that despite the requirement that lawyers designate the Clerk as agent for service of process (see RPC 5.5(c)(3) above) only seventeen lawyers have done so.

The PRRC has therefore recommended to the Court that –

a. RPC 5.5 be expressly amended to require registration by MJP lawyers, and that a specific registration form be filed with the Clerk and the Fund by any lawyer practicing here pursuant to the rule,
b. The rule make it clear that every out-of-state lawyer must pay the annual registration fees for the disciplinary system, the Fund, and LAP,
c. The judiciary embark on an "outreach campaign" designed to publicize the MJP rule requirements,
d. The trust account requirements of R. 1:21-6 should not be changed even though the in-state bona fide office rule requirement has been eliminated.

Registration and Annual Fees

The NJSBA believes that the registration and fee requirement advocated by the PRRC is impractical and burdensome for lawyers coming here pursuant to RPC 5.5. This conclusion is based on the very nature of the MJP rule. An out-of-state lawyer coming to New Jersey pursuant to the rule (referred to as an "MJP lawyer") is not representing a New Jersey "client". The rule specifically limits an MJP lawyer's presence in New Jersey to specified activities on behalf of an "existing client in a jurisdiction where the lawyer is admitted to practice" in a matter that "originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice." See RPC 5.5(b). That being the case, there is no New Jersey client that needs the protection that might be afforded by the Lawyers Fund for Client Protection, and the likelihood of disciplinary problems requiring intervention from New Jersey's discipline system would seem to be minimal.

For instance, an Arizona lawyer stops at Newark Airport for a twenty minute meeting with a New Jersey lawyer regarding a transaction between the Arizona client and a New Jersey corporation. What conceivable purpose is served by requiring the Arizona lawyer to register with the Clerk and pay a registration fee? This sort of transitory "practice" occurs frequently, and not only in private practice. New Jersey is home to many corporations who often bring in lawyers from other states to consult briefly on transactions, or ADR proceedings. The imposition of registration and fees will add to the cost of doing business and lead corporations to conduct certain business elsewhere.

The NJSBA found it impossible to draw a line (at least one that could be expressed in a rule) between "transitory" and "occasional" practice, or to devise some other standard that would describe the type of multi-jurisdictional practice that might legitimately be subject to registration and the payment of

fees. We ultimately concluded that the impracticality of such requirements more than outweighed any perceived benefits that might result.

The fact of the matter is that while dozens of states have some form of an MJP rule, only four of them (including New Jersey) have a registration and/or fee requirement. When the ABA adopted a model MJP rule for consideration by the states, it specifically avoided any registration or fee requirements.

The NJSBA also raises the possibility of retaliatory fees being imposed on New Jersey lawyers by neighboring states. The high courts in New York and Pennsylvania may very well decide to impose their own fees on New Jersey lawyers handling matters in those states pursuant to applicable MJP rules.

The PRRC report fails to state why there is a need for MJP lawyers to register and pay fees. The NJSBA asks -- what specific problems or risks are addressed by either requirement? The PRRC report reveals that since the adoption of RPC 5.5 on January 1, 2004 there have not been any disciplinary complaints, or claims to the Lawyers Fund, involving lawyers practicing here pursuant to the rule.

The fundamental concept behind RPC 5.5 is a recognition that our highly mobile society, and commercial demands, require a more flexible approach to law practice across state borders. The rule therefore recognizes that it is not the unauthorized practice of law for a lawyer to come here on an occasional basis to address a matter that arises in her home state. New Jersey lawyers may do likewise pursuant to the multi-jurisdictional practice rules enacted in other states. To place unnecessary barriers on such practice serves no purpose except to burden lawyers and raise costs for clients, and serve as a disincentive for conducting business in New Jersey, particularly in light of the fact that both the OAE and Lawyers Fund report no complaints or claims involving lawyers practicing here pursuant to RPC 5.5.

While the NJSBA, and others, expressed some doubt in 2003 about the impact of the MJP rule, it now appears that the registration and fee requirements proposed by the PRRC serve no purpose, other than to generate paper in lawyer's offices, and revenue in the office of the Clerk. Even if the Supreme Court is inclined to adopt the PRRC proposals it should direct the PRRC to take a more extensive look at the practical implications of its proposed registration and fee requirements, rather than adopt rules based simply on the analysis provided by the OAE and the Lawyers Fund.

Model Rule for Lawyers Funds for Client Protection

The NJSBA believes that any concerns the Lawyers Fund for Client Protection may have about the payment of claims against lawyers admitted

pursuant to RPC 5.5 can be addressed by New Jersey's adoption of the ABA's Model Rule for Lawyers Funds for Client Protection. The model rule was not addressed in the PRRC report but the NJSBA calls it to the attention of the Court.

The ABA model rule contains features not contained in our Rule 1: 28. The model rule permits a claim to be paid by either the state where the loss occurred, by the state where the offending lawyer is admitted to practice, or by both states. Further, the rule permits payment of claims even if an offending lawyer has not contributed to the Fund. Thus, the model rule appears to protect the interests of clients, without imposing additional burdens on the bar. As an aside, the Court should be aware of the fact that perhaps through oversight, Rule 1:28 does not specifically allow the payment of a claim against an MJP lawyer, although it does permit a claim to be paid against a lawyer admitted pro hac vice.

Trust Accounts

The PRRC Report notes that the Supreme Court's Civil Practice Committee had asked whether R. 1:21-6 should be amended so that lawyers admitted to practice in New Jersey who have offices in other states no longer have to maintain trust accounts in New Jersey. The PRRC declined to recommend any change in the rule.

The NJSBA disagrees with the PRRC. If a New Jersey admitted lawyer has an office, and trust and business accounts in another state there is no sound reason to require the maintenance of a trust account in this state. The OAE has told the PRRC that disciplinary investigations would be easier if an account was maintained in New Jersey. However, if a disciplinary problem arose the lawyer involved is still a member of the New Jersey bar and subject to the disciplinary authority of the Supreme Court regardless of where the office and accounts are located. The continuation of this requirement is unnecessary. It simply increases the cost of legal services and provides no real benefit to clients.

Legal Services Following Major Disaster

The NJSBA wanted to advise the Supreme Court that the ABA has proposed an amendment to Rule 5.5 regarding the adoption of a Model Court Rule on the Provision of Legal Services Following Determination of Major Disaster. Such a rule would be quite useful in assisting the legal community and the citizens of New Jersey in receiving assistance in the event of a major disaster. This rule proposal's effectiveness is contingent upon the uniformity of its adoption in neighboring states. For this reason, the NJSBA is working with the Mid-Atlantic Bar Conference States to develop a version which would be acceptable to all members. In this regard, we would respectfully request: 1.

that the Supreme Court of New Jersey refrain from taking action on this particular matter until the NJSBA can file a recommendation; and 2. that the Supreme Court of New Jersey inform the NJSBA of its consideration of such a proposal providing us with representation on any committee reviewing same.

Thank you for your attention to our comments. Please contact me if you have any questions or comments.

Very truly yours,

Harold L. Rubenstein, Esq.
Executive Director

c: Steven W. Townsend
Theodore J. Fetter
David P. Anderson
Steven D. Bonville
Wayne J. Positan
Lynn F. Newsome
Charles J. Hollenbeck
D. Todd Sidor

Attachment B

RECEIVED
APR 20 2007
PHILIP S. CARCHMAN, JAD
ACTING ADMIN. DIRECTOR

ACC AMERICA
Association of Corporate Counsel
New Jersey (NJCCA) Chapter

Lee Braem, President NJCCA

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April 16, 2007

VIA E-MAIL (Comments.Mailbox@judiciary.state.nj.us)

Philip S. Carchman, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

RE: Report of the Professional Responsibility Rules Committee (PRRC) Proposed Rule Amendments for RPC 5.5 (Multi-Jurisdictional Practice) (MJP)

Dear Mr. Carchman:

Please accept these comments to the proposed amendments to Rule of Professional Conduct (RPC) 5.5 on behalf of the New Jersey Corporate Counsel Association (NJCCA). NJCCA, an affiliated chapter of the Association of Corporate Counsel, is an organization of over 1,000 corporate counsel in Northern and Central New Jersey. Our members are in-house legal counsel to a wide cross-section of New Jersey businesses, ranging from small businesses to Fortune 500 corporations.

We recommend that no changes be made to RPC 5.5 at this time, particularly with respect to the registration and payment of fees for out-of-state attorneys under RPC 5.5(c) whose activities fall within RPC 5.5(b)(3)(i) - (iv) (hereinafter referred to as MJP Matters). Indeed, the concept of registration in anticipation of and for every conceivable occurrence of MJP Matters should be re-examined.

We see several problems with trying to impose the registration and fee structure set up for plenary licensed attorneys in New Jersey to MJP Matters. First, there is a fundamental disconnect between the reality of modern interstate business and legal practice and a system that attempts to record and invoice every practice contact with and in New Jersey no matter how inconsequential. Second, the system for registration of MJP Matters contemplated by the existing rule is expensive, unmanageable and unworkable (compared to the ABA Model Rule 5.5), and the proposed amendment by the PRRC merely compounds the problem. Finally, as the proposed amendment will further act to make

the MJP rules of New Jersey one of the most stringent (if not the most stringent) in the country, we are concerned that the reaction to an amended RPC 5.5 will be a mix of retaliatory rules in other states, higher costs for New Jersey residents, and a disincentive to businesses to conduct their affairs in this state to the detriment of the bar, ancillary organizations and the public in general. We believe the underlying goal of public protection is not alleviated by key elements of the existing RPC 5.5 or the proposed amendment.

Instead, we urge a careful and considered study of the practical and financial risks of registration for certain types of MJP Matters. Rather than accept a proposal to amend RPC 5.5 based upon a committee working confidentially, the Court should conduct the same thorough and public fact finding it did more than three years ago when it last amended RPC 5.5 (and related Rules and RPCs). The implications for New Jersey business and practitioners across the country are too important to limit the fact finding and analysis (especially since at least 32 other states have enacted and have experience with MJP practice).

The Need and Purpose of MJP Rules

The issue of MJP has been studied extensively prior to the passage of the current Model Rule 5.5 and RPC 5.5. While we will not revisit the work of the special commission headed by Justice Pollock or the ABA Commission on MJP, we need to recall that modern commerce and the practice of law routinely covers multiple jurisdictions. Law firms have clients in various states across the country and may serve corporate headquarters and any number of affiliates and subsidiaries of that organizational client. What RPC 5.5(b)(3)(i) - (iv) recognizes is that information, witnesses and parts of a business organization (the "client" under RPC 1.13) may be located in or touch upon New Jersey even though the initial representation on the matter may have had nothing to do with New Jersey.

The MJP rules recognize that in our mobile interconnected society, witnesses and facts may be in more than one state. As our RPCs recognize for MJP Matters, it should not be regarded as the unauthorized practice of law for someone in another state to cross into our state to address matters arising in the attorney's licensing home state (or for some MJP Matters, matters for which there is also an existing client relationship). Under the MJP rules, New Jersey has a more limited interest in these activities and the courts are not at issue as *pro hac vice* admission and registration is required for court appearances.

According to an analysis by the American Bar Association on state enactment of Model Rule 5.5 (http://www.abanet.org/cpr/mjp/home.html), 11 States have enacted Model Rule 5.5 and 21 States, including New Jersey, have enacted some variation of Model Rule 5.5. Of these 21 States, it appears that only four states besides New Jersey require some type of registration and two appear to have some fee requirement for MJP. What is not clear, however, is whether the fees apply for such occasional practice as is sought here. We suspect that further study may reveal the registration and/or fees required by other states do not touch on the same situations.

Registration of MJP Practitioners

Corporate counsel and their employers frequently conduct business in many states. A matter that arises in another state may necessitate investigations and meetings with the client (its employees) here in New Jersey, such as at a division or local sales office. This type of event is one of the MJP Matters listed under RPC 5.5(b)(3). Indeed, someone coming to New Jersey could conduct a client meeting related to the attorney's licensing home jurisdiction. Under a pre-registration requirement (or other conditions to be imposed by RPC 5.5(c)), however, the out-of-state attorney must stop everything, register and pay fees, all before further business can be conducted. Yet for some matters, the only connection to New Jersey may be that the witness happens to be in the state at the time the attorney is available for an interview. These meetings may also be conducted under some transactional or court deadline, and the time it takes to meet the RPC 5.5 registration requirements could have significant negative consequences.

By contrast, registration for *pro hac vice* appearances is manageable and commonsense given the attorney's appearance before a court in New Jersey.

What appears to have happened here, however, is the PRRC saw few registrations for MJP Matters and simply seeks to enforce the rule in a more draconian fashion. What we urge the court to do is to stop and truly assess the past three years for MJP Matters in an open, investigative. We believe the wisdom of limiting registration to *pro hac vice* admissions will be clear.

Broader Implications for New Jersey

Businesses, and the counsel that represent them, have a choice as to where to hold meetings, negotiate transactions, conduct arbitrations and other activities that are permissive MJP Matters. The registration and fee rules will likely create a disincentive for businesses to have transactions or events occur in New Jersey. Simply put, the transaction costs will be too high. For example, if a New Jersey business had a matter pending in Nevada and wanted to have counsel come to New Jersey to interview witnesses, discuss transactions or strategy, under the registration rule, that counsel would have to register with the Court and pay fees, all of which will be no doubt passed on to the client. The timing of the transaction or event will also be affected. Indeed, there being no ability to register prospectively, it appears a separate registration would be needed for each MJP Matter, even if they occur days, weeks or months apart.

Faced with such choices, it will be logical to move such activity out of state, thus losing income tax bases, losing revenue for ancillary businesses such as the hospitality industry, and further fostering a view that the cost of doing business in New Jersey is too high.

The PRRC Proposal

The PRRC's proposed solution of tri-state advertising (NY, PA, and DE) misses the point. New Jersey is home to many multi-national companies or their subsidiaries. Our members interact with counsel across the United States, not just jurisdictions contiguous to New Jersey. Therefore, notice of New Jersey's unique MJP requirements would theoretically have to be published in all 50 States and the District of Columbia and on a very frequent basis.

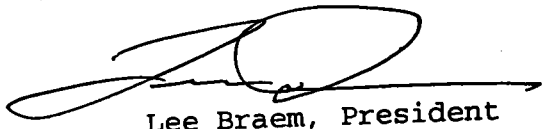
But, as noted above, this is not simply an issue of notice to the bar of New Jersey's unique practice requirements. This is an issue of fully understanding MJP and MJP Matters within the State before further restrictions are imposed. The results argue for study of who is practicing MJP, what the practice entails, how much of an impediment and disincentives are created by registration and fees, what public policy concerns are implicated, and what can be workable in the reality of today's commercial world.

Conclusion

We respectfully urge rejection of the proposed amendments to RPC 5.5, call for more careful study of the scope of the registration and fees requirements applied to MJP matters, and consider further changes to RPC 5.5 as discussed in this letter. Further consideration of the MJP issue in New Jersey should squarely address whether plenary type registration, fee arrangements, trust fund considerations, and similar requirements will work for MJP Matters.

NJCCA appreciates the opportunity to submit these comments.

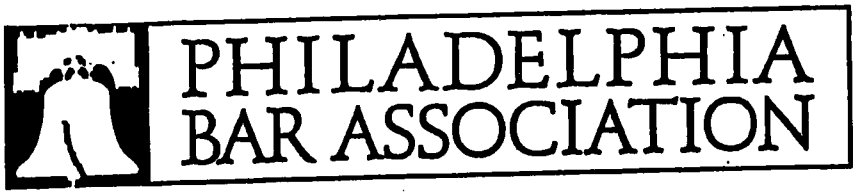
Sincerely,



Lee Braem, President
New Jersey Corporate
Counsel Association

cc: Wayne Positan, Esq.

Attachment C



Jane Leslie Dalton, Esq.
Chancellor

30 South 17th Street • Philadelphia, PA 19103-4196
Phone: 215-979-1830 • Fax: 215-979-1020 • E-mail: dalton@duanemorris.com

April 16, 2007

Philip S. Carchman, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Via e-mail to: Comments.Mailbox@judiciary.state.nj.us.

Re: Proposed Amendments to New Jersey Rule of Professional Conduct 5.5(c)

Dear Mr. Carchman:

As Chancellor of the Philadelphia Bar Association and its 13,000 members, I thank the New Jersey Supreme Court for the opportunity to comment upon recently proposed amendments to New Jersey's Rule of Professional Conduct 5.5(c) (the "Rule") which governs the multijurisdictional practice of law ("MJP"). I consider the amendment to Rule 5.5(c)(3) not to be necessary. I urge the New Jersey Supreme Court to repeal the provisions of current Rule 5.5(c)(6).

In amending the Model Rules of Professional Conduct to allow for MJP, the American Bar Association recognized the reality of law practice in the 21st century. In many cases, effective representation of clients can no longer be limited to conduct within the boundaries of any one specific state. Our clients demand that within reason as attorneys we meet as many clients' needs as is possible. In other situations, individuals are sought out by clients across the United States because of a recognized expertise in a particular practice area.

Multijurisdictional practice is not a "one size fits all" phenomenon. For the out of state practitioner, who within the confines of present Rule 5.5(b)(1) and (2) maintains a systematic and continuous presence in New Jersey, the current provisions of New Jersey RPC 5.5(c) make sense and facilitate the regulation of that attorney, consistent with New Jersey RPC 8.5. As is provided for by Comment 17 to the ABA's Model Rules of Professional Conduct:

"If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer

may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education."

Our concerns are about the proposed amendment to New Jersey RPC 5.5(c)(3) and the retention of New Jersey RPC 5.5(c)(6) even in its present form, for the instances of multijurisdictional practice that are provided for under Rule 5.5(b)(3)(i-iv). Obviously, our main concern is the impact of Rule 5.5(c)(3) and (c)(6) on Philadelphia attorneys who come into New Jersey under certain circumstances, but we believe that to a large degree, they are applicable to any out state attorney who goes into New Jersey for what is truly the occasional rendering of services to certain clients, oftentimes clients not even located within New Jersey.

By definition, the negotiation of the type of transaction contemplated in 5.5(b)(3)(i) is a negotiation for a client who is not in New Jersey and where that transaction has a nexus in the jurisdiction to which the attorney is located. If the issue is protecting clients in New Jersey, in this instance there is no New Jersey client to protect. While one specific meeting where a negotiation might take place could happen in New Jersey, it does not follow that all the necessary negotiations in consummating an agreement will. Likewise, at what point is it determined that something has occurred in New Jersey? If a meeting at which negotiation occurs is done by video or teleconference and the attorney involved never actually comes to New Jersey has the conduct occurred there? More importantly how is this type of activity to be tracked, if as a practical matter an attorney does not register and pay the fees required? Depending on a New Jersey attorney's obligation to report that attorney presumes that the New Jersey attorney will be willing to ask if the out of state attorney is registered and has paid the required fees. Considering that the purpose of a negotiation to have the consummation of a transaction that is in the interests of all represented parties, (such as in a business deal), I would suggest that such reporting will be a seldom and isolated instance by New Jersey attorneys since it is not in their clients' best interests to do so. Simply put, it won't help the deal go through.

By definition, the parties to an arbitration or mediation as contemplated in 5.5(b)(3)(ii) will have already agreed to the jurisdiction whose law will govern the dispute, as well as the ADR/Mediation provider whose procedural rules will govern. Usually a location for such a proceeding is dictated by the desire of the parties, and/or the desires and availability of the arbitrator or mediator. An attorney with a business client in Pennsylvania who is unable to come into New Jersey to handle an arbitration for that client one or two times a year without paying the fees and registering is simply not going to go into New Jersey for such a proceeding. The impact will be further costs to both parties for the arbitrator (if so willing) to travel to Pennsylvania, or in the alternative loss of work to the arbitrator who happens to be in New Jersey.

The necessity of both registering and paying of fees in the arbitration setting is made even more troubling by the abrogation of Opinion 28 (1994) of New Jersey's

Unauthorized Practice of Law Committee (allowing the conduct covered by the Rule without registering or payment of any fees) by its recent Opinion 43 requiring the payments of fees in accordance with Rule 5.5(c). Opinion 43 appears to have been motivated by the proposed amendments to Rule 5.5(c). Had there been any real threat to the general public or clients posed by the conduct permitted in Opinion 28, it is certain that the Committee would have acted prior to 2007 (and the promulgation of the amendments) to address those concerns. The fact that they have now done so would appear to be a major step backwards and is actually contrary to the reality of multijurisdictional practice.

In the litigation setting, contemplated in 5.5(b)(3)(iii), the jurisdiction before which the matter is pending has jurisdiction over the case, and the actual occurrence of the deposition in New Jersey, is simply coincidental to the proceedings in the other state. Even according to New Jersey's own Rule 8.5, the rules of the jurisdiction where the tribunal sits will govern the matter. Retaining Rule 5.5(c)(6) and amending 5.5(c)(3) will also as an unintended side effect add to the litigation arsenal a weapon of intimidation by opposing counsel in such situations. The threat to report what is being characterized as the "unauthorized practice of law" was commonplace when the in state office rule was in force. It did not in any way help clients to resolve their problems. The success of the abolition of that rule shows that it was unnecessary and had outlived its usefulness by the time it was repealed.

Finally the circumstance for practice outlined in 5.5(b)(3)(iv) are by definition occasional and limited.

In all these scenarios, the contact with individuals in New Jersey is *di minimis* and collateral to the representation of the client in a jurisdiction where the attorney is admitted, a jurisdiction which has authority over an attorney's ethical conduct and protection for clients no matter where the attorney engages in unethical conduct or worse, defalcation of client funds.

Rule 5.5(c)(3) already provides that an attorney, by engaging in the conduct outlined in 5.5(b)(3), has consented to the jurisdiction of New Jersey. The provision is similar in many jurisdictions. It would appear that given this reality, that the proposed amendments are really just a way to be able to collect the fees outlined in Rule 5.5(c)(6).

Even New Jersey's own *Rules Governing the New Jersey Lawyers' Fund for Client Protection* do not reflect any desire to protect the clients who are being represented in the MJP setting. Specifically Rule 1:28-3 (Payment of Claims) provides that:

Philip S. Carchman, J.A.D.
April 16, 2007

1:28-3. Payment of Claims

(a) Eligible Claims. The Trustees may consider for payment all claims resulting from the dishonest conduct of a member of the bar of this state or *an attorney admitted pro hac vice* [emphasis added] acting either as an attorney or fiduciary, provided that:

(1) Said conduct was engaged in while the attorney was a practicing member of the Bar of this State or admitted Pro Hac Vice in a matter pending in this State;

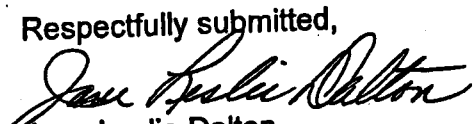
There is no coverage for those who are acting within the state under present Rule 5.5(b)(3) except those admitted *pro hoc vice,* and **no amendment to the coverage rule has been proposed.** Had it been the intent in 2004 for all individuals acting in New Jersey under Rule 5.5(b)(3) to be covered, certainly Rule 1:28-3 would have been amended at the time. The fact that it was not and remains so is consistent with the approach taken by the American Bar Association and Pennsylvania. Simply stated, the fund of the jurisdiction in which the attorney is admitted, regardless of where the offending conduct occurs is responsible for payment of a legitimate claim on behalf of the client (See Pennsylvania Rule of Disciplinary Enforcement 512 and ABA Model Rule for Lawyers' Funds for Client Protection 1A.)

There is the further risk that adoption of the proposed amendments will result in other states taking similar positions as regards New Jersey attorneys operating under those other jurisdictions' MJP rules. This will then operate to the detriment of not only New Jersey admitted attorneys, but their clients as well.

The October 19, 2006 memorandum from David E. Johnson, Jr., the Director of the New Jersey Office of Attorney Ethics, indicates that he is unaware of any problems being reported due to multijurisdictional practice. It is of concern that consideration is being given to a strengthening of Rules when they have obviously been honored in the breach for the past three years, yet no evidence of any harm to clients or the public has been uncovered.

I would urge the court to recognize that enactment of these amendments will not only hurt New Jersey clients and businesses but will represent a step backwards from the realities of law practice in this day and age. Furthermore, the requirements of present Rule 5.5(c)(6), in connection with the conduct permitted by 5.5(b)(3), are not necessary, and we ask that the Court give serious consideration to their repeal.

Respectfully submitted,



Jane Leslie Dalton
Chancellor

Attachment D

NEW JERSEY LAWYERS' FUND
FOR
CLIENT PROTECTION

TRUSTEES
JEAN M. RAMATOWSKI, CHAIR
TINA E. BERNSTEIN, VICE CHAIR
EMMETT E. PRIMAS, JR., TREASURER
SUSAN E. LAWRENCE
JAMES H. LASKEY
LUIS R. SANCHEZ

ASSISTANT TREASURER
CHRISTINA P. HIGGINS

STREET ADDRESS:
25 WEST MARKET STREET
5TH FLOOR, NORTH WING
TRENTON, N.J. 08625

RICHARD J. HUGHES JUSTICE COMPLEX
P.O. BOX 961
TRENTON, N.J. 08625-0961

DIRECTOR & COUNSEL
KENNETH J. BOSSONG

DEPUTY DIRECTOR
DANIEL R. HENDI

SENIOR COUNSEL
EDWARD T. EHLER

DEPUTY COUNSEL
RUBY D. COCHRAN

(609) 984-7179
CLAIMS: (609) 292-8008
BILLING: (609) 292-8079
FAX: (609) 394-3637

October 26, 2007

MEMORANDUM

TO: Members, Professional Responsibility Rules Committee

FROM: Kenneth J. Bossong

RE: MJP

Based on some suggestions following the most recent meeting of the PRRC, I thought it might be useful to briefly summarize the points raised in our discussion of Multi-Jurisdictional Practice (MJP) at the meeting.

The Fund's Position

The Fund's position on MJP has not changed over the years and may be briefly summarized as follows:

1) The Fund has no position to take with respect to how restrictive or permissive the Supreme Court should be in permitting lawyers not licensed in New Jersey to practice law within the State. Thus, the Fund has not advocated for or against specific proposed "safe harbors".

2) However restrictive or permissive those safe harbors may be, and whatever they may be called, the Fund has always urged the Court to require those extended the privilege of practicing in New Jersey to:

(a) identify themselves;
(b) be subject to discipline; and
(c) pay the annual assessment, with the corresponding understanding that the Fund

would have jurisdiction to consider claims filed against them.

An Apt and Useful Analogy

Multi-jurisdictional practitioners are closely analogous to those admitted *pro hac vice*. Indeed, a good way of looking at MJP is to consider it transactional *pro hac vice*: lawyers not admitted in New Jersey being permitted to handle transactional, rather than litigated, matters in New Jersey. It has been well established for many years that lawyers admitted *pro hac vice* in New Jersey pay the annual assessment for as long as they appear in any matter within the jurisdiction. The biggest difference between *pro hac vice* and MJP – the lack of supervision in the latter by a Judge – augers more strongly, not less, for regulation, payment of the assessment and protection of the Fund in the case of MJP.

Overstating the "Burden"

The resistance to the Court's adoption of these principles makes two mistakes: it vastly overstates the burden of regulation and greatly understates what is at stake by way of potential harm and exposure.

The "burden" imposed by the Supreme Court on MJPs consists of
(1) filling out one 1-1/2 page form that requires name, jurisdictions admitted, a couple of addresses and phone numbers, and a signature appointing the Clerk of the Supreme Court as agent for service or process; and
(2) payment of the annual assessment (currently $186.00) once per calendar year, no matter how many matters are handled, for any year in which any matter is handled in New Jersey – just as *pro hac vice* lawyers have been doing for decades.

This regulatory scheme, such as it is, is notable for how *little* regulation is involved. There is no sponsoring New Jersey lawyer, and there is no one even attempting to say whether or not the practitioner may handle a given matter. Indeed, no one is tracking, or even asking, what the MJP is doing in New Jersey.

Understating the Exposure

The size and significance of matters that may be handled by MJPs in New Jersey is greatly understated, on the other hand. It is always easy, of course, to conjure up a trivial example of anything. For some reason, discussions of MJP often start with trivial examples, whether it be the 10 minute meeting at Newark Airport, or the lawyer handling a matter in a state where licensed going elsewhere to take a deposition. Such red herrings should not be allowed to obscure the fact that transactional matters are at least as likely to be sizeable and significant as litigated matters. Some of the largest claims any Client Protection Fund faces involve transactional matters. Whether the purchase and sale of businesses or real estate in New Jersey, or matters of estate planning or administration, transactions may well involve the life savings of New Jersey residents, on at least one side of the transaction.

Reliance on other states' Funds to protect New Jersey's citizens from the deeds of their

lawyers in New Jersey matters is misplaced for at least two reasons:

(1) The vast majority of Funds in the United States require some nexus to their state in the transaction that is the subject of a claim in order for the claim to be considered for payment. New Jersey's Fund is among them.

(2) While there has been considerable progress and the trend is toward improvement, the truth remains that most American Funds have little or no assessment, little or no reserve, and per-claimant and aggregate maximums in the thousands or tens of thousands, with actual awards heavily discounted even from these levels. These Funds struggle mightily to protect their own citizens from dishonest conduct of their lawyers occurring in their states.

Simply put, if New Jersey's Fund does not provide protection in these transactions, there will be no remedy. If the Fund does provide the remedy, the potential exposure is real and quite substantial.

CONCLUSION

Practicing law anywhere is a privilege. The Supreme Court of New Jersey has the constitutional power and duty to regulate lawyers and the practice of law in New Jersey. The Court's approach for doing so with respect to licensed New Jersey attorneys and lawyers admitted Pro Hac Vice is well established and long-standing. In imposing a modicum of regulation in return for the privilege of Multi-Jurisdictional Practice, the Supreme Court of New Jersey was correct on the law, sound in public policy, and prudent.

Inconsequential examples of Multi-Jurisdictional Practice should be defined out of the discussion. Perhaps something like this would work: "It is not the Unauthorized Practice of Law in New Jersey for a lawyer admitted only elsewhere in the United States to...[from the language of RPC 5.5 (b) (3) (iii):] investigate[s], engage[s] in discovery, interview[s] witnesses or depose[s] witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice."

Meanwhile, the Fund understood that jurisdiction to cover losses caused by the dishonest conduct of authorized Multi-Jurisdictional Practitioners would accompany regulation of them and payment by them of the annual assessment. Language clarifying that point can, and probably should, be added to R. 1:28-3(a)(1). Doing so without a corresponding revenue stream to accompany the exposure would place the Fund in unnecessary jeopardy at some point. Those engaged in MJP would also be subject to discipline and able to avail themselves of the LAP, which are funded by the other two portions of the assessment they would be paying.

Supreme Court of New Jersey

NON-NEW JERSEY ATTORNEY
DESIGNATION OF CLERK AS AGENT
FOR SERVICE OF PROCESS

Re: Multi-Jurisdictional Practice (per RPC 5.5)

A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to subparagraph (b) of RPC 5.5 shall consent to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction.
[Excerpt from RPC 5.5(c)(3)]

[N.J. MJP ATTORNEY ID: _____ (To be designated by Clerk's Office)]

ATTORNEY MUST PROVIDE ALL REQUESTED INFORMATION:

FIRST NAME: _____

MIDDLE NAME: _____

LAST NAME: _____

SUFFIX (if applicable): _____

BAR ADMISSIONS (List State(s) and Date(s) of Admission) _____

_____

[Attorney must be in Good Standing in all jurisdictions in which he or she has been admitted]

BONA FIDE OFFICE(S) FOR THE PRACTICE OF LAW:

Firm Name _____

Address _____

_____

Municipality _____ State _____ Zip Code _____

Telephone _____

Email Address _____

RESIDENCE:
Address _____

Municipality _____ State _____ Zip Code _____

Telephone _____

ATTORNEY'S CERTIFICATIONS & DESIGNATION:

I certify that I meet the criteria for practice in New Jersey in RPC 5.5(b).

I designate the Clerk of the Supreme Court as agent on whom service of process may be made for all actions against me or my firm that may arise out of my participation in legal matters in the State of New Jersey.

I certify that all of the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment, including possible attorney disciplinary action.

DATE: _____ _____
(Signature)

_____
(Print Name)

File the original of this form with:

Clerk of the Supreme Court of New Jersey
Hughes Justice Complex
PO Box 970
Trenton, NJ 08625-0970

If you have any questions regarding the completion of this form, you may send an email to <supremect.mailbox@judiciary.state.nj.us> or telephone (609) 984-4371.

MJP DF
Revised March 29, 2007

Attachment E

NEW JERSEY STATE BAR ASSOCIATION

LYNN FONTAINE NEWSOME, PRESIDENT
Donahue, Hagan, Klein, Newsome & O'Donnell, P.C.
360 Mount Kemble Avenue
Morristown, NJ 07960
973-664-6782 • FAX: 973-664-6788
EMAIL: lnewsome@dhkno.com

November 1, 2007

Hon Stewart G Pollock
Riker Danzig Scherer Hyland & Perretti
Headquarters Plaza, 1 Speedwell Avenue
PO Box 1981
Morristown, NJ 07962

Dear Justice Pollock:

The New Jersey State Bar Association Board of Trustees recently had occasion to discuss RPC 5.5, in the context of a request from our Dispute Resolution Section about the implications of Opinion 43 of the Supreme Court's Unauthorized Practice of Law Committee (UPLC). The Board has asked that I bring to your attention certain aspects of the rule and the opinion that impact negatively on the conduct of private ADR proceedings in New Jersey. I request that the Professional Responsibility Rules Committee consider the NJSBA's comments and recommendations during its review of RPC 5.5.

Opinion 43

In January 2007 the Supreme Court's Unauthorized Practice of law Committee issued Opinion 43 which addressed the ability of out-of-state attorneys to represent parties in arbitration proceedings before the American Arbitration Association (AAA). The opinion (which supplements earlier UPLC Opinion 28) concludes that such representation is permissible, so long as it complies with requirements set forth in RPC 5.5. Further, the UPLC concluded that in order to ensure compliance with RPC 5.5 "the AAA and other alternate dispute resolution forums" must require out-of-state attorneys to submit proof of compliance with RPC 5.5, "particularly proof that they have registered with the Clerk of the Supreme Court and have paid the required fees."

The Impact of RPC 5.5 and Opinion 43 on ADR

The NJSBA recognizes that the Professional Responsibility Rules Committee does not have the authority to review UPLC Opinion 43. However, because the opinion references RPC 5.5 and in light of its impact on ADR practice we ask the committee to consider amendments to RPC 5.5 that would:

- Eliminate the "registration" requirement contained in paragraph (c)(3),
- Eliminate the requirement, in paragraph (c)(6) that the annual attorney fees be paid, and
- Amend the rule to make it clear that entities providing private ADR forums have no duty to ensure attorney compliance with the rule.

Such amendments would effectively negate the more onerous portions of Opinion 43, while leaving in place its central finding that appearances of out-of-state attorneys in private ADR proceedings are generally permissible in New Jersey.

For many decades it had been widely accepted that any person may represent a party in a private ADR proceeding (See AAA Commercial Arbitration Rule 24 permitting a party to be represented by counsel of other representative). The UPLC recognized this fact in its Opinion 28.

However, the adoption by the Supreme Court of RPC 5.5, and the subsequent issuance by the UPLC of Opinion 43, has introduced uncertainty into private ADR proceedings not only for out-of-state attorneys but for New Jersey participating attorneys. In this regard, it appears that the interpretation of RPC 5.5 contained in Opinion 43 not only calls into questions decades of accepted practice, it also:

- Conflicts with the Uniform Mediation Act, Section 10, permitting any individual to accompany a party and participate in a mediation
- Imposes policing and enforcement responsibilities on private "alternative dispute resolution forums," that are likely unconstitutional
- Leaves New Jersey attorneys to wonder how to interpret their ethical obligation not to assist others in the unauthorized practice of law and to report professional misconduct.
- Makes New Jersey a less hospital place for private ADR proceedings.

The NJSBA Position

As we noted in our April 24, 2007 comments to the PRRC, RPC 5.5 recognizes that New Jersey needs a more flexible approach to law practice across state borders. The rule recognizes that lawyers may engage in cross border practice, on an occasional basis, to assist clients and address matters connected to the lawyer's jurisdiction of admission. Unnecessary barriers should not be established to impede such activity.

It continues to be the position of the NJSBA that any type of registration requirement (including the currently mandates notice) and imposition of an annual fee serves no real purpose except to place barriers in front of those lawyers who engage in cross-border practice.

In ADR proceedings, such requirements transform into the unauthorized practice of law conduct which has long been deemed permissible. If a lawyer duly licensed in another jurisdiction, participating in a private ADR proceeding in New Jersey, is engaged in the unauthorized practice of law by failure to comply with RPC 5.5, then a non-lawyer in the same circumstances must also be engaged in the unauthorized practice of law.

Thus, the combination of Opinion 43 and RPC 5.5 produces uncertainty for New Jersey lawyers in private ADR proceeding, whether participating as counsel or as neutrals, who have an obligation not to assist in the unauthorized practice of law and charged with reporting such a crime. Thus, it appears that, in ADR proceedings, out-of-state lawyers face more stringent requirements than faced by non-lawyer ADR participants.

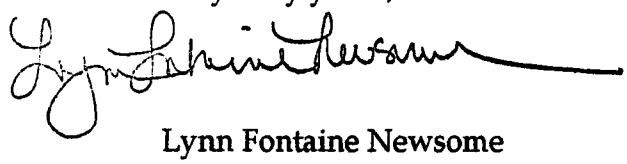
Further, who is "protected" by RPC 5.5? In regards ADR proceedings the rule permits an out-of-state lawyer to appear **only** on behalf of an existing client in the jurisdiction where the lawyer is admitted to practice, in a matter that has a nexus to that same jurisdiction. Thus, there is no New Jersey client that needs to be afforded the protection of the Lawyers Fund for Client Protection or the disciplinary system. Why then should the lawyer face registration and fee requirements?

Finally, the Opinion 43 requirement that the AAA and other forums monitor compliance with RPC 5.5 brings into question the ability of the judiciary to oversee private ADR proceedings that were agreed to by the parties and have no connection with pending litigation. If a rational basis might be found, perhaps such a requirement could be instituted by legislation, but it is questionable whether the judiciary could do so via court rule, let alone by an opinion of a Supreme Court committee.

Conclusion

The NJSBA respectfully recommends to the PRRC that it consider amending RPC 5.5 to address the concerns raised above. Particularly in ADR proceedings, parties should be able to be represented by individuals of their choice without any filing or fee requirements, or related limitations.

Very truly yours,



Lynn Fontaine Newsome

C: Peggy Sheahan Knee, Esq.
Bennett Feigenbaum, Esq.
Charles J. Hollenbeck, Esq.

Attachment F

RECEIVED
APR 20 2007
PHILIP S. CARCHMAN, JAD
ACTING ADMIN. DIRECTOR

degussa.

creating essentials

Degussa Corporation
379 Interpace Parkway
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April 16, 2007

VIA E-MAIL (Comments.Mailbox@judiciary.state.nj.us)

Philip S. Carchman, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

RE: Report of the Professional Responsibility Rules Committee (PRRC)
Proposed Rule Amendments for RPC 5.5 (Multi-Jurisdictional Practice)
(Amended Letter)

Dear Mr. Carchman:

I respectfully submit these comments to request clarification of the scope of practice for those in-house attorneys practicing in New Jersey under Rule of Professional Conduct (RPC) 5.5(b)(2) and, more specifically, Rule 1:27-2. The question presented is as follows:

Question Presented:

Whether Rule 1:27-2 and its language regarding practice limited to legal representation of the attorney's employer organization is intended to be more restrictive to the scope of practice than RPC 1.13 (organization as client) or whether practice under Rule 1:27-2 is to be read fully consistent with RPC 1.13, and especially RPC 1.13(e). If the answer is the latter, then, for the reasons stated below, in-house counsel with a limited license issued under Rule 1:27-2 should be able to represent constituents of their organizational client consistent with RPC 1.13(a), 1.13(d), and RPC 1.13(e).

Background:

I have a plenary license to practice in the State of New Jersey. I have been practicing as an in-house attorney for approximately 15 years. I am President of the New Jersey Corporate Counsel Association, a member of the New Jersey State Bar Association (NJSBA), and a member of the NJSBA's Professional Responsibility Committee. I am also a member of the faculty that developed and has been delivering (under the auspices of the New Jersey Institute for Continuing Legal Education) the ethics and professionalism course mandated by the New Jersey Supreme Court for those in-house

attorneys receiving their limited license under Rule 1:27-2. I submit these comments in my capacity of this last role.

In the ethics portion of the above cited course, I present the topic of conflicts and identification of the client; basically covering RPCs 1.13, 1.7, and 1.9. Up to now, I have been making two points to the attendees about the issue of "identification of the client". First, while RPC 1.13(a) does indicate that when representing an organization only the organization is the client, RPC 1.13(a) and 1.13(e) nonetheless, provide limited means for having the constituents of the organization treated as clients (RPC 1.13(a) refers to the litigation control group and RPC 4.2 and 4.3)(RPC 1.13(e) allows representation of constituents subject to RPC 1.7). Second, because the attendees for the course are subject to Rule 1:27-2, I have been explaining that RPC 1.13(e) likely does not apply because language in Rule 1:27-2 limits representation to the employer organization only. I have talked with many New Jersey licensed attorneys about this interpretation (including other faculty for the mandatory Rule 1:27-2 course) and until recently no one has expressed a contrary view about the more limiting effect of Rule 1:27-2 when compared to RPC 1.13(e).

A corporation with at least one attorney who attended the mandatory Rule 1:27-2 course has recently asked me whether the above relationship I have been describing between Rule 1:27-2 and RPC 1.13 is correct. Upon reflection, it seems an appropriate view that Rule 1:27-2 may simply be reaffirming the RPC 1.13(a) position that when representing an organization, the organization and only the organization is the client. Thus, a limited license attorney, just as any attorney at law in New Jersey, is permitted to have certain interactions with constituents under RPC 1.13(a), 1.13(d), and 1.13(e).

I understand the employer of the above cited attorney is submitting comments to your office regarding the issue of representing constituents under Rule 1:27-2.

Discussion of Issue:

RPC 5.5 allows attorneys without a plenary license in New Jersey to practice in the State under limited circumstances. RPC 5.5(b)(2) provides for the practice of in-house counsel who have received a limited license under Rule 1:27-2.

Rule 1:27-2 contains the following language with regard to the scope of practice of a limited license attorney:

"To be eligible to practice law in New Jersey as an in-house counsel, a lawyer must comply with the provisions of this Rule. A limited license issued by the Supreme Court pursuant to this Rule shall authorize the lawyer to practice solely for the designated employer in New Jersey. Except as specifically limited herein, the rules, rights and privileges governing the practice of law in this State shall be applicable to a lawyer admitted under this Rule. (emphasis added)

"(a) In-House Counsel Defined. In-House Counsel is a lawyer who is employed in New Jersey for a corporation, a partnership, association, or other legal entity (taken together with its respective parents, subsidiaries, and affiliates) authorized to transact business in this State that is not itself engaged in the practice of law or the rendering of legal services outside such organization, whether for a fee or otherwise, and does not charge or collect a fee for the representation or advice other than to entities comprising such organization.

"(b) Requirements. All applications under this Rule are to be submitted to the Secretary to the Board of Bar Examiners. An in-house counsel who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may receive a limited license to practice law in this State under the following conditions:

...

"(iii) The applicant certifies that he or she performs legal services in this State solely for the identified employer; and (emphasis added)

"(iv) The employer certifies through an officer, director or general counsel that the applicant is employed as a lawyer for said employer, that the applicant is of good moral character, and that the nature of the employment conforms to the requirements of this Rule." (emphasis added)

This Rule followed Opinion 14 (issued by the Committee on the Unauthorized Practice of Law in 1975). Opinion 14 states that the following is not the unauthorized practice of law when the lawyer:

"1. Is employed solely by such employer.

"2. Confines his legal activities only to the business of such employer and receives his entire compensation only from the employer.

"3. Does not render legal services, for a fee or otherwise, to others, including other employees of this employer, and his employer makes no charge to others for his service.

"4. ..."

In its Supplemental Administrative Determination on Rule 1:27-2, the New Jersey Supreme Court had this to say about the relationship between the Rule and Opinion 14:

" 'Practicing Law' Under Rule 1:27-2. Although the Rule has superseded Opinion 14 of the UPLC as the means by which the Supreme Court is exercising its authority over the practice of law by in-house counsel, the Opinion and the Rule are to be read together in their identification of the activities that come within the scope of an in-house counsel. The limitations on in-house counsel relate to their ability to practice and appear before the courts (and administrative bodies). Rule 1:27-2 and Rule 1:21-1(a) and (c) have to be read together. The new Rule has not expanded the scope of functions in-house counsel could perform under Opinion 14 of the UPLC. It has created a mandatory licensing procedure for the attorneys who perform those functions."

RPC 1.13 provides in part:

"RPC Organization as the Client

"(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purpose of RPC 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. (emphasis added) ...

"(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstanding on their part.

"(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of RPC 1.7. (emphasis added) ..."

Upon my closer examination of the relationship between Rule 1:27-2 and RPC 1.13, it appears entirely plausible that the client-limiting language of Rule 1:27-2 is intended to be the equivalent of RPC 1.13(a) when applied to any attorney who has an organization for a client. It appears the intent of the wording in Rule 1:27-2 was to distinguish the in-house practitioner from the attorney in private practice. The client relationship for the former is determined by the employment contract and the client relationship for the latter is determined by the retention agreement. In the former, the attorney represents only their employer, the organization, and their income is solely paid by the employer. In the latter, the law firm may represent many clients at once, receiving income from all these clients, subject to various rules of law, ethics and prudence. In this sense, the practice of in-house counsel is more limited that the private lawyer. However, a fair interpretation of the client language in Rule 1:27-2 should allow full application of RPC 1.13 to the in-house attorney practicing under Rule 1:27-2. There are several reasons for this.

First, if RPC 1.13(a) does not apply to a Rule 1:27-2 in-house counsel, than interactions between a limited license in-house counsel and constituents (or at least the litigation control group) may not be protected by privilege and prohibitions against *ex parte* communications. Second, as counsel must work with constituents who speak and act for the organization and there will often be a nexus of interests between an organization and its constituents, it seems very difficult to always be able to draw the line between the organization and the constituent. The sanction for improperly drawing this line would be charges for the unauthorized practice of law. Third, there is longstanding rationale why the courts allow joint representation of an organization and a constituent. The protection built into RPC 1.13(e) (and other RPCs) is that the representation of the constituent must involve informed consent and otherwise be screened or cleared of any conflicts pursuant to RPC 1.7.

RPC 1.13 (especially when compared to the ABA Model Rule 1.13) makes it clear that when an attorney represents an organization, the attorney solely represents the organization. Despite this admonition, for various reasons that have developed under law for years and decades (whether in New Jersey or under the comparable Model Rule), RPC 1.13 does allow a limited attorney-client relationship between a constituent and the attorney. That same reasoning should apply to in-house counsel licensed under Rule 1:27-2 and allow such counsel to represent constituents in limited circumstances.

I am only aware of one interpretation of RPC 5.5(b)(2) and RPC 1:27-2 when it comes to defining the scope of practice of in-house counsel. This was issued by the Advisory Committee on Professional Ethics on November 30, 2006. I am unaware, however, of the extent of any analysis of the history of the language in Rule 1:27-2 or whether the Committee even considered the relationship of the Rule to RPC 1.13.

The language from Opinion 14 cited above potentially adds one additional element to the discussion: that in-house counsel not work for any other employees of the employer organization. However, it appears that this language may no longer be operative. In the New Jersey Supreme Court's Supplemental Administrative Determination (cited above), the Court states, on the one hand, that the Rule has superseded Opinion 14 but, on the other hand, indicates that Opinion 14 and Rule 1:27-2 "are to be read together in their identification of the activities that come within the scope of an in-house counsel." Arguably, as to the issue of the relationship between Rule 1:27-2 and RPC 1.13, Rule 1:27-2 has superseded Opinion 14. If that is the case, the fact that the "employee" language from Opinion 14 has been removed from the language adopted in Rule 1:27-2 adds strong support to the argument that Rule 1:27-2 licensed attorneys may represent constituents in limited circumstances and that Rule 1:27-2 and RPC 1.13 must be read to be consistent and equal.

Lastly, please note that the language of RPC 1.13(a) cited above contemplates that an attorney subject to RPC 1.13 will be employed by his/her organizational client. Thus, it appears that the drafters of RPC 1.13 have already accounted for the in-house lawyer being subject to the provisions of the RPC.

Conclusion:

In-house counsel licensed under Rule 1:27-2 are subject to disciplinary actions of the Supreme Court and are subject to its Rules of practice and the RPCs. Therefore, RPC 1.13 should apply to Rule 1:27-2 licensed attorneys the same as all the other rules. Unless the Supreme Court expressly intended to limit the scope of practice for Rule 1:27-2 attorneys when compared to RPC 1.13, Rule 1:27-2 should be clarified to be read consistent with RPC 1.13 and thus not prevent application of RPC 1.13(a), 1.13(d), and 1.13(e) to the interactions between constituents and the limited license in-house counsel. This clarification could be issued through any combination of an administrative determination, an amendment to Rule 1:27-2, or an amendment to Opinion 14.

I appreciate the opportunity to submit these views to your office.

Sincerely,

Lee Braem, Esq.

cc: Stephen W. Townsend

Attachment G

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April 16, 2007

RECEIVED
APR 16 2007
PHILIP S. CARCHMAN, JAD
ACTING ADMIN. DIRECTOR

Via Hand Delivery

Philip S. Carchman, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Professional Responsibility Rules Committee

Dear Judge Carchman:

I am writing on behalf of UBS Financial Services, Inc. ("UBS"), a major financial services company based in New York with a substantial presence in Weehawken. For the reasons set forth below, UBS requests that the Supreme Court consider a circumscribed expansion of the scope of legal work that may be performed by in-house attorneys under the limited license provision of R. 1:27-2. This issue was not among the issues addressed by the Professional Responsibility Rules Committee in its Report of February 2007.

The proposed revision would permit in-house attorneys in the limited context of the securities industry to represent employees as well as the company itself in certain administrative and regulatory settings that do not involve New Jersey law. UBS respectfully submits that the proposed representation would afford to the affected employees the benefit of representation by attorneys expert in the relevant law and thoroughly familiar with the issues involved. By virtue of the extraordinary context in which these securities matters arise, the proposed representation would not raise concerns that might arise when in-house attorneys represent corporate employees in other settings. A summary of the current rules, the special considerations that govern the securities industry and the proposed revision is set forth below.

The Current Rules and the Limited License

The limited license for in-house attorneys constitutes an exception to the normal prohibition on legal practice in New Jersey by attorneys not fully admitted to practice. RPC 5.5(b)(2) provides:

> A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia . . . may engage in the lawful practice of law in New Jersey only if . . . (2) the lawyer is an in-house counsel and complies with R. 1:27-2.

R. 1:27-2 requires the in-house lawyer seeking a limited license to certify that he or she will perform legal services in New Jersey "*solely for*" the Company. (R. 1:27-2(b)(iii)) (emphasis added). R. 1:27-2(b)(iv) requires the Company to certify that the in-house lawyers meet this requirement. The comments to the court rules do not address the scope of the legal representation that may be undertaken by an attorney holding a limited license. There is no New Jersey case law interpreting the scope of representation under the limited license provision established by R. 1:27-2 and RPC 5.5, which is just over three years old.

On September 7, 2007, UBS submitted to the Advisory Committee on Professional Ethics ("ACPE") a Request for a Formal Opinion seeking a ruling with respect to the proposed representation. By letter dated November 30, 2006, the ACPE responded to UBS's inquiry. Quoting the language of R. 1:27-2, the ACPE responded that the Rule "does not permit in-house counsel to represent agents or employees of their employer." Ltr. at 2. It further noted that Rule of Professional Conduct 5.5(b)(2) does not expand the provisions of R. 1:27-2 to permit in-house counsel to represent anyone other than the in-house lawyer's "designated employer." Id.

Thus, as currently drafted, the limited license provision is construed by the ACPE to permit an in-house attorney to represent only the corporation for which he or she works. The rule draws a stark distinction between the company and its employee who may be identified with the employer as the subject of inquiries and claims. That rule serves an important purpose if the proposed representation by a New Jersey-based in-house attorney involved New Jersey clients, entailed appearances in New Jersey courts or implicated New Jersey law. However, in the case of the securities attorneys at issue here, the opposite is true: corporate employees, faced with inquiries and claims bearing no nexus to New Jersey, can be served most effectively by in-house attorneys who are expert in the relevant law and factual context in which those inquiries and claims arise.

Moreover, as presently construed, R. 1:27-2 does not permit lawyers practicing pursuant to a limited license to conduct the representation contemplated by RPC 1:13(e). That rule permits an attorney for an organization to concurrently represent its employees if the attorney complies with the conflict and waiver provisions of RPC 1.7. The proposed revision would permit in-house attorneys in the securities field to represent clients as permitted by RPC 1.13.

The Unique Setting of the Securities Industry

The circumstances that prompt UBS's request are extraordinary. Its in-house counsel are uniquely qualified to effectively represent UBS's employees, along with the company itself, in the proceedings at issue. UBS respectfully submits that these circumstances warrant a narrow exception to the bar upon the representation of individuals by in-house attorneys practicing under a limited license. Such an exception would permit UBS, and similarly situated companies, to base high-level in-house lawyers in New Jersey rather than in New York or other locations.

The in-house attorneys are fully admitted in jurisdictions other than New Jersey. The matters at issue arise under the federal securities laws, Securities Act of 1933, 15 U.S.C. §§ 78a *et seq.*, Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.*, the rules of the securities self-regulatory organizations ("SROs") (New York Stock Exchange (the "NYSE"), National Association of Securities Dealers (the "NASD"), etc.) and the securities and anti-fraud provisions of numerous states other than New Jersey. Those matters typically involve claims about whether specific conduct of particular employees in connection with the sale or disposition of a security violates federal or other states' laws, or the rules of self-regulatory organizations. Some consist only of an informal or formal request for documents; others proceed to telephone or live interviews or administrative proceedings. In all cases in which the in-house attorney would represent employees as well as the company, appropriate conflict waivers are obtained.

These proceedings are not venued in New Jersey. The regulatory and other entities involved in matters at issue are outside of New Jersey. The inquiries come from the offices of the U.S. Securities & Exchange Commission (the "SEC") in Washington or in New York, from the NYSE, from the NASD, which has offices throughout the country, or from state agencies, other stock exchanges or self-regulatory organizations ("SRO's") that are also located outside of New Jersey. The individual employees in question lack any nexus to New Jersey; they work at Company offices located in other states and reside outside of New Jersey.

Given the lack of a connection between New Jersey and the matters in question, any appearances by the in-house lawyers in the matters that are the subject of this request take place outside of New Jersey. The vast majority of counsel appearances In regulatory matters take place at the offices of the SEC in New York or Washington, or the offices of the NYSE or the NASD in New York. Some appearances take place at branch offices of the SEC or locations for NYSE or NASD testimony around the country. In a telephone interview in which a New Jersey-based in-house lawyer would participate, the employee might be in Tennessee or Kansas, and the lawyer representing the regulator might be in New York or Washington, D.C.

Thus, an in-house lawyer's representation of a non-New Jersey UBS employee who is the subject of a regulatory inquiry or customer claim would not require an appearance in a New Jersey forum or familiarity with New Jersey substantive or procedural law. Such a representation would permit the employee the most expert counsel available, and send a positive message to the regulator about the company's support of the employee by virtue of the dual representation.

The Proposed Revision to Rule 1:27-2

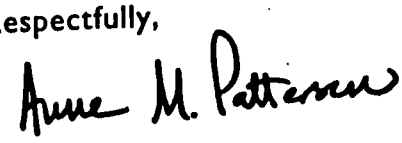
The issue raised by UBS could be addressed by means of a simple revision to R. 1:27-2, as follows:

> 1:27-2(b) . . . An in-house counsel who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may receive a limited license to practice law in this State under the following conditions:
>
> * * *
>
> (iii) the applicant certifies that he or she performs legal services in this State solely for the identified employer, or, in the case of in-house attorneys employed in the securities industry, that he or she performs legal services in the State solely for the identified employer and employees who are identified with the employer as the subject or potential subject of regulatory proceedings or claims initiated in jurisdictions other than New Jersey.

RPC 5.5, which cross-references R. 1:27-2, would require no revision. No other Rules of General Application or Rules of Professional Responsibility would be affected.

UBS respectfully requests that the Supreme Court consider the proposed revision. We would appreciate the opportunity to submit a brief addressing the legal, ethical and policy considerations raised by this request at the appropriate time. Thank you for your consideration.

Respectfully,



Anne M. Patterson

AMP/dt

cc: Stephen W. Townsend,
Clerk, New Jersey Supreme Court
Lee Braem, Esq.
Ilene B. Marquardt, Esq.

3748220.1

Attachment H

NEW JERSEY STATE BAR ASSOCIATION

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November 29, 2007

Honorable Stuart Rabner
Office of the Chief Justice
Hughes Justice Complex
P.O. Box 023
Trenton, NJ 08625-0023

RECEIVED
2007 DEC -5 A 10: 52
SUPREME COURT
CLERK'S OFFICE

RE: ABA Model Court Rule Easing Practice Restrictions During Disasters

Dear Chief Justice Rabner:

On behalf of the New Jersey State Bar Association, I respectfully urge the Supreme Court of New Jersey to adopt the ABA Model Court Rule on the Provision of Legal Services Following Determination of Major Disaster.

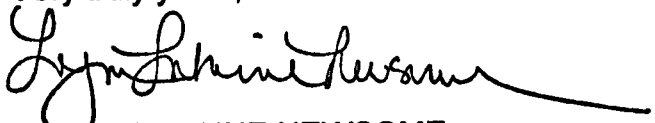
Attached please find ABA House of Delegates Report No. 104 adopted on February 12, 2007 which provides two methods for authorizing the provision of legal services following the determination of a major disaster. This proposal was developed in the wake of events which occurred concerning Hurricane Katrina in which a mass evacuation of the region occurred and surrounding judicial and legal resources were indefinitely suspended. The first method is via court rule and the second is by amending the unauthorized practice of law rules. The NJSBA was a cosponsor of this report. We believe that the adoption of this proposal would enhance New Jersey's preparedness in dealing with a major regional disaster by creating a mechanism to instantly provide legal resources once the Supreme Court had designated that a major disaster had occurred. It also would place on notice surrounding state providers of legal services that New Jersey was one of those jurisdictions who have adopted the ABA rule allowing limited licensure in the event of a major disaster.

As you may know, the NJSBA has raised this issue with the Supreme Court at its two most recent meetings. The association delayed formal submission to the Court to enable members of the Regional Task Force on Emergency Preparedness and Disaster Planning to examine the ABA proposal and determine if changes needed to be made to accommodate concerns raised by the group. That Task Force, established after the NJSBA's Summit on Disaster Planning last spring, consists of representatives from the mid-Atlantic state bar associations and major city bar associations. After about eight months of operation, the Regional Task Force has concluded that such "fine tuning" is not necessary and New York formally submitted the proposal to its Court of Appeals for

adoption this summer.

Thank you for your attention to this important matter. Please contact me if you have any questions regarding this or any other issues involving the practice of law in New Jersey.

Very truly yours,



LYNN FONTAINE NEWSOME
President

c: Hon. Philip S. Carchman
Stephen W. Townsend
Theodore J. Fetter
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Holly Barbera
Peggy Sheahan Knee
Wayne J. Positan
Kevin P. McCann
Brian S. Montag
Charles J. Hollenbeck
Sharon A. Balsamo
D. Todd Sidor

REVISED REPORT 104
January 29, 2007

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON CLIENT PROTECTION
SANTA CLARA COUNTY BAR ASSOCIATION
SECTION OF DISPUTE RESOLUTION
COMMISSION ON LAW AND AGING
COUNCIL ON RACIAL AND ETHNIC JUSTICE
SENIOR LAWYERS DIVISION
STANDING COMMITTEE ON LAW AND NATIONAL SECURITY
CENTER FOR RACIAL AND ETHNIC DIVERSITY
WASHINGTON STATE BAR ASSOCIATION
NATIONAL ORGANIZATION OF BAR COUNSEL
SECTION OF SCIENCE AND TECHNOLOGY LAW
STANDING COMMITTEE ON PRO BONO AND PUBLIC SERVICE
NEW JERSEY STATE BAR ASSOCIATION
OHIO STATE BAR ASSOCIATION
SECTION OF INTELECTUAL PROPERTY LAW
BAR ASSOCIATION OF SAN FRANCISCO
GENERAL PRACTICE, SOLO AND SMALL FIRM DIVISION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, That the American Bar Association adopts the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*, dated February 2007.

FURTHER RESOLVED, That the American Bar Association amends Comment [14] to Rule 5.5 of the *Model Rules of Professional Conduct.*

Model Court Rule on Provision of Legal Services Following Determination of Major Disaster
(February 2007)

RULE ___. PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER

(a) ***Determination of existence of major disaster.*** **Solely for purposes of this Rule, this Court shall determine when <u>an emergency affecting the justice system, as a result of a natural or other major disaster,</u> ~~a major disaster~~ has occurred in:**

(1) this jurisdiction and whether the emergency ~~conditions~~ caused by the major disaster affects the entirety or only a part of this jurisdiction, or

(2) another jurisdiction but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction. The authority to engage in the temporary practice of law in this jurisdiction pursuant to paragraph (c) shall extend only to lawyers who principally practice in the area of such other jurisdiction determined to have suffered a major disaster causing an emergency affecting the justice system and the provision of legal services.

(b) *Temporary practice in this jurisdiction following major disaster.* Following the determination of an emergency affecting the justice system ~~major disaster~~ in this jurisdiction pursuant to paragraph (a) of this Rule, or a determination that persons displaced by a major disaster in another jurisdiction and residing in this jurisdiction are in need of pro bono services and the assistance of lawyers from outside of this jurisdiction is required to help provide such assistance, a lawyer authorized to practice law in another United States jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Such legal services must be provided on a *pro bono* basis without compensation, expectation of compensation or other direct or indirect pecuniary gain to the lawyer. Such legal services shall be ~~supervised by a lawyer authorized to practice law in this jurisdiction and~~ assigned and supervised through an established not-for-profit bar association, *pro bono* program or legal services program or through such organization(s) specifically designated by this Court.

(c) *Temporary practice in this jurisdiction following major disaster in another jurisdiction.* Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.

(d) *Duration of authority for temporary practice.* The authority to practice law in this jurisdiction granted by paragraph (b) of this Rule shall end when this Court determines that the conditions caused by the major disaster in this jurisdiction have ended except that a lawyer then representing clients in this jurisdiction pursuant to paragraph (b) is authorized to continue the provision of legal services for such time as is reasonably necessary to complete the representation, but the lawyer shall not thereafter accept new clients. The authority to practice law in this jurisdiction granted by paragraph (c) of this Rule shall end [60] days after this Court declares that the conditions caused by the major disaster in the affected jurisdiction have ended.

(e) Court appearances. The authority granted by this Rule does not include appearances in court except:

(1) pursuant to that court's *pro hac vice* admission rule and, if such authority is granted, any fees for such admission shall be waived; or

(2) if this Court, in any determination made under paragraph (a), grants blanket permission to appear in all or designated courts of this jurisdiction to lawyers providing legal services pursuant to paragraph (b). If such an authorization is included, any *pro hac vice* admission fees shall be waived.

(f) *Disciplinary authority and registration requirement.* Lawyers providing legal services in this jurisdiction pursuant to paragraphs (b) or (c) are subject to this Court's disciplinary authority and the *Rules of Professional Conduct* of this jurisdiction as provided in Rule 8.5 of the *Rules of Professional Conduct.* Lawyers providing legal services in this jurisdiction under paragraphs (b) or (c) shall, within 30 days from the commencement of the provision of legal services, file a registration statement with the Clerk of this Court. The registration statement shall be in a form prescribed by this Court. Any lawyer who provides legal services pursuant to this Rule shall not be considered to be engaged in the unlawful practice of law in this jurisdiction.

(g) *Notification to clients.* Lawyers authorized to practice law in another United States jurisdiction who provide legal services pursuant to this Rule shall inform clients in this jurisdiction of the jurisdiction in which they are authorized to practice law, any limits of that authorization, and that they are not authorized to practice law in this jurisdiction except as permitted by this Rule. They shall not state or imply to any person that they are otherwise authorized to practice law in this jurisdiction.

Comment

[1] A major disaster in this or another jurisdiction may **cause an emergency affecting the justice system with respect to the provision of legal services** for a sustained period of time interfere**ing** with the ability of lawyers admitted and practicing in the affected jurisdiction to continue to represent clients until the disaster has ended. When this happens, lawyers from the affected jurisdiction may need to provide legal services to their clients, on a temporary basis, from an office outside their home jurisdiction. In addition, lawyers in an unaffected jurisdiction may be willing to serve residents of the affected jurisdiction who have unmet legal needs as a result of the disaster or, though independent of the disaster, whose legal needs temporarily are unmet because of disruption to the practices of local lawyers. Lawyers from unaffected jurisdictions may offer to provide these legal services either by traveling to the affected jurisdiction or from their own offices or both, provided the legal services are provided on a *pro bono* basis through an authorized not-for-profit entity or such other organization(s) specifically designated by this Court. A major disaster includes, for example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event caused by terrorists or acts of war.

[2] Under paragraph (a)(1), this Court shall determine whether a major disaster **causing an emergency affecting the justice system** has occurred in this jurisdiction, or in a part of this jurisdiction, for purposes of triggering paragraph (b) of this Rule. This Court may, for example, determine that the entirety of this jurisdiction has suffered a ~~major disaster~~ **disruption in the provision of legal services** or that only certain areas have suffered such an event. The authority granted by paragraph (b) shall extend only to lawyers authorized to practice law and not disbarred, suspended from practice or otherwise restricted from practice in any other manner in any other jurisdiction.

[3] Paragraph (b) permits lawyers authorized to practice law in an unaffected jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, to provide pro bono legal services to residents of the affected jurisdiction following determination of **an emergency caused by** a major disaster; notwithstanding that they are not otherwise authorized to practice law in the affected jurisdiction. Other restrictions on a lawyer's license to practice law that would prohibit that lawyer from providing legal services pursuant to this Rule include, but are not limited to, probation, inactive status, disability inactive status or a non-disciplinary administrative suspension for failure to complete continuing legal education or other requirements. Lawyers on probation may be subject to monitoring and specific limitations on their practices. Lawyers on inactive status, despite being characterized in many jurisdictions as being "in good standing," and lawyers on disability inactive status are not permitted to practice law. Public protection warrants exclusion of these lawyers from the authority to provide legal services as defined in this Rule. Lawyers permitted to provide legal services pursuant to this Rule must do so without fee or other compensation, or expectation thereof. Their service must be provided through an established not-for-profit organization that is authorized to provide legal services either in its own name or that provides representation of clients through employed or cooperating lawyers. Alternatively, this court may instead designate other specific organization(s) through which these legal services may be rendered. Under paragraph (b), an *emeritus* lawyer from another United State jurisdiction may provide *pro bono* legal services on a temporary basis in this jurisdiction provided that the *emeritus* lawyer is authorized to provide *pro bono* legal services in that jurisdiction pursuant to that jurisdiction's *emeritus* or *pro bono* practice rule. Lawyers may also be authorized to provide legal services in this jurisdiction on a temporary basis under Rule 5.5(c) of the *Rules of Professional Conduct.*

[4] Lawyers authorized to practice law in another jurisdiction, who principally practice in the area of such other jurisdiction determined by this Court to have suffered a major disaster, and whose practices are disrupted by a major disaster there, and who are not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, are authorized under paragraph (c) to provide legal services on a temporary basis in this jurisdiction. Those legal services must arise out of and be reasonably related to the lawyer's practice of law in the affected jurisdiction. For purposes of this Rule, the determination of a major disaster in another jurisdiction should first be made by the highest court of appellate jurisdiction in that jurisdiction. For the meaning of "arise out of and reasonably related to," see Rule 5.5 Comment [14], *Rules of Professional Conduct.*

[5] **Emergency** ~~C~~conditions created by major disasters end, and when they do, the authority created by paragraphs (b) and (c) also ends with appropriate notice to enable lawyers to plan and to complete pending legal matters. Under paragraph (d), this Court determines when those conditions end only for purposes of this Rule. The authority granted under paragraph (b) shall end upon such determination except that lawyers assisting residents of this jurisdiction under paragraph (b) may continue to do so for such longer period as is reasonably necessary to complete the representation. The authority created by paragraph (c) will end [60] days after this Court makes such a determination with regard to an affected jurisdiction.

[6] Paragraphs (b) and (c) do not authorize lawyers to appear in the courts of this jurisdiction. Court appearances are subject to the *pro hac vice* admission rules of the particular court. This Court may, in a determination made under paragraph (e)(2), include authorization for lawyers who provide legal services in this jurisdiction under paragraph (b) to appear in all or

designated courts of this jurisdiction without need for such *pro hac vice* admission. If such an authorization is included, any *pro hac vice* admission fees shall be waived. A lawyer who has appeared in the courts of this jurisdiction pursuant to paragraph (e) may continue to appear in any such matter notwithstanding a declaration under paragraph (d) that the conditions created by major disaster have ended. Furthermore, withdrawal from a court appearance is subject to Rule 1.16 of the *Rules of Professional Conduct.*

[7] Authorization to practice law as a foreign legal consultant or in-house counsel in a United States jurisdiction offers lawyers a limited scope of permitted practice and may therefore restrict that person's ability to provide legal services under this Rule.

[8] The ABA National Lawyer Regulatory Data Bank is available to help determine whether any lawyer seeking to practice in this jurisdiction pursuant to paragraphs (b) or (c) of this Rule is disbarred, suspended from practice or otherwise subject to a public disciplinary sanction that would restrict the lawyer's ability to practice law in any other jurisdiction.

ABA RULES OF PROFESSIONAL CONDUCT

(Deletions are ~~stricken through~~; additions are in **bold** and **underlined**.)

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment

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

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

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

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

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

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

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

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

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

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

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

in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

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

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. **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.***

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

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

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

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

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

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

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

REPORT

BACKGROUND

In the summer of 2005, Alabama, Louisiana and Mississippi were devastated by Hurricanes Katrina and Rita. The physical damage done in those jurisdictions was catastrophic but the storms also damaged and crippled their legal systems. In response, then American Bar Association President Michael S. Greco formed the ABA Task Force on Hurricane Katrina (the "Task Force"). One of the most significant early efforts of the Task Force was advocating the suspension of unlicensed practice of law rules by various states impacted by the hurricane so that lawyers from other jurisdictions could volunteer to provide pro bono legal services in the affected jurisdictions.[1]

The Task Force soon recognized the need for a model rule that would allow out-of-state lawyers to provide pro bono legal services in an affected jurisdiction and lawyers in the affected jurisdiction whose legal practices had been disrupted by a major disaster to practice law on a temporary basis in an unaffected jurisdiction. Both the highest court of a jurisdiction affected by the major disaster and the highest courts of jurisdictions not affected by the disaster could implement the Rule on an emergency basis. In February 2006, the Task Force approached the ABA Coordinating Council for the Center for Professional Responsibility and requested assistance in drafting such a model rule. In light of its jurisdictional statement that includes the multijurisdictional practice of law and the unlicensed practice of law, the Standing Committee on Client Protection (the "Committee") agreed to undertake the project.

[1] *In the Wake of the Storm: The ABA Responds to Hurricane Katrina.* Report of the ABA Task Force on Hurricane Katrina. www.abanet.org/katrina

With the assistance of Professor Stephen Gillers, Chair of the ABA Joint Committee on Lawyer Regulation and former member of the Commission on Multijurisdictional Practice, the Committee spent the next several months researching the issues and the law and preparing drafts of model rules. On September 6, 2006, the Committee circulated for comment to all ABA entities and other interested parties a proposed new Model Rule of Professional Conduct 5.8 (Provision of Legal Services Following Determination of Catastrophic Event) and a Model Court Rule with the same title. The ABA entities and other interested parties were requested to comment on the substance of the Model Rule/Model Court Rule and whether the topic should be addressed in a Model Rule of Professional Conduct or in a Model Court Rule.[2]

It was the consensus of the responding entities, including the Standing Committee on Ethics and Professional Responsibility, that the issues to be addressed were administrative matters involving the temporary practice of law and that they should be addressed in a Model Court Rule. The Standing Committee on Ethics and Professional Responsibility believes that the proposed Model Court Rule, if adopted, would effectively facilitate the provision of legal services in urgent situations, such as the occurrence of natural disasters. The Ethics Committee also believes that because the creation of a mechanism for making legal services available is not an ethical, but essentially an administrative and operational concern of each state's highest court, it is appropriate that the subject be addressed by a Model Court Rule, rather than a Rule of Professional Conduct, and supports its adoption by the House of Delegates. The Ethics Committee agrees that proposed amended Comment [14] to Model Rule of Professional Conduct 5.5, which serves as an important cross-reference to any such rule of court, is a necessary and helpful addition to the Model Rules, and supports its adoption by the House of Delegates as well.

Model Court Rule on Provision of Legal Services Following Determination of Major Disaster

An emergency affecting the justice system, as a result of a natural or other major disaster, may for a sustained period of time interfere with the ability of lawyers admitted and practicing in the affected jurisdiction to continue to represent clients until the disaster has ended. A natural or other major disaster includes, for example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event caused by terrorists or acts of war. When this happens, lawyers from the affected jurisdiction may need to provide legal services to their clients, on a temporary basis, from an office outside their home jurisdiction. In addition, lawyers in an unaffected jurisdiction may be willing to serve residents of the affected jurisdiction who have unmet legal needs as a result of the disaster or whose legal needs temporarily are unmet because of disruption to the practices of local lawyers.

Lawyers from unaffected jurisdictions may offer to provide these legal services either by traveling to the affected jurisdiction or from their own offices or both, provided the legal services

[2] The Committee received comments from numerous ABA entities including: the Standing Committees on Ethics and Professional Responsibility, Professional Discipline, Professionalism, Pro Bono and Public Service, Legal Aid and Indigent Defendants, Delivery of Legal Services, the Commissions on Interest on Lawyers' Trust Accounts and Law and Aging, the Task Force on GATS Legal Services Negotiations, the National Organization of Bar Counsel and the Association of Corporate Counsel.

are provided on a pro bono basis through an authorized not-for-profit legal services organization or such other organizations specifically designated by the highest court of the affected jurisdiction.

Under the Model Court Rule, the highest court in the affected jurisdiction shall determine whether an emergency affecting the justice system as a result of a natural or other major disaster has occurred in the jurisdiction, or in a part of the jurisdiction, for purposes of triggering paragraph (b) of the Model Court Rule. The regulation of the practice of law by the judicial branch of government, which includes jurisdictional limits on legal practice, is a fundamental principle recently re-affirmed as policy by the American Bar Association.[3] The court in making a determination whether an emergency affecting the justice system has occurred can take judicial notice of any Presidential proclamations or declarations by the governor or executive officer of an affected jurisdiction.

Paragraph (b) permits lawyers authorized to practice law in an unaffected jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, to provide pro bono legal services to residents of the affected jurisdiction following determination of an emergency affecting the justice system and the provision of legal services. Lawyers permitted to provide legal services pursuant to this Model Court Rule must do so without fee or other compensation, or expectation thereof. Their service must be provided through an established not-for-profit organization that is authorized to provide legal services either in its own name or that provides representation of clients through employed or cooperating lawyers. The rules governing the not-for-profit organization will determine who should be considered an eligible client in light of the circumstances caused by the disaster.

Alternatively, the Court may instead designate other specific organizations through which these legal services may be rendered. Under paragraph (b), an emeritus lawyer from another United State jurisdiction may provide pro bono legal services on a temporary basis in this jurisdiction provided that the emeritus lawyer is authorized to provide pro bono legal services in that jurisdiction pursuant to that jurisdiction's emeritus or pro bono practice rule. Lawyers may also be authorized under paragraph (b) of this Rule to provide legal services on a temporary basis in an affected jurisdiction, or to provide legal services on a pro bono basis to the citizens of an affected jurisdiction who have been displaced to and are temporarily residing in an unaffected jurisdiction.~~, under Rule 5.5(c) of the Rules of Professional Conduct.~~

Lawyers authorized to practice law in an affected jurisdiction, as determined by the highest court of the affected jurisdiction, and whose practices are disrupted by a major disaster there, are authorized under paragraph (c) to provide legal services on a temporary basis in the jurisdiction adopting the Model Court Rule. Those legal services must arise out of and be reasonably related to the lawyer's practice of law in the affected jurisdiction. The Court in the affected jurisdiction shall determine when a major disaster has occurred in another jurisdiction but only after such a determination and the geographical scope of the disaster have been made by the highest court of that other jurisdiction. The authority to engage in the temporary practice of law in an unaffected jurisdiction pursuant to paragraph (c) shall extend only to those lawyers who principally practice

[3] Report 201A, *Regulation of the Practice of Law by the Judiciary*, adopted August 12, 2002.

467 in the area of a jurisdiction determined to have suffered an emergency affecting the justice
468 system and the provision of legal services.
469
470 Emergency conditions created by major disasters end, and when they do, the authority created by
471 the Model Court Rule also ends with appropriate notice to enable lawyers to plan and to
472 complete pending legal matters. Under paragraph (d), the highest court in the affected
473 jurisdiction determines when those conditions end only for purposes of the Model Court Rule.
474 The authority granted under paragraph (b) shall end upon such determination except that lawyers
475 assisting residents of the affected jurisdiction under paragraph (b) may continue to do so for such
476 longer period as is reasonably necessary to complete the representation. The authority created by
477 paragraph (c) will end 60 days, or as otherwise enacted in the Rule, after the highest court in an
478 unaffected jurisdiction makes such a determination with regard to an affected jurisdiction. The
479 parameters created by the Model Court Rule are intended to be flexible and the highest court in a
480 jurisdiction has the discretion to extend the time period during which out-of-state lawyers may
481 provide pro bono legal services in an affected jurisdiction or during which lawyers displaced by
482 a disaster may practice law on a temporary basis in an unaffected jurisdiction.
483
484 Paragraphs (b) and (c) do not authorize lawyers to appear in the courts of the affected
485 jurisdiction. Court appearances are subject to the *pro hac vice* admission rules of the particular
486 court. The highest court may, in a determination made under paragraph (e)(2), include
487 authorization for lawyers who provide legal services in the jurisdiction under paragraph (b) to
488 appear in all or designated courts of the jurisdiction without need for such *pro hac vice*
489 admission. If such an authorization is included, any *pro hac vice* admission fees shall be waived.
490 A lawyer who has appeared in the courts of an affected jurisdiction pursuant to paragraph (e)
491 may continue to appear in any such matter notwithstanding a declaration under paragraph (d) that
492 the conditions created by the major disaster have ended. Furthermore, withdrawal from a court
493 appearance is subject to Rule 1.16 of the Rules of Professional Conduct.
494
495 **AMENDMENT TO COMMENTARY OF RULE 5.5 OF THE *RULES OF PROFESSIONAL CONDUCT***
496
497 Following the occurrence of a major disaster, lawyers practicing law outside the affected
498 jurisdiction will begin to research what legal services they may provide on a temporary basis to
499 the citizens of the affected jurisdiction. In addition, not-for-profit legal organizations within the
500 affected jurisdiction will begin to research what legal services out-of-state lawyers may provide
501 in their jurisdiction on a temporary basis. At some point, the lawyers and not-for-profit
502 organizations will consult the *Rules of Professional Conduct*. While Rule 5.5 of the *Rules of*
503 *Professional Conduct* is titled "Unauthorized Practice of Law: Multijurisdictional Practice of
504 Law," Rule 5.5 does not directly address the provision of pro bono legal services by out-of-state
505 lawyers in a jurisdiction affected by a major disaster nor does it address the temporary practice of
506 law in an unaffected jurisdiction by displaced lawyers principally practicing in the affected
507 jurisdiction. The *Model Court Rule on Provision of Legal Services Following Determination of*
508 *Major Disaster* does address these issues. Upon the suggestion of the Standing Committee on
509 Ethics and Professional Responsibility, whose jurisdictional statement includes recommending to
510 the ABA House of Delegates amendments to the *Rules of Professional Conduct*, the Committee
511 recommends that Comment [14] to Rule 5.5 of the *Rules of Professional Conduct* be amended to

include a cross-references to the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.*

CONCLUSION

Following Hurricanes Katrina and Rita, thousands of lawyers from across the United States were inspired to offer their legal expertise on a pro bono basis to the citizens of the affected jurisdictions. Unfortunately, in some instances, the delivery of those pro bono legal services was hampered by the existence of unlicensed practice of law statutes and rules. The Committee believes that the adoption of the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster* will allow lawyers to provide temporary pro bono legal services and that it will allow lawyers whose legal practices have been disrupted by major disasters to continue to practice law on a temporary basis in an unaffected jurisdiction. The Model Court Rule will facilitate the delivery of pro bono legal services while at the same time insuring the proper regulation of the lawyers providing those legal services in an affected jurisdiction and those displaced lawyers practicing law on a temporary basis in an unaffected jurisdiction

Janet Green Marbley, Chair
Standing Committee on Client Protection
February 2007

Attachment I

OFFICE OF ATTORNEY ETHICS

OF THE

SUPREME COURT OF NEW JERSEY

DAVID E. JOHNSON, JR.
Director

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TRENTON, NEW JERSEY 08625
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OFFICE OF DIRECTOR

May 30, 2007

Hon. Stewart G. Pollock, Chair
Supreme Court of New Jersey
Professional Responsibility Rules Committee
P.O. Box 970
Trenton, NJ 08625-0970

Re: Guidelines for Media Coverage of Attorney Disciplinary Hearings

Dear Chair Pollock:

The Office of Attorney Ethics is pleased to respond to the committee's request for input on this important issue. In this regard, we have reviewed the responses filed by five members of district ethics committees. We have also considered our experiences at the Office of Attorney Ethics since its creation in 1983.

Preliminarily, let me address a few issues of background which may be helpful in understanding the unique situation in which hearings are handled in an attorney disciplinary system involving substantial numbers of volunteers. Most attorney disciplinary hearings are handled before three- member panels of volunteer district ethics committees (consisting of two attorneys and one public member). Occasionally, in complex matters, a single special ethics master appointed by the Supreme Court sits to adjudicate cases him or herself. Special masters are either former chairs, vice chairs and secretaries of district ethics committees or former hearing panel chairs, or retired, recalled and, very occasionally, sitting Superior Court judges. The attorney who presents the case is also a volunteer, as is the Committee Secretary. In all cases, the predominant forum for holding hearings is a private law office. Although there are several district ethics committees utilizing courtrooms or administrative rooms, such facilities are not available to most committees.

Occasionally, where the grievant or respondent, or, even rarer, a witness, is incarcerated in a New Jersey penal facility, the hearing is held at the facility and is totally subject to rules and restrictions of the Department of Corrections. Since 1983, we have never attempted to have such an incarcerated individual transported outside the secure penal facility. Security is the number one issue here and we are satisfied that that can only be adequately maintained by having hearings at the facility.

Additionally, costs and logistics are other factors in our policy. Likewise, you can imagine what would happen if the word got around that a prisoner could get "a day out" for a disciplinary hearing.

With the above thoughts in mind, we suggest that generally the "Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey" (as approved October 2003) should apply in attorney disciplinary hearings. Attorney disciplinary hearings are and should be public. Therefore, we begin with the premise that the rules governing regular public court proceedings should apply with exceptions as noted below tailored to the unique features and limitations of the disciplinary system. We believe that the public interest requires public and media access to the attorney disciplinary system, even to the extent of still cameras and audio coverage of disciplinary hearings.

We do, however, suggest the following modifications.

1. Guideline 2A requires "reasonable advance notice" which notice "shall be in writing." We would simply comment that because the attorney disciplinary system relies so heavily on volunteers as opposed to full time personnel who staff the state court system, the attorney disciplinary system will normally need at least three full business days' advance notice in order to adequately communicate with the parties and witnesses in advance of a hearing that has already been scheduled. The committee needs to assess the request in light of the facilities available. A postponement may be required to find suitable accommodations. The presenter and respondent's counsel may also need to communicate with witnesses to alert them so as to avoid a surprise on the day of hearing. In a number of cases, there are multiple witnesses, some with disabilities who may need accommodation and this issue must be considered. Occasionally, there are witnesses from outside of New Jersey who require even longer advance notice. We believe that the media needs to know that such advance notice is required.

   In the absence of adequate advance notice, hearings will most likely be held on the date scheduled and, while the media, just like the public, can attend to the extent that they can be accommodated in the facility originally scheduled, usually a private law office, still cameras will probably not be permitted due to the lack of notice.

2. Television should not be permitted in any attorney disciplinary proceedings. Television cameras are much more invasive and unsettling than still cameras. This may be particularly true with witnesses and grievants in the attorney disciplinary system, many of whom are inexperienced and ill at ease. Moreover, inadmissible statements by witnesses, once televised, cannot be easily deleted from the television recording or transmission. For these reasons, we believe that television should not be allowed.

3. Camera coverage should not be allowed if a protective order has been entered as to all, or a substantial part, of attorney disciplinary proceedings in accordance with R.1:20-9(g).

4. No still pictures of grievants should be permitted either inside the hearing room, outside the hearing room or any place on the property in which the hearing is held, including the

parking area. The PRRC has received a letter dated February 19, 2007, from Seth Ptasiewicz, Esq., Secretary of the District VB (Suburban Essex) Ethics Committee. That letter details the unconscionable intrusion and imposition by a photographer on a grievant, who was the main witness who was to testify at an ethics proceeding. Although the photographer was from one of the largest statewide newspapers in New Jersey, he or she apparently conducted him or herself in a manner more reminiscent of notorious paparazzi. When the grievant balked at being photographed at the hearing, the photographer is alleged to have followed the grievant throughout the building into the parking lot and even out into the street, clicking picture after picture. We believe that this experience should not be visited on any other grievant.

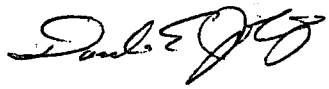
5. The hearing room should be vacated by all parties, except for the panel, special ethics master, presenter or respondent's counsel during breaks and at other times where the panel believes they need to caucus in private, and where it is not convenient for the panel to step out to another room to consult with each other.

6. If the testimony in any disciplinary proceeding will reference any proceeding wherein media coverage is prohibited under Guideline 2c, media coverage of the disciplinary proceeding should, likewise, be prohibited without the necessity of a protective order.

7. Cameras should not be permitted at prison facilities where hearings are held, except as permitted by the Department of Corrections and then, only under the rules and restrictions adopted by that department. However, "reasonable advance notice," as described above, must still be given to the district ethics committee.

8. "(R)easonable advance notice" should be given to the Chair, Vice Chair and Secretary of the District Ethics Committee, the presenter, hearing panel chair and respondent or respondent's counsel.

Very truly yours,



David E. Johnson, Jr.
Director

DEJ/bc
cc: Holly M. Barbera, Esq., Staff to PRRC
John J. Janasie, Esq., First Assistant Ethics Counsel
Paula T. Granuzzo, Esq., Statewide Ethics Coordinator