RECOMMENDATIONS
OF THE
DISTRICT OF COLUMBIA BAR BOARD OF GOVERNORS,
ACTING ON THE REPORT
OF THE
SPECIAL COMMITTEE ON MULTIJURISDICTIONAL PRACTICE

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Introduction and History

On November 9, 2004, the Board of Governors approved the *Final Report and Recommendations of the District of Columbia Bar Special Committee on Multijurisdictional Practice (MJP Committee)*. The MJP Committee's report included nine recommendations. Recommendations one through three dealt with extending disciplinary authority to non-member attorneys who engage in multijurisdictional practice of law in the District. (The disciplinary system currently has jurisdiction only over members of the D.C. Bar.) The fourth recommendation proposed that a study of the potential operational and fiscal consequences to the disciplinary system and certain regulatory programs of extending disciplinary authority to non-D.C. Bar members be undertaken by the Bar's Disciplinary System Study Committee (DSS Committee) or another committee of the Bar. (The DSS Committee, appointed in September 2003, was then engaged in studying whether to recommend changes to certain aspects of the D.C. disciplinary system governed by the District of Columbia Court of Appeals Rule XI of the Rules Governing the Bar.) The Board also decided that it would not act on the three recommendations about the extension of disciplinary authority to non-members until the DSS Committee had completed its consideration of the operational and fiscal consequences of such an extension of disciplinary jurisdiction.

Recommendations five through nine of the MJP Committee report proposed modifications to D.C. Court of Appeals Rule 49, governing the Unauthorized Practice of

Law. The recommendations would add a limited exception for practice related to alternative dispute resolution proceedings and other modifications that would clarify or strengthen existing provisions of the rule.

Shortly after the Board approved the report, then-Bar president John C. Keeney, Jr., with the concurrence of the Board, decided not to transmit the report until after the DSS Committee had had an opportunity to study the consequences of extending disciplinary authority to non-D.C. Bar members engaged in multidisciplinary practice in the District. The DSS Committee's review of Rule XI -- that Committee's primary focus -- turned out to be more complicated and time-consuming than had been anticipated, however, and the DSS Committee subsequently declined to study the issue on which the MJP Committee had sought guidance.[1]

The Board of Governors believes that it would be premature to consider a proposal to expand disciplinary jurisdiction while the Bar's disciplinary system recommendations are pending before the Court of Appeals and before any changes have been implemented. The Board anticipates that, following the Court's approval of any changes to the disciplinary sytem, the Bar will appoint an implementation committee to monitor the effects of those changes. The Board believes that that committee, or another committee designated by the Bar, should assess the consequences of extending

[1] In the fall of 2006, the DSS Committee completed an extraordinary three-year effort and submitted its report to the Board of Governors. On October 10, 2006, the Board approved the Committee's report and recommendations and forwarded the report to the D.C. Court of Appeals for its consideration.

disciplinary jurisdiction to non-members of the D.C. Bar in light of any changes in the disciplinary system approved by the Court.

In the meantime, the Board submits the other recommendations of the MJP Committee to the Court of Appeals for its approval.

The MJP Committee and Its Assignment

The Board of Governors of the District of Columbia Bar formed the MJP Committee in November 2001 to recommend whether changes should be made to the District of Columbia Rules of Professional Conduct, or to other relevant rules governing the delivery of legal services, as those rules relate to multijurisdictional practice. "Multijurisdictional practice" refers to practice in one jurisdiction by a lawyer admitted only elsewhere.

At the time the Board of Governors appointed the MJP Committee, the American Bar Association's Commission on Multijurisdictional Practice was studying ethics and bar admission rules regarding multijurisdictional practice and developing recommendations governing multijurisdictional practice. The ABA Commission filed its Final Report with the ABA House of Delegates in June of 2002. In August of 2002, the ABA House of Delegates adopted the Commission's recommendations with relatively minor changes. Among other things, the House of Delegates (1) amended the ABA Model Rules of Professional Conduct to permit multijurisdictional practice on a temporary basis, subject to certain restrictions; (2) amended the Model Rules to subject lawyers to the disciplinary authority of any jurisdiction in which they engage in

multijurisdictional practice; and (3) adopted a new Model Rule on *pro hac vice* admission. The MJP Committee considered all of the ABA Commission's recommendations as adopted by the House of Delegates.[2]

The MJP Committee began meeting in March 2002. The Committee determined early in its deliberations that, to a substantial degree, the current D.C. rule excepting much multijurisdictional practice from the definition of the unauthorized practice of law – Rule 49 of the District of Columbia Court of Appeals – is consistent with new ABA Model Rule 5.5, which addresses multijurisdictional practice. One important difference between the D.C. rules and the ABA Model Rules, however, involves the authority of the D.C. disciplinary system over lawyers engaged in multijurisdictional practice in the District of Columbia. ABA Model Rule 8.5(a) provides that a lawyer not admitted in a jurisdiction is subject to that jurisdiction's disciplinary authority if the lawyer provides any legal services in that jurisdiction. This provision has no current equivalent in the District of Columbia. As a general matter, lawyers engaged in multijurisdictional practice in the District of Columbia are not now subject to disciplinary jurisdiction here.

The Committee devoted most of its deliberations to the issue of disciplinary authority over lawyers engaged in multijurisdictional practice in the District of Columbia. On February 6, 2004, the Committee issued a unanimous Interim Report to the Board of

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[2] Thirty-three states have adopted the ABA Model Rules on multijurisdictional practice, or a variation of it, since the ABA adopted amendments to the Model Rules of Professional Conduct in 2002. The highest courts of Illinois, Michigan, Montana, New York, and Virginia are currently considering recommendations to adopt rules about multijurisdictional practice modeled on ABA Model Rules 5.5 and 8.5. Posting of John Holtaway, JHoltaway@staff.abanet.org, to CPR_Lawyersfund@mail.abanet.org (Apr. 18, 2007); http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf; http://www.abanet.org/cpr/jclr/8_5_quick_guide.pdf (visited on April 23, 2007).

Governors on Disciplinary System Issues. On April 13, 2004, the Board of Governors approved the Interim Report. On September 30, 2004, the Committee issued its unanimous final report and recommendations.

On November 9, 2004, the Board of Governors approved the Committee's final report. As described above, however, the Board subsequently decided not to transmit the report to the Court of Appeals. This report, which is now submitted for the Court's consideration, covers only the proposed substantive revisions to D.C. Court of Appeals Rule 49 on the unauthorized practice of law.

Summary of the Committee's Conclusions

The MJP Committee concluded that an exception should be added to Rule 49 for multijurisdictional practice in arbitration, mediation, or other alternative dispute resolution (collectively "ADR") proceedings. Specifically, a non-member of the D.C. Bar should be permitted to provide legal services in or reasonably related to pending or potential ADR proceedings, as long as he or she (a) is authorized to practice law by the highest court of a state or territory or by a foreign country and is not disbarred or suspended for disciplinary reasons from, and has not resigned with charges pending in, any jurisdiction or court; (b) does not begin to provide such services in more than five ADR proceedings in the District of Columbia per calendar year; and (c) does not otherwise practice in the District of Columbia except under another exception in Rule 49.

In addition, the Committee recommended several changes that do not materially change the scope of multijurisdictional practice currently authorized under Rule 49, but that clarify or strengthen existing provisions:

(1) The current provision of Rule 49 allowing a lawyer who is not a member of the District of Columbia Bar, but who is authorized to practice elsewhere, to provide legal services in the District of Columbia on an incidental basis (Rule 49(b)(3)) should be placed in a new exception, clarified, and amended to exclude lawyers who have been disbarred or suspended for disciplinary reasons or resigned with charges pending in any jurisdiction or court.

(2) The current provisions of Rule 49 excepting from the definition of unauthorized practice of law the activity of a non-D.C. Bar member who provides legal services in any court of the United States following admission to practice in that court (Rule 49(c)(3)), or who provides legal services in any court of the District of Columbia following admission *pro hac vice* (Rule 49(c)(7)), should be clarified explicitly to except the provision of legal services reasonably related to a pending or potential proceeding in that court if such person reasonably expects to be admitted to practice in that court.

(3) The current provision of Rule 49 specifying the contents of the declaration that must accompany each application for admission *pro hac vice* to a court of the District of Columbia (Rule 49(c)(7)(ii)) should be clarified and amended to require (a) a description of all disciplinary complaints pending against the applicant; (b) a description of the circumstances of all suspensions, disbarments, or resignations with charges pending in any jurisdiction or court; (c) certification that the person has not had an application to the D.C. Bar denied, or a description of the circumstances of all such denials; and (d) a commitment by the applicant promptly to notify the court if, during the course of the proceeding, the person is suspended or disbarred for disciplinary reasons or resigns with charges pending in any jurisdiction or court.

(4) The current provisions of Rule 49 permitting (a) limited duration practice by a non-D.C. Bar member as a lawyer employed by the government of the District of Columbia, (b) limited duration practice by a non-D.C. Bar member with a pending application to the D.C. Bar, (c) the provision of *pro bono* legal services under certain circumstances by an inactive member of the D.C. Bar or by a non-D.C. Bar member, and (d) the provision of legal services by a non-D.C. Bar member as a part of certain court-authorized programs (Rule 49(c)(4), (8), (9), and (10)) should be amended to exclude practitioners who have been disbarred or suspended for disciplinary reasons from, or who have resigned with charges pending in, any jurisdiction or court.

Recommendations

Rule 49(a) of the District of Columbia Court of Appeals generally prohibits any person from practicing law in the District of Columbia unless the person is an active member of the District of Columbia Bar or "except as otherwise permitted by these Rules." Rule 49(c) contains a number of exceptions to this general rule, and these exceptions effectively permit several forms of multijurisdictional practice. In addition, Rule 49(b)(3) defines practice of law "[i]n the District of Columbia" as "conduct in, or conduct from an office or location within, the District of Columbia, *where the person's presence in the District of Columbia is not of incidental or occasional duration*." (Emphasis added.) As explained in the comments to Rule 49(b)(3), the italicized language is intended to permit the provision of legal services in the District of Columbia by non-D.C. Bar members on an incidental and temporary basis. This provision has a narrower counterpart in the new ABA Model Rule 5.5(c), which authorizes a lawyer

admitted in another U.S. jurisdiction to "provide legal services on a temporary basis in this jurisdiction" in four specific circumstances.

> The Committee did not favor reducing the scope of multijurisdictional practice currently allowed by Rule 49.[3] The Committee's recommendations were instead intended to authorize additional forms of multijurisdictional practice that are expressly permitted under Model Rule 5.5 but that are not now expressly encompassed by Rule 49. The Committee also recommended incorporation of the Model Rule's prohibition on multijurisdictional practice by any person who has been disbarred or suspended in any jurisdiction.

The Committee made the following five recommendations, which the Board of Governors approves:

Recommendation 1

> A non-member of the D.C. Bar should be permitted to provide legal services in or reasonably related to pending or potential arbitration, mediation, or other alternative dispute resolution proceedings, as long as he or she (a) is authorized to practice law by the highest court of a state or territory or by a foreign country and is not disbarred or suspended for disciplinary reasons from, and has not resigned with charges pending in, any jurisdiction or court; (b) does not begin to provide such services in more than five alternative dispute resolution proceedings in the District of Columbia per calendar year; and (c) does not practice in the District of Columbia except under another exception in Rule 49.

[3] This is one reason why the Committee did not recommend a reciprocity requirement that would permit lawyers not admitted to the D.C. Bar to practice here only if their home jurisdiction permits D.C. lawyers to practice there in similar circumstances. A reciprocity provision would also be inconsistent both with the ABA Model Rules and with the tradition of the District of Columbia Court of Appeals to adopt policies that are justified on their own terms without such a reciprocity provision. Moreover, there is no reason to expect that a reciprocity requirement would have any significant practical effect in expanding multijurisdictional opportunities for D.C. lawyers.

Rule 49(c) does not now expressly address practice by non-D.C. Bar members in alternative dispute resolution ("ADR") proceedings. Rule 49(b)(3) currently allows lawyers licensed in other jurisdictions to represent clients in ADR proceedings so long as their presence in the District of Columbia is of incidental or occasional duration.[4]

The Committee recommended that a new subsection (12) be added to Rule 49(c) allowing lawyers who are not D.C. Bar members to represent clients in ADR proceedings in specified circumstances. Appendix A includes the specific provision and related commentary that we propose.

We recommend this addition to further the strong public policy favoring the efficient and expeditious resolution of disputes outside the judicial process. The proposed option for clients who agree to resolve their disputes through ADR proceedings to retain attorneys who are not members of the D.C. Bar is generally equivalent to the option provided through the *pro hac vice* exception in Rule 49(c)(7) for clients who choose to resolve their disputes in judicial proceedings. The purpose of this exception is to expand the ability of lawyers to represent clients in ADR proceedings that require more than incidental presence in the District.

Our proposed Rule 49(c)(12) contains three important provisos, each of which is based on provisos for the *pro hac vice* exception in Section (c)(7). *First*, the lawyer must be authorized to practice law by the highest court of a state or territory or by a foreign country, and must not be disbarred or suspended for disciplinary reasons, or have

[4] The ABA's Model Rule 5.5(c)(3) authorizes multijurisdictional practice in ADR proceedings "on a temporary basis … if the services arise out of or are reasonably related

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resigned with charges pending, in any jurisdiction or court. *Second*, the lawyer may begin to provide services in no more than five ADR proceedings in the District of Columbia in each calendar year. An ADR proceeding would not count as a new ADR proceeding for purposes of the rule if it is ancillary to a judicial proceeding in which the lawyer is admitted *pro hac vice* (for example, when the court orders or encourages the parties to try to resolve the suit through ADR). Similarly, the limit of five new ADR proceedings annually would not apply so long as the lawyer's participation in an ADR proceeding in the District of Columbia is temporary and incidental to his or her practice in another jurisdiction. *Third*, the lawyer may not maintain a base of operations in the District of Columbia or otherwise practice here, unless the lawyer qualifies under another exception in Rule 49(c).

Recommendation 2

> The current provision of Rule 49 allowing a lawyer who is not a member of the District of Columbia Bar, but who is authorized to practice elsewhere, to provide legal services in the District of Columbia on an incidental basis (Rule 49(b)(3)) should be placed in a new exception, clarified, and amended to exclude lawyers who have been disbarred or suspended for disciplinary reasons or resigned with charges pending in any jurisdiction or court.

This recommendation is intended to reaffirm and to clarify the scope of multidisciplinary practice currently permitted by Rule 49(b)(3), which defines practice "[i]n the District of Columbia" as "conduct in, or conduct from an office location within,

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to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."

the District of Columbia, where the person's presence in the District of Columbia is not of incidental or occasional duration."

The Committee recommended that the authorization of multijurisdictional practice currently reflected by definition in Rule 49(b)(3) be moved from that subsection of the rule to a new exception in Rule 49(c), which contains the other exceptions to the general proscription of the practice of law by non-D.C. Bar members. Specifically, the Committee recommended the addition of the following new subsection (13) to Rule 49(c):

> **Incidental and Temporary Practice**: Providing legal services in the District of Columbia on an incidental and temporary basis, provided that the person is authorized to practice law by the highest court of a state or territory or by a foreign country (and a lawyer admitted only in a foreign country must be engaged in the practice of law in that country), and is not disbarred or suspended for disciplinary reasons and has not resigned with disciplinary charges pending in any jurisdiction or court.

We think this aspect of multijurisdictional practice should be reflected in a new exception in Rule 49(c), rather than in Rule 49(b)(3), for the following reason. The definition of the practice of law "in the District of Columbia" to exclude practice on an incidental and temporary basis is awkward: even if one practices here only on an incidental or temporary basis, one is still physically practicing "in" the District of Columbia.

Our proposed addition to Rule 49(c) incorporates a restriction not now reflected in Rule 49(b)(3) – that is, a lawyer may engage in multijurisdictional practice here on an incidental and temporary basis only if he or she has not been disbarred or suspended for

disciplinary reasons and has not resigned with charges pending in any jurisdiction or court. A similar restriction is included in the ABA's Model Rule 5.5(c), concerning the provision of legal services on a temporary basis, and we think the restriction is salutary and in the interest of protecting the public.

The language of proposed Rule 49(c)(13) differs from current Rule 49(b)(3) in another respect. Rule 49(b)(3) speaks of presence in the District of Columbia that is not "of incidental or occasional duration." Our proposed Rule 49(c)(13) speaks of "[p]roviding legal services in the District of Columbia on an incidental and temporary basis." We recommend the change because we believe the term "incidental or occasional duration" is confusing. We also believe that the word "temporary" is more appropriate than "occasional," and that it is preferable to track the terminology of ABA Model Rule 5.5(c), which uses the word "temporary." Finally, we recommend that the multijurisdictional practice permitted under our proposed Rule 49(c)(13) be on an incidental *and* temporary basis, rather than using the disjunctive formulation currently in Rule 49(b)(3).

The MJP Committee drafted proposed commentary to revised Rule 49(b)(3) and to new Rule 49(c)(13). The commentary to both provisions draws from but substantially modifies the current commentary to Rule 49(b)(3). The Committee, for example, amended the comment to Rule 49(b)(3) to clarify that Rule 49 does not apply unless a lawyer is physically present in the District, and that "virtual presence" through correspondence or electronic communications with persons in the District is not sufficient to constitute unauthorized practice here. The language of the current comment is ambiguous on that issue.

The Committee's proposed changes to Rule 49 and its commentary were not intended to prohibit any multijurisdictional practice currently permitted under Rule 49(b)(3), including multijurisdictional practice by foreign lawyers. The proposed changes are primarily clarifying. The proposal also includes in the text of Rule 49(c)(13) key safeguards in Rule 46(c) that apply when foreign lawyers practice in the District of Columbia as special legal consultants, and adds commentary explaining the consistency between Rule 49(c)(13) and Rule 46(c)(4).

Appendix A includes proposed Rule 49(c)(13) as well as the commentary proposed for Rules 49(b)(3) and 49(c)(13).

Recommendation 3

> The current provision of Rule 49 of the D.C. Court of Appeals excepting from the definition of unauthorized practice of law the activity of a non-D.C. Bar member who provides legal services in any court of the United States following admission to practice in that court (Rule 49(c)(3)), or in a court of the District of Columbia following admission *pro hac vice* (Rule 49(c)(7)), should be clarified explicitly to except the provision of legal services reasonably related to a pending or potential proceeding in that court if such person reasonably expects to be admitted to practice in that court.

Rule 49(c)(3) currently permits the provision of legal services by a non-D.C. Bar member in any court of the United States following admission to practice before that court, and Rule 49(c)(7) currently permits the provision of legal services by a non-D.C. Bar member in the courts of the District of Columbia following admission *pro hac vice*. Neither rule expressly permits the provision of legal services reasonably related to a pending or potential proceeding before an application for admission is granted.

The comparable provision of the ABA Model Rule on multijurisdictional practice, Rule 5.5(c)(2), permits a lawyer to provide legal services that "are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer . . .is authorized by law to appear in such proceeding *or reasonably expects to be so authorized*." (Emphasis added.) The MJP Committee recommended that Rules 49(c)(3) and (c)(7) be amended to conform to ABA Model Rule 5.5(c)(2). The amendment is consistent with the approach in Rules 49(c)(2)(A) and (c)(5)(A), which make the exception for certain practice before federal and D.C. agencies applicable to conduct "reasonably ancillary" to such matters. The comment to the Model Rule explains that examples of conduct permissible under the rule "include meetings with the client, interviews of potential witnesses, and the review of documents."

Appendix A includes the amendment to Rule 49(c)(3) and (c)(7) that we propose.

Recommendation 4

> The current provision of Rule 49 of the D.C. Court of Appeals specifying the contents of the declaration that must accompany each application for admission *pro hac vice* to a court of the District of Columbia (Rule 49(c)(7)(ii)) should be clarified and amended to require (a) a description of all disciplinary complaints pending against the applicant; (b) a description of the circumstances of all suspensions, disbarments, or resignations with charges pending in any jurisdiction or court; (c) a certification that the person has not had an application to the D.C. Bar denied, or a description of the circumstances of all such denials; and (d) a commitment by the applicant promptly to notify the court if, during the course of the proceeding, the person is suspended or disbarred for disciplinary reasons or resigns with charges pending in any jurisdiction or court.

Rule 49(c)(7), which governs *pro hac vice* admission to practice in a court of the District of Columbia, currently requires an applicant for admission *pro hac vice* to submit a declaration under penalty of perjury stating, among other things, that there are no disciplinary complaints pending against the applicant for violation of the rules of the courts of the states in which the applicant is admitted to practice, and that the applicant has not been suspended or disbarred for disciplinary reasons from practice in any court.

The rule does not by its terms address what an applicant or a court should do if there is a disciplinary complaint pending against the applicant, or if the applicant has ever been suspended or disbarred. The Court of Appeals' Committee on Unauthorized Practice of Law has interpreted Rule 49(c)(7)(ii) to allow an applicant to "make changes necessary to make the sworn statement accurate and complete." Opinion No. 9-10 (available at http://www.dcbar.org/for_lawyers/courts/court_of_appeals/opinion09_01.cfm).

Consistent with this interpretation, the MJP Committee recommended that Rule 49(c)(7) be amended to require that an applicant for *pro hac vice* admission *either* certify that there are no pending disciplinary complaints and that he or she has not been suspended or disbarred *or* describe all pending complaints and the circumstances of all suspensions, disbarments, or resignations with charges pending. The proposed amendment is intended to make clear that the court may, in its discretion, grant an application for *pro hac vice* admission even if there are charges pending against the applicant or if the applicant has at some point been suspended or disbarred or resigned with charges pending. The MJP Committee believed that the fact that disciplinary charges have been filed against an applicant should not automatically prevent admission

pro hac vice, and that the court should be permitted to take account of the substance and circumstances of the charges. Similarly, the Committee believed that the fact that an applicant has been suspended or disbarred or resigned with charges pending at some time in the past should not necessarily preclude admission *pro hac vice*, and that the court should be permitted to take account of such factors as how long ago the disciplinary action occurred, the facts underlying the action, and the applicant's history since the disciplinary action occurred.

The MJP Committee also recommended that an applicant for *pro hac vice* admission be required to certify that he or she has not had an application for admission to the D.C. Bar denied, or to describe the circumstances of all such denials. The Rule does not now require such a certification or description. The Committee believed this information to be pertinent and that a court should be able to consider the circumstances of any denial of admission to the D.C. Bar in determining whether to exercise its discretion to grant an application for *pro hac vice* admission.

The Committee further recommended that an applicant for *pro hac vice* admission be required to agree to notify the court promptly if, during the course of the proceeding, he or she is suspended or disbarred for disciplinary reasons or resigns with charges pending in any jurisdiction or court. The Committee believed that this important information should be brought to the attention of the court for its consideration in determining whether to revoke admission *pro hac vice*.

Finally, the MJP Committee recommended that an applicant for admission *pro hac vice* be required to identify *all jurisdictions and courts* where the applicant is a

member of the bar in good standing, and not merely the *states* in which the applicant is a member in good standing of the bar of the highest court, as Rule 49(c)(7) currently requires. Similarly, the Committee recommended that the disciplinary information required by the declaration accompanying an application for admission *pro hac vice* include such information about all courts and jurisdictions in which the applicant is admitted, and not just state courts.

Recommendation 5

> The current provisions of Rule 49 of the D.C. Court of Appeals permitting (a) limited duration practice by a non-D.C. Bar member as a lawyer employed by the government of the District of Columbia, (b) limited duration practice by a non-D.C. Bar member with a pending application to the D.C. Bar, (c) the provision of pro bono legal services under certain circumstances by an inactive member of the D.C. Bar or by a non-D.C. Bar member, and (d) the provision of legal services by a non-D.C. Bar member as a part of certain court-authorized programs (Rule 49(c)(4), (8), (9), and (10)) should be amended to exclude practitioners who have been disbarred or suspended for disciplinary reasons from, or who have resigned with charges pending in, any jurisdiction or court.

Some provisions of Rule 49(c) permit lawyers in good standing in any jurisdiction to engage in multijurisdictional practice where no local court or administrative agency regulates such practice. The Committee recommended that such multijurisdictional practice be permitted only if the lawyer has not been disbarred or suspended for disciplinary reasons from, or resigned with charges pending in, any jurisdiction or court. Specifically, the Committee recommended that such a restriction be added to Rule 49(c)(4), (8), (9), and (10), the provisions that require the lawyer engaged in multijurisdictional practice to be in good standing in some jurisdiction or court. The

amendment addresses the concern that lawyers practicing under this exception may be admitted in several jurisdictions and courts, and it may take a significant amount of time for reciprocal discipline to be imposed in all of the other jurisdictions where a lawyer who has been disciplined or resigned is admitted. The privilege of practicing law in the District of Columbia under these exceptions should not be extended to lawyers who have committed an ethical violation sufficiently serious to justify disbarment or suspension, or to cause them to resign with charges pending, in any jurisdiction or court.

Appendix A

Rule 49. Unauthorized Practice of Law [section (d) omitted]

(a) **General Rule**

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

(b) **Definitions**

The following definitions apply to the interpretation and application of this rule:

(1) **"Person"** means any individual, group of individuals, firm, unincorporated association, partnership, corporation, mutual company, joint stock company, trust, trustee, receiver, legal or business entity.

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

(A) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect interests in real or personal property, will, codicils, instruments intended to affect the disposition of property of decedents' estates, other instruments intended to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;

(B) Preparing or expressing legal opinions;

(C) Appearing or acting as an attorney in any tribunal;

(D) Preparing any claims, demands or pleadings of any kind, or any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal;

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

(F) Furnishing an attorney or attorneys, or other persons, to render the services described in subparagraphs (a) through (e) above.

(3) **"In the District of Columbia"** means conduct in, or conduct from an office or location within, the District of Columbia~~, where the person's presence in the District of Columbia is not of incidental or occasional duration~~.

(4) **"Hold out as authorized or competent to practice law in the District of Columbia"** means to indicate in any manner to any other person that one is competent, authorized, or available to practice law from an office or location in the District of Columbia. Among the characterizations which give such an indication are "Esq.," "lawyer," "attorney at law," "counselor at law," "trial or legal advocate," "legal representative," "legal advocate," and "judge."

(5) **"Committee"** means the District of Columbia Court of Appeals Committee on Unauthorized Practice of Law, as constituted under this rule.

(c) **Exceptions**

The following activity in the District of Columbia is excepted from the prohibitions of section (a) of this Rule, provided the person is not otherwise engaged in the practice of law or holding out as authorized or competent to practice law in the District of Columbia:

(1) **United States Government Employee:** Providing authorized legal services to the United States as an employee thereof;

(2) **United States Government Practitioner:** Providing legal services to members of the public solely before a special court, department or agency of the United States, where:

(A) Such legal services are confined to representation before such fora and other conduct reasonably ancillary to such representation;

(B) Such conduct is authorized by statute, or the special court, department or agency has adopted a rule expressly permitting and regulating such practice; and

(C) If the practitioner has an office in the District of Columbia, the practitioner expressly gives prominent notice in all business documents of the practitioner's bar status and that his or her practice is limited consistent with this section (c).

(3) **Practice Before a Court of the United States:** Providing legal services in or reasonably related to a pending or potential proceeding~~, and reasonably ancillary to litigation~~ in any court of the United States if the person has been or reasonably expects to be admitted ~~following admission~~ to practice in that court.

(4) **District of Columbia Employee:** Providing legal services for his or her employer during the first 360 days of employment as a lawyer by the government of the District of Columbia, where the person is an enrolled Bar member in good standing of a state or territory, is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court, and has been authorized by her or his government agency to provide such services;

(5) **District of Columbia Practitioner:** Providing legal services to members of the public solely before a department or agency of the District of Columbia government, where:

> (A) Such representation is confined to appearances in proceedings before tribunals of that department or agency and other conduct reasonably ancillary to such proceedings;
>
> (B) Such representation is authorized by statute, or the department or agency has authorized it by rule and undertaken to regulate it;
>
> (C) If the practitioner has an office in the District of Columbia, the practitioner expressly gives prominent notice in all business documents of the practitioner's bar status and that his or her practice is limited consistent with this section (c); and
>
> (D) If the practitioner does not have an office in the District of Columbia, the practitioner expressly gives written notice to clients and other parties with respect to any proceeding before tribunals of that department or agency and any conduct reasonably ancillary to such proceedings of the practitioner's bar status and that his or her practice is limited consistent with this section (c).

(6) **Internal Counsel:** Providing legal advice only to one's regular employer, where the employer does not reasonably expect that it is receiving advice from a person authorized to practice law in the District of Columbia;

(7) ***Pro Hac Vice* In the Courts of the District of Columbia:** Providing legal services in or reasonably related to a pending or potential proceeding in a ~~the~~ court~~s~~ of the District of Columbia, if the person has been or reasonably expects to be admitted ~~following admission~~ *pro hac vice*, provided:

(i) **Limitation to 5 Applications Per Year.** No person may apply for admission *pro hac vice* in more than five (5) cases pending in the courts of the District of Columbia per calendar year, except for exceptional cause shown to the court.

(ii) **Applicant Declaration.** Each application for admission *pro hac vice* shall be accompanied by a declaration under penalty of perjury: (1) certifying that the applicant has not applied for admission *pro hac vice* in more than five cases in courts of the District of Columbia in this calendar year, (2) identifying all jurisdictions and courts where the applicant is a member of the bar in good standing, (3) certifying that there are no disciplinary complaints pending against the applicant for violation of the rules of any jurisdiction or court, or describing all pending complaints, (4) certifying that the applicant has not been suspended or disbarred for disciplinary reasons or resigned with charges pending in any jurisdiction or court, or describing the circumstances of all suspensions, disbarments, or resignations, (5) certifying that the person has not had an application for admission to the D.C. Bar denied, or describing the circumstances of all such denials; (6) agreeing promptly to notify the Court if, during the course of the proceeding, the person is suspended or disbarred for disciplinary reasons or resigns with charges pending in any jurisdiction or court; (7) identifying by name, address, and D.C. Bar number the D.C. Bar member with whom the applicant is associated under Super. Ct. Civ. R. 101, (8) certifying that the applicant does not practice or hold out to practice law in the District of Columbia or that the applicant qualifies under an identified exception in Rule 49(c), (9) certifying that the applicant has read the rules of the relevant division of the Superior Court of the District of Columbia and the District of Columbia Court of Appeals, and has complied fully with District of Columbia Court of Appeals Rule 49 and, as applicable, Super. Ct. Civ. R. 101, (10) explaining the reasons for the application, (11)

acknowledging the power and jurisdiction of the courts of the District of Columbia over the applicant's professional conduct in or related to the proceeding, and (12) agreeing to be bound by the District of Columbia Court of Appeals Rules of Professional Conduct in the matter, if the applicant is admitted *pro hac vice*.~~sworn statement as follows:~~

~~I declare under penalty of perjury: (1) that I have not applied for admission *pro hac vice* in more than five cases in courts of the District of Columbia this calendar year, (2) that I am a member in good standing of the highest court(s) of the State(s) of (state all states), (3) that there are no disciplinary complaints pending against me for violation of the rules of the courts of those states, (4) that I have not been suspended or disbarred for disciplinary reasons from practice in any court, (5) that I am associated with (name the D.C. Bar member and give his/her Bar number) under Super. Ct. Civ. R. 101, (6) that I do not practice or hold out to practice law in the District of Columbia, and (7) that I have read the rules of the relevant division of the Superior Court of the District of Columbia and the District of Columbia Court of Appeals, and have complied fully with District of Columbia Court of Appeals Rule 49 and, as applicable, Super. Ct. Civ. R. 101. The reason(s) I am applying for admission *pro hac vice* are as follows:~~

~~I acknowledge the power and jurisdiction of the courts of the District of Columbia over my professional conduct, and I agree to be bound by the District of Columbia Court of Appeals Rules of Professional Conduct in this matter, if I am admitted *pro hac vice*.~~

(iii) **Office Outside of D.C.** No person who maintains or operates from an office or location for the practice of law within the District of Columbia may be admitted to practice before a court of the District of Columbia *pro hac vice*, unless that person qualifies under another express exception provided in section (c) hereof.

(iv) **Supervision.** Any person admitted *pro hac vice* must comply with Super. Ct. Civ. R. 101 and other applicable rules of the District of Columbia courts.

(v) **Application Fee.** Application to participate *pro hac vice* shall be accompanied by a fee of $100.00 to be paid to the Clerk of Court. Proof of payment of the fee shall accompany the application for admission *pro hac vice*. The application fee shall be waived for a person whose conduct is covered by section (c)(9) hereof, or whose client's application to proceed *in forma pauperis* has been granted.

(vi) **Filing.** The applicant first shall submit a copy of the application to the office of the Committee, pay the application fee, and there receive a receipt for payment of the fee; whereupon the applicant shall file the application with the receipt in the appropriate office of the Clerk of Court. Only certified checks, cashiers checks, or money orders will be accepted in payment of the fee, made payable to "Clerk, D.C. Court of Appeals." The application will not be accepted for filing without the required receipt.

(vii) **Power of the Court.** The court to which the relevant litigation matter is assigned may grant or deny applications, and withdraw admissions to participate *pro hac vice* in its discretion.

(8) **Limited Duration Supervision By D.C. Bar Member:** Practicing law from a principal office located in the District of Columbia, while an active member in good standing of the highest court of a state or territory, <u>and while not disbarred or suspended for disciplinary reasons or after resignation with charges pending in any jurisdiction or court,</u> under the direct supervision of an enrolled, active member of the District of Columbia Bar, for one period not to exceed 360 days from the commencement of such practice, during pendency of a person's first application for admission to the District of Columbia Bar; *provided* that the practitioner has submitted the application for admission within

ninety (90) days of commencing practice in the District of Columbia, that the District of Columbia Bar member takes responsibility for the quality of the work and complaints concerning the services, that the practitioner or the District of Columbia Bar member gives notice to the public of the member's supervision and the practitioner's bar status, and that the practitioner is admitted *pro hac vice* to the extent he or she provides legal services in the courts of the District of Columbia.

(9) **Pro Bono Legal Services:** Providing legal services *pro bono publico* in the following circumstances:

> (A) Where the person is an enrolled, inactive member of the District of Columbia Bar who is employed by or affiliated with a legal services or referral program in any matter that is handled without fee <u>and who is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court</u>; provided that, if the matter requires the attorney to appear in court, the attorney shall file with the court having jurisdiction over the matter, and with the Committee, a certificate that the attorney is providing representation in that particular case without compensation.
>
> (B) Where the person is a member in good standing of the highest court of any state, <u>is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court,</u> and is employed by the Public Defender Service, or is employed by or affiliated with a non-profit organization located in the District of Columbia that provides legal services for indigent clients without fee or for a nominal processing fee; provided that the person has submitted an application for admission to the District of Columbia Bar within ninety (90) days after commencing the practice of law in the District of Columbia, and that such attorney is supervised by an enrolled, active member of the Bar who is employed by or affiliated with the Public Defender Service or the non–profit organization.

(C) Where the person is an officer or employee of the United States, is a member in good standing of the highest court of a state or territory, is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court, and is assigned or referred by an organization that provides legal services to the public without fee; provided that the person is supervised by an enrolled, active member of the District of Columbia Bar.

An attorney practicing under this section (c)(9) shall give notice of his or her bar status, and shall be subject to the District of Columbia Rules of Professional Conduct and the enforcement procedures applicable thereto to the same extent as if he or she were an enrolled, active member of the District of Columbia Bar.

An attorney may practice under Part (B) of this section (c)(9) for no longer than 360 days from the date of employment by or affiliation with the Public Defender Service or the non-profit organization, or until admitted to the Bar, whichever first shall occur.

(10) **Specifically Authorized Court Programs:** Providing legal services to members of the public as part of a special program for representation or assistance that has been expressly authorized by the District of Columbia Court of Appeals or the Superior Court of the District of Columbia, provided that the person gives notice of his or her bar status and is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court.

(11) **Limited Practice for Corporations:** Appearing in defense of a corporation or partnership in a small claims action, or in settlement of a landlord-tenant matter, through an authorized officer, director, or employee of the organization; provided:

(A) the organization must be represented by an attorney if it files a cross-claim or counterclaim, or if the matter is certified to the Civil Action Branch; and

(B) the person so appearing shall file at the time of appearance an affidavit vesting in the person the requisite authority to bind the organization.

(12) **Practice in ADR Proceedings:** Providing legal services in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution ("ADR") proceeding, provided:

(i) The person is authorized to practice law by the highest court of a state or territory or by a foreign country, and is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court.

(ii) The person may begin to provide such services in no more than five (5) ADR proceedings in the District of Columbia per calendar year.

(iii) The person does not maintain or operate from an office or location for the practice of law within the District of Columbia or otherwise practice or hold out to practice law in the District of Columbia, unless that person qualifies under another express exception provided in section (c) hereof.

(13) **Incidental and Temporary Practice:** Providing legal services in the District of Columbia on an incidental and temporary basis, provided that the person is authorized to practice law by the highest court of a state or territory or by a foreign country, and is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court.

NEW OR REVISED COMMENTARY

Commentary to § 49(b)(3):

Section (b)(3) clarifies by explicit definition the geographic extent of the Rule.

The Rule is intended to regulate all practice of law within the boundaries of the District of Columbia. The fact that an attorney is associated with a law firm that maintains an office in the District of Columbia does not, of itself, establish that that attorney is maintaining an office in the District of Columbia.

The practice of law subject to this Rule is not confined to the matters subject to the law of the District of Columbia. The Rule applies to the practice of all substantive areas of the law and requires admission to the District of Columbia Bar where the practice is carried on in the District of Columbia and does not fall within one of the exceptions enumerated in section (c).

Rule 49 applies only if a lawyer is physically present in the District of Columbia at least once during the course of a matter. Even if a matter involves a client, and a dispute or transaction, in the District, the Rule does not apply if a lawyer located outside the District advises a client in-person only when the client visits the lawyer in the lawyer's office, or if the lawyer advises the client only by telephone, regular mail, or electronic mail. However, if a lawyer is physically present in the District even once during the course of a matter, the lawyer may be engaged in the District of Columbia in the practice of law with respect to the entire matter, even if the lawyer otherwise operates only from a location outside the District.

The definition of "in the District of Columbia" is intended to cover the practice of law within the District under the supervision of, or in association with, a member of the District of Columbia Bar. Persons who provide legal services as lawyers with law firms and other legal organizations in the District of Columbia, with or without bar memberships elsewhere, are practicing law in the District and are in violation of the Rule, unless they fall within one of the express exceptions set forth in section (c).

Commentary to § 49(c)(12):

Section (c)(12) is new. This exception allows lawyers to represent clients in up to five new ADR proceedings annually. This provision furthers the strong public policy favoring the efficient and expeditious resolution of disputes outside the judicial process, to the extent consistent with the broader public interest. This provision gives clients who agree to resolve their disputes through ADR proceedings an option to retain attorneys not admitted in the District of Columbia that is generally equivalent to the option provided through the *pro hac vice* exception in section (c)(7) to clients who resolve their disputes in judicial proceedings.

This new exception (c)(12) contains three important provisos, each of which is based on provisos for the *pro hac vice* exception in section (c)(7). First, the lawyer must be authorized to

practice law by the highest court of a state or territory or by a foreign country, and must not be disbarred or suspended for disciplinary reasons, or have resigned with charges pending, in any jurisdiction or court. Second, the lawyer may begin to provide such services in no more than five ADR proceedings in the District of Columbia in each calendar year. An ADR proceeding would not count as a new ADR proceeding for purposes of this limit if it is ancillary to a judicial proceeding in which a lawyer is admitted pro hac vice (for example, when the court orders or encourages the parties to try to resolve the matter through ADR). Similarly, this limit of five new ADR proceedings annually would not apply so long as the lawyer's participation in an ADR proceeding in the District of Columbia is temporary and incidental to his or her practice in another jurisdiction. Third, the lawyer may not maintain a base of operations in the District or Columbia or otherwise practice here, unless the lawyer qualifies under another exception in Rule 49(c).

This provision allows lawyers to represent clients in ADR proceedings that require more than incidental or temporary presence in the District. Separate from the authority granted by this exception, a lawyer may represent parties in ADR proceedings (or other matters) under section (c)(13) if the lawyer's presence in the District is incidental and temporary.

This exception relates only to lawyers who represent clients in ADR proceedings. As explained in the Commentary to Rule 49(b)(2), lawyers who serve as arbitrators, mediators, or other kinds of neutrals in ADR proceedings are not engaged in the practice of law.

Commentary to § 49(c)(13):

Section (c)(13) is new. Rule 49 is not intended to require admission to the District of Columbia Bar where an attorney with a principal office outside the District of Columbia is incidentally and temporarily required to come into the city to provide legal services to a client.

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

Where, however, an attorney provides legal services concerning a transaction related to the District from a location within the District of Columbia, the attorney may be engaged in the practice of law in the District of Columbia because the attorney's presence is not incidental. Whether a transaction is related to the District of Columbia depends on the location of the parties, the location of the property and interests at issue, and the law to be applied. Another relevant factor is whether the lawyer not admitted to the D.C. Bar is the only lawyer for a party, or whether the lawyer is co-counsel or the lawyer's role is limited to one aspect of a transaction

with respect to which a D.C. Bar member is lead counsel. For example, where a transaction concerns real estate located in the District of Columbia, a lawyer based outside the District who comes to the city to provide legal services to a client located inside or outside the District relating only to the federal tax aspects of the transaction may qualify for this exception. However, a lawyer based outside the District who comes to the city to be primary counsel to a District-based client with respect to all aspects of the real estate transaction may not qualify for this exception. Whether the lawyer who is not admitted to the D.C. Bar and whose principal office is outside the District is associated with or supervised by a member of the D.C. Bar is a relevant, but not controlling, factor in determining whether the lawyer's practice in the District is "incidental."

Section (c)(13) also requires that the lawyer's presence in the District be "temporary." There is no absolute limit on the number or length of a lawyer's visits to the District that makes the lawyer's presence "temporary." For example, a lawyer who spends several weeks or even months in the District in connection with a case that does not involve the District and that is pending in a court outside the District may be only temporarily, and incidentally, in the District for purposes of section (c)(13). If a lawyer's principal place of business is in the District, the lawyer is not practicing law in the District on a temporary basis and must be a member of the D.C. Bar unless another exception in section (c) applies.

This exception permits a person authorized to practice law in another country to practice law in the District on an incidental and temporary basis, subject to the specified conditions. Those conditions, including the requirements that a foreign lawyer be authorized to practice law in a foreign country and not be disbarred or suspended in any jurisdiction, are consistent with the requirements in Rule 46(c)(4) concerning special legal consultants that the foreign lawyer be in good standing as an attorney or counselor at law (or the equivalent of either) in the country where he or she is authorized to practice law.

The exception in section (c)(13) is separate from other exceptions in Rule 49(c), and the specific exception controls the general exception. For example, whether or not regular appearances before federal agencies located in the District of Columbia by attorneys with their principal offices in other jurisdictions fit within this exception for temporary practice, they may qualify under the federal practice exception in section (c)(2). A lawyer with a principal office outside the District who comes to the District in connection with a pending or potential case in the District of Columbia courts must qualify for the *pro hac vice* exception in section (c)(7) regardless of whether the lawyer's practice in the District is otherwise temporary and incidental.