

## CHAPTER 22

### AN UPDATE ON MULTIJURISDICTIONAL PRACTICE AND ADR

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#### **I. Introduction**

As more and more national and international businesses expand their use of mediation and arbitration, attorneys representing these entities find themselves traveling from state to state representing clients in ADR proceedings.

In the past, state regulation of the practice of law had not kept up with this rapidly changing expansion in the use of ADR proceedings by companies doing business throughout the United States. Most states were slow to make their own legal ethics rules more flexible in permitting out-of-state attorneys to appear intermittently on behalf of clients in mediation and arbitration without becoming licensed in those jurisdictions.<sup>1</sup> To remedy this situation, the American Bar Association

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<sup>1</sup> See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (1998); Kristen M. Blankley, Emily E. Root & John Minter, *Multijurisdictional ADR Practice: Lessons for Litigators*, 11 CARDOZO J. CONFLICT RESOL. 29 (Fall 2009); Rachel B. Cash & Meghan P. Stephens, *The Other Fifty Shades of Gray: Multijurisdictional Practice in Private Arbitrations*, 37 AM. J. TRIAL ADVOC. 1 (Summer 2013); Sarah Rudolph Cole, *Unauthorized Practice of Law Charges: A Risk for Lawyers Representing Clients in Mediation and Arbitration in a Multijurisdictional Practice Environment*, 13 DISP. RESOL. MAG 26 (Fall 2006); Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 – an Interim Assessment*, 43 AKRON. L. REV. 729 (2010); G. Hammond, *Multijurisdictional Practice: An Analysis of the ABA's proposed Changes to Rule 5.5 of the Rules of Professional Conduct*, 26 SETON

(“ABA”) made important additions to its Model Rules of Professional Conduct (“Model Rules”) for states to consider concerning the multijurisdictional practice of law. This article concerns only one aspect of the multijurisdictional practice of law—the rules that apply when a lawyer admitted to practice in one state, occasionally appears in another state to represent a party in a private arbitration (as distinguished from a court-annexed arbitration).

## II. Model Rule 5.5(c)(3)

The highest court in a jurisdiction regulates the practice of law in that jurisdiction. *Pro hac vice* rules permit lawyers to temporarily practice before courts in states where they are not admitted but with few exceptions noted later in this article, these rules do not apply to attorneys representing parties in private arbitration. Thus, courts have granted *pro hac vice* admission to lawyers in individual court cases for some time, but no comparable procedure typically exists in private arbitration.

Disturbing to many was the reaction by some courts to attorneys who travel out of their home jurisdiction to represent clients in arbitration in other states. For example, in 2003, the Florida Supreme Court, in *Florida Bar v. Rapoport*,<sup>2</sup> enjoined Mr. Rapoport, a lawyer licensed to practice in the District of Columbia, from representing parties in securities arbitrations in Florida. Not surprisingly, relying upon an earlier decision,<sup>3</sup> the court found that giving legal advice and performing the traditional tasks of lawyers in arbitration proceedings was “the practice of law.” Rapoport’s situation, however, was not particularly sympathetic as he actually operated a law practice in Florida and advertised in at least one Florida newspaper.

The Florida decision followed by five years the ruling of the California Supreme Court in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*.<sup>4</sup> That decision involved a fee dispute in which an out-of-state law firm, in defending against a claim it had committed legal

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HALL LEG. J. 533 (2002); Harriet Miers, *Recommended Reading: Issues for the Multijurisdictional Lawyer Where Pro Hac Vice Admission Does Not Apply*, ARK. L. NOTES 131 (2001); D. Ryan Nayar, *Unauthorized Practice of Law in Private Arbitral Proceedings: A Jurisdictional Survey*, 6 J. AM. ARB. 1 (2007).

<sup>2</sup> 845 So. 2d 874 (Fla. 2003).

<sup>3</sup> *Florida Bar re Advisory Opinion on Nonlawyer Representation in Sec. Arbitration*, 696 So. 2d 1178 (Fla. 1997).

<sup>4</sup> 949 P.2d 1 (Cal. 1998).

malpractice in California, sought to recover its attorneys' fees. Birbrower, an attorney at the firm, came to California to file a demand for arbitration with the San Francisco office of the American Arbitration Association, and to interview arbitrators; he subsequently returned to California to pursue a settlement of the dispute.

The California Business and Professions Code provided at the time that "[n]o person shall practice law in California unless the person is an active member of the State Bar." Because Birbrower, a New York lawyer, was not admitted in California, the court found he was engaged in the unauthorized practice of law, and therefore could not recover his attorney's fees.<sup>5</sup>

Recognizing the practice of law has taken on a truly national (and indeed, international) dimension, and in response to decisions such as the foregoing, the ABA proposed a solution to the increasing multijurisdictional nature of the practice of law and the periodic need of attorneys to be able to represent their clients outside of their home jurisdiction. The ABA established the Commission on Multijurisdictional Practice to look broadly at this issue and to determine whether special rules should apply to lawyers who travel on occasion to states where they are not licensed to practice law. The Commission determined that such rules were necessary. In its report, the Commission recognized that "lawyers commonly engage in cross-border legal practice," and that "such practice is on the increase." With respect to alternative dispute resolution, the Commission found:

In ADR proceedings as well, it is common for lawyers to render services outside particular states in which they are licensed. Sometimes, the parties choose to conduct the ADR proceeding in

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<sup>5</sup> It is commonly held by courts that representation of a party in an arbitration constitutes the practice of law. *E.g.*, *Matter of Creasy*, 12 P.3d 214 (Ariz. 2002); *Nisha, LLC v. Tribuilt Constr. Group, LLC*, 388 S.W.3d 444 (Ark. 2012); *Doctor's Assocs. Inc. v. Jamieson*, 2006 WL 2348849 (Conn. Super. Ct. July 19, 2006); *Disciplinary Counsel v. Alexicole, Inc.*, 822 N.E.2d 348 (Ohio Sup. Ct. 2004); *contra Prudential Equity Group, LLC v. Ajamie*, 538 F.Supp.2d 605 (S.D.N.Y. 2008) and cases cited in note 49 *infra*. Labor arbitration, however, is viewed differently by the courts. The prevailing rule is that a nonlawyer can represent a party in an arbitration arising from a dispute involving a collective bargaining agreement. *E.g.*, *In re Town of Little Compton*, 37 A.3d 85 (R.I. 2012); CAL. CIV. PRO. CODE § 1282.4 (2015) ("[A]ny party to an arbitration arising under collective bargaining agreements in industries and provisions subject to either state or federal law may be represented in the course of . . . those proceedings by any person, regardless of whether that person is licensed to practice law in this state.").

a state that has no relation to the parties or the dispute, because they prefer a neutral site.

As part of its report, the Commission recommended the adoption of a new rule of professional conduct that would speak to the modern practice of law.

The Commission proposed, and in August 2002, the ABA House of Delegates approved, important amendments to Rule 5.5 of the Model Rules. The amendments addressed the entire subject of multijurisdictional practice, and specifically ADR.<sup>6</sup> The amended rule permits lawyers, on a temporary basis, to represent clients in arbitrations (and mediations and other ADR proceedings) in states where they are not licensed to practice law. The portion of Model Rule 5.5 addressing ADR is in subparagraph (c)(3). It states:

(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

. . . (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. . . .

Model Rule 5.5(c)(3) became a part of the broader revisions to the Model Rules, completed by the ABA's Ethics 2000 Commission in February 2002. Thus, under Model Rule 5.5(c)(3), a lawyer would not run afoul of rules prohibiting the unauthorized practice of law in a jurisdiction if the lawyer is admitted to practice in another jurisdiction and (1) on a temporary basis, (2) represents a party in an arbitration, mediation or other ADR proceeding, (3) that is reasonably related to the lawyer's

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<sup>6</sup> The ABA Center for Professional Responsibility maintains a website that contains a variety of resources on multijurisdictional practice including a chart which tracks each state's implementation of the ABA's multijurisdictional policies: [www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/recommendations.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf); *see also* [www.barreciprocity.com/mjp/](http://www.barreciprocity.com/mjp/).

practice in the jurisdiction where the lawyer is admitted to practice, and (4) the forum's rules do not require *pro hac vice* admission.

### III. State Responses to Model Rule 5.5(c)(3)

Since the release of the ABA's Ethics 2000 Commission report, virtually all of the states have reviewed their own ethics rules for lawyers. Indeed, most states now have addressed multijurisdictional ADR practice issues and Model Rule 5.5(c)(3) has been widely adopted.

This section discusses each state's response to Model Rule 5.5(c)(3). It is important to keep in mind, however, some states that have adopted Model Rule 5.5(c)(3) impose other requirements that must be met by out-of-state attorneys appearing in private arbitrations.

#### *Alabama*

The Alabama Supreme Court, effective September 19, 2006, adopted a rule similar to Model Rule 5.5(c)(3), except it eliminates the requirement that the legal services "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."<sup>7</sup>

#### *Alaska*

Effective April 15, 2009, the Alaska Supreme Court adopted new rules of professional conduct which include an identical version of Model Rule 5.5(c)(3).<sup>8</sup>

#### *Arizona*

In May 2002, a member of the Arizona State Bar Committee on the Rules of Professional Conduct issued an informal opinion<sup>9</sup> concluding that, because the representation of a party in arbitration is the practice of law, a member of the Arizona bar who serves as an arbitrator would be assisting another in the unauthorized practice law if counsel is not admitted as an attorney in Arizona.<sup>10</sup> This informal opinion was short

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<sup>7</sup> [www.judicial.alabama.gov/library/rules\\_bar\\_conduct.cfm](http://www.judicial.alabama.gov/library/rules_bar_conduct.cfm).

<sup>8</sup> [www.courts.alaska.gov/rules/prof.htm#5.5](http://www.courts.alaska.gov/rules/prof.htm#5.5).

<sup>9</sup> Informal Op. Request No. 2191.

<sup>10</sup> Four years later, the State Bar Unauthorized Practice of Law Committee, citing Rule 31(a)(2), Rules of the Arizona Supreme Court, found that an out-of-state attorney

lived, as the Arizona Supreme Court subsequently adopted Model Rule 5.5(c)(3).<sup>11</sup> In addition, the Arizona rule requires lawyers engaged in multijurisdictional practice to advise their clients they are not admitted to law in Arizona and must obtain their client's informed consent to the representation.

### *Arkansas*

Effective May, 1, 2005, the Arkansas Supreme Court adopted a rule identical to Model Rule 5.5(c)(3).<sup>12</sup>

### *California*

Attorneys not admitted to practice in California may represent parties in arbitration proceedings if they prepare an "Out-of State Attorney Arbitration Counsel Certificate" containing information prescribed by statute, obtain the approval of the arbitrator, and file the certificate with the State Bar of California and provide a copy to all parties and counsel in the arbitration.<sup>13</sup>

### *Colorado*

Effective January 1, 2003, the Colorado Supreme Court permitted out-of-state attorneys to practice law in Colorado. Rule 220 of the Colorado Rules of Civil Procedure permits an attorney licensed in another jurisdiction to practice law temporarily in Colorado so long as that attorney has not established domicile in Colorado and the attorney has not established a place for the regular practice of law in Colorado from which the attorney practices "Colorado law" or "accepts Colorado

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representing a party in a securities arbitration was engaged in the practice of law. By then the Arizona Supreme Court adopted Model Rule 5.5(c)(3), and so the Committee concluded the attorney was not engaged in the unauthorized practice of law. UPL 06-04 (April 2006). [www.azbar.org/media/75265/uplaa0604.pdf](http://www.azbar.org/media/75265/uplaa0604.pdf).

<sup>11</sup> [www.azbar.org/Ethics/RulesofProfessionalConduct/ViewRule?id=51](http://www.azbar.org/Ethics/RulesofProfessionalConduct/ViewRule?id=51). Without considering the applicability of Model Rule 5.5(c)(3), the Arizona Court of Appeals held an arbitration award should not be vacated because one of the attorneys participating was not licensed in Arizona. *Nolan v. Kenner*, 230 P.3d 236 (Ariz. Ct. App. 2011).

<sup>12</sup> [www.courts.arkansas.gov/rules-and-administrative-orders/%5Bcurrent%5D-arkansas-rules-of-professional-conduct](http://www.courts.arkansas.gov/rules-and-administrative-orders/%5Bcurrent%5D-arkansas-rules-of-professional-conduct). *Nisha, LLC v. Tribuilt Constr.Group, LLC*, *supra* note 5 (a nonlawyer's representation of a party in an arbitration constitutes the unauthorized practice of law).

<sup>13</sup> See generally CAL. CIV. PROC. CODE §§ 1282-1284.3; see also Rule 9.43, California Rules of Court. [www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9\\_43](http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_43).

clients.”<sup>14</sup> If these conditions are satisfied an out-of-state attorney can periodically represent parties in arbitrations in Colorado.

### *Connecticut*

Effective January 1, 2008, Rule 5.5 of the Connecticut Rules of Professional Conduct was amended to provide that a lawyer who is not admitted to practice in Connecticut, but who is admitted in another jurisdiction that accords similar privileges to Connecticut lawyers, may provide the legal services set forth in Model Rule 5.5(c)(3) on a temporary basis in Connecticut. This representation is permitted if the lawyer gives notice to the Statewide Bar Counsel prior to and at the conclusion of each representation and pays the fee prescribed by the Judicial Branch.<sup>15</sup> The Comments to the Rule state that the legal services in the arbitration must be “with respect to a matter that is substantially related to, or arises out of, a jurisdiction in which the lawyer is admitted. A variety of factors may evidence such a relationship. However, the matter, although involving other jurisdictions, must have a significant connection with the jurisdiction in which the lawyer is admitted to practice. A significant aspect of the lawyer’s work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client’s activities and the resulting legal issues involve multiple jurisdictions.”

### *Delaware*

When the Delaware Supreme Court adopted a comprehensive new set of rules of professional conduct effective July 1, 2003, it included in those rules Model Rule 5.5(c)(3).<sup>16</sup> The rule was amended in 2007 to provide that in order to practice law on a temporary basis in Delaware a lawyer must not be disbarred or suspended from practice in any jurisdiction.

### *District of Columbia*

Rule 49(12) of the Rules of the District Columbia Court of Appeals permits attorneys not admitted to practice in the District to engage in the

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<sup>14</sup> [www.coloradosupremecourt.com/pdfs/Registration/Rule%20220%20Out-of-State%20Attorney%20--%20Conditions%20of%20Practice.pdf](http://www.coloradosupremecourt.com/pdfs/Registration/Rule%20220%20Out-of-State%20Attorney%20--%20Conditions%20of%20Practice.pdf).

<sup>15</sup> [www.jud.ct.gov/Publications/PracticeBook/PB.pdf#page=8](http://www.jud.ct.gov/Publications/PracticeBook/PB.pdf#page=8).

<sup>16</sup> [www.depdc.delaware.gov/sections/lobbying/related/dlrpc.pdf](http://www.depdc.delaware.gov/sections/lobbying/related/dlrpc.pdf).

temporary representation of parties in “no more than five (5) ADR proceedings in the District of Columbia per calendar year.”<sup>17</sup>

### ***Florida***

Under Rule 4-5.5, a “non-Florida lawyer” may appear in an arbitration in Florida for a client who resides in or has an office in the lawyer’s home state or where the appearance arises out of or is reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. In all arbitration proceedings, except international arbitrations, prior to practicing pursuant to this rule, the non-Florida lawyer must file a verified statement with The Florida Bar and serve a copy of the verified statement on opposing counsel, if known. The verified statement must include certain information such as listing all jurisdictions where the lawyer is admitted to practice, a list of all arbitrations in which the lawyer has appeared in Florida during the preceding five years (confidential information may be excluded), and certain other information specific to the pending arbitration. A \$250 fee must also be paid to The Florida Bar.<sup>18</sup>

### ***Georgia***

On April 5, 2003, the Board of Governors of the Georgia Bar approved the Final Report of the State Committee on Multijurisdictional Practice. The Report recommended adoption of the revised Model Rules in their entirety, including Model Rule 5.5(c)(3). That rule was adopted by the Georgia Supreme Court on June 8, 2004. Although the rule distinguishes between “domestic” and “foreign” lawyers, both are allowed to engage in the temporary practice of law.<sup>19</sup>

### ***Hawaii***

On June 25, 2013, the Hawaii Supreme Court entered an Order adopting amendments to the Hawaii Rules of Professional Conduct, effective January 1, 2014. The Court did not adopt Model Rule 5.5.<sup>20</sup> Hawaii’s unauthorized practice of law statute makes it unlawful to engage in the practice of law in Hawaii “except and to the extent that the person . .

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<sup>17</sup> [www.dccourts.gov/internet/documents/rule49.pdf](http://www.dccourts.gov/internet/documents/rule49.pdf).

<sup>18</sup> [www.floridabar.org/divexe/rrtfb.nsf/FV/AE4F324F9F246B2085257A2C00628278](http://www.floridabar.org/divexe/rrtfb.nsf/FV/AE4F324F9F246B2085257A2C00628278); see generally *In re Amendments to the Rules Regulating the Florida Bar and the Rules of Judicial Administration-Multijurisdictional Practice of Law*, 991 So. 2d 842 (Fla. 2008).

<sup>19</sup> [www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=129](http://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=129).

<sup>20</sup> [www.courts.state.hi.us/docs/court\\_rules/rules/hrpcond.htm](http://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.htm)



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. is licensed or authorized so to do by an appropriate court, agency, or office or by a statute of the State or of the United States.”<sup>21</sup> The procedure for obtaining temporary permission to practice law in Hawaii is found in Hawaii Supreme Court Rule 1.9.<sup>22</sup> It is unclear whether the procedure in this rule applies to the representation of a party in a private arbitration.<sup>23</sup> However, in one decision the Hawaii Supreme Court held that, among other things, preparation of a statement in anticipation of mediation was the practice of law,<sup>24</sup> and in another case, the court held representation of a party before a state agency was the practice of law.<sup>25</sup>

### *Idaho*

Rule 5.5 of the Idaho Rules of Professional Conduct contains language similar to Model Rule 5.5(c)(3). It provides that an out-of-state lawyer may temporarily practice in Idaho if the lawyer associates with an Idaho lawyer or if the representation “arises out of or is otherwise reasonably related to the lawyer’s representation of a client in a jurisdiction in which the lawyer is admitted to practice.”<sup>26</sup>

### *Illinois*

When the Illinois Supreme Court amended its Rules of Professional Conduct effective January 1, 2010, the amendments included the adoption of Model Rule 5.5(c)(3).<sup>27</sup>

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<sup>21</sup> HAW. REV. STAT. 605-14.

<sup>22</sup> [www.hsba.org/images/hsba/HSBA/Forms/2015/Pro%20Hac%20Vice%20Instruction%202015.pdf](http://www.hsba.org/images/hsba/HSBA/Forms/2015/Pro%20Hac%20Vice%20Instruction%202015.pdf).

<sup>23</sup> “Hawai’i court rules prohibit out-of-state attorneys who are not licensed to practice here from representing parties in any court proceedings related to arbitrations, such as pre-arbitration proceedings to compel or stay arbitration or post-award proceedings to confirm or vacate awards, unless the attorney is granted *pro hac vice* status and has local co-counsel who accepts the responsibilities of lead counsel. So the possibility of judicial proceedings related to the arbitration generally makes it appropriate and advisable to at least have local co-counsel for out of state attorneys who represent parties in arbitration here. However, I did have an arbitration case a couple of years ago in which an out-of-state attorney represented one of the parties. He had local co-counsel but conducted the arbitration himself. The opposing party did not object and, as indicated, Hawai’i arbitration law doesn’t specifically prohibit it. No issue was raised about it in the arbitration.” E-mail from Charles Crumpton, Crumpton Collaborative Solutions (July 25, 2015) (on file with author).

<sup>24</sup> *Fought & Co., Inc. v. Steel Eng’g & Erection, Inc.*, 951 P.2d 487 (Haw. 1998).

<sup>25</sup> *Office of Disciplinary Counsel v. Lau*, 941 P.2d 295 (Haw. 1997).

<sup>26</sup> [www.isb.idaho.gov/pdf/rules/irpc.pdf](http://www.isb.idaho.gov/pdf/rules/irpc.pdf).

<sup>27</sup> [www.illinoiscourts.gov/SupremeCourt/Rules/Art\\_VIII/ArtVIII\\_NEW.htm#5.5](http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#5.5). In *Colmar, Ltd. v. Freemantlemedia North America, Inc.*, 801 N.E.2d 1017 (Ill. Ct. App.

***Indiana***

Since 2005, the Indiana Rules of Professional Conduct have included the identical version of Model Rule 5.5(c)(3).<sup>28</sup>

***Iowa***

Rule 32:5.5 of the Iowa Rules of Professional Conduct is identical to Model Rule 5.5(c)(3).<sup>29</sup>

***Kansas***

On January 29, 2014, the Kansas Supreme Court adopted amendments to the Kansas Rules of Professional Conduct, effective March 1, 2014. These amendments include a rule identical to Model Rule 5.5(c)(3).<sup>30</sup>

***Kentucky***

Rule SCR 3.130 (5.5)<sup>31</sup> of the Kentucky Rules of Professional Conduct, effective July 15, 2009, permits a nonresident attorney to provide temporary legal services if the attorney complies with Kentucky Supreme Court Rule 3.030(2).<sup>32</sup> That rule requires the attorney to be subject to the jurisdiction of the Kentucky Supreme Court, pay a one-time fee to the Kentucky Bar Association and associate a member of the Kentucky Bar Association as co-counsel.

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2003), the court held that representation of a party in an arbitration by an out-of-state lawyer was not a basis to vacate an arbitration award. “Though the ABA Model Rule 5.5 has not been adopted by the Illinois Supreme Court at the time that we decide this case, we find it persuasive in that it reflects the modern trend in the law of multijurisdictional practice and is also in keeping with well-reasoned decisions from other jurisdictions that have found that an out-of-state attorney’s representation of a client during arbitration does not violate the rules prohibiting the unauthorized practice of law.” *Id.* at 1026.

<sup>28</sup> [www.in.gov/judiciary/rules/prof\\_conduct/index.html#\\_Toc418253547](http://www.in.gov/judiciary/rules/prof_conduct/index.html#_Toc418253547).

<sup>29</sup> [www.legis.iowa.gov/docs/ACO/CourtRulesChapter/05-29-2015.32.pdf](http://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/05-29-2015.32.pdf).

<sup>30</sup> [www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorneys&r2=17](http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Discipline+of+Attorneys&r2=17). In *Pemberton v. Citigroup Global Markets, Inc.*, 2012 WL 223928 (Kan. Ct. App. Jan. 20, 2012), the court, citing Kansas Supreme Court Rule 116, refused to vacate an arbitration award because counsel for the prevailing party was not admitted to practice in Kansas and had not applied for *pro hac vice* admission. The court explained that *pro hac vice* admission did not apply in private arbitrations.

<sup>31</sup> [www.kybar.org/resource/resmgr/SCR3/SCR\\_3.130\\_\(5.5\).pdf](http://www.kybar.org/resource/resmgr/SCR3/SCR_3.130_(5.5).pdf).

<sup>32</sup> [www.govt.westlaw.com/kyrules/Document/ND42824B0A91C11DA8F5EE32367A250AE?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](http://www.govt.westlaw.com/kyrules/Document/ND42824B0A91C11DA8F5EE32367A250AE?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)).

***Louisiana***

Effective April 1, 2005, the Louisiana Supreme Court amended its rules regarding multijurisdictional practice to include a provision identical to Model Rule 5.5(c)(3).<sup>33</sup>

***Maine***

The Maine Supreme Judicial Court amended the Maine Rules of Professional Conduct, effective August 1, 2009. These rules incorporate Model Rule 5.5(c)(3) with the caveat that the nonresident attorney's representation be on behalf of an "existing" client.<sup>34</sup>

***Maryland***

The Maryland Lawyers' Rules of Professional Conduct contain a rule identical to Model Rule 5.5(c)(3).<sup>35</sup> However, under Rule 14 of the Rules Governing Admission to the Bar of Maryland, special rules apply in cases involving "the application of Maryland law."<sup>36</sup> A Maryland attorney must move in writing that the nonresident attorney be associated as co-counsel. The motion must be filed in the circuit court where the arbitration is pending. The out-of-state attorney must be accompanied by the Maryland attorney unless the presence of the Maryland attorney is waived by the arbitrator.

***Massachusetts***

The Massachusetts Supreme Judicial Court adopted the identical version of Model Rule 5.5(c)(3) effective January 1, 2007, as part of the Massachusetts Rules of Professional Conduct.<sup>37</sup>

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<sup>33</sup> [www.ladb.org/Material/Publication/ROPC/ROPC.pdf](http://www.ladb.org/Material/Publication/ROPC/ROPC.pdf); *see also* Louisiana Supreme Court Rule XVII(13)(B), (C).

<sup>34</sup> [www.mebaroverseers.org/attorney\\_regulation/bar\\_rules.html?id=88251](http://www.mebaroverseers.org/attorney_regulation/bar_rules.html?id=88251).

<sup>35</sup> [www.courts.state.md.us/attygrievance/rules.html](http://www.courts.state.md.us/attygrievance/rules.html).

<sup>36</sup> [www.courts.state.md.us/ble/pdfs/baradmissionrules.pdf](http://www.courts.state.md.us/ble/pdfs/baradmissionrules.pdf).

<sup>37</sup> [www.mass.gov/obcbbbo/rpc5.htm#Rule 5.5](http://www.mass.gov/obcbbbo/rpc5.htm#Rule%205.5). Prior to its adoption of ABA Model Rule 5.5(c)(3), the Massachusetts Supreme Judicial Court held that an appearance by an attorney not admitted to practice in Massachusetts was not a ground on which to vacate an arbitration award. *Superadio Ltd. P'ship v. Winstar Radio Productions, LLC*, 844 N.E.2d 246 (Mass. 2006).

### ***Michigan***

Effective January 1, 2011, the Michigan Supreme Court adopted Model Rule 5.5(c)(3).<sup>38</sup> However, under Michigan Court Rule 8.126, an out-of-state attorney who wishes to appear in a “specific arbitration” must associate with a lawyer licensed to practice in Michigan who files a motion for temporary admission of the out-of-state attorney with the arbitrator.<sup>39</sup> A copy of the motion with attachments must be filed with Attorney Grievance Commission which will then notify the arbitrator whether the out-of-state attorney has appeared temporarily in Michigan during the past 365 days. An out-of-state attorney may not appear temporarily in Michigan more than five times during each 365-day period. A fee also must be paid to the State Bar of Michigan.

### ***Minnesota***

On June 17, 2005, the Minnesota Supreme Court adopted amendments to its Rules of Professional Conduct incorporating Model Rule 5.5(c)(3).<sup>40</sup>

### ***Mississippi***

The Mississippi Rules of Professional Conduct have not been amended to include Model Rule 5.5(c)(3) although in 2014 the Mississippi Bar submitted a petition to the Supreme Court to adopt Model Rule 5.5 and also adopt a comprehensive definition of the practice of law. As of July 2015 no action had been taken on the petition.

The Mississippi Supreme Court has suggested in *dicta* that by participating in a private arbitration in Mississippi, an out-of-state attorney would be making an “appearance” within the meaning of Rule 46(b) of the Mississippi Rules of Appellate Procedure.<sup>41</sup> The court stated:

A foreign attorney may further make an appearance in a Mississippi court by physically appearing at . . . an arbitration or

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<sup>38</sup> [www.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan%20Rules%20of%20Professional%20Conduct.pdf](http://www.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan%20Rules%20of%20Professional%20Conduct.pdf).

<sup>39</sup> [www.courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/subchapters/Subchapter%208.100%20General%20Administrative%20Orders.pdf](http://www.courts.mi.gov/Courts/MichiganSupremeCourt/rules/Documents/subchapters/Subchapter%208.100%20General%20Administrative%20Orders.pdf).

<sup>40</sup> [www.lprb.mncourts.gov/rules/Documents/MN%20Rules%20of%20Professional%20Conduct.pdf](http://www.lprb.mncourts.gov/rules/Documents/MN%20Rules%20of%20Professional%20Conduct.pdf).

<sup>41</sup> A nonresident attorney must be admitted *pro hac vice* in accordance with Rule 46(b) when making an “appearance” in a “proceeding in which testimony is given.” [www.courts.ms.gov/rules/msrulesofcourt/rules\\_of\\_appellate\\_procedure.pdf](http://www.courts.ms.gov/rules/msrulesofcourt/rules_of_appellate_procedure.pdf).

mediation proceeding. . . . These actions require that the foreign attorney be admitted *pro hac vice*.<sup>42</sup>

In a recent article, the former chair of the Mississippi Bar's Unauthorized Practice of Law Committee wrote that the "current status of the law in Mississippi regarding whether representation in a private arbitral proceeding is the unauthorized practice of law is unclear due to the lack of case law and the fact that the Mississippi Rules of Professional Conduct have not been revised to address this situation."<sup>43</sup>

### ***Missouri***

Effective January 1, 2006, the Missouri Supreme Court adopted a rule identical to Model Rule 5.5(c)(3).<sup>44</sup>

### ***Montana***

The Montana Supreme Court has not adopted Model Rule 5.5(c)(3). Rule IV of the Rules for Admission to the Bar of Montana provide that an attorney who is admitted in another jurisdiction may appear "*pro hac vice* in any action or proceeding, if an attorney admitted to practice in the courts of Montana is associated as attorney of record."<sup>45</sup> Although the rule does not specifically speak to private arbitrations, knowledgeable attorneys in Montana state that best practices in Montana would be for out-of state attorneys in private arbitrations to follow this rule. The rule requires that an application for *pro hac vice* admission be filed with the State Bar of Montana. Rule IV(C) provides that except "upon a showing of good cause, no attorney or firm may appear *pro hac vice* in more than

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<sup>42</sup> *In re Williamson*, 838 So. 2d 226, 235 (Miss. 2002).

<sup>43</sup> Jim Warren & Scott Murray, *Is Representation in an Arbitration Considered the Unauthorized Practice of Law in Mississippi?*, 79 MISS. L.J. MISSING SOURCES 44 (2009). "It remains unsettled as to whether an out of state attorney can participate in a Mississippi arbitration. When The Mississippi Bar receives inquiries about it, we suggest the attorney contact the court administrator for that particular court and ask if the judge requires *pro hac vice* admission (Rule 46 of the Mississippi Rules of Appellate Procedure) for arbitration or not. Our feedback thus far is that it is determined on a court by court basis based upon that particular judge's interpretation of what types of cases require admission to practice." E-mail from Adam Kilgore, General Counsel, The Mississippi Bar (June 29, 2015) (on file with author).

<sup>44</sup> [www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/84187ab9f9f1995486256ca600521226?OpenDocument](http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/84187ab9f9f1995486256ca600521226?OpenDocument)

<sup>45</sup> [www.http://montanabar.site-ym.com/?page=ProHacVice&hhSearchTerms=%22pro+and+hac+and+vice%22#Rules](http://montanabar.site-ym.com/?page=ProHacVice&hhSearchTerms=%22pro+and+hac+and+vice%22#Rules)

two actions or proceedings in any state court or administrative agency in Montana.” Because this limitation applies to “actions or proceedings in any state court or administrative agency,” it is unclear whether this restriction would apply to private arbitrations.

### *Nebraska*

Section 3-505.5 of the Nebraska Rules of Professional Conduct contains a provision identical to Model Rule 5.5(c)(3).<sup>46</sup>

### *Nevada*

Effective May 1, 2006, the Nevada Supreme Court amended its Rules of Professional Conduct addressing multijurisdictional practice without adopting the language of Model Rule 5.5(c)(3). However, Nevada Rule 5.5 permits lawyers licensed in other jurisdictions to practice in Nevada so long as the “lawyer is acting with respect to a matter that is incident to work being performed in a jurisdiction in which the lawyer is admitted, provided that the lawyer is acting in [Nevada] on an occasional basis and not as a regular or repetitive course of business in” Nevada.<sup>47</sup> This rule appears to cover representation in arbitration. The Nevada Supreme Court also adopted a special rule for ADR proceedings that “are court-annexed or court ordered, or that are mandated by statute or administrative rule.”<sup>48</sup> Under Nevada Supreme Court Rule 42, an out-of-state lawyer must file a written application to appear as counsel in ADR proceedings (similar to a *pro hac vice* application), and may do so only upon approval by the “court, arbitrator, mediator or . . . hearing officer.” The out-of-state lawyer also must associate as counsel with a Nevada lawyer.

### *New Hampshire*

Effective January 1, 2008, the New Hampshire Rules of Professional Conduct incorporated a rule identical to Model Rule 5.5(c)(3).<sup>49</sup>

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<sup>46</sup> [www.supremecourt.nebraska.gov/supreme-court-rules/1869/%C2%A7-3-5055- unauthorized-practice-law-multijurisdictional-practice-law](http://www.supremecourt.nebraska.gov/supreme-court-rules/1869/%C2%A7-3-5055- unauthorized-practice-law-multijurisdictional-practice-law).

<sup>47</sup> [www.leg.state.nv.us/CourtRules/ RPC.html](http://www.leg.state.nv.us/CourtRules/ RPC.html).

<sup>48</sup> [www.leg.state.nv.us/courtrules/SCR.html#SCRRule42](http://www.leg.state.nv.us/courtrules/SCR.html#SCRRule42).

<sup>49</sup> [www.courts.state.nh.us/rules/pcon/pcon-5\\_5.htm](http://www.courts.state.nh.us/rules/pcon/pcon-5_5.htm).

*New Jersey*

The New Jersey Rules of Professional Conduct contain a provision substantially similar to Model Rule 5.5(c)(3) although nonresident attorneys are subject to the New Jersey Rules of Professional Conduct and the disciplinary authority of the New Jersey Supreme Court.<sup>50</sup>

*New Mexico*

Rule 16-505 of the New Mexico Rules of Professional Conduct incorporates Model Rule 5.5(c)(3).<sup>51</sup>

*New York*

Although the New York State Bar Association has recommended adoption of Model Rule 5.5(c)(3) (or equivalent language) three separate times in recent years (2003, 2008, and 2012), the New York Court of Appeals has not accepted the proposals.<sup>52</sup> Thus, when New York adopted a version of the Model Rules in 2009, the Court of Appeals did not adopt ABA Model Rule 5.5(c)(3), but instead essentially re-numbered former DR 3-101 as Rule 5.5 (which is based on the ABA's former Model Rule 5.5) without any significant changes. The Association of the Bar of the City of New York has adopted the report of its Arbitration Committee which has opined that the representation of a party in a New York arbitration by a lawyer admitted to practice in another jurisdiction is not the practice of law.<sup>53</sup> This conclusion is supported by a series of New York federal court decisions.<sup>54</sup> Thus, out-of-state attorneys may ethically

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<sup>50</sup> [www.judiciary.state.nj.us/rules/apprprc.htm#P745\\_78667](http://www.judiciary.state.nj.us/rules/apprprc.htm#P745_78667).

<sup>51</sup> [www.nmbar.org/NmbarDocs/forMembers/PHV/16-505\\_11-1-2013.pdf](http://www.nmbar.org/NmbarDocs/forMembers/PHV/16-505_11-1-2013.pdf).

<sup>52</sup> The most recent proposal, which was sent to the New York Court of Appeals in 2012, sought to transform the language of ABA Model Rule 5.5 into a set of Court of Appeals Rules, but the Court of Appeals never circulated these proposals and never acted on them.

<sup>53</sup> Committee on Arbitration, Association of the Bar of the City of New York, *Unauthorized Practice of Law and the Representation of Parties in New York by Lawyers Not Licensed to Practice in New York*, 63 THE RECORD 700 (2008).

<sup>54</sup> See generally *Prudential Equity Group, LLC v. Ajamie*, 538 F. Supp. 2d 605 (S.D.N.Y. 2008) (participation by a non-New York attorney in a New York arbitration is not the unauthorized practice of law); *Seigel v. Bidas Sociedad Anomina Petrolera Indus. Y Commercial*, No. 90 Civ. 6108 (RJV) 1991 U.S. Dist. LEXIS 11455 (S.D.N.Y. Aug. 19, 1991) (representation of a party in a New York arbitration proceeding by a lawyer admitted to practice in another jurisdiction is not the unauthorized practice of law); *Williamson, P.A. v. John D. Quinn Const. Corp.*, 537 F. Supp. 613 (S.D.N.Y. 1982) (an unlicensed attorney could recover fees for representing a party in an arbitration because arbitration is not the unauthorized practice of law).

represent parties in private arbitrations in New York without violating the restrictions against the unauthorized practice of law.

### *North Carolina*

The North Carolina Supreme Court approved amendments to the North Carolina Rules of Professional Conduct, effective March 1, 2003, substantially adopting Model Rule 5.5(c)(3).<sup>55</sup>

### *North Dakota*

A nonresident lawyer may represent a party in an arbitration in North Dakota so long as the lawyer complies with Rule 3 of the Admission to Practice Rules. This Rule requires the lawyer to file an affidavit with the State Board of Law Examiners setting forth the information prescribed in the Rule.<sup>56</sup> The state's multijurisdictional practice rule permits an out-of-state lawyer to represent a party in an arbitration in North Dakota so long as the lawyer complies with Rule 3.<sup>57</sup>

### *Ohio*

The Ohio Supreme Court has adopted a multijurisdictional practice rule similar to Model Rule 5.5(c)(3); the rule requires the nonresident attorney to "regularly practice law" in the home jurisdiction.<sup>58</sup>

### *Oklahoma*

Effective January 1, 2008, the Oklahoma Rules of Professional Conduct incorporated Model Rule 5.5(c)(3).<sup>59</sup>

### *Oregon*

The Oregon Rules of Professional Conduct have a provision identical to Model Rule 5.5(c)(3).<sup>60</sup> In addition, under Rule 5.5(e), out-of-state attorneys must submit a "Certificate of Representation" to the Oregon State Bar (with a copy to the arbitrator and other parties) and certify the lawyer is in good standing in every jurisdiction where the lawyer is

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<sup>55</sup> [www.ncbar.gov/rules/rules.asp](http://www.ncbar.gov/rules/rules.asp).

<sup>56</sup> [www.ndcourts.gov/court/rules/Admission/rule3.htm](http://www.ndcourts.gov/court/rules/Admission/rule3.htm).

<sup>57</sup> [www.ndcourts.gov/rules/Conduct/frameset.htm](http://www.ndcourts.gov/rules/Conduct/frameset.htm).

<sup>58</sup> [www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf](http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf).

<sup>59</sup> [www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=448989](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=448989).

<sup>60</sup> [www.osbar.org/\\_docs/rulesregs/orpc.pdf](http://www.osbar.org/_docs/rulesregs/orpc.pdf).



admitted to practice, maintains professional liability insurance equivalent to that required by Oregon lawyers (or informs the client the lawyer has no liability insurance), and pays a fee to the Oregon State Bar in the amount of \$200.

***Pennsylvania***

The Pennsylvania Rules of Professional Conduct contain a rule identical to Model Rule 5.5(c)(3).<sup>61</sup>

***Rhode Island***

The Rhode Island Rules of Professional Conduct contain a rule identical to Model Rule 5.5(c)(3).<sup>62</sup>

***South Carolina***

The South Carolina Rules of Professional Conduct contain a provision identical to ABA Rule 5.5(c)(3).<sup>63</sup> However, under Rule 404(1) of the South Carolina Rules Governing the Practice of Law:

For each matter in which a lawyer seeks to provide legal services pursuant to Rule 5.5(c)(3), the lawyer shall file a verified statement with the South Carolina Supreme Court Office of Bar Admissions stating that the lawyer has not filed more than three statements pursuant to this rule in a 365-day period. The statement shall be accompanied by a \$250 fee . . . .<sup>64</sup>

If an out-of-state lawyer provides legal services pursuant to Rule 5.5(c)(3) more than three times during a calendar year it is “presumed” the lawyer is providing services on a regular and not temporary basis.<sup>65</sup>

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<sup>61</sup> [www.padisciplinaryboard.org/documents/rules-of-professional-conduct-with-toc.pdf](http://www.padisciplinaryboard.org/documents/rules-of-professional-conduct-with-toc.pdf).

<sup>62</sup> [www.courts.ri.gov/PublicResources/disciplinaryboard/PDF/Article5.pdf](http://www.courts.ri.gov/PublicResources/disciplinaryboard/PDF/Article5.pdf)

<sup>63</sup> [www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=407.0&subRuleID=RULE%205%2E5&ruleType=APP](http://www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=407.0&subRuleID=RULE%205%2E5&ruleType=APP).

<sup>64</sup> [www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=404.0&subRuleID=&ruleType=APP](http://www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=404.0&subRuleID=&ruleType=APP).

<sup>65</sup> *Id.*

***South Dakota***

The multijurisdictional provision of the South Dakota Rules of Professional Conduct with respect to ADR proceedings is identical to Model Rule 5.5(c)(3), with the addition that any out-of-state attorney “obtains a South Dakota sales tax license and tenders the applicable taxes.”<sup>66</sup>

***Tennessee***

Effective January 1, 2010, the Tennessee Rules of Professional Conduct include a provision corresponding to Model Rule 5.5(c)(3).<sup>67</sup>

***Texas***

The Supreme Court of Texas has not adopted Model Rule 5.5(c)(3). Although Texas has a broad definition of the practice of law, currently no Texas court decision or rule speaks directly to the question of whether an out-of-state attorney may temporarily represent a party in a private arbitration in Texas. Historically, the Supreme Court of Texas Unauthorized Practice of Law Committee, which is charged with preventing the unauthorized practice of law in Texas, has not challenged as the unauthorized practice of law, the representation of a party in a private arbitration in Texas by an attorney licensed to practice in another jurisdiction.<sup>68</sup>

***Utah***

The Utah Rules of Professional Conduct include Model Rule 5.5(c)(3).<sup>69</sup>

***Vermont***

The Vermont Rules of Professional Conduct include Model Rule 5.5(c)(3).<sup>70</sup>

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<sup>66</sup> [www.sdbar.org/Rules/rules.shtm](http://www.sdbar.org/Rules/rules.shtm).

<sup>67</sup> [www.tncourts.gov/rules/supreme-court/8](http://www.tncourts.gov/rules/supreme-court/8).

<sup>68</sup> Telephone interview with Leland C. de la Garza, Chair, Supreme Court of Texas Unauthorized Practice of Law Committee (Dec. 1, 2009).

<sup>69</sup> [www.utcourts.gov/resources/rules/ucja/ch13/5\\_5.htm](http://www.utcourts.gov/resources/rules/ucja/ch13/5_5.htm).

<sup>70</sup> [www.vermontjudiciary.org/LC/Shared%20Documents/VermontRulesofProfessionalConduct\\_withamendmentssthroughJune2011.pdf](http://www.vermontjudiciary.org/LC/Shared%20Documents/VermontRulesofProfessionalConduct_withamendmentssthroughJune2011.pdf).

### *Virginia*

Rule 5.5 of the Virginia's Rules of Professional Conduct is substantially similar to Model Rule 5.5(c)(3) although the "foreign lawyer" must inform the client and interested third parties in writing that the lawyer is not admitted to practice in Virginia, the jurisdictions where the lawyer is admitted to practice, and the lawyers' address in the foreign jurisdiction.<sup>71</sup>

### *Washington*

Since 2006 the Washington State Supreme Court Rules of Professional Conduct have included Model Rule 5.5(c)(3).<sup>72</sup>

### *West Virginia*

On September 29, 2014, the Supreme Court of Appeals of West Virginia revised the West Virginia Rules of Professional Conduct, effective January 1, 2015, to include adoption of Model Rule 5.5(c)(3).<sup>73</sup>

### *Wisconsin*

Effective July 1, 2007, the Wisconsin Supreme Court Rules of Professional Conduct for Attorneys, have included a provision, SCR 20:5.5, substantially similar to Model Rule 5.5(c)(3).<sup>74</sup>

### *Wyoming*

The Wyoming Rules of Professional Conduct for Attorneys at Law include Model Rule 5.5(c)(3).<sup>75</sup>

## **IV. Conclusion**

The area of multijurisdictional practice is rapidly changing to adapt to the greater fluidity in economic life. Keeping up with these changes is essential for attorneys whose practice calls upon them to travel to different

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<sup>71</sup> [www.vsb.org/pro-guidelines/index.php//main/print\\_view](http://www.vsb.org/pro-guidelines/index.php//main/print_view).

<sup>72</sup> [www.courts.wa.gov/court\\_rules/?fa=court\\_rules.display&group=ga&set=RPC&ruleid=garpc5.05](http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpc5.05).

<sup>73</sup> [www.courtswv.gov/legal-community/court-rules/professional-conduct/rule5.html#rule5.5](http://www.courtswv.gov/legal-community/court-rules/professional-conduct/rule5.html#rule5.5).

<sup>74</sup> [www.wicourts.gov/sc/scrule/DisplayDocument.pdf?content=pdf&seqNo=132538](http://www.wicourts.gov/sc/scrule/DisplayDocument.pdf?content=pdf&seqNo=132538).

<sup>75</sup> [www.courts.state.wy.us/WSC/CourtRule?RuleNumber=62](http://www.courts.state.wy.us/WSC/CourtRule?RuleNumber=62).

states to participate in private arbitrations. With very few exceptions, the states have adopted Model Rule 5.5(c)(3) or substantial versions of it. This response to the ABA Commission on Multijurisdictional Practice has helped expand the use of ADR, and arbitration in particular, by allowing attorneys to meet client needs where representation is called for in a jurisdiction where the attorney is not licensed to practice law.