

SUPREME COURT OF NEW JERSEY
TRENTON, NEW JERSEY

AD HOC COMMITTEE

ON BAR ADMISSIONS

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:TRANSCRIPT OF PUBLIC HEARINGS

: March 7, 2002

IN ATTENDANCE:

HON. JOHN. E. WALLACE, JR., CHAIR
JOHN J. FRANCIS, JR., ESQ., VICE CHAIR
SHACARA N. BOONE, ESQ.
RONALD K. CHEN, ESQ., ASSOCIATE DEAN
HON. PATRICIA K. COSTELLO
PROF. PAULA A. FRANZESE
JEFFREY J. MILLER, ESQ.
HON. EDITH K. PAYNE
DARRYL W. SIMPKINS, ESQ.
PETER TU, ESQ.
BEVERLY A. WILLIAMS, ESQ.
HON. JOSEPH L. YANNOTTI
E. NEAL ZIMMERMAN, ESQ.

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I N D E X
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Wallace - Opening Remarks

JUDGE WALLACE: To my left is John J. Francis, Junior. He is the vice chair of this group. And we have representatives, approximately ten in number. You see it in the front as well as staff for this organization.

Our announcement concerning the public hearings requested comments concerning one, multi jurisdictional practices issues. Two, status and oversight of in house counsel who are admitted, who are not admitted in New Jersey. Three, admission of out of state attorneys on motion. And four, requirements for permitting qualified prior educated attorneys to take the New Jersey bar examination.

Since our announcement of our public hearings and as a result of the Philadelphia Bar association's proposal to establish a shared office in New Jersey for Pennsylvania attorneys who also are members of the New Jersey Bar, our Supreme Court requested that we consider, quote, "an assessment and recommendation on whether the current bona fide office requirements in our court rules should be retained, modified or deleted." End of quote. The Supreme Court's commission on the rules of professional conduct chaired by Justice Pollock is also reviewing the same issue.

Now although this recent charge to our

1 committee was not included in our notice to the public
2 on these hearings, anyone who wishes to address this
3 issue, we would certainly welcome your comments.

4 We are very fortunate to have with us this
5 morning Wayne J. Positan, the Chair of the ABA's
6 Commission on Multijurisdictional Practice present to
7 address us and to answer any questions as well as to
8 give comments from the committee's interim report.

9 At this time I call upon Mr. Positan to make
10 any presentation he wishes to make at this time.

11 MR. POSITAN: Thank you, Judge Wallace and
12 other Judges and other many friends I see on the, on
13 the committee. It has been a pleasure to be in
14 communication with you in our respective missions so
15 that we can compare what the two bodies have been doing
16 and hopefully to facilitate further progress and
17 communication as to where these issues should end up in
18 the State of New Jersey which, of course, is dearest to
19 my heart in all of these proceedings as we go through
20 them.

21 Let me first give two disclaimers. I am not
22 here, you know, as a member of the Board of Trustees of
23 the New Jersey State Bar Association to speak on behalf
24 of the NJSBA, contrary to some remarks I saw on one of
25 the recent articles when I said a few things.

1 Secondly, I am not here to speak as a
2 representative of the ABA Section of Litigation where
3 I'm director of divisions who is also studying the
4 issue and which I've been involved in as the Chair of
5 that committee. I'm not longer at this time.

6 I am here as Chair of the ABA Commission on
7 Multijurisdictional Practice and also to give whatever
8 personal remarks I can be that would not be
9 inconsistent with the work of the commission in that
10 regard.

11 Having said all that, let me first tell you
12 where we are in terms of our process. We are expecting
13 to close our commentary period this coming week on
14 March 15th. We have engaged, as you know I'm sure, in
15 an effort that began in August of 2001. It was 2000
16 actually to educate the public as to what we were doing
17 and to seek comments, seek involvement and seek
18 testimony ultimately and submissions from the various
19 states and other interested groups and attorneys around
20 the country on the issue. That will culminate finally
21 in a closure of that next week.

22 We will then have hearings in New York City
23 on the twenty first and twenty second of this month.
24 We will then have further hearings in April, internal
25 committee hearings to determine where we're going by

1 way of final report. Our final report will be issued
2 on May 10th to the ABA House of Delegates and rules and
3 calendars of the ABA will be scheduling us for hearings
4 in front of the House of Delegates and for hopefully a
5 conclusion of our process at the meetings in Washington
6 this coming August.

7 It was my absolute anticipation that that
8 will occur in terms of our responsibilities whether the
9 H.A.D. decides to ultimately approve it or disapprove
10 it or take another action or even delay it of course is
11 beyond my control.

12 I will tell you that I do not know exactly
13 where we will come out on the various issues that we
14 put forth in the mid term report of the Commission on
15 Multijurisdictional Practice in November. There are
16 obviously a bunch of different proposals that have come
17 forth from different groups since then and we've heard
18 from a bunch of states. There are still others that we
19 expect this week.

20 I know, for example, that Florida is supposed
21 to issue their report by March 15th and of course,
22 Florida has, has been a jurisdiction of great interest
23 in terms of the process, the multijurisdictional
24 process on practice. And we've heard from California.
25 We've heard from other states. Ohio, Missouri and New

1 Jersey at its Board of Trustees meeting a couple of
2 weeks ago passed on what their recommendations were for
3 New Jersey. There are others that we are still waiting
4 for and hope will weigh in certainly by next week so
5 that we can have this (indiscernible) process if
6 possible.

7 We have taken a variety of approaches. I
8 think it's important to, to emphasize that the very
9 first thing we did in our report was to affirm or
10 recommend that the ABA affirm and support for the
11 principal state judicial licensing and regulation
12 boards. There was considerable comment and speculation
13 in the beginning as we started the process in favor of
14 national licensure (phonetic) or, you know, a much
15 broader administration of how people, you know, become
16 lawyers and then can travel about the country in
17 practice.

18 That has been rejected by our group and I
19 don't expect that we'll see any change in that
20 position. We have instead, beyond that, gone into a
21 process where we've recommended that Rule 5.5 be
22 changed to essentially allow a series of safe harbors
23 for practice when you practice on a temporary basis in
24 another jurisdiction.

25 I want to emphasize that one, two clear

1 points out of that is that we do not count them in
2 solicitation when you go to another jurisdiction nor do
3 we contemplate that you will have a regular practice
4 there, such as open a law office. Those two things are
5 not accepted under our proposals under 5.5 as they
6 stand today. Any time you have those situations, it's
7 our position you should be licensed in the state that
8 you're going to go into.

9 There have been other proposals. There's one
10 that the NOBC, ACCA and APRO have put forth which they
11 call the common sense proposal which I have kind of
12 chided them about down in Philadelphia a couple weeks
13 ago because they said we've got to have a little more
14 common sense in terms of what we think might ultimately
15 get adopted and might be a more workable model. But we
16 continue to do that battle and one of the things we'll
17 be voting on in New York is whether we should accept
18 that kind of a model as opposed to ours. I don't want
19 to make any predictions about that but I feel very
20 strongly that the safe harbor, personally, approach is
21 a better one because I think it gives a better map for
22 lawyers in jurisdictions in terms of what their conduct
23 is and what is acceptable.

24 I think also it's a, certainly a, a somewhat
25 pragmatic recognition of the fact that we have fifty

1 jurisdictions who will be passing upon this, as you are
2 doing here, and making recommendations to our Supreme
3 Court. And that I think it promotes an evolution of
4 change that people can deal with and say okay, we don't
5 agree with all of your proposals on safe harbors and we
6 have certain groups who have come before such as the
7 military and asked for better clarification of what is
8 permissible, for example, and they represent people
9 from the military in various jurisdictions. But I
10 think it gives you a road map and a feeling for what
11 you might find acceptable or not acceptable in a
12 particular state and allows for a, for a state to say
13 well, we agree with your recommendations A through B
14 but we're not quite comfortable with, you know, E and F
15 and, therefore, we're not ready to go there. But I
16 think it starts the process going because what I see
17 ultimately in this situation is going to be, you know,
18 an evolutionary period.

19 Some states may say, you know, we think
20 you're, you're really off the map here and they're not
21 going to go along with this. I suspect because of what
22 has happened in our practice, technological change,
23 movement across the country, corporate counsel
24 complaining that when they change jobs and go to
25 another state, they really are not a, you know, a

1 valuable accepted, you know, group of people to get
2 involved in bar issues or feel that they can even
3 practice without some fear that they're going to be
4 reprimanded. Certainly people in big firms who switch
5 offices will, will tell you the same thing. Corporate
6 people will tell you that they, you know, want lawyers
7 who can go around the country. And we've had testimony
8 from a variety of them who say I violate the rules in
9 many states continuously because I go around the
10 country and do various pre-litigation activity, for
11 example.

12 We have lawyers who, who retire and move on
13 or clients who retire and move on. We, in New Jersey,
14 certainly know a lot of our citizens move to the sunny
15 south at some point in their lives and they develop a
16 trust relationship with our attorneys and want to know
17 why when their attorney comes down to Florida to visit
18 them, they can't talk about trust and estates practice.
19 Well we know that they do.

20 Most people that I talk to say well, you
21 know, I'm not in favor of opening up the doors in New
22 Jersey to the Philadelphia and New York lawyers and I
23 say well, did you ever talk to somebody about this over
24 in New York? Well, yeah. Did you ever do this? Did
25 you ever do that? Well, yeah. And what you find out

1 is that when I, when I ask them, you know, have you
2 engaged in multijurisdictional practice in the state in
3 which you're not admitted, that most of them will
4 candidly admit to me that they have. And I think
5 personally and I think the commission thinks that what
6 we're trying to do is to bring lawyers in terms of the,
7 in terms of the real world that we live in today into
8 the twenty first century and to have lawyers have a set
9 of rules that reflect both what society need in terms
10 of representation and to allow lawyers to practice
11 within the law, as we, above all people should do. And
12 also to protect the public at the same time.

13 So when, so when you go and solicit and
14 there's some disaster and you flitting in, you know,
15 there are rules that deal with that already but that's
16 not something that should be countenanced. When you
17 set up a shingle down the street, you know, and say
18 that you're there practicing to the public, you're
19 telling them that that's where you can be found and
20 that you're there regularly and we say when you do
21 that, you should be admitted.

22 And I'm also obviously keenly aware by
23 (indiscernible) and the various other things, you know,
24 that we're required to do as licensed attorneys in this
25 state and which serve absolutely, you know, excellent

1 public purposes and we these should be continued. I
2 also have a lot of frustration in my various bar roles
3 when I see people who generally, you know, have, have
4 drifted away from the bar. It's certainly a different
5 environment then when I started twenty seven or twenty
6 eight years ago and all the firms supported the bar.
7 And I've seen that diminish and I think the liability
8 of the bar associations, whether it be on the county
9 level, specialty bars, state level and American bar is
10 critical because of the function that we serve in terms
11 of our relationship with the judiciary and the system
12 of justice in general.

13 So that's something that's always in the back
14 of my mind as we move forward and something that I care
15 very much about because I know that in the final
16 analysis, what we do as lawyers is critical to our
17 democracy in general.

18 Now having said that, I mean I think we, we
19 in New Jersey, you know, have to deal with the concept
20 that there's a fear, an economic one many times that
21 gee, if we allow this to happen, we're gonna have a
22 flood of lawyers who are gonna come in here and New
23 Jersey attorneys are gonna be compromised in terms of
24 their ability to continue to do what they do in their
25 practice.

1 But I think there's another side of that.
2 For example, we, we have seen certainly in the last
3 fifteen, twenty years, you know, that Philadelphia and
4 New York firms have come in here and they've recruited
5 some of the best and finest of our New Jersey fellow
6 lawyers and they have established those practices with
7 licensed New Jersey lawyers and there are certainly, I
8 could probably click off twenty five or thirty names
9 right now of national firms in New Jersey right now who
10 are practicing with New Jersey lawyers, doing it
11 exactly the way they're supposed to do.

12 So the feel I think that there's gonna be
13 some, you know, see change in how we practice by
14 loosening any of these restrictions just isn't there.
15 It's already happened. You know, as I told some of the
16 lawyers, if that's what you're worried about, they
17 already ate your lunch. Now let's talk about dinner.
18 And that's not to say that you should just broaden the
19 barriers and knock them down entirely because the
20 public has to be protected. And if you look at Justice
21 LaVecchia's opinion certainly in the Jackman (phonetic)
22 case, you see I think, you know, the critical part
23 which is is there, is it gonna be injurious to the
24 public and the public interest. And I, and I think
25 there is certainly things that, that can be liberalized

1 over a period of time that would reflect what, what our
2 citizens really need and what our attorneys really
3 need.

4 For example, people who practice in a variety
5 of areas. I practice labor and employment law and
6 litigation. Pro hoc vice is generally not a problem
7 anywhere in the country except there are some
8 aberrations in some states where, you know, there's
9 limitations on strict numbers and, you know, why is six
10 the limit in some cases when, you know, a quote,
11 unquote Microsoft case might mean you're there for, you
12 know, ten years with twenty lawyers as opposed to the
13 person who comes in and handles three PI cases and, you
14 know, there's certainly a qualitative analysis that has
15 to be done as well. It's very difficult to quash those
16 things out.

17 But essentially, as you move forward towards,
18 towards looking at these things, I think you have to
19 look at what do you do for New Jersey lawyers in
20 reverse. I mean if I had a client and, and Lord only
21 knows that you change all the time with clients. You
22 got (indiscernible) by this one. That one merged with
23 that one and you end up with a closely held New Jersey
24 corporation that now has branches in Pennsylvania, New
25 York, Delaware, someplace else in the north east. If

1 New Jersey lawyers who have had those traditional
2 relationships can't represent that client in those
3 other states, then they're gonna lose that business to
4 these very firms that we're worried about because
5 they're gonna -- the client doesn't want to go to five
6 different law firms. They want to go to one law firm
7 and say, hey Positan, handle by labor and employment
8 practice. They want me to go those states. So you
9 don't put me in a position to compete, you know, and I,
10 I just used myself as an example. I've talked to
11 plenty of transactional lawyers and some of our firms
12 throughout the state who tell me they routinely engage
13 in transactional practice where you have to go to
14 another state.

15 Transactional lawyers are very concerned.
16 They say you litigators are protected because you can
17 always avail yourself of pro hoc vice, whereas we
18 can't. And, of course, part of the answer to that is
19 well, when you're doing that, you're automatically
20 associating with local counsel and, therefore, you
21 know, the state interests are protected.

22 They tell me when I say that, that you're not
23 being practical because nobody is going to associate
24 with a local counsel in some huge transactional deal
25 that involves a multinational corporation because

1 that's just not the way it's done. It happens every
2 day. And that's probably true. You know, you can say
3 well, you know, why not associate with local counsel.
4 And they'll say well, because it would be irrelevant to
5 do that. It's just all you're doing is engaging in
6 protectionism and protecting your turf and making sure
7 that the local attorney makes a fee as opposed to
8 having any real necessity to, to be part of that
9 transactional deal that's going on right then.

10 And it's difficult sometimes to answer that.
11 So a balance has to be stricken, I think, between
12 protecting the public and protecting the attorneys who
13 are vibrant and essential in our system. But, but
14 really allowing change to occur which is happening
15 every day out there in the work place and it's not a
16 situation where you say well, just because it's
17 happening, doesn't mean we have to abide by it.
18 Because everybody speeds on the turnpike doesn't mean
19 it's okay.

20 But, but that's kind of a simplistic analysis
21 that doesn't really answer the question which is what
22 is best for the practice. What is best for the public.
23 What is best for the system of justice. And when you
24 get into areas like motion on admission. I'm admitted
25 in New York. I waived in back in 1982 when that was

1 still possible before New York said, you know, it's not
2 reciprocal. We're not gonna allow it any more. I am
3 certainly very cognizant of what my limitations are in
4 the state of New York. I don't particularly care to go
5 litigate in the Supreme Court of New York. Federal
6 Court's a different, different issue and I can
7 certainly counsel and engage in labor relations
8 activities that are traditional in federal law,
9 national regulations board type work and OSHA and EOC
10 work which are pretty much common.

11 Those kinds of things, you know, certainly I
12 think lend themselves to the idea where, you know, you
13 have about twenty states that have allowed motion by
14 admission and I think as a concept, that it's something
15 we ought to seriously consider moving to whether it
16 happens now or over a period of time. I, I ultimately
17 think that what will happen is what you're seeing
18 happening right now in the north west where Oregon,
19 Idaho and Washington state are getting together and
20 trying to work out because of the commonality in the
21 practice out there, how you can work, you know, in one
22 state but still go to the other two and practice for
23 various clients because a client moves out there tend
24 to be that people who are engaging in business in one
25 of those states tends to be engaging in business in all

1 three states.

2 We found the same thing in Kansas City,
3 Missouri and Kansas City, Kansas. And yet Kansas and
4 Missouri seem to take a very varied approach on that.
5 You get the practitioners out there who'll tell you
6 they do it all the time. Because how do you not
7 practice when the, you know, the state runs right down
8 the middle of Main Street?

9 That's certainly the case in New Jersey with
10 the Delaware River and the Hudson River. But
11 ultimately I think you have to look at what makes sense
12 in terms of reciprocity. And I think reciprocity
13 personally is important. It's not necessarily
14 something that we've dealt with in the report yet but
15 we will have that on our agenda when we meet in two
16 weeks. And I think it's something that we need to deal
17 with.

18 It's -- on a temporary practice side, there
19 are a couple of states, Michigan and Virginia, who have
20 pretty much open doors on, on MJP and the people from
21 those states will tell you that they haven't seen any
22 huge change in terms of how people do business.

23 You know, the, you know, the feel that this
24 is somehow going to decimate the bar just didn't
25 happen. There are obviously limitations on how many

1 states you can practice in in terms of being licensed.
2 Nobody's gonna go become a member of twenty five state
3 bars, I think, or get licensed in twenty five states.
4 It just isn't practical. And I think we've dealt on a
5 very positive basis throughout the years with ethics
6 opinion fourteen, for example. On corporate counsel,
7 we're actually one of the more, I think, accepting
8 states of what corporate counsel can do and I think a
9 lot of states would like to have what we have in terms
10 of their corporate attorneys. But corporate attorneys
11 will tell you that they want, they want to be involved
12 in, in activities in the state more and they're, in
13 fact, being precluded to because they're really second
14 class citizens since they're not admitted in the state
15 and they always have, you know, concerns about getting
16 into difficulties.

17 So in a nut shell -- and the other thing I
18 want to add, too, is in terms of all of these issues,
19 we have stood strongly behind ABA Accreditation. You
20 raised a question, for example, Judge Wallace, about
21 the, the foreign lawyer. That's a very difficult
22 subject in terms of what you allow or don't allow by
23 MJP. We in New Jersey, of course, adopted the foreign
24 legal consultants rule recommended by the ABA about
25 seven or eight years ago although ours is more

1 restricted than the model rule. And we have made some
2 recommendations on that in terms of allowing for
3 summaries of MJP by foreign lawyers when they come in.
4 But the, the admission rule in terms of the
5 accreditation, you know, I would say to you that we
6 have been consistent in looking at ABA Accreditation as
7 critical in terms of law schools. And in any situation
8 where that has arisen under our report, it's something
9 that we felt very strongly about.

10 Similarly, with our recommendation for an
11 admission on motion says it should be consistent with
12 the one proposed by the ABA section of legal education
13 and admissions to the bar in such instances.

14 JUDGE WALLACE: Mr. Positan --

15 MR. POSITAN: Any time the ABA has had --

16 JUDGE WALLACE: Pardon me. Mr. Positan, it's
17 my natural habit to interrupt during conversation. I
18 apologize for it but you bring up an issue with regard
19 to foreign educated attorneys. Did you consider
20 whether or not for foreign educated attorneys, there
21 should be some, something that the ABA would do to
22 evaluate to determine if a institution that they
23 graduated from would qualify them to take a state bar?

24 MR. POSITAN: We haven't finally considered
25 that. It's something that's come up during our recent

1 deliberations and submissions and that's something we
2 will be talking about. We haven't made a conclusion on
3 that yet. But it's a sticky wicket because of the
4 accreditation issue. And, of course, that is also an
5 issue in California for example, where they permit
6 admission to practice in California from non-accredited
7 law schools. We've had a lot of testimony from those
8 people who are very concerned, saying if you adopt a,
9 an admission by motion rule, you know, why wouldn't we
10 be able to. We've had fifteen years of experience,
11 let's say, in our practice and why can't we go to your
12 state because we know a lot more than somebody coming
13 out of law school. It's an interesting argument but
14 we, we feel that ABA accreditation on law schools is
15 very important.

16 The other aberration you have is in, in
17 Wisconsin where you have an admission by diploma rule.
18 If you're a graduate of one of the two law schools
19 there, you can get admitted to practice automatically
20 as opposed to sitting for the bar exam. So that's
21 another little bit of a wrinkle. I know Chief Justice
22 feels very strongly that that's not to be an impediment
23 to somebody from Wisconsin going to another state and I
24 think that there's gonna be probably a change already
25 in terms of ABA policy on that with that body that will

1 take that into account.

2 So essentially I mean that's the over view of
3 where we're at and you know, I would encourage
4 everyone. I sat in on this process personally as being
5 a fairly conservative person feeling that, you know,
6 I'm a New Jersey guy and let's protect New Jersey and
7 I'm a New Jersey lawyer and, you know, who wants to all
8 these Philadelphia and New York firms over here. But I
9 look around and I see that they're here any way.

10 The other thing I wanted to say is that I
11 don't think what we've done in terms of our
12 recommendations in any way suggest that the bona fide
13 office requirement is inconsistent with that because if
14 you're going to come over here and get admitted, or
15 you're gonna solicit business, we say you should have
16 an office. You should be admitted and that is not at
17 all inconsistent with the position that the State Bar
18 has taken in front of the Supreme Court and the
19 Philadelphia Bar Association case.

20 So that's still there and that's not
21 inconsistent with any of our recommendations.

22 JUDGE WALLACE: I think you had indicated
23 that you would entertain some questions that we might
24 have on your report, the interim report.

25 MR. POSITAN: Sure.

1 JUDGE WALLACE: I have one dealing with the
2 rule itself, the proposed rule. In B1B, I think you
3 indicate that as long as the client was informed that
4 you were not a member of that Bar in that state and the
5 client agreed for you to represent him or her in that
6 matter, that you could then perform that interim
7 service and forward in the realms of the rule. There
8 was no indication that that notice had to be in writing
9 either to the client or from the client. Was there any
10 consideration of that, that it be in writing, not just
11 informing the client?

12 MR. POSITAN: We haven't come up with a
13 specific recommendation in that regard. There's been a
14 lot of talk about whether you should require it.
15 There's some people who have said that you should
16 require legal malpractice insurance to be disclosed or
17 as to whether you have it or not. There are some that
18 say it should be a mandatory requirement.

19 You know, we keep in mind also that one of
20 the overriding precepts in all of this is that we, we
21 continue to abide by the, you know, rule one in effect
22 which is that if you're not competent to perform a
23 service, you shouldn't be doing it. So you're, you
24 know, you're really acknowledging to a client when you
25 take any matter on that you have, you know, the

1 experience or the ability to handle a matter i.e. that
2 you're competent to handle it and if you're not, you
3 shouldn't be handling that even if you're in your own
4 state. So, you know, that's kind of the overriding
5 view. But the, you know, the specifics in terms of
6 what you should do in terms of disclosure, we haven't
7 dealt with specifically in terms of signing should be
8 this way or that way but there has been some talk about
9 it and it's certainly reasonable to, to require some
10 notice if, you know, if that is a consideration or
11 concern.

12 JUDGE WALLACE: All right. And I notice you
13 also permit that notice to be made retroactively so
14 that after an incident might come up, you could get the
15 approval after the incident itself?

16 MR. POSITAN: Well I think we need to spend a
17 little more time on that. I mean my personal view is
18 that, you know, if you're gonna require disclosure, you
19 ought to have disclosure at a time when it means
20 something and when we can take the work on as opposed
21 to after you do it. I think any client should
22 certainly know what the, you know, what the essence is
23 of what you, what your expertise is and what you think
24 you're gonna do whenever you take a matter on. So I
25 think that's something that needs to get a little more

1 attention.

2 JUDGE WALLACE: Now I'm sure you've had some
3 question regarding that, there's a phrase that is sort
4 of general about creating an unreasonable risk to the
5 interest of the lawyer's client. That's, that's gonna
6 be very difficult --

7 MR. POSITAN: That's one that's still on the
8 agenda for a lot of discussion.

9 JUDGE WALLACE: Yeah. That's gonna -- that's
10 sort of how do you grab wind of that.

11 MR. POSITAN: Well, you know, it really
12 started as a process of, of what we did with safe
13 harbor because originally when we started talking about
14 safe harbor concepts, we talked about, we had the words
15 temporary or occasional and then it became temporary
16 and occasional and then it became just temporary
17 because there was a concern that people would be
18 confused about what we meant. Now, of course, there's
19 commentary that says well we don't know what you mean
20 by temporary.

21 You know, temporary in my mind, and I frankly
22 personally like the definition of having a little bit
23 more to it, but the feeling was that, you know, it was
24 the same thing and, therefore, let's make it simple
25 rather than have a lot of extra verbiage. When we

1 changed from the concept of safe harbor for exceptions
2 that would guide lawyers and the courts in terms of
3 deciding what was acceptable or not acceptable to the
4 word illustrative and such that to the members, it
5 became a matter of the safe harbor as being examples as
6 opposed to exceptions, saying that these were just some
7 of the things that we would count on as safe harbors by
8 way of illustration. That's when the phrase about
9 unreasonable risk was put in because that was the kind
10 of debate that went on in terms of whether or not, you
11 know, that was providing adequate protection and, and
12 kind of frame work to the concept that you can engage
13 in temporary practice.

14 We also started with the concept that you
15 were gonna do this for existing clients originally and
16 then people said well what about, you know, people who
17 are experts in securities law or some other area,
18 federal law. What about people who do the same things
19 that non-lawyers do. You know, some of those became
20 safe harbors. But that kind of gravitated towards
21 well, you know, what if you're the world's expert on,
22 on this particular substantive area. You know, and we
23 began to use the example well, you know, what if one of
24 the famous criminal lawyers comes into your
25 jurisdiction. And, of course, that's answered by pro

1 hoc vice and association with local counsel.

2 But then the transactional lawyers will say
3 well, you know, but there are people who are their
4 equivalents in a transactional area who, you know,
5 don't have any vehicle to, to utilize to become
6 admitted on a temporary basis and, therefore, how do
7 you deal with that. Why shouldn't they be allowed to
8 do it because they happen to be the world's expert on
9 this little area of securities law and, you know,
10 you're really depriving the client in this case from
11 using the best possible attorney, at least the one that
12 they think is best, from assisting them in this
13 extremely complicated deal.

14 So it became a process of evolution and we're
15 still grappling with the transactional lawyers feel
16 that if we're being too restrictive in what we've kind
17 of provided for them by way of safe harbors and they
18 want us to be a little bit more in line with the
19 restatement of law and say that, you know, you're not
20 restricted to this existing client because if you get a
21 call from, you know, client, from a new client in
22 another jurisdiction who wants to avail themselves of
23 your services because they heard you were so good, they
24 should be allowed to do that. And that's kind of how
25 we evolved to this whole area of kicking back the

1 unreasonable risk and what I call the critical hinge,
2 which was to unhinge the safe harbors from being
3 exceptions as opposed to now being illustrative.

4 But I think it also ties into a lot of the
5 UPL cases that have come down particularly in New
6 Jersey. I think when you look at the Jackman case, it
7 ties into that because it's really taking into account
8 the public interest and how one approaches this
9 subject, namely is it injurious to the public. Is it a
10 significant risk to the public.

11 Somebody asked me last week on the ABA
12 Journal hook up that we had on national audio visual as
13 to why shouldn't sophisticated multi national
14 corporations have an exception to this because, you
15 know, using the example I just did, they said, you
16 know, they're really different. I mean they're not
17 gonna be injured by that and, you know, if they are,
18 that's their problem because they picked the people
19 and, you know, they really are inherently more
20 sophisticated and, therefore, you know, they're not
21 gonna be duped by anybody. And I said well, I can
22 answer that in one word, Enron. And I said, you know,
23 I said make a case for me where the public wasn't
24 injured by that. And there was dead silence on the
25 other side.

1 So I said, you know, they're really no
2 different than everybody else then. Are they? And,
3 and I don't think that you can make a case that there
4 should be a split based upon sophistication level of
5 clients. And I think one rule has to apply to all.

6 MR. FRANCIS: Judge Wallace asked about the
7 phrases that gave me some pause, temporary and
8 unreasonable risk to the interest of the client. When
9 you talk about unreasonable risk, are you talking about
10 competence? And if so, how, how do you know whether
11 somebody has come in from out of state in here and
12 they're practicing and they're really not competent?
13 They don't have the expertise. They don't have the
14 experience or the skills. How do you ever know that?

15 MR. POSITAN: Well it's certainly difficult
16 to know that. I mean it's difficult to know that for
17 people who practice in our state as to whether they
18 should be handling the matter. You know, I'm sure,
19 John, you and I have seen many, many times when you're
20 up with an adversary in Federal Court and you kind of
21 say what are they doing here. I mean they don't have a
22 clue what's going on here.

23 So, you know, people who will say that. You
24 know, how do you say that well, you know, these out of
25 state attorneys are automatically gonna be that when

1 you know that a lot of them are very sophisticated when
2 they come into Federal Court let's say from another
3 state. We find that we're signing papers pro hoc vice
4 admission people and so forth. So you have a higher
5 level of protection. But I don't think you can ever be
6 certain, even in our own state that somebody is
7 handling something competently. And we all know that
8 there's, you know, great variance in what particular
9 competency, competency may be in any particular case.
10 You know, whether you're handling a transaction or even
11 a law suit, and yet, you know, people practice totally
12 within the rules and I guess that's, you know, a
13 question of how well the client gets along with the
14 lawyer and the client, of course, has that choice. I
15 mean was the client diligent in finding who was the
16 best lawyer to handle particular matter? You know,
17 it's a tough one to deal with.

18 But I, I can't make the statement that that's
19 any different than somebody from another state coming
20 in. I mean certainly I think we have to be certain
21 that there's an adherence to disciplinary rules. That
22 there's a, you know, an interest obviously in terms of
23 making sure that if people are doing things that they
24 shouldn't do, such as soliciting business when they
25 shouldn't be, or otherwise breaching the rules, that

1 there's a remedy for that. And I think we've covered
2 that in 8.5. But I think we also need to be cognizant
3 of the fact that there are these areas of law where
4 it's, it's pretty clear that people have expertise in
5 areas and they're being prohibited from, from
6 practicing. So there's a balance once again that has
7 to be struck because I think the public interest is
8 that they want lawyers to be less restrictive about
9 practicing in particular jurisdictions because it
10 doesn't really serve any interest other than that of
11 the lawyers in that jurisdiction.

12 I think it's a fine line to draw but I think
13 there has to be some relief in the rules to permit the
14 movement of attorneys from state to state on an easier
15 basis than there has been historically. And I think
16 there are certainly client needs and public interest
17 issues in terms of making sure that a client can have a
18 lawyer who's competent, who they feel is the most
19 competent perhaps, to handle their matter and maybe the
20 lawyer that they trust the most. Whether that's, you
21 know, a multi national transaction or a simple trust
22 and estates matter where the family has been
23 represented by this attorney throughout the family
24 history or the attorney's thirty four year practice
25 with them and they move to another state and they still

1 want this attorney to come and advise them on, on their
2 legal affairs. So I think that has to be taken into
3 account.

4 I think Florida obviously is the classic
5 example of that and Florida will tell you well, you
6 know, we don't want ten thousand new attorneys coming
7 down from New Jersey and New York every year and
8 getting admitted down here.

9 But the practical effect of that really is,
10 you know, are these people gonna go down there and
11 Florida attorneys are gonna be out of business? I
12 don't think so. I mean, yeah, to some extent, I'll
13 quote FDR. The only thing you have to fear is fear
14 itself. I mean if you're a competent lawyer and you've
15 done what you should do with your clients and you've
16 established a reputation as being, you know, one of the
17 best and finest at least in your client's eyes, you
18 don't have anything to be afraid of because that
19 client's not going anywhere any way. And you're not
20 gonna recruit the multi national corporation that's
21 coming over here from France any way. Are we gonna
22 force those clients of various types, from the single
23 client to the multi national corporation, and say you
24 have to use somebody from New Jersey any time you do
25 anything here? I mean that's essentially what we're

1 doing and I, I think that's not realistic in today's
2 world of technological change.

3 I think we have to begin the process of at
4 least recognizing that we can't be that restrictive.
5 And I know it's not easy and it's certainly a difficult
6 line to draw in every one of these safe harbors. I
7 don't necessarily personally agree with every one of
8 these.

9 There's been a lot of issue over number two,
10 for example, about should lawyers be able to do what
11 non-lawyers do. I mean episodically, I can tell you
12 that I have lost business to California personnel
13 consulting firms who have come in here and found that
14 there's an NNRB (phonetic) matter going on and they
15 hang out down by the desk down there and see what got
16 filed that day and then my client gets a phone call and
17 says well, you know, gee we'll do this for a couple
18 thousand dollars. You don't need Positan and his
19 rates. And next thing you know, or else, you know, X
20 company from, from Missouri called up and they like to
21 use this national consulting firm who are not lawyers
22 and low and behold, because there's no requirement that
23 they practice, that they be admitted into practice in
24 New Jersey because they're not lawyers to start with,
25 they're the, you know, the consulting companies of the

1 world, I lose the business.

2 Now I can't go to California and do that.
3 And are we putting lawyers at a competitive
4 disadvantage by not allowing lawyers to do such things?
5 There's always two sides of the story to these things
6 because we have good lawyers who do, who do what they
7 do very well in Federal law, let's say. I mean I think
8 labor was a perfect example. And I can tell you in the
9 practice of labor laws, since I've been doing it for,
10 you know, twenty seven, twenty eight years now that
11 it's routinely expected that lawyers from other states
12 will come in and handle labor arbitrations. They do it
13 all the time. And they can go and negotiate a labor
14 contract or handle an NLRB matter. It happens every
15 day. And, you know, it's a situation where it's going
16 on and everybody just kind of is like well, you know,
17 they can do that. But that's not what the rules say.

18 Are they practicing law when they come in to
19 handle a labor arbitration? I mean essentially anytime
20 a lawyer does anything, they're practicing law. But
21 yet, I mean I'll come to the real key component of all
22 this. What do we do in New Jersey to enforce all of
23 that? If you're not gonna have a valid enforcement
24 mechanism, and we have had our cases. I mean we've had
25 the Jackman case and that came up only because the

1 person moved to another firm and the other firm got a
2 little sensitive to it and the next thing you know, it
3 became an issue. You know, we've had the DiBenedetto
4 case.

5 I mean there are circumstances where
6 something gets thrown in where you have to do something
7 about it. But what are we gonna do as a state to
8 prosecute or (indiscernible) what's going on right now?
9 The answer. Zero. Because you won't go to any
10 prosecutor in any county in the state and prosecute the
11 attorney from the south who's up here doing labor
12 arbitration. It just isn't gonna happen. It's
13 happened throughout my entire career. So how do we
14 allow New Jersey lawyers then to go do that down south?
15 Why should it be different?

16 And that's the real conundrum in all this, is
17 how do you enforce any of this? I mean I think
18 lawyers, lawyers tend to be very affected by it because
19 most of us or the great majority of us, you know, a
20 very high percentage, want to practice within the
21 confines of the law. We don't want to do anything
22 wrong. We want to make sure we've complied with
23 everything there is to comply with.

24 I don't want to go to -- I mean that's why I
25 got admitted in New York. I thought it was a great

1 opportunity because of the fact that we're in northern
2 New Jersey and there may be some clients who straddle
3 both states so when the opportunity arose, I did it,
4 because I wanted to do it right.

5 I think lawyers generally want to do that.
6 So how do you make them able to do that? And it's
7 gonna happen any way. It's happening every day out
8 there and yet nothing gets done about it. I defy
9 anybody to define what the practice of law is. I mean
10 we've talked about it and I, and I to this day as I
11 stand before you, how do you ever get there? It's
12 impossible except to say that anything a lawyer does,
13 you're practicing law when you do it. But yet, any
14 member of the public out there who's an accountant or
15 in some other consulting business does probably, except
16 when I'm in court litigating, the things I do on the
17 personnel and employment HR side, they do every day. I
18 mean my competition is only, isn't only other lawyers.
19 It's the, all the big (indiscernible) consulting firms
20 and, at least consulting outfits I'm talking about. I
21 get mail every day from them. You know, they want to
22 send me tapes and go to a seminar. And that's out
23 there.

24 So how do you stop that? You can't. So how
25 do you make lawyers best able to deal with it? To

1 enable them to do the same kinds of things and probably
2 at a much higher level in some cases than they do. I
3 mean that's, that's the conundrum. How do you enforce
4 this stuff?

5 JUDGE WALLACE: On your proposal for
6 admission on motion, I notice that I think the last
7 provision provides that if a proposed attorney had
8 taken the bar in the last five years and failed it,
9 that he or she would not be eligible to be admitted on
10 motion. What was some of the discussion or thinking
11 for that?

12 MR. POSITAN: Well I think certainly the
13 State is entitled to provide reasonable boundaries to
14 who they will admit on motion. I mean you could
15 require, New York does for example, the ethics
16 component where -- and of course a lot of these states
17 in some cases have CLE that goes beyond ours. In New
18 York, I have to certify with CLE. I take it. I know
19 Pennsylvania has mandatory CLE every year. And
20 essentially, and you can talk about that. I remember
21 when I went to New York, I had to appear before an
22 ethics committee up there and had me study the ethics
23 rules before I could get admitted. That's certainly a
24 reasonable component.

25 I, I certainly think that a state can say

1 well, you know, five years isn't enough. We've
2 attached to our report a bunch of indications from the
3 various states that have allowed it as to how often,
4 how many years you have to practice. It could be ten
5 years. There's certainly a level at some point in time
6 where you can say well, that's a pretty experienced
7 lawyer. And, you know, that's not a real danger. I
8 don't know if I can make that case in five years. I
9 could probably make it at ten for most lawyers.

10 We, we have recommended, for example, that
11 the national data bank be utilized and updated and
12 become much more efficient in terms of the ability of
13 states to check on the disciplinary proceedings that
14 have been against lawyers so if you're practicing in
15 any state and you have a disciplinary charge that
16 results in discipline against you, that that's
17 available to anybody for checking.

18 The same thing about passing and failing bar
19 exams. You know, certainly that's a component. If
20 somebody's failed or if somebody's, you know, been
21 derelict in their duties. I would think you could add
22 a component about whether somebody's been convicted of
23 malpractice or not convicted but found, you know,
24 liable for malpractice which would certainly be a
25 reasonable component.

1 JUDGE WALLACE: Well the reason I ask it,
2 because frequently when someone may move into the state
3 from another jurisdiction, they may have practiced in a
4 particular field for a number of years and they have
5 focused on that and may be very good in that field but
6 they don't have the broad background necessarily to
7 focus on the bar examination to complete it and have
8 passed it. That person would not be eligible to come
9 in on motion even though he or she might be qualified
10 in their field to practice law but they wouldn't be
11 qualified for the bar 'cause they passed it one time.

12 MR. POSITAN: Well see that's the problem I
13 have with the concept of requiring the bar admission,
14 bar exam in every situation. Certainly, I mean given
15 my level of practice, I mean I, I'm not gonna go handle
16 somebody's real estate transaction, even the most
17 simple one 'cause I haven't done it in I don't know,
18 twenty plus years and, you know, that's the last thing
19 in the world I want to do and yet, it's probably one of
20 the most common things that a lawyer does. But I
21 certainly wouldn't want to go to any state and say all
22 right, I want to take the exam and let's deal with real
23 estate because it would be like going back to law
24 school. You know, and yet there's certainly people on
25 the other side of that who, who, you know, would say

1 the same thing about labor and employment law.

2 I think you have to recognize that those, you
3 know, those so called specialties exist and expertises
4 exist and that's precisely why, I think, you know, that
5 a bar exam isn't essential and isn't necessarily a good
6 measure. And I think, I think it's an essential
7 measure at the beginning. You should have to pass one
8 somewhere and you should be from an accredited ABA law
9 school. After that, and with the multi state
10 particularly in many, many states, it becomes less
11 relevant I think once you've passed it, you know, in
12 terms of whether you should require that twenty five
13 years later. I would dread the thought of going to X
14 state right now and taking the bar exam. I'd probably
15 have to take two or three weeks off from my practice.
16 I'm confident I could probably do it but what purpose
17 would it serve? I'm not gonna go down to that state
18 and practice real estate law. I'm probably go do what
19 I do best which is labor and employment law and
20 litigation.

21 So I think it becomes almost a, you know,
22 kind of an interesting concept to say is somebody going
23 to be competent just because they took a bar exam.
24 Because even if I take it, I'm not gonna handle a real
25 estate transaction anyway so it's gonna be like the bar

1 exam I took here in 1974. And if you asked me to take
2 that today, I'd, you know, I'd be really winging it on
3 a couple areas because they're not areas that if a
4 client called me up, I'm gonna say hey, call my real
5 estate partner or here, go to my trust and estates guy.
6 I mean you don't want me handling your federal tax law
7 dispute. I don't know anything about that. I mean I
8 know that I better go call Walter Fessler when that one
9 comes in because he knows about it and I don't. So I
10 think that's what people do. That's what lawyers do.

11 And we have been forced to specialize and to,
12 and become experts in areas, and that's not to in any
13 way suggest that solos can't do those kinds of things.
14 But I think, I mean I get plenty of calls from solos
15 who say, hey, Positan, you know, we got a labor matter
16 here. I don't know anything about this stuff. I'm
17 gonna send it over to you. And that's why I always
18 tell people they should be involved in the bar
19 association because that's what happens when people
20 recognize your expertise. They send you work. And
21 vice versa. And I'll send them back work because I
22 know that you do that kind of work and, you know. And
23 you can do that well and we don't do that. So I think
24 that's inherent in you're going back to the first rule
25 again. You should be competent to do what you do. And

1 I think that's the protection ultimately.

2 Or perhaps the thing that you can't protect
3 against also because you can't say that about lawyers
4 in New Jersey. I mean there are lawyers in New Jersey
5 who can't do what I can do competently. And likewise,
6 I can't do what they do competently because I just
7 don't do it. And, you know, my duty at that point is
8 to tell the client I don't do that. But if I have
9 somebody in my firm that does it, fine. Here, you want
10 to talk to talk my other partner or associate. And if
11 I don't, I say our firm doesn't do that. Here. Here's
12 a list of five firms who I think do and you should call
13 them up. I mean you have to make that determination
14 every day of your career.

15 But we can't protect them any more against
16 that, that lawyer coming from another state than we can
17 against our own attorneys who are admitted and there's
18 a presumption that they're competent to do everything.
19 But they're not.

20 JUDGE WALLACE: Any questions anyone else?

21 Yes.

22 MR. TU: Mr. Positan, some attorneys have
23 criticized the ABA's commissions approach to model rule
24 5.5 and in particular, the use of illustrative safe
25 harbors rather than an exclusive list and it's

1 suggested that not only should the safe harbors be
2 narrowed but that the enumerated list should be the
3 only exceptions to UPL. And what is the ABA's response
4 to that criticism?

5 MR. POSITAN: Well the judgment of the
6 commission to date has been that, that they don't want
7 to be that restrictive. That they think it's
8 reasonable in protection, you know, such as the one we
9 talked about, about unreasonable risk and the rules of
10 competency to, to practice any particular area. So
11 that the feeling among the commission to date has been
12 that that's an appropriate extension to make, an
13 illustrative, rather than exception. Most of the
14 states that we've seen lately have kind of tailored it
15 to what they feel is right.

16 There are certainly some states who have been
17 very broad about it, like Michigan and Virginia who I
18 mentioned before. I mean you've had California, Ohio,
19 Missouri, Louisiana and Nevada do different things with
20 it and to tailor them. Nevada, for example, has put in
21 a registration requirement as a protection which is
22 something that some people have talked about. I think
23 the commission probably would say that that's unduly
24 restrictive.

25 But one of the things I like about the safe

1 harbor approach is that it precisely allows states to
2 do that. To say I don't like number two and number
3 seven. You know, the doing things that non-lawyers do.
4 I heard that from Arizona. Not officially yet but I
5 think that's the way they're gonna come down. We don't
6 like two and seven. And at least some of the people
7 involved in their committee have told me that. So I
8 can't say that officially.

9 But I had a bunch of states say, say those
10 kind of things and I think that, you know, when I talk
11 to some of the Chief Justices around the country, I
12 think what we're trying to do is to give you that list.
13 You can argue -- I mean it's certainly a fair comment
14 to say it shouldn't be a illustrative. It should be
15 exception. I would expect that a lot of states are
16 gonna say we're not gonna go along with that. They're
17 gonna say exceptions. Certainly New Jersey has taken
18 that approach and done it under their own defined
19 terms.

20 That's what I expect states to do.
21 Ultimately I think it will broaden because when people
22 try it and see that it's not having this horrible
23 effect that everybody's concerned about, that they'll
24 become more comfortable with it and gradually, they'll
25 evolve to allowing piece by piece things to open up.

1 If I'm wrong, well certainly you'll, you'll see that
2 not happen.

3 But I suspect that over a period of time,
4 what you'll see is kind of regional conclaves. Chief
5 Justices appointing committees such as this and perhaps
6 moving to the next step, talking on a broader basis,
7 two, three, four states, regions. New England, for
8 example, I understand there's some movement afoot
9 there. You know, Connecticut at one point was, has
10 been more conservative. But I think what you'll see is
11 that evolution happen and I think our approach is to
12 give you that road map to, to get through it over a
13 period of time.

14 I think twenty years from now, you'll see
15 that most states have bought into essentially what the
16 commission has done. And it's gonna be a very sporadic
17 effort in some cases.

18 MR. TU: One follow up to that. One issue
19 that I haven't seen at least addressed well is the
20 whole issue of choice of law. That is which
21 disciplinary rules apply. So as an example, the
22 Georgia lawyer coming into New Jersey and under
23 Georgia's rules, whatever that attorney is doing falls
24 within a safe harbor but it doesn't fall within a New
25 Jersey safe harbor. Is that person subject to

1 discipline or should the Georgia rules apply? And if,
2 if the answer is that the Georgia rules should apply,
3 then does that suggest that if New Jersey doesn't adopt
4 these safe harbors or adopts narrower safe harbors,
5 that all we're doing is hampering our attorneys and not
6 protecting our citizens?

7 MR. POSITAN: Well it's a little bit of
8 caveat emptor. If you decide that you're a New Jersey
9 attorney and you want to go to Georgia and engage in
10 MJP and assuming MJP is permitted on some level in
11 Georgia or perhaps not even dealt with yet, you
12 recognize that you're subjecting yourself to the
13 discipline of that state. And it is that state's laws
14 that's gonna apply. And you saw that in the
15 DiBenedetto case. And basically what we've said is
16 understand that, that when you go into one of these
17 jurisdictions, you're doing that and that essentially,
18 if you get into a proceeding at that point in time
19 when, when Georgia, by way of example, says what you've
20 done here is wrong. You've wronged one of our citizens
21 and we're going to discipline you and say never come
22 back to Georgia and here's a, you know, a fine or some
23 other thing, that gets reported back to your home state
24 and your home state is supposed to give that not quite
25 full faith and credit but close to it. And unless it's

1 contrary to public policy, and we've essentially made a
2 recommendation that the state should, should
3 acknowledge that.

4 There's a split in authority throughout the
5 country on how, how much full faith and credit those
6 kinds of things get today but essentially, MJP
7 contemplates that if a lawyer came to New Jersey from
8 any other state and they're engaging in MJP, if New
9 Jersey were to adopt it, but they would recognize that
10 our, our system is a disciplinary system which would
11 apply and that we expect that when we report that back
12 to wherever they came from, that it's gonna get in
13 effect full credence. Maybe not full faith and credit
14 because they're gonna probably take a look at it but we
15 expect it to be substantially enforced in the same
16 manner as it was done here. And that's what you bought
17 into when you said I'm gonna do this.

18 PROFESSOR FRANZESE: Mr. Positan, thank you.
19 Our main concerns would be over arching and
20 (indiscernible) in avoiding the imposition of
21 unreasonable risk to the client, particularly the less
22 sophisticated or more unwitting client and I'm
23 wondering if you could help us here. Would you think
24 that it's reasonable to conclude that there would at
25 least be a meaningful baseline of competence? That

1 those who succeed in attaining admission and
2 maintaining admission to practice in the state of New
3 Jersey would enjoy as to New Jersey practice than
4 perhaps those coming in from outside would not enjoy
5 and that that might well be lost on the more naive
6 client?

7 MR. POSITAN: Well I think it's a matter that
8 you deal with in a couple of ways. First of all, I
9 think you, anybody who wants to come in and get
10 licensed by admission, motion by admission, let's
11 assume we were to adopt motion by admission. I think
12 that would certainly contemplate a requirement that you
13 take certain courses. That you at least appear before
14 a committee or show proof that you have competency and
15 at least ethics opinions and ethics rules. In other
16 words, how you conduct yourself in practice.

17 I think you can go beyond that and require
18 some CLE if you chose to do so. What that component
19 is, you know, would be up to reasonable minds to differ
20 as to how broad it should be or how limited it should
21 be depending upon what you want to do. It would
22 certainly contemplate paying all the funds that a New
23 Jersey lawyer is paying to whether it be our IALTA or
24 otherwise.

25 Certainly, for example, if somebody comes in

1 right now and gets admitted pro hoc vice in our state
2 or federal courts, they, they have to deal with
3 whatever fees we require. I know in various national
4 firms that I've, I've sponsored people pro hoc vice,
5 they had to pay IALTA. It gets reviewed once a year
6 and becomes a yearly review process and they have to
7 comply.

8 So I think you could put those components
9 into it. You know, varying degrees of what you thought
10 was reasonable. You could certainly make disclosures
11 required and you know, you could have whatever you
12 wanted, as John has indicated in terms of what you tell
13 a client. You certainly, once again, get back to -- I
14 mean the ethics rules themselves contain a lot of the
15 concerns that we have which is that, you know, you
16 should not handle a matter for a client unless you're
17 competent to do so. And that's the overriding one that
18 protects everybody already and it's there. It's there
19 in our rules and it's there in any model rule that
20 you'll ever see.

21 That, that, in essence, is a guideline for
22 everything from where you start. Because you just, I
23 mean I shouldn't represent somebody in New Jersey where
24 I'm licensed for, since 1974 if I don't have the
25 competency to do it. I used a few examples before.

1 So I think you could put reasonable
2 components on when you do it and how you do it and I
3 don't think there's any automatic right or wrong
4 answers on how broad you want to go. If you're gonna
5 allow people to do things, you can require reciprocity.
6 You can say we'll only do this if you let New Jersey
7 lawyers go to your place. And I think that's
8 reasonable and probably something I would suspect, as
9 in New Jersey, and I'll take my MJP ABA hat off now. I
10 would certainly expect that personally that if we were
11 gonna allow that, we would certainly say it only
12 applies to reciprocal states. And that's what New York
13 has done which is why we can't go (indiscernible) into
14 New York any more. It's entirely reasonable I think.

15 So I think you define what the parameters
16 are. You say what comfort level do I have to make sure
17 this attorney is competent. You check the national
18 data base. You find out if there have been any
19 disciplinary matters. You find out if they graduated
20 from an accredited law school. How many times did they
21 pass the bar exam. I mean things that may be relevant
22 to whether or not we think it's okay to bring that
23 person in. You know, as I've often said, you know, and
24 I draw the line when, you know, when you see the guy's
25 name on the bus going down the street. That's

1 solicitation and at that point, you better be licensed
2 in the state because then, you know, the people that
3 you're concerned about are gonna call that number and
4 say, you know, injured? Call so and so. You know.

5 But there are things I've seen in the last
6 week where people are on the internet, you know. I get
7 things from Lawyer Services, you know. You don't need
8 a lawyer and there's a thing called, you know, this dot
9 com who, you know, why you don't need a lawyer or
10 something like. Why you don't need a lawyer dot com.
11 And you know, they got forms, trusts and estates forms.
12 I mean that's what's going on out there. How do you
13 stop it? How do you stop the internet? I mean people
14 are advertising.

15 Unluckily we've all seen the situation where
16 people come in and they kind of affiliate with a firm.
17 And I'm not gonna mention names but I mean I've seen
18 some of it go on. You've seen some of the disasters
19 that we've had. I mean I was involved with the World
20 Trade Center thing and the after math where there were
21 some efforts being made. I was working with Bob
22 Clifford on the task force on terrorism and, you know,
23 there were some stuff got distributed about, you know,
24 solicitation of victims and things like that. And the
25 ABA reacted very strongly to it and ATLAS has reacted

1 very strongly to it. But how do you deal with these
2 people who, you know, who solicit.

3 I mean there's another one I heard of the
4 other day where somebody from the south west apparently
5 had put a notice out kind of saying we're not admitted
6 in your state but, you know, if you've been injured,
7 we've done a lot of work in this area and when you, if
8 you call us up, we'll affiliate with somebody in your
9 state. That sounds a little shady to me. I have a
10 problem with that. But how do you stop it? And that's
11 what we have to do.

12 But I think we can come up with reasonable
13 rules and restrictions and say it's ten years and it's
14 xyz and you got to take so much CLE. You got to appear
15 before a panel of the Supreme Court. You got to take
16 an ethics course. That's what you got to do but you
17 can come in. And then the corporate counsel that are
18 here can avail themselves of it. The attorneys from
19 other states who are competent can avail themselves of
20 it. And like I said, the restriction is such that I'm
21 not gonna go join twenty five places and pay all these
22 fees and do all that stuff. But there may be two or
23 three or four states where it's a reasonable thing for
24 me to do because my clients and practice mandate it.
25 They want it. And my client's not getting injured by

1 me being able to do that nor is the public. But you
2 got to draw the line. Where does the public begin to
3 get injured? And that's really what our paramount
4 concern has to be.

5 JUDGE WALLACE: Mr. Positan, thank you very
6 much. You've enlightened us very much.

7 MR. POSITAN: Thank you. I know it's a tough
8 task as you wrestle with these things and I, you know,
9 you mind is always churning on it so I appreciate the
10 opportunity to --

11 JUDGE WALLACE: We can all congratulate you.
12 I assume that your partners are working very, very hard
13 because you're out doing this wonderful work but we
14 thank your partners for allowing you to do that 'cause
15 you've certainly --

16 MR. POSITAN: They weren't saying that
17 yesterday morning at 6:30 when I started my labor
18 negotiations.

19 JUDGE WALLACE: Thank you again.

20 MR. POSITAN: Thank you.

21 JUDGE WALLACE: Okay. Next we have -- is
22 Susan Sharko (phonetic) present?

23 UNIDENTIFIED: Ed Mathews is gonna do it.

24 JUDGE WALLACE: All right, Mr. Mathews. All
25 right, in lieu of Ms. Sharko for the Trial Attorneys of

1 New Jersey.

2 MR. MATHEWS: Yes, Your Honor. Mr. Chairman,
3 Judges, members of the panel, I am not Susan Sharko, as
4 you can tell, although my daughter told me this morning
5 that seeing a man go to substitute for a woman who
6 wasn't available is progress in her view.

7 Susan unfortunately could not be here and I
8 assure you it was not because she was afraid of the
9 withering cross examination she would get from John
10 Francis. She unfortunately had a conflict so I was
11 asked to come.

12 The Trial Attorneys of New Jersey is an
13 organization made up essentially of trial lawyers. We,
14 we cross all disciplines. We have defense. We have
15 plaintiff. We have matrimonial. We have workmens
16 comp. Essentially, we're litigators. We're trial
17 lawyers. And I think that's important because we, we,
18 we don't like to be confused with ATLA or the New
19 Jersey Defense Association, both of which are terrific
20 organizations of trial lawyers but our focus tries to
21 be broader and tries to look at it from a little bit
22 more objective point of view. At our core is the, the
23 goal of the protection of the jury system in the state
24 of New Jersey and to address other issues that may be a
25 concern to trial lawyers.

1 Susan has forwarded to you a written
2 statement of position and there's just a couple of
3 things I might want to add to that. There are
4 basically three requirements to be admitted in New
5 Jersey. Good character, grovel to the ethics of the
6 profession and knowledge of the law. These latter two
7 are demonstrated through graduation from an approved
8 ABA law school and passing of the bar examination.

9 The concept of admission, coming in simply
10 because you're admitted in another jurisdiction doesn't
11 necessarily satisfy those two requirements. It doesn't
12 demonstrate whether somebody had difficulty initially
13 passing the bar exam in another jurisdiction and if
14 the, if the concept is you're admitted somewhere else,
15 you've been practicing for seven years and you come,
16 it's difficult to say well because you've been admitted
17 for seven years, that you now have some competence.
18 What did you do in that seven years that, that gives
19 you some degree of competence that could give people an
20 assurance that you're, you're competent to practice?

21 Indeed a lot of law school graduates today
22 get admitted and don't practice law. And then, you
23 know, they could come ten years later, never having
24 practiced law, and say all right, I was admitted in
25 California. I'm admitted for ten years. I should be

1 admitted in New Jersey on labor.

2 I'll go back to, to when I was a young
3 college graduate, I went into the Marine Corp. and I
4 went in at an interesting time. We were dealing with
5 lawyers who were not lawyers within the meaning of
6 section thirty seven of the uniform code of military
7 justice. What that meant was you didn't go to law
8 school. You weren't admitted to the bar but you were
9 allowed to function as lawyers and, indeed, you were
10 assigned in a lot of cases to represent enlisted
11 personnel and court martials and probably I would not
12 be here today hadn't I had that experience because
13 that's what got me on the bug of wanting to be a
14 lawyer, wanting to be a trial lawyer. But they were
15 also switching over to what they thought was a better
16 system where they were gonna have all lawyers
17 representing people. And so they brought in a bunch of
18 lawyers into the Marine Corp and they would
19 (indiscernible) for graduates and they would go to
20 Quantico and they would go through OCS and then the
21 theory was they would then become competent and, and
22 they'd be Marine officers and they could represent
23 people.

24 One of the problems they had was a lot of
25 these lawyers were flunking the bar exams in the state

1 that they came from. So now although they'd been to
2 law school, they were really no different from me in
3 the sense that they were still not a lawyer within the
4 meaning of article thirty seven of the uniform code.

5 And what a lot of these lawyers did was they
6 ran up to Washington, DC and took the bar exam in
7 Washington and all of them passed the bar exam in
8 Washington. Now I'm not suggesting that the bar exam
9 in Washington today isn't a good bar exam. The point
10 I'm making is that there are degrees of difficulties in
11 bar exams. In different jurisdictions, it's easier to
12 be admitted through a bar exam. So you may have
13 somebody who, who, for example, would take the multi
14 state bar exam and wouldn't get a score high enough to
15 qualify them for admission in New Jersey but, but they
16 might get admitted elsewhere because of whatever the
17 formulas are. And I'm not pretending to be an expert
18 on this. I don't know what all of that entails. But
19 the point I'm making is that they may not have that
20 degree of competence from having passed the bar exam.

21 Now they passed the bar exam that maybe
22 doesn't have the rigors of our exam and they've
23 practiced law for ten years within that meaning but
24 they've never really practiced law and they're coming
25 and we're going ahead and admitting them. So I think

1 that there has to be some concern and you have to look
2 at it.

3 Now I know that Mr. Positan thought that
4 maybe we could have a component, and it almost sounds
5 like well they won't take the bar exam but we'll have
6 another bar exam for them and maybe that bar exam would
7 have New Jersey practice. Maybe we'll have something
8 in terms of rules of evidence and somebody thought it
9 maybe have an ethics component to it. That might
10 possibly address some of the issues. I'm not sure.
11 But I think that we have to be concerned and we have to
12 focus on, on whether just the fact that they're
13 admitted somewhere else is indeed a qualification.

14 The second issue that I'd like to comment a
15 little bit on is the, the pro hoc vice issue. And I do
16 agree and our position has stated this, that if lawyers
17 are coming into New Jersey whether it's to do
18 transactional work and if we're gonna broaden to allow
19 that, there should be, in essence, a pro hoc vice
20 application of some sort so that it clearly brings them
21 within our system in terms of disciplinary. It also
22 requires them to pay the appropriate fee so that if
23 indeed we have to do the disciplinary process, they've,
24 they at least started to pay something.

25 JUDGE WALLACE: If I might interrupt --

1 MR. MATHEWS: Yes, Judge.

2 JUDGE WALLACE: -- just to get a
3 clarification of that last point. You're saying that
4 anyone that would come in to practice under the
5 multijurisdictional rubric, that they would have to
6 file a pro hoc vice application?

7 MR. MATHEWS: I would think they should.
8 Yes, Your Honor.

9 JUDGE WALLACE: I assume that would go --

10 MR. MATHEWS: And I think that's our
11 position, that they should.

12 JUDGE WALLACE: That would go to the law
13 division or someone in our Superior Court or --

14 MR. MATHEWS: Well I -- normally you would
15 file it I guess in the law division or you would set up
16 a procedure for it to be filed somewhere. But the
17 point that I want to jump to on that, Judge, is there
18 is a criteria for admission for pro hoc vice which,
19 and, and I'm not -- I never had a pro hoc vice
20 application before any of the Judges that are in this
21 court room, but the rules are rarely enforced. When
22 you go to the criteria under 121-2A3, it's rare. I
23 shouldn't say it's rare. That's unfair. If somebody
24 doesn't qualify on that, it's rare if ever that the
25 application is denied. It's not to say all lawyers who

1 come in don't meet the criteria but there are a
2 significant number of lawyers who become admitted that
3 don't meet that criteria and there are cases where
4 lawyers are, are admitted to the bar in November in
5 Massachusetts, for example, and they make a pro hoc
6 vice application in New Jersey in May and they get
7 admitted.

8 Now there's no way that a lawyer who's
9 admitted for five months can qualify under the criteria
10 for a pro hoc vice application. People don't focus on
11 it. I've seen applications where people have come in
12 and said I've been representing these plaintiffs in
13 this case for two years, therefore I have a long
14 standing relationship with the clients. Admit me. Now
15 you shouldn't have been representing these clients in a
16 New Jersey case for two years if you haven't been
17 admitted pro hoc vice before. So, so if, if we're
18 gonna take that step, lawyers should, in fact, qualify.
19 The Courts should actually look at these and should
20 scrutinize the practice.

21 And again, I think it gives us more control.
22 We know what lawyers are in New Jersey. When I say we,
23 I mean the system. Not myself or the trial lawyers.
24 But it gives the system some idea of what lawyers are
25 actually in the case practicing, whether they're doing

1 transactional work, whether they're doing litigation,
2 whether they're doing labor law.

3 MR. FRANCIS: Let me just follow that line.
4 What's TAN's (phonetic) position pre-litigation?
5 You're practicing in Chicago. You've gotten letters so
6 you know a law suit is coming. You've got witnesses in
7 New Jersey that you want to interview. You've got
8 documents in New Jersey you want to interview. I think
9 TAN says that that Chicago attorney should associate
10 with a New Jersey attorney. Would that co-written --
11 they still are below the radar screen. Aren't they?
12 That they've not been admitted by a Court. They don't
13 have a Court supervision over it.

14 MR. MATHEWS: You're correct and perhaps, and
15 maybe I should say I may be overstating the TAN's
16 position a little bit because the TAN's position was
17 you should associate with New Jersey people. And what
18 I guess I'm suggesting, so I'm going beyond the TAN's
19 position, is there should be that pro hoc vice. And
20 that's a Mathews, not a TAN's position because the
21 TAN's didn't take the position.

22 MR. FRANCIS: Well would you allow, under
23 whatever rule you were to adopt, would you allow the
24 Chicago attorney to come in pre-litigation to interview
25 witnesses and look at documents?

1 MR. MATHEWS: If, if they -- certainly -- the
2 TAN's position is that if they're associated with a New
3 Jersey attorney, you would allow them to do that and I
4 would suggest you should do the pro hoc vice process,
5 too. And again, we're assuming here --

6 MR. FRANCIS: Well -- pardon me. It is TAN's
7 position that they should pay the fees to the fund
8 though. Is it not? I thought that that was part of
9 your position, that they should have to pay the same
10 fees the New Jersey attorneys are paying --

11 MR. MATHEWS: That's, that's correct, Judge.

12 MR. FRANCIS: All right. So in order to
13 enforce that, then you're saying that the pro hoc vice
14 would be consistent with that?

15 MR. MATHEWS: I think you really have to do
16 that. You have to do it as a pro hoc vice thing.
17 Somewhere you want to, you want to, I think you want a
18 registration and you want to know who's out there and
19 who's doing it. And I don't think you know that if
20 people aren't registering. You know, it may be
21 simplistic to say that but you don't. And if I
22 associate, or somebody associates with me, you still
23 have no idea that people from Chicago are here doing
24 whatever they're doing and practicing law essentially.

25 The, the -- I'd like to spend a moment or two

1 on Jackman and I know that, that Mr. Positan talked
2 about it. The problem in Jackman, there's was really a
3 two fold problem with Jackman. Number one, the client
4 never really understood that Jackman was not admitted
5 in New Jersey. Jackman wasn't admitted in New Jersey.
6 He went to another firm in New York. They wanted him
7 to be admitted in New Jersey and New York so they told
8 him to take the bar exam, which he did.

9 Jackman was sued by a client in New Jersey
10 who filed a complaint and in that complaint said he was
11 licensed to practice law in the state of New Jersey.
12 And when Jackman's answer to that complaint was filed,
13 Jackman said no. I deny that allegation. It was at
14 that point that Jackman went before the character
15 committee and somebody realized that he was not
16 admitted in New Jersey and he had practiced here.

17 Now Jackman gets further complicated by the
18 fact that he was licensed originally in Massachusetts
19 but he goes inactive status in Massachusetts when he's
20 here in New Jersey practicing with a law firm in New
21 Jersey. So now he's not really licensed anywhere at
22 that point in time because his Massachusetts license is
23 inactive and, and he's not licensed in New Jersey. So
24 that complicates the problem.

25 And at the time that Jackman was floating

1 around, most of the large firms in New Jersey had other
2 Jackmans out there. Some of them had as many as ten or
3 twelve or fifteen people who are listed on their
4 letterhead with a little note which I would need not
5 only my reading glasses but a magnifying glass to see
6 what that note says and means because it's so little on
7 it and it says admitted in Massachusetts or not
8 admitted in New Jersey. So the letterhead tells you
9 that. The clients don't do that. I mean most clients
10 don't sit there and scrutinize the letter head.

11 It may not be as important or as critical if
12 it's, you know, IBM who's hiring you and you're doing
13 the work for as it is if it's Mary Smith and John Smith
14 who, who own their little mom and pop store who have no
15 idea what they're doing and they're there because
16 somebody walked into the store one day and said yeah,
17 Harry Smith's my lawyer so they go to Harry Smith and
18 little do they know that Harry Smith has no admission
19 in the state of New Jersey.

20 The last issue I think I'd like to talk about
21 a little bit is the foreign lawyers, the admission of
22 foreign lawyers. The concern there is we don't know
23 when a foreign lawyer comes here what they're a
24 graduate of. You can be admitted in some countries
25 without even having graduated from college. So if

1 we're going to focus on foreign lawyers and start
2 admitting foreign lawyers, there has to be a process to
3 find out and to validate what that prior background and
4 history is.

5 We, we only admit people here who are, who,
6 who graduate from ABA accredited law schools.
7 Certainly if we're gonna require our American educated
8 people to have gone to an ABA accredited law school, it
9 seems to me we would want to do the same thing with,
10 with foreign graduates who are coming. And you have to
11 look at what that process and then look at, you know,
12 what's in that. I guess the ABA accreditation would
13 get you the assurances that you need that there is, in
14 fact, some, some competent education out there.

15 But the, the, in the end, what I think all of
16 what we're trying to do and what the focus is is that
17 we want to make sure that lawyers who are coming here
18 are competent, that they know what they're doing, that
19 they are subject to our disciplinary processes if they
20 do things wrong. You can't wait til the, til the horse
21 is out of the barn to figure that out. I think that's
22 all got to be done in advance.

23 I think that would conclude any comments I
24 would have unless there are questions from members of
25 the panel.

1 JUDGE WALLACE: Yes.

2 MR. MATHEWS: Yes, Judge.

3 JUDGE PAYNE: Would two concerns on admission
4 by motion be satisfied if there were a particular score
5 that one had to achieve on the multi state and there
6 were in addition to that, a requirement similar to
7 skills and methods but perhaps not exactly the same
8 that would require in state education as to New Jersey
9 practice (indiscernible)?

10 MR. MATHEWS: I hesitate to bite completely
11 on the multi state spread because I don't really
12 understand that. In fact, there's two people behind
13 here that probably have a pretty good sense of what
14 that is and -- Sam Uberman and Martha Treese.

15 I think that there needs to be something to,
16 to show that they have some basic understanding of New
17 Jersey practice and New Jersey rules and it probably
18 should be something like obviously to go through
19 something similar to the character committee admission
20 which -- I mean I waived into New York, and I don't
21 practice in New York any more because I, I got to the
22 point where I realized that it was malpractice for me
23 to try and go all the way to the Supreme Court in New
24 York and figure out what I'm doing because I mean their
25 rules make ours look like they're very unsophisticated

1 and, and there are rules that aren't even written in
2 New York that you have to, have to know and understand.
3 So I don't know.

4 I mean I personally have concerns about
5 having waived in and what you're gonna do but if, if
6 you can assure yourself of the fact that there is some
7 degree of competence, if you can assure yourself that
8 they know the rules of procedures in New Jersey and if
9 we can assure ourselves in terms of the ethical
10 consideration, then, then I don't think that there's an
11 objection to people coming in.

12 Again, the competence, the ethics, getting
13 back to what our original criteria is. The, the three
14 things that we talked about. The knowledge of the
15 ethics, the degree of competence and that --

16 JUDGE PAYNE: Well just to follow up, I think
17 in the discussions that I have heard, any admission on
18 motion would simply provide (indiscernible) but not
19 authorization to practice and that there would still be
20 a requirement that any attorney in order to practice
21 would have to fulfill the same requirements that a New
22 Jersey resident attorney would have to fill which would
23 include character, skills and methods and bona fide
24 office. Under those circumstances, do you think that
25 that would satisfy TAN or is there more that they're

1 looking for?

2 MR. MATHEWS: Well I think again, there's so
3 many that if we figured out how to know that there was
4 some degree of competency, I think that they would
5 satisfy TAN.

6 MR. FRANCIS: I think that's, that's the guts
7 of it, if I can follow up on Judge Payne. All -- if,
8 if the rules just dispenses with the exam but you
9 require everything else, reciprocity, bona fide office,
10 admission by exam, graduate from an ABA approved law
11 school, you know, everything else, character committee
12 review, reciprocal (indiscernible), all you're
13 dispensing with is the New Jersey bar exam. Do you, do
14 you, are you comfortable enough that you've achieved
15 some level of confidence that that person is competent?

16 MR. MATHEWS: Well I think there's got to be
17 something a little bit beyond that and New York and
18 Wayne is still here so maybe he can be heard. One of
19 the things I remember in New York was it really was a
20 difficult process. It -- from the time you started
21 'til the time you were admitted was at least two years,
22 as I recall it. One of which was you had to get
23 letters from ten Judges you had appeared in front of.
24 You had to have letters from ten adversaries that you
25 had had in cases. Almost in a way similar to the

1 judicial questionnaire they give you in New Jersey
2 when, when you're going on the, becoming a candidate
3 where you have to list Judges, adversaries and things
4 like that. And then those people all had to write
5 letters on your behalf and had to comment specifically
6 with respect to your competence. And so if there's
7 that kind of a component in there, then it probably
8 makes sense.

9 Somewhere along the line --

10 MR. FRANCIS: You and I can find three
11 friends who can say we're competent though. Maybe not
12 four, but three we --

13 MR. MATHEWS: I understand that. Well, John,
14 you can. I don't know whether I can. But I, I -- it's
15 correct but you know, it would surprise you and, and I
16 say this, I look at details but I've been on the
17 judicial committee for the county bar for, for about
18 five or six years now. We've actually had a couple
19 people come before the committee who list references
20 and when you call the references, they say I wouldn't
21 let that guy judge a dog show much less be a Superior
22 Court Judge. So then, of course, you wonder about
23 their judgment when they can't even figure out, you
24 can't find five people to say nice things about you.

25 But I understand what you're saying and it's

1 obviously a problem. I think you still have to have
2 something that gives you some assurance of some degree
3 of competence. Although, you know, (indiscernible)
4 will tell you the fact that you can pass a bar exam
5 doesn't mean that you're competent either. So I knew
6 the rule against perpetuities, you know, for the exam
7 but I'll never know it again and hopefully, I'll never
8 have to deal with it.

9 UNIDENTIFIED: We should go over that.
10 That's what I teach.

11 MR. MATHEWS: Is that right? That would be
12 very good (indiscernible) but Professor Diaz (phonetic)
13 did a good job at the time and I, I remembered it well
14 for the first six months after I took the bar exam.
15 Yes.

16 DEAN CHEN: Mr. Mathews, on the issue of
17 foreign attorneys, because right now the rule in New
18 Jersey is you must have a J.D. from an ABA accredited
19 law school, so we have some foreign educated attorneys
20 who may have been educated in another (indiscernible)
21 jurisdiction where their training is very similar but
22 they have to come here and practice, and get a full
23 J.D. as opposed to some other jurisdiction such as New
24 York where (indiscernible) certain amount of
25 (indiscernible) in American law and I'm wondering

1 (indiscernible). I'm wondering if you think that if a
2 requirement like that, some amount of work at an ABA
3 school in order to take the bar exam is sufficient but
4 not maybe the full eighty four credits that's required
5 to get the J.D.

6 MR. MATHEWS: I think the official position
7 we took in the paper was that there should be an ABA
8 approval of your, of your school. But again, I think
9 that's a concept that should be looked at. I mean, you
10 know, it may be difficult to, to get all foreign law
11 school accredited. It would probably take years and
12 years to do it but again, --

13 DEAN CHEN: I'm talking about someone who has
14 come out of the United States from whatever
15 jurisdiction, foreign jurisdiction and takes some cross
16 work but not at an ABA approved school, an American law
17 school but not the full amount of credits required for
18 the J.D. which is at least eighty four.

19 MR. MATHEWS: Again, I don't think that, I
20 think that that's a concept that's worth looking at and
21 I think that there can be an alternative to that 'cause
22 again, we'll probably have problems with going back and
23 essentially ABA accrediting all of the foreign law
24 schools. And then you get into the thing well if you
25 do this one, you know, why wouldn't you do this one.

1 So obviously, it's problematic.

2 But again, the concern that we had when we
3 discussed this was, was the basic fact that you can be
4 a lawyer practicing law in some foreign jurisdictions
5 and not even be a college graduate and somewhere along
6 the line, the public has to be protected because a
7 person with that degree of training, you know, is not
8 gonna come anywhere near meeting the minimum standards
9 I think that we would expect.

10 But I would not say that a program that
11 you're suggesting be, you know, shouldn't be considered
12 as an alternative. It certainly can be. And again, I
13 would prefer to pull out Marty and Sam who are behind
14 you who have some degree of competence in those areas
15 to say if they can come up with a program that they
16 feel meets, you know, some criteria that could give the
17 Court the assurance that these people are competent and
18 should be admitted. Obviously such a program should be
19 implemented. Again, I'm not competent to, I'm very
20 competent to practice law. I'm not competent to figure
21 out the bar exam stuff.

22 JUDGE WALLACE: Mr. Mathews, thank you very
23 much for your presentation.

24 MR. MATHEWS: Thank you. I appreciate your
25 committee listening to it.

1 JUDGE WALLACE: We'll certainly consider your
2 thoughts. Next, Mr. Melvin Bergstein.

3 MR. BERGSTEIN: Good morning everybody.

4 JUDGE WALLACE: Good morning.

5 MR. BERGSTEIN: I'm representing myself. No
6 institution. Just me. For all the time that I've been
7 practicing, I know that there's a conflict between the
8 lawyer professional and the lawyer business person. I
9 have it almost every day. The lawyer professional may
10 want to tell a client to settle or to litigate or to
11 take a course of action which would be inimical to my,
12 my fees. I mean just sort of cut my fees short. And
13 the business person in me, wanting to maximize profits,
14 might suggest a cause of action which would maximize my
15 fees. That is a constant tension. And one of the
16 great things I learned in this wonderful law school was
17 that was a no brainer for lawyers. That for lawyers,
18 the professional responsibility is the responsibility
19 that came first. The public's, the client's interest
20 came before the lawyer's pocket book.

21 This is an area, this meeting, the area of
22 admission on motion and bona fide office and certain
23 other things about which you are charged represents
24 that kind of tension because it is for many lawyers a
25 strongly emotional issue. They see it as a fear of

1 some kind of Tsunami of lawyers coming over from New
2 York and from Pennsylvania and there in lies the polls
3 which show overwhelmingly that lawyers do not favor
4 admission on motion or expansion of the bona fide
5 office rule.

6 And that, that brings into play the question
7 of what constitutes leadership. When I was a bar
8 president in Essex County, I was asked to address
9 incoming bar presidents about problems that each might
10 encounter. And one of the things I said to them is I
11 had this conflict when I was a bar president. What's
12 my role as a leader? Am I simply a person to get the
13 consensus of the people who ostensibly I'm leading and
14 represent that consensus or if I believe the consensus
15 to be less than what we ought to be as a profession, do
16 I, do I try to lead in that fashion? I think this is a
17 similar issue.

18 I would hope that the committee in its
19 recommendation doesn't simply represent the consensus
20 of lawyers but makes an independent judgment about what
21 truly is in the best interest of clients, citizens of
22 our state primarily because I think the, the notion
23 that the lawyers are gonna be harmed by all this is
24 truly exaggerated.

25 If it's indeed the public interest that we're

1 dealing with, then questions of knowledge of our law
2 and ethics are truly relevant. But we don't test our
3 New Jersey lawyers to see whether they are
4 knowledgeable about the law five years or ten years
5 out. Indeed, we don't test them to see if they know
6 anything about ethics. Indeed, they don't have to know
7 anything about it necessarily because we don't compel
8 them to be educated in the law after they graduated
9 from law school and passed the bar exam.

10 So we have lots of lawyers out there who are
11 practicing essentially based on their own judgment
12 about what constitutes their professional
13 responsibility and the client's judgment and unless
14 they transgress our laws in one respect or another, we
15 just don't know. We don't know how many lawyers could
16 ever pass the bar exam a week and a half after they've
17 taken the bar exam. Surely, not five years or ten
18 years. We just don't know that. And if I could guess,
19 I would guess an awful lot of very, very competent
20 lawyers in whom we hold great esteem that cannot pass
21 the bar exam at least without enormous effort. So the
22 bar exam then becomes simply a right of passage.

23 If you want, if you want this goal, then walk
24 on these coals. And I don't think that necessarily
25 protects the public's interest. It doesn't protect the

1 public's interest. What protects the public's interest
2 more, it seems to me, is that after a track record of
3 practice, after a number of years, five, six, seven,
4 eight years, after ten years, after that track record
5 of practice, one can be vetted by a responsible group
6 of lawyers just as we vet prospective lawyers in our
7 state. One can be vetted by that responsible group who
8 can see whether this is a lawyer who is of competence.
9 How do we know that he or she is of competence? Well
10 for one thing, the person has not been in trouble. The
11 person's been recommended across the board by
12 responsible people. Any number of indicia not
13 dissimilar to what we do for people who are infants in
14 the law in our state. These are not infants we're with
15 whom we're dealing. These are people who are grown.
16 These people have counseled people. These are people
17 who have had a track record. We understand something
18 about their emotional stability because we see that
19 they've not been in trouble. We set standards at least
20 as high as the standards we set for people who are new
21 to our law, that is infants in the law. People who
22 have just been graduated from law school.

23 So to the extent that we vet experienced
24 lawyers, we have a far better handle on the quality of
25 lawyer that our citizens are gonna be dealing with than

1 we do simply because one has graduated from a law
2 school and passed the bar exam without having gotten in
3 trouble in his or her essentially young life for the
4 most part. You know nothing about that person's life
5 experience. Nothing about that person's interaction.
6 Nothing about that person's value system to the extent
7 that it can do harm to a client. Nothing about this
8 infant.

9 But we do know something about somebody who
10 has at least, at least grown up, at least an adult in
11 the law from whom we can make a far more credible
12 judgment.

13 Now just imagine that this group was sitting
14 in New York and you had to decide issues in the law
15 that you're deciding here and then the question is well
16 wait a minute. Are lawyers in New Jersey competent
17 enough to come practice here? How can we know what
18 they know? And does anybody here believe that, that he
19 or she is not competent to study the law in the area in
20 which, in which you may be interested, to study the
21 practice, to study the ethics and make a intelligent
22 judgment about whether this is something within your
23 competence or the without? We do it every day in our
24 own practice. Every day we have to make a judgment.
25 Is this something that I can responsibly handle and so

1 do our clients. Our clients make responsible
2 judgments. Is this something that this lawyer can
3 handle? And there are many, many things that are just
4 beyond my care, I just don't do it. Just as Mr.
5 Positan says. That doesn't make us poor lawyers.

6 So why, if you're sitting in New York and
7 you're looking here in New Jersey, why could you not
8 say can I identify people like yourselves and others,
9 many others in the state whom I would trust to
10 represent clients, citizens of, of my state to deal
11 with those citizens with the same quality and
12 competence and trust and ethical sensitivity that they
13 do for the citizens of their states? And I think that
14 answer is an obvious answer.

15 There are twenty two jurisdictions beside the
16 District of Columbia that admit on motion. Twenty two.
17 Are those jurisdictions really not concerned about
18 their citizens? Are they cavalier about the interest
19 of their citizens so they allow people to come in on
20 motion? And by the way, this coming in on motion is
21 not sending in a, a check. It is a serious process.
22 And you can establish that kind of serious process with
23 the same degree of reciprocity that responsible states
24 have established among themselves.

25 And whether we have to have certain skills

1 courses or things of that nature, I don't object to
2 that if on its merits it really makes sense. I do
3 object to it if I have to sit in and listen to how to
4 draft a real estate contract because that's a right of
5 passage. I mean the same skills course that people,
6 that young lawyers are taking now, these are for people
7 who have never practiced essentially, for the most
8 part. Or -- and therefore, we have to give them some
9 kind of broad understanding of what New Jersey law is.

10 But for example, I lectured on, on deposition
11 taking in the state both in New Jersey law and Federal
12 law. I was asked to lecture in New York. So I took
13 the New York practice book and I studied the New York
14 practice book and I gave a lecture in New York about
15 depositions between New York and the Federal rules and
16 I didn't have a revolt. People didn't get up and say
17 well you dum dum, you don't know anything. You can't,
18 you can't -- how can you read our rules and really
19 believe them. I read the rules and believed them.
20 They said what they said just as, just as we expect
21 lawyers to read our rules and believe them. Just as we
22 read cases and rules that may be new to us or been on
23 the books for a long time in any given case.

24 Really I think this is a class issue. I
25 don't think this is a, an issue of the large

1 corporations and other people. The fact here is that,
2 that every client has relatives, has friends, has
3 contact in other states. We're not talking about
4 somebody in Arizona. We're talking about just whatever
5 the distance is between New Jersey and New York or New
6 York and Philadelphia. Every client has contacts. And
7 those are contacts worth developing.

8 And I often get calls from people in New York
9 I have to turn away. I would like to practice in New
10 York. I think there are other lawyers that would like
11 to practice in Philadelphia or in Pennsylvania. I
12 believe that I can compete. I believe that I have
13 colleagues in this state that would like to compete.
14 But do I want to go through some dance to avoid
15 somebody's sense of economic (indiscernible)? No, I
16 don't.

17 Now there are, there are many states which
18 are naive. This is gonna come to pass. I agree with
19 Mr. Positan. It's going to come to pass. And the
20 question is whether we do it in an orally professional
21 way about which we can be proud just as we can be proud
22 of our extraordinary judicial system and the way we do
23 things and the attention that we pay to improving its
24 system and protecting the public. And we should do it
25 in a way we can proud and I think we can do it. So I

1 don't believe that the logic of the position that we
2 should not admit by motion is a defensible position.
3 I've expressed that in the article which I read, which
4 I hope you've received and I'm prepared to defend it if
5 you have any questions.

6 MR. FRANCIS: Now let me just ask you about
7 the vetting process.

8 MR. BERGSTEIN: Yes.

9 MR. FRANCIS: I would agree that, that all of
10 us, there's a self evaluation process. I mean there
11 are certain things that you just don't want to handle.
12 You don't feel competent.

13 MR. BERGSTEIN: Yes.

14 MR. FRANCIS: But if somebody's gonna come in
15 from out of state, they get up and assuming they pass
16 muster, they're gonna get a plenary (phonetic) license
17 to do whatever they can. You can't -- it doesn't seem
18 to me you can just rely on that self evaluation. Don't
19 you have to satisfy the public that this person that
20 you're admitting now in New Jersey to get a plenary
21 license satisfies some criteria as practice for a
22 minimum certain amount of time, minimum amount of time
23 and has done some things in that other jurisdiction?
24 How does -- what's the vetting process? What do you
25 look for?

1 MR. BERGSTEIN: I don't disagree --

2 MR. FRANCIS: What would you ask? What would
3 you require of the applicant?

4 MR. BERGSTEIN: Okay. I absolutely agree
5 that, that one needs to be practicing a number of
6 years. As I understand, the consensus is five years
7 but I'm not -- it's gonna be reciprocity whether it's
8 five years or seven years, as long as it's
9 intelligently thought out and not just another
10 obstacle. I have no problem with that.

11 I also have no problem with issues of, of
12 ethical competence, issues of emotional stability. All
13 of the criteria for which we judge our lawyers that are
14 coming in to the state. We don't, we couldn't ask
15 people in our state about their respective competencies
16 because as they say in my article, twenty minutes after
17 you get a license, you can go out and defend in a
18 capital murder case in this state or do any other kind
19 of law that is highly esoteric and we have no controls.
20 I mean that's a separate issue but that is the reality.
21 We trust that our lawyers are people of integrity who
22 will do the right thing without even a track record
23 when they're young. But when they're older and they've
24 practiced some time, how much more easily it is to put
25 trust in somebody who has established a record

1 competence. So I hope that's responsive but if, if --
2 I don't think we should do for out of staters who have
3 a track record in their state any, any less than we do
4 in our own state for our own lawyers. That's, that's
5 how we protect our citizens.

6 MR. FRANCIS: Would you ask that applicant
7 though, for example, to describe with particulars the
8 kind of work he had been doing in the other state?

9 MR. BERGSTEIN: Absolutely. Absolutely. The
10 more you know about the lawyer, I think the better.

11 MR. FRANCIS: To mention cases and Judges
12 before whom he appeared.

13 MR. BERGSTEIN: Yes.

14 MR. FRANCIS: Transactions he had done, or
15 she.

16 MR. BERGSTEIN: The answer is, the answer is
17 absolutely yes. And whether one would do some random
18 sampling about that, the answer is yes. You want to
19 assure yourself that you have a person of quality. And
20 yes, you make, you make responsible inquiries.

21 Frankly, one of the things which the
22 wonderful world of computer does is you can just go on
23 the net and see what the application process is all
24 over. You can go to the District of Columbia. I know
25 in New York, the application process is right on the

1 net. So what you have to do in these states, which I
2 think should be some guide in terms of what their own
3 experience is, I mean what they do in these states is
4 highly relevant and to see what the experience is. Is
5 it so that out of state lawyers are intrinsically less
6 ethical than lawyers in this state? I can't believe
7 that. But maybe it's so. You know, maybe it's
8 something in the water in New York. I don't know. It
9 can't be the air. It can't be the air because it's our
10 air they're breathing. So that can't be the criteria.

11 And the answer to your question is I find an
12 intelligent vetting process that is not, doesn't create
13 unnecessary obstacles. A mature judgment of what's
14 important and how one goes about getting that
15 information.

16 JUDGE WALLACE: Yes. Question.

17 MR. TU: I have a question about your view on
18 the interaction between the active practice requirement
19 and a reciprocity requirement if we adopt one. Almost
20 all jurisdictions that have a motion admission rule
21 require some number of years of active practice, --

22 MR. BERGSTEIN: Yes.

23 MR. TU: Typically five. Some are longer.

24 MR. BERGSTEIN: Yes.

25 MR. TU: And most but not all jurisdictions

1 also have some sort of reciprocity requirement.

2 MR. BERGSTEIN: Yes.

3 MR. TU: The question is whether the active
4 practice requirement must be satisfied in the
5 reciprocal jurisdiction. I'll give you an example.
6 If, for example, an attorney is admitted in New York
7 but for the last fifteen years, has been practicing in
8 New Jersey in house under the opinion fourteen safe
9 harbor --

10 MR. BERGSTEIN: Right.

11 MR. TU: If you require that the active
12 practice be in the reciprocal jurisdiction, than this
13 attorney would not qualify under the motion admission
14 rule and would not be allowed to waive in to New
15 Jersey. So the question is should we require that the
16 active practice requirement be satisfied under
17 reciprocal jurisdiction?

18 MR. BERGSTEIN: I think that's a good
19 question. My understanding is that New York does not
20 require that the active practice take place in a
21 reciprocal jurisdiction. So for example, I could apply
22 in DC, do that dance for six months and five hundred or
23 \$750.00, get admitted in DC, although I never, I may
24 have showed up once to, to acknowledge that I've not
25 been in trouble with the ethics people, and then use

1 that admission to go to New York.

2 But it's -- I don't believe that the active
3 practice should be in a reciprocal, necessarily should
4 be in a reciprocal jurisdiction because what we're
5 dealing with is substance, and the substance is
6 practice. So I, I, if I were the King of France, I
7 would write the rule as the New York rule says, that
8 five years of active practice somewhere.

9 JUDGE WALLACE: Any further questions? Thank
10 you very much, sir.

11 MR. BERGSTEIN: Thanks very much.

12 JUDGE WALLACE: Sharon Balsamo. Good
13 morning.

14 MS. BALSAMO: Good morning. My name is
15 Sharon Balsamo and I'm staff attorney at the New Jersey
16 State Bar Association. Association President, Dan
17 Roebman (phonetic), apologizes for his inability to
18 attend this morning's hearing but he has asked me to
19 testify on behalf of the Association with regard to the
20 issue of whether to retain, modify or delete the bona
21 fide office rule.

22 I am not a litigator like some of the
23 previous speakers so public speaking doesn't
24 necessarily come easily for me so please bear with me.

25 The bona fide office issue is before you

1 today as the result of an inquiry submitted to the
2 Court by the Philadelphia Bar Association in which the
3 Association proposed establishing a New Jersey office
4 that would be utilized by Association members licensed
5 in New Jersey but whose offices are in Philadelphia.

6 The New Jersey State Bar Association has
7 repeatedly expressed, expressed concerns about this
8 proposal for several reasons. Most notably, that the
9 proposal violates the spirit and intent of the bona
10 fide office rule which we believe serves an important
11 public purpose.

12 The intent of the rule, as expressed by the
13 Supreme Court in In Re Pason (phonetic) and In Re
14 Sackman (phonetic) is to assure competent accessibility
15 and accountability of lawyers practicing in New Jersey
16 for the benefit of clients, courts, counsel and
17 parties. Admittedly, whether the rule achieves these
18 intentions was questioned by the third circuit in
19 Tolchen versus The Supreme Court of New Jersey
20 (phonetic). But even that Court agreed that at a
21 minimum, the rule ensured the accessibility of lawyers
22 practicing in New Jersey and that's not a small thing.

23 The New Jersey State Bar Association, which
24 represents a broad range of attorneys from varied
25 backgrounds and firms, urges you to recommend retention

1 of this bona fide office rule for several practical
2 reasons.

3 When an individual hires a New Jersey
4 attorney with a New Jersey address, it is reasonable
5 for that individual to expect that the lawyer or his
6 staff can be reached at the New Jersey address and
7 phone number during normal business hours. The bona
8 fide office rule ensures that that individual's
9 expectations will be met. Without the rule, it would
10 be very easy for a lawyer to establish a New Jersey
11 address and phone number simply to attract New Jersey
12 clients. In reality, that address could simply be a
13 mail drop or a rarely used satellite office. And the
14 phone number could just be a bounce through to
15 somewhere else, all unbeknownst to the individual
16 hiring the attorney. Unbeknownst that is until the
17 individual needs to drop documents off at the
18 attorney's office or wants to meet with the attorney on
19 an emergent basis at an unscheduled time. Or if
20 certified mail or Fed Ex package requires a signature
21 that can't be obtained from an empty office. Or an
22 adversary's attorney wants to personally serve the
23 individual's attorney and the individual's attorney
24 can't be located.

25 Admittedly, with such technological advances

1 as cell phones, pagers, beepers and e-mails, people are
2 generally more accessible today than ever before. But
3 what does accessible really mean? I urge you not to
4 underestimate the importance of personal contact in
5 legal matters. The most compelling matters that come
6 to mind are those involving domestic abuse or where a
7 delicate family decision must be made like in the case
8 of a guardianship petition to take over the affairs of
9 an aging loved one.

10 Sure, you could probably obtain some dry
11 basic legal advice over the telephone but there is
12 nothing that can match a face to face meeting between
13 attorney and client where the attorney can see for
14 himself what is really going on.

15 Some matters even require face to face
16 meetings, such as a will signing or most real estate
17 transactions. The bona fide office rule ensures that
18 that personal contact will be preserved. That personal
19 contact that is so important in confidential delicate
20 matters and that is essential in some other matters.

21 The rule ensures again that an individual
22 hiring an attorney can be confident that that attorney
23 or at least someone knowledgeable on that attorney's
24 staff will be reasonably available to the individual in
25 the New Jersey location listed on the attorney's

1 letterhead, when emotions flair or particular problems
2 or needs arise.

3 Also, be requiring an investment in the New
4 Jersey practice, the rule ensures that the attorney
5 will have more than just an occasional practice in New
6 Jersey. Theoretically, this should motivate the
7 attorney to become more familiar with New Jersey laws,
8 rules and procedures. It should motivate the attorney
9 to join the local bar association and maybe some other
10 public community groups. And all of this should boost
11 the confidence of the public in the ability of their
12 attorney to adequately handle a New Jersey matter.

13 If you think about if, if anyone you know has
14 ever been stopped for a traffic ticket or running a
15 stop sign and they're looking for an attorney, a
16 typical response is you want to find somebody who has
17 practiced that municipal court before because they're
18 familiar with the court and the staff.

19 But now the professional responsibility issue
20 that the elimination of the bona fide office rule would
21 raise. Where and how would attorneys without a New
22 Jersey office satisfy their (indiscernible) and pro
23 bono requirements? Wouldn't it be difficult to keep
24 track of attorneys who don't have an actual office and
25 who only make occasional appearances in the state? The

1 bona fide office rule ensures that attorneys can be
2 held accountable to fulfill their professional
3 obligations to the courts, their clients and the
4 public.

5 Some (indiscernible) made about the bona fide
6 office rule is simply a protectionist measure and
7 serves to limit the availability of legal services in
8 the state. To my knowledge, however, there has not
9 been a public outcry that we don't have enough lawyers
10 in New Jersey.

11 The bar association has not received a single
12 complaint that an individual has not been able to find
13 an attorney to handle his or her matter. We have
14 heard, however, from a number of attorneys unwilling
15 and sometimes unable to make the investment in a New
16 Jersey office but who want the benefit of New Jersey
17 clients.

18 The bona fide office rule should not be
19 changed or eliminated to satisfy the aspirations of a
20 few attorneys at the expense of public confidence.

21 I thank you for the opportunity to speak
22 before you today and once again, I urge you to
23 carefully consider the importance of the bona fide
24 office rule to the public before making your final
25 recommendation and I would be happy to entertain any

1 questions.

2 JUDGE WALLACE: Thank you. Just one before I
3 open it up. Has the bar association received
4 complaints about, from clients about New Jersey
5 attorneys who do not respond to their calls?

6 MS. BALSAMO: We, we receive complaints about
7 the way attorneys have acted and we refer those
8 complaints to the office of attorney ethics.

9 JUDGE WALLACE: Okay. So we have complaints
10 about New Jersey attorneys as well as trying to
11 restrict the Philadelphia attorney that may not have an
12 appropriate office.

13 MS. BALSAMO: Yes. Of course. No matter
14 what rule you have in place, there are going to be
15 attorneys, whether they're in state, out of state,
16 whether they have an office or not who, who are not
17 going to live up to all of the expectations of the
18 clients or who are not going to act in an ethical
19 manner.

20 JUDGE WALLACE: Now as I understand the
21 Philadelphia Bar Association's proposal, they would
22 maintain an office for solely, where there would be a
23 secretary located that would several attorneys, I don't
24 know the number, would be available to use those
25 offices and be present so many hours of the week.

1 Clients could contact them and if they were not at that
2 office, I assume the secretary would contact the
3 attorney in their Philadelphia or Pennsylvania office
4 who could then contact the client.

5 Is that any different from what might happen
6 -- for example, yesterday I tried to contact two
7 attorneys, one a Justice, one (indiscernible). I
8 called early in the morning. I received a call back at
9 2:00 when he returned from court and responded to my
10 call. The other call I didn't get back yet because I
11 assume they're out for the entire day. Would that be
12 any different from a Philadelphia or Pennsylvania
13 attorney that would maintain an office associated with
14 the Philadelphia Bar Association as far as the contact
15 with a client? And I'm not a client. I was just
16 making a call regarding some issues that we're
17 addressing today.

18 MS. BALSAMO: In the particular instance of
19 telephone contact, it might not be. There are lots of
20 things associated with the Philadelphia Bar proposal
21 that we don't know insofar as the numbers of attorneys
22 that would be there and the level of information that
23 the secretary who would be at the office answering the
24 telephones and doing some of the clerical work would
25 know. The bar association has raised concerns about if

1 it's a large number of attorneys. If it's twenty or
2 twenty five attorneys and you have one person
3 responsible for knowing the whereabouts of all of these
4 attorneys, will the attorneys really check in with that
5 person in addition to the person in their Philadelphia
6 office.

7 But putting that aside, you mentioned that
8 you tried to contact an attorney in the morning and
9 they were out but they called you later in the day when
10 they got back to their office and were back from court.
11 What we're saying is that if at that point in time you
12 needed to see that attorney right then, you would be
13 able to in their New Jersey office or someone on the
14 attorney's staff in the New Jersey office.

15 JUDGE WALLACE: Assuming they court fit me
16 in.

17 MS. BALSAMO: Yes.

18 JUDGE WALLACE: I mean, as you know, with a
19 busy practice, just because I might want to see my
20 attorney at a certain time does not mean my attorney
21 can see me.

22 MS. BALSAMO: Yes. That's correct. But
23 again, if in a real estate transaction, if you needed,
24 if you were supposed to mail a deposit check and you
25 didn't get a chance to put it in the mail but you

1 needed to drop it off that day, there was a New Jersey
2 location where it could be dropped off and handled
3 efficiently by someone who knew something about that
4 real estate transaction, even if it wasn't the attorney
5 him or herself because they were off in court or at
6 depositions or something like that.

7 And that's really why we talk about the
8 spirit and the intent of the bona fide office rule. To
9 make sure that when, when the individual, Mary Smith,
10 hires an attorney and she sees on a letterhead a New
11 Jersey address, she can be confident that when she
12 needs to stop at that office or call that office or
13 drop something off or pick something up, that's a bona
14 fide office where legitimate activities are going on
15 where, where there will be someone there who can answer
16 a mundane question for her, even if it's not
17 necessarily the attorney but that's where the
18 responsible person under the bona fide office rule
19 comes in.

20 JUDGE WALLACE: All right. Thank you. Judge
21 Costello.

22 JUDGE COSTELLO: I don't necessarily disagree
23 with your proposal of what would be ideal but I'm just
24 gonna ask whether one of your examples is realistic or
25 even fair because I saw it in your submission and then

1 you happened to mention it again. A battered spouse.
2 And I just really -- invoking the specter of a battered
3 spouse knocking on a phantom office door just doesn't
4 seem to be that realistic or clear to me given the fact
5 that it's my experience, and I don't know if anyone
6 would have anything different to say, but people
7 seeking a temporary restraining order don't walk or
8 drive to their attorney's office.

9 The call system is so carefully geared and so
10 incredibly well thought out to get them to a Municipal
11 Court Judge by telephone after hours or a hearing
12 officer and a Superior Court Judge during court hours
13 that I would venture to say that I have, I personally
14 have never seen an attorney come in on a temporary
15 restraining order. And if I asked ten Judges that
16 actually do domestic violence on a regular basis, I
17 don't know if I'd get more than a handful of yeses out
18 of ten other Judges. And I'm really concerned about
19 that example because I just don't know whether it's
20 fair. Do you want to comment on that?

21 MS. BALSAMO: Perhaps it needs to be
22 clarified somewhat. I mean I think you're probably
23 right on the initial temporary restraining order but
24 going forward where there might be a violation of that
25 restraining order or there might be questions of, of

1 there's going to be visitation tomorrow and do, do I
2 need to let this person into my house. Do I need to
3 meet him on the sidewalk? I don't have anyone to stay
4 with the children so I can be gone when, when the other
5 person picks them up or drops them off or things like
6 that.

7 Our matrimonial attorneys have told us that
8 they get calls like that all the time on Thursdays and
9 Friday afternoons and that it's very, it's so important
10 for them to be there to talk with their clients, to
11 sometimes meet with them, to sometimes just act as a
12 calming force.

13 JUDGE COSTELLO: That really goes back to the
14 responsiveness of the attorney and whether their staff
15 can reach them and whether they return their phone
16 calls. Not really whether they need to necessarily
17 meet them face to face.

18 I mean there was an example, I think it was
19 in Mr. Bergstein's, one of his writings about the
20 client from Cherry Hill would be better served by
21 hiring a lawyer with a main office in Philadelphia or a
22 main office in Newton. It's really the client's choice
23 at some point whether they want to choose an attorney
24 who's physically accessible based on their needs.
25 Isn't it?

1 Another example I found troubling really was
2 the client accused of a crime based on police
3 interrogation. I can just imagine that in almost every
4 one of those cases, the client's not free to walk down
5 the street and contact the lawyer's office.

6 MS. BALSAMO: But they need to be able to get
7 in touch with their lawyer and he or she needs to be in
8 the area to be able to accompany that client --

9 JUDGE COSTELLO: We're back to
10 responsiveness.

11 MS. BALSAMO: -- in the police interrogation.

12 JUDGE COSTELLO: We're back to responsiveness
13 more than geographic proximity. Aren't we?

14 MS. BALSAMO: Responsiveness, yes. But
15 again, you're back to if you have, if you have a New
16 Jersey address, the client expects that you are going
17 to be in New Jersey. A regular run of the mill client
18 typically looks when, when they're going to hire an
19 attorney, they'll look for somebody who's close by,
20 who's in their area. And when you see an address
21 that's close by and in their area, they think oh that
22 attorney is in New Brunswick. You know, I, I, my case
23 is in Middlesex County so I'm going to hire that
24 attorney. Without the bona fide office rule, attorneys
25 could just have a mail drop in New Brunswick and really

1 have no real significant contact with New Brunswick.

2 And we're not just talking about out of state
3 attorneys who have a principal office somewhere else
4 who have a staff that can answer the phones and, you
5 know, who can reach them. Without the bona fide office
6 rule, you can have an attorney just set up a shop
7 without having an answering machine. Without having
8 someone there to answer the phones. Without having
9 anyone able to get in touch with him or her. Chances
10 are they wouldn't have many clients or they wouldn't be
11 able to keep clients for very long but that would be
12 possible if you completely eliminated the bona fide
13 office rule.

14 JUDGE WALLACE: Yes.

15 DEAN CHEN: Doesn't that sort of illustration
16 almost beg the question though -- the dangers you
17 describe, the mail drops, et cetera, aren't they, might
18 they be just caused by the bona fide office rule such
19 that if we got rid of it completely, well if the
20 Supreme Court, of course, (indiscernible) completely so
21 that a lawyer, a lawyer who was admitted in New Jersey
22 but his office is in Philadelphia or Manhattan but had
23 on the letterhead I'm admitted in New Jersey but my
24 office, this is where you can reach me, Philadelphia or
25 Manhattan, and the client would have to have some

1 information on where to go in order reach their lawyer
2 if they needed to and it would then be up to the
3 client, (indiscernible) protect their clients and
4 decide whether that was agreeable.

5 Isn't that something -- isn't that a decision
6 a client, that any client could make on their own? If
7 it's important to them that the, be in New Jersey right
8 down the street, (indiscernible) they can make that
9 decision but if it's the type of client where if they
10 live in Cherry Hill or Camden but wants to hire a
11 lawyer still admitted in New Jersey but whose office is
12 in Philadelphia if that's convenient for them, isn't
13 that a choice that a client can normally make?

14 MS. BALSAMO: Yes, to a certain extent but
15 the flip side of that is that if you are an attorney,
16 another one uses Philadelphia and Manhattan, and that's
17 fine, but if you're an attorney who practices in an
18 unknown suburb in Pennsylvania or an unknown suburb in
19 New York or in Westchester or Rockland or somewhere
20 like that and you're admitted to practice in New
21 Jersey, chances are you're not going to get New Jersey
22 clients with a Rockland County address. And so there
23 would be motivation for you, if you wanted New Jersey
24 clients, to establish that mail drop and to establish
25 that New Jersey address without really having any

1 responsibilities beyond having that New Jersey address
2 and New Jersey telephone number.

3 DEAN CHEN: How would the bona fide office
4 rule affect that? If that situation occurs, how would
5 it be affected by the bona fide office rule?

6 MS. BALSAMO: Because now if, if you, if
7 you're practicing in Rockland and you want to attract
8 New Jersey clients, you have to establish a bona fide
9 office in New Jersey where you would have again, a
10 responsible person, perhaps an associate staffing that
11 office.

12 DEAN CHEN: Well (indiscernible) -- what
13 about a rule that said if you're gonna have an office
14 in New Jersey, it has to be a real office
15 (indiscernible). If, if you don't want to have such an
16 office, such a (indiscernible) office, you want to try
17 to attract New Jersey clients from Westchester or
18 wherever you are, you can do that. You may not be
19 successful because the clients may decide they don't
20 want you to, they don't want to hire you. But that's
21 the client's choice. How, how is the public injured by
22 that, by that mechanism because it seems to me in that
23 case, the public might be making intelligent choices.

24 MS. BALSAMO: In that case, that might
25 address that situation but then you, you go back to the

1 other two things that the Supreme Court has noted as
2 the purpose of the bona fide office rule. The Supreme
3 Court called it competence but it's really the
4 motivation for the attorney to become familiar with New
5 Jersey practice instead of just every once in a while
6 when they have a case in New Jersey, getting up to
7 speed on that. And the accountability factor. Again,
8 how do you structure things like pro bono requirements
9 and other professional obligations of attorneys when
10 the attorney isn't really in the state?

11 JUDGE WALLACE: Yes.

12 MR. TU: I just want to first say that
13 you're, Ms. Balsamo, that you're much more articulate
14 than many litigators I've seen so you're doing a
15 commendable job of representing the State Bar's
16 position on this issue.

17 Now I'm gonna give you a tough and perhaps
18 unfair question as --

19 MS. BALSAMO: Thank you.

20 MR. TU: And it's a hypothetical but I think
21 a realistic hypothetical on how the bona fide office
22 rule would be applied to a New Jersey lawyer, not one
23 of these carpet baggers from, you know, Philadelphia or
24 New York but say a real New Jersey lawyer who's not
25 admitted anywhere else but wants to start a solo

1 practice, maybe a part time practice. Perhaps this is
2 a single father who has kids to take care of and
3 therefore, can only work from nine to two on a given
4 day and cannot afford to hire a full time secretary or
5 have a fancy office but nevertheless is competent to
6 practice in whatever area he's practicing in and
7 explains to the clients that he's only in his office
8 from nine to two and that if they need to contact him
9 after that, they can leave a message on his voice mail
10 or perhaps, you know, call his cell phone number but
11 that he's only a part time lawyer and he doesn't have
12 the ability to comply, as I understand it, with the
13 bona fide office rule and have full time staffing
14 answering the phone the full day.

15 Is this person in violation of the bona fide
16 office rule and if so, does that suggest that the OAE
17 should be out there looking for all these part time and
18 solo attorneys and prosecuting them for violation of
19 the rule?

20 MS. BALSAMO: That has been a real concern
21 within the bar association and a concern -- I'm only
22 admitted six years and it's a concern. When I first
23 got out of law school and finding a job was difficult
24 and the thought occurred to try to do something on my
25 own perhaps out of my house or something like that.

1 But you have this bona fide office rule staring at you
2 in the face.

3 The bar -- ideally, the bar association would
4 like strict compliance with the bona fide office rule
5 but the reality is that there can't always be strict
6 compliance with the bona fide office rule and I think
7 that's a question, the situation that you present is a
8 question that needs to be dealt with.

9 That attorney, I would bet would be
10 fastidious about checking that answering machine every
11 hour to make sure that he returns every message and
12 makes sure that his clients and anyone who needs to get
13 in touch with him gets a response within a reasonable
14 amount of time. But that attorney is going to run into
15 a problem again if a delivery has to be made in the
16 afternoon. If he or she has an afternoon court
17 appearance. If an emergent situation arises with, with
18 a client and he needs to be available in the afternoon.
19 The two worlds are going to lock horns and quite
20 honestly, I don't know what happens in that situation.
21 I'm sorry I can't give you a better answer.

22 JUDGE WALLACE: One additional question I
23 have that you probably are more familiar with the New
24 Jersey, the New Jersey, the Philadelphia Bar
25 Association's proposal than most of us in front of you.

1 Could you indicate to us how the bar feels the
2 Philadelphia proposal would violate our present bona
3 fide office rule? If it does.

4 MS. BALSAMO: The Philadelphia Bar proposal,
5 there are many facets to it. We, we feel it would
6 violate the bona fide office rule but more importantly
7 than that, we feel it would also pose many, many
8 conflicts of interest issues and many ethical issues.

9 But focusing specifically on the bona fide
10 office rule, you go back to the responsible aspect
11 person of that rule and as the proposal was originally
12 presented, they said they would have one person there
13 to act as a secretary and receptionist for all of these
14 attorneys who would be using the space and the way they
15 described the space was a few offices where attorneys
16 would be coming in and out. And so you may have one
17 attorney using a particular office in the morning and
18 another attorney using that same office, that same
19 desk, that same computer in the afternoon and maybe
20 even a third attorney using that same office in the
21 early evening. And that going on with all of the
22 offices there.

23 It was difficult for us to imagine one person
24 keeping track of all of these attorneys coming in and
25 out and what cases they were handling and, therefore,

1 to be able to answer the phone effectively, to be able
2 to accept packages or answer questions from clients,
3 other counsel, the Courts effectively about what was
4 going on with that attorney's New Jersey case load or
5 even that attorney's schedule, with that person being
6 responsible for so many attorneys.

7 Eventually the Philadelphia Bar Association I
8 believe indicated they anticipated about twenty
9 attorneys would be using the office. But even with
10 twenty attorneys all coming and going at different
11 times, there didn't seem that there would be an exact
12 schedule of when the attorneys would be there. It was
13 they would be there in a proportionate amount that goes
14 along with their New Jersey case load. So that could
15 be one day a week, one day a month, a couple hours
16 every other week. That was never really solidified.
17 And the Philadelphia Bar Association, understandably I
18 suppose, said well we don't have the actual attorneys
19 lined up yet because we don't know how this is going to
20 go so we can't really tell you specifically whether it
21 will be a requirement of one day a week or one day a
22 month or something like that.

23 And so again, we felt that there would be no
24 responsible person at the New Jersey office who could
25 handle the attorneys' New Jersey matters.

1 JUDGE WALLACE: Yes, Professor.

2 PROFESSOR FRANZESE: Ms. Balsamo, I'm still
3 thinking about the concern raised by Judge Costello and
4 also Dean Chen that's rooted in the client's freedom of
5 choice and the clients making the judgment call.

6 In your estimation, how much responsibility
7 appropriately could or should be allocated to the
8 client in making the determination with regard to the
9 ease of accessibility to counsel?

10 MS. BALSAMO: I think an individual should be
11 able to choose the attorney that they would like to
12 use. If there's a particular reason why they would
13 like to use an out of state attorney because of a long
14 standing relationship or something like that, as has
15 been discussed before, they can utilize that attorney
16 through pro hoc vice or associate him with a local New
17 Jersey counsel.

18 I'll go back to again, though, this argument
19 is brought up in many different situations but I don't
20 know that the public is saying they're not able to hire
21 an attorney that they want or they're not able to find
22 an attorney who is convenient to them. If that's out
23 there, we haven't heard it. And so I'll ask you to
24 think about where that's coming from and if the public
25 were making a complaint like that, then that's one

1 thing. That's a valid complaint to consider but if
2 it's not the public making the complaint, then perhaps
3 that's not really even an issue.

4 JUDGE WALLACE: Yes.

5 DEAN CHEN: Just to clarify. If, again just
6 hypothetically, the bona fide office rule were
7 abolished, that would mean that the shared office
8 proposal (indiscernible) would be unnecessary.

9 MS. BALSAMO: Yes.

10 DEAN CHEN: Okay. And as I recall the
11 opinion of the advisory committee on professional
12 ethics, on which I should have told you I also sit, so
13 I have (indiscernible) that opinion, they didn't really
14 express -- they actually found that that's connected
15 the standards of the bona fide office rule but their
16 concern was that in so doing, it generated such other
17 conflicts and confidentiality issues that it was not a
18 viable proposition with (indiscernible)
19 characterization.

20 MS. BALSAMO: Yes.

21 DEAN CHEN: Which would then, I mean,
22 (indiscernible) presumably go away all those issues if
23 we did away with the bona fide office rule and members
24 of the New Jersey Bar whose offices were in
25 Philadelphia would simply practice out of Philadelphia.

1 MS. BALSAMO: Again, it would do away with
2 that set of problems but it may open up a whole other
3 set of problems.

4 JUDGE WALLACE: All right. I thank you very
5 much. You did an excellent job.

6 MS. BALSAMO: Thank you.

7 JUDGE WALLACE: Now on the other side of that
8 coin, is Mr. Gordon from the Philadelphia Bar
9 Association present?

10 MS. DUMAS: Good morning.

11 JUDGE WALLACE: Good morning.

12 MS. DUMAS: Actually I'm not Allan Gordon. I
13 am Alexandra Dumas. I'm from Lowenstein, Sandler
14 (phonetic). As some of you may know, we represented
15 the Philadelphia Bar Association in their proposal
16 before the Supreme Court regarding the shared office in
17 southern New Jersey. That has been referred to this
18 committee and therefore, I would like to introduce
19 Allan Gordon to you who is the Chancellor of the
20 Philadelphia Bar Association.

21 MR. GORDON: Thank you.

22 JUDGE WALLACE: Thank you. Mr. Gordon.

23 MR. GORDON: Good morning, Your Honor.

24 JUDGE WALLACE: Good morning.

25 MR. GORDON: Good morning, Judges, members of

1 the panel. First let me thank you sincerely for
2 allowing me the opportunity to come here today not only
3 to appear in front of you but to have the opportunity
4 for the last hour and a half or so to listen to my
5 colleagues from New Jersey voice their opinions on
6 lawyers' interest that are of interest to lawyers all
7 over the United States today.

8 I did not know until yesterday that I would
9 be appearing before you today so I did not have the
10 opportunity to submit to you my prepared remarks for
11 today. I assume that the committee has the documents
12 that have already been submitted to the Supreme Court
13 of New Jersey.

14 Let me begin by trying to answer some of the
15 questions that were asked of my colleague from the
16 State Bar of New Jersey a few minutes earlier. We
17 originally, on behalf of New Jersey licensed lawyers,
18 lawyers who have passed your state bar exam, lawyers
19 who have conformed and comported with all of the
20 requirements of the state of New Jersey to practice law
21 in New Jersey, may have taken whatever education
22 courses are required, they have paid whatever fees are
23 required, (indiscernible) on their behalf would they be
24 given the opportunity to practice law in the state of
25 New Jersey if citizens of the state of New Jersey or

1 citizens of any other state want them to be their
2 lawyer.

3 My understanding is that the reason for the
4 bona fide office rule was and perhaps still is to
5 assure the citizens of the state of New Jersey that the
6 lawyer who is representing them is competent, is
7 accountable and is accessible. Let me try and talk
8 about each of those.

9 Remembering what the United States Court of
10 Appeals for the Third Circuit in Toltien (phonetic)
11 said, I think it's hard to argue that any lawyer who
12 has passed your bar exam, has taken your educational
13 courses as required, is any less competent than a
14 lawyer who has an office on Main Street in Camden just
15 because that lawyer has an office on Broad Street in
16 Philadelphia.

17 With regard to accountability, these are
18 licensed and New Jersey lawyers. By coming before your
19 courts, they are submitting themselves to the
20 disciplinary rules, the professional rules of conduct
21 of the courts of New Jersey. We don't suggest it
22 should be anything other than that.

23 And so it really comes down to this question
24 of accessibility. And perhaps accessibility would have
25 been a rational argument a number of years ago but it

1 is 2002 and it is 2002 whether we like it or not. And
2 I know that you are charged with the task of helping to
3 decide what will be done with multi jurisdictional
4 practices as are committees such as yours in every
5 state in the United States today. Well how can we sit
6 here and talk about multi jurisdictional practice and
7 allow ourselves to say that there is an artificial
8 barrier and it's right here and it's called the
9 Delaware River. And because of that river, someone who
10 has all of the qualifications of each of you as lawyers
11 in the state of New Jersey may not practice in New
12 Jersey on behalf of a client who has chosen that lawyer
13 merely because the desk that they are sitting at is
14 here and not there.

15 How is a lawyer from Newark, New Jersey more
16 accessible to a client from Cherry Hill than a lawyer
17 in Philadelphia to that client in Cherry Hill? I
18 believe it was you, Dean Chen, who asked the question
19 that doesn't this rule almost force people to set up
20 sham offices, and I think it does. I think a client
21 does receive much more and much better information
22 knowing here's my office. It's in Manhattan. It's in
23 Norristown, Pennsylvania. Wherever it may be but I'm a
24 licensed New Jersey lawyer. If you want me to
25 represent you, that's the choice you're gonna make.

1 And you're gonna understand that you're not gonna drive
2 to an office in Cherry Hill or Newark. You're gonna
3 drive to Norristown. You're gonna drive to Pittsburgh.
4 Wherever it may be.

5 We initially asked not that the rule be
6 abrogated but that the rule be modified so that we as
7 an association can perform a service for our lawyers
8 who are New Jersey licensed lawyers and we would set up
9 an office. And we really strained to give as much
10 detail to that proposal as we possibly could.
11 Unfortunately, there are questions that cannot be
12 answered honestly.

13 For example, where is the office going to be?
14 I don't know. I would suggest that unless any of us
15 knew that we were going to be permitted to open an
16 office, we wouldn't go and enter into a lease with
17 someone.

18 How many lawyers are going to participate? I
19 don't know. And interestingly enough, the advisory
20 committee on professional ethics report and
21 recommendations which was issued on October 23, 2001
22 states at page five, although the PBA's proposal, and
23 this was with the shared office proposal. Although the
24 PBA's proposal may meet the medial (phonetic)
25 definition of a bona fide office, that conclusion does

1 not end our inquiry. So while your proposal does
2 comply with the rule, we still don't want it. And we
3 don't want it, says the committee, because we're
4 troubled by issues of confidentiality, issues of
5 conflict of interest, issues that we as lawyers, and
6 I've been practicing for thirty six years, are troubled
7 with every day of our practice. And yet we handle them
8 every day in our practice.

9 And I suggest that if we were to walk out of
10 this building today, we could walk into many office
11 buildings in Newark in which there are lawyers who are
12 not partners, who are not affiliated but are sharing
13 office space. Who are sharing office space under
14 circumstances not dissimilar to what we at the
15 Philadelphia Bar Association recommended. And they
16 have the same issues of conflict of interest and
17 confidentiality and we would hope that they are
18 handled.

19 The New Jersey State Bar Association submits
20 that our proposal didn't identify a responsible person
21 initially. And then we provided well, there'll be a
22 manager, an office manager responsible and that would
23 be the responsible person. And so they said, well then
24 there's the conflict of interest 'cause now that person
25 will be privy to information about various cases and

1 there could be a conflict or confidentiality problems.

2 And, therefore, we decided it is time to bite
3 the bullet and we ask this honorable committee to
4 recommend to the Supreme Court the rule be abolished.
5 The rule does not serve the legal community. The rule
6 does not serve the citizens, citizenry of the state of
7 New Jersey. The rule does nothing except to establish
8 an artificial barrier that prohibits duly licensed New
9 Jersey lawyers from representing clients who choose
10 them as their counsel. And I thank you.

11 JUDGE WALLACE: Yes, Judge.

12 MR. GORDON: Yes, Your Honor.

13 JUDGE PAYNE: One of the questions that I
14 would have relates to your initial hypothesis that all
15 your attorneys have already been admitted in New Jersey
16 and under our existing state of affairs, they would
17 have passed the New Jersey bar. We're obviously
18 considering contemporaneously the possibility of
19 admission on motion. And then one of the concerns
20 that's raised in connection with the admission on
21 motion is that the admission not be a trophy but
22 instead represent a commitment to this state. And the
23 bona fide office rule has been one of the assurances
24 that has been advanced as a symbol perhaps of
25 commitment to New Jersey. How would you address that

1 (indiscernible)?

2 MR. GORDON: Well I have not thought of the
3 admission on motion. That was not something that we
4 had discussed --

5 JUDGE PAYNE: But it is an inevitable
6 consequence.

7 MR. GORDON: I would assume it is based on
8 what I heard here this morning, Your Honor.

9 JUDGE PAYNE: (indiscernible) I don't mean
10 that the admission is a consequence but that the two
11 come hand in hand.

12 MR. GORDON: Yes, I understand. I believe
13 that certainly with those lawyers, and I'd like to just
14 stick with my original proposition for a moment if I
15 may. With those lawyers who have taken your bar exam
16 and have passed your bar exam and complied with all of
17 your requirements, that I believe that requiring that
18 they have a piece of real estate, which is what we're
19 talking about, really does nothing for the citizens of
20 New Jersey or for the judicial and legal community in
21 New Jersey.

22 JUDGE PAYNE: Would you, would you speak with
23 such assurance when you're not dealing with a
24 contiguous state?

25 MR. GORDON: Yes, because I think as my last

1 colleague who spoke admitted, preference of the client
2 has to be given some deference and I would think that a
3 client is not going to, for the most part, go out and
4 hire an attorney from South Dakota to come here to
5 handle a matter in New Jersey unless that attorney is a
6 licensed New Jersey attorney who has some degree of
7 expertise in some area that perhaps lawyers, a lawyer
8 in New Jersey doesn't have or they have some other
9 relationship with them.

10 I, I believe -- look, you know, in
11 Philadelphia where I practice, and I've been a
12 litigator all my life and I go to court almost every
13 day and I walk into a court room and I know so many
14 lawyers over there from New Jersey who are colleagues
15 of mine, are friends of mine from various organizations
16 I've been on with. They're Pennsylvania licensed
17 attorneys but they happen to have their offices in New
18 Jersey. I don't believe the fact that they are on one
19 side of the river and I'm on the other side of the
20 river, that they are any more sincere and honorable in
21 their dealings with the Pennsylvania courts than I am.

22 JUDGE PAYNE: Well as a practical matter, as
23 a Judge, I want the (indiscernible) a matter that
24 really has to be a face to face competition,
25 negotiation or whatever you want to call it. Are there

1 practical problems involved if you are drawing from a
2 pool of attorneys that is nation wide without the bona
3 fide office rule?

4 MR. GORDON: No. I can see, Your Honor, that
5 if a lawyer is in Los Angeles and you call him at 9:00
6 in the morning and say I want you here at noon for a
7 settlement conference, of course there's a practical
8 problem. I'm not sure that there would be anybody in
9 the bona fide office in New Jersey who would be
10 competent to handle that matter on that short notice
11 anyway assuming it is that significant and that
12 important that it had to be done within three hours.

13 We have lawyers in New Jersey. We have
14 lawyers in every state who are trying cases today, who
15 are attending settlement conferences today from all
16 over the country. And, you know, it is not the day any
17 longer of the Philadelphia lawyer going by horse and
18 buggy up to New York. We practice law today with cell
19 phones, with e-mails, with faxes. Unfortunately, we're
20 accessible twenty four hours a day, seven days a week.
21 I wish we were not. It would be nice to be able to
22 relax at home on the weekend but we are accessible all
23 the time. And if we were to decide to undertake the
24 representation of a client in a given jurisdiction,
25 with the Court's permission, it would be our

1 responsibility to be accessible. It is for that reason
2 that I am offered cases all over the country and I
3 don't take them most of the time because I don't want
4 to get a call from a Judge in Kansas City telling me I
5 have to be there tomorrow morning for a motion. And I
6 think as a practical matter, that -- could it ever
7 happen? Of course it could. Is it going to be an
8 insurmountable problem? Not in my judgment. Yes, sir.

9 MR. MILLER: Mr. Gordon, I take it the
10 Philadelphia Bar Association would not object to a
11 modification of the rule that allowed for the bona fide
12 office to be in Pennsylvania.

13 MR. GORDON: Oh, absolutely.

14 MR. MILLER: You would object --

15 MR. GORDON: That would not be a problem.
16 No.

17 MR. MILLER: That would not be a problem.

18 MR. GORDON: I have no objection to a lawyer
19 having had an office.

20 MR. MILLER: Right. You agree, don't you,
21 that there is a benefit to requiring that a lawyer have
22 an office that is in place nine to five where he or she
23 can be reached?

24 MR. GORDON: Absolutely.

25 MR. MILLER: Okay.

1 MR. GORDON: Yes, sir.

2 DEAN CHEN: Just to clarify. Is the shared
3 office proposal that was raised, is that off the table
4 at this point?

5 MR. GORDON: Well speaking as Allan Gordon,
6 the individual, I would hope that it would be off the
7 table. Speaking as the Chancellor of the bar
8 association, I don't have the authority to withdraw it
9 at this point. I would hope that we could by-pass it
10 and go to the real issue which is --

11 DEAN CHEN: Well am I right (indiscernible)
12 if the bona fide office rule is either abolished or
13 perhaps revised the way Mr. Miller just suggested then,
14 it (indiscernible).

15 MR. GORDON: Of course.

16 JUDGE WALLACE: Mr. Gordon, did you intend to
17 submit something in writing since this is a change of
18 what we had anticipated based upon the prior submission
19 by the Philadelphia Bar.

20 MR. GORDON: If Your Honor would allow, I
21 will have it submitted tomorrow, if I may.

22 JUDGE WALLACE: Oh. That's -- it's not
23 necessary to be done that soon. We have a public
24 hearing that's even close to you next week in Camden.

25 MR. GORDON: I had planned to attend that but

1 unfortunately, I have some medical tests that I have to
2 have that day and so that's why I came here today.

3 JUDGE WALLACE: I'm only saying that so
4 there's plenty of time for you to submit that in
5 writing.

6 MR. GORDON: It will be submitted.

7 JUDGE WALLACE: If you can do it by that
8 time, that'll be fine.

9 MR. GORDON: With your permission.

10 JUDGE WALLACE: Okay.

11 MR. GORDON: Thank you, sir.

12 JUDGE WALLACE: Thank you, Mr. Gordon.

13 MR. GORDON: Thank you. Thank you, members.

14 JUDGE WALLACE: And we have I believe Mr.
15 Hector. Bruce Hector.

16 MR. HECTOR: Yes. Yes, Your Honor.

17 JUDGE WALLACE: Mr. Hector, you represent the
18 New Jersey Corporate Counsel Association.

19 MR. HECTOR: Yes, Your Honor. That's
20 correct.

21 JUDGE WALLACE: Very good. We'll entertain
22 your comments.

23 MR. HECTOR: Good morning, everyone. First
24 of all, I'd like to thank the committee for giving us
25 the opportunity to be heard on this. Being a member of

1 the legal profession, I want to utter a couple of
2 disclaimers up front. My every day job is as associate
3 general counsel at Beck and Bickenson and Company
4 (phonetic), a fine institution up in Franklin Lakes. I
5 am not here to express their views in any way, shape or
6 form on any of the issues we're going to discuss today.

7 I've submitted, and I don't know if you had a
8 chance to circulate, you know, a position paper taken
9 by our national in house counsel association, NACA,
10 (phonetic) on the subject of multi jurisdictional
11 practice.

12 In addition, I am prepared to share some
13 views with you on the other subjects outlined in your
14 invitation letter. So -- and I've frankly enjoyed this
15 morning's discussion from the various people on the
16 issues involved.

17 To finish this disclaimer section, let me say
18 that I'm admitted to practice in New Jersey and New
19 York. Both times, the hard way. Took the exam, took
20 the ethics committee skills and methods, so it's with
21 great regret that I say I'd be unable to avail myself
22 of any of the fine reforms you're considering today.
23 I've already done my suffering.

24 And let me also add that I have, in fact,
25 worked in private practice. I worked for

1 (indiscernible) for a while before I went in house and
2 so hopefully, I'm not totally blind to the concerns of
3 the practicing profession.

4 I find myself in a unique position to be
5 talking to you today, both as a fellow lawyer and as a
6 client. I know the great interest of your concern for
7 the rights of clients to choose counsel in this
8 discussion today and, you know, I have a kind of
9 schizophrenic role as an in house counsel personally
10 and so do most of my colleagues in the in house bar.
11 We both render legal services and advice and counsel to
12 the companies which employ us. We also work with
13 outside counsel and as far as the outside counsel are
14 concerned, we are at least in the first instance, the
15 client unless some big wig at the company decides to
16 play amateur night and then we have to deal with that
17 as well.

18 But let me go down the list of the issues
19 that you're considering today. On the issue of MJP, I
20 happen to know that New Jersey, the state of New Jersey
21 has been very enlightened as far as in house counsel
22 are concerned with regard to the status of someone who
23 works for a company, a lawyer who works for a company
24 but is not admitted to practice in New Jersey but in
25 some other state. I refer to opinion fourteen which

1 goes back to 1975.

2 And indeed, you know, for the every day
3 practice of law in house for a corporation, as long as
4 we're employed full time, not holding ourselves out to
5 the public, don't do legal services for other employees
6 of the company other than in the course of your work,
7 then we at least can do so without fear that the
8 Sheriff is gonna show up at our door with cuffs and
9 accuse us of unauthorized practice.

10 And as in so many other areas of the law, New
11 Jersey has been very enlightened in this regard, just
12 as they have been in the judicial system and in our
13 rules of evidence, a number of, you know, civil trial
14 certification procedures and things like that.

15 From my view point, the various proposals
16 currently being circulated as variations in 5.5,
17 whether it's the New Jersey State Bar Association
18 recommendation or the ABA, differs only in the matter
19 of a few words in terms of the nature of the safe
20 harbor that New Jersey corporate counsel had for some
21 time. So certainly, we're not opposed to that. And
22 it's the sad fact that attorneys in other states who
23 work as in house counsel need that protection.

24 I've been interested in this issue for some
25 time and I was talking to some colleagues in

1 Connecticut who were admitted in some other state but
2 working for corporations in Connecticut. And so I
3 proudly told them about our opinion fourteen in New
4 Jersey. They turned around and called their own
5 administrative office of the courts in Connecticut to
6 inquire whether they had such a similar thing and the
7 last communication they received was a letter inquiring
8 as to whether they were engaged in unauthorized
9 practice of law.

10 So it's sad to say even though opinion
11 fourteen has been with us and very comfortable in New
12 Jersey for some time, nation wide that protection is
13 necessary at the very least for in house counsel.

14 Now with my letter to the committee, I
15 enclosed something called a common sense proposal to
16 MJP which has been adopted by a number of organizations
17 including NACA, the Association of Bar of the City of
18 New York, the Association of Professional
19 Responsibility Lawyers, Colorado Bar Association,
20 Federal Communication Bar Association, three different
21 sections of the ABA and the National Organization of
22 Bar Counsel, and it attempts to I think cut through
23 some of the cross fire of the various hypothetical
24 exceptions and carve out some safe harbors by trying to
25 get down to the essence of the issue. And, you know,

1 from the view point of in house counsel, we think
2 they've done that.

3 If the purpose of this is the protection of
4 the public, both in terms of malfeasance and
5 competence, we think the elements are there in the
6 common sense proposal. They include a requirement that
7 whoever a lawyer is be admitted to the bar of a state
8 and in good standing, that they're engaged in their
9 professional activity at the request of a client. So
10 the first section recognizes the in house counsel
11 situation. Some people might want to add a word or two
12 here, I think, but I think the essence is there. And
13 the second catches the concept of the fact that lawyers
14 may find themselves performing legal services in other
15 jurisdictions on a temporary basis without trying to
16 set themselves up for the practice of law in that other
17 jurisdiction and without holding themselves out to the
18 public in that jurisdiction to be available to
19 practice.

20 And basically the common sense proposal urges
21 that as a conceptual approach to dealing with MJP
22 issues.

23 I think there has been a certain amount of
24 discussion of classism, when you talk about large
25 firms, small firms, large clients like big companies,

1 small clients. I'll put on my client hat for a second
2 and tell you that in my personal experience, hiring
3 outside counsel, we hire counsel all over the country.
4 We hire -- our practice is to hire lawyers, not law
5 firms depending on the issue we're confronting.

6 Sometimes that lawyer works for a very large
7 multi state law firm which has hundreds of attorneys.
8 We also hire lawyers who have offices with three
9 attorneys but they happen to be the best attorney in
10 the type of concern we're looking at. In addition,
11 even if we hire a larger law firm for a matter which is
12 recurring around the country, because, frankly, as a
13 client, we don't want to make the investment in
14 educating a set of lawyers as to our business, our
15 products, the issues involved around it and then have
16 to face the expense frankly, of educating each new
17 attorney in each new state to do that. But there is a
18 continuing demand for local counsel and there will
19 always be a demand for local counsel.

20 My job is, frankly, the manager of litigation
21 against the company. There are some venues like New
22 Jersey where both the bench and the jury are, are very
23 tolerant people. They will easily deal with attorneys
24 from around the country. I have to tell you that's not
25 true around the country. And that, frankly, there are

1 some places you're just asking to get murdered if you
2 just want to walk in with a New Jersey attorney and
3 nobody else, even if they're your attorney of choice
4 otherwise.

5 So I think both from the view point of us
6 employing outside counsel or you want to use counsel
7 wherever the matter arises, and also as inside counsel
8 when you work for companies where you can get
9 transferred around, we think this common sense proposal
10 for MJP makes a lot of sense.

11 Now having said that, I don't know if this
12 committee is aware, but given the fact that we had
13 opinion fourteen back in 1975 and have kind of gotten
14 use to that, at least in New Jersey, some of my
15 colleagues who are not admitted in New Jersey but
16 worked here for long periods of time find themselves
17 kind of professionals without a country. They go to
18 work every day. Everybody they work with considers
19 them a lawyer. They do legal things but they cannot
20 join the New Jersey State Bar Association as an
21 attorney member. They cannot participate in committees
22 in the state. And so actually several years ago, we
23 had a very good dialogue I think with the State Bar
24 Association about the concept of setting up a separate
25 form of corporate admission for in house counsel with a

1 lot of limitations. Pro hoc vice would still apply if
2 you wanted to go to court and all restrictions of
3 opinion fourteen. You know, you had to be fully, you
4 know, full time employed by the corporation. You could
5 not hold yourself out to the public for practice of law
6 and couldn't engage in the private practice of law even
7 for, you know, co-employees. And I think a lot of
8 progress was made on that and we didn't make that
9 request in a vacuum because at the time we did that,
10 back in 1999, eight states actually provided for some
11 form of in house admission.

12 I think a lot of these concerns, both with
13 MJP and our own specialized kind of selfish request for
14 recognition for in house attorneys could be resolved if
15 this committee were to consider authorizing the
16 admission of attorneys by motion. That would take out
17 a whole class of in house counsel who have at least X
18 amount of years of experience, whatever measure you
19 decide that should be, whether it's five or seven or
20 ten. And for attorneys who find themselves so often in
21 our state on business for clients that it's not really
22 temporary any more, it actually gives us, the state of
23 New Jersey, the opportunity to get them into our
24 disciplinary system, our IALTA system, where we can
25 effectively protect the public by not having to worry

1 about conflict of law issues, whether it applies in
2 this state or the other state, you know, if there is
3 misconduct.

4 And I think there is a trend in that
5 direction. When we were discussing the corporate
6 admission option with the State Bar Association several
7 years ago, at the time fifteen states authorized
8 admission by motion. As you heard this morning, that's
9 now twenty two.

10 I don't pretend to be an expert in that area
11 but I certainly have not heard reports from any of the
12 states who have done admission by motion and there have
13 been some who've had that in place for a long period of
14 time, that they've experienced any higher degree of
15 lawyer malpractice or malfeasance than other states
16 which don't have.

17 I just -- forgive me for jumping around and
18 trying to cover some of the things I heard this
19 morning. I came completely unprepared to discuss the
20 bona fide office rule. But just in case you think that
21 couldn't possibly affect in house attorneys in New
22 Jersey, I'm sad to report that that's incorrect. I
23 actually had, about five months ago, an inquiry from an
24 in house counsel who worked at a major financial
25 institution. This in house counsel was licensed to

1 practice in New Jersey, worked for this company in
2 their New Jersey office, that's where his job was, and
3 was litigated matters directly for the bank.

4 A court, a Judge in one of the courts that he
5 was litigating one of these matters for set aside a
6 judgment he'd obtained on the basis that he could not
7 do so because corporations could not be represented in
8 court by in house counsel and in any event, he did not
9 have a bona fide office for the practice of law within
10 the state of New Jersey because that was his company's
11 address, not his address as a lawyer.

12 I know this kind of sounds like a judicial
13 interpretation from bizzarro world, another dimension.
14 And we were prepared to enter the fray and file amicus
15 briefs on the issue although luckily, informal
16 conversations were able to readjust the Bench's
17 thinking on this particular point.

18 But as long as this committee is considering
19 what I think personally is the enlightened approach of
20 admission by motion, with all of the constraints that
21 you're considering, you know, the number of years of
22 practice, having to pass the ethical review, and
23 subjecting the lawyer educational rigors we subject our
24 own attorneys to.

25 I find it interesting that the interaction of

1 the bona fide office required that. Working in a
2 company, there are several different areas of law, tax
3 law, environmental law, frankly high stakes
4 (indiscernible) liability litigation where the practice
5 is national and the lawyers you deal with travel all
6 over the country all the time dealing with these
7 matters. It's very common for these attorneys to be
8 admitted in more than one state. I'm not aware of very
9 many other states other than New Jersey that have any
10 version to what we call the bona fide office rule.
11 There is certainly a notation on the letterhead of
12 attorney who are admitted in other states.

13 But to someone else's point, to him we have
14 (indiscernible) now. The e-mail. There's attorneys I
15 work with now who have (indiscernible) -- I no longer
16 know whether they're sending me an e-mail from their
17 office or from the eighteenth hole. I think
18 unfortunately with twenty four hour accessibility and
19 technology, that from my view point as a client, the
20 bona fide office rule will become increasingly
21 irrelevant. And I think it sends a wrong signal for a
22 state which is otherwise I think very progressive, very
23 enlightened all the way from its jurisprudence to the
24 way we select Judges to our attorney certification
25 provisions.

1 And I think it would, just speaking
2 personally now, it's kind of a sour note in what would
3 otherwise be a very enlightened approach to considering
4 applications for attorneys in other states.

5 So forgive the kind of scatter shot ramble
6 through the various issues here you're dealing with but
7 I hope I've captured some of our association's thinking
8 on these issues and I certainly invite any questions
9 you might have.

10 JUDGE WALLACE: Thank you very much, Mr.
11 Hector. I notice in your common sense approach that
12 you didn't have an element for pro hoc vice for in
13 house counsel. Was that intentional or, or not? In
14 the general definition that a lawyer who's an employee
15 of a client and acts on the client's behalf or on
16 behalf of the client's organization or affiliates,
17 would that, did you intend that the lawyer could also
18 go into court or not?

19 MR. HECTOR: Well I'm in the great position
20 of not having drafted this so I don't know what they
21 meant.

22 JUDGE WALLACE: Okay. Fair enough.

23 MR. HECTOR: I think if you ask me
24 personally, I certainly, when we were discussing
25 corporate admission with the New Jersey Bar

1 Association, it was always an (indiscernible) of our
2 dialogue that pro hoc would remain. That if anybody
3 wanted to avail themselves of the courts in the state
4 --

5 JUDGE WALLACE: I notice you mention that in
6 a conversation with the New Jersey State Bar --

7 MR. HECTOR: Right.

8 JUDGE WALLACE: -- that that was an element.
9 So you would envision that that would be a part of this
10 proposal.

11 MR. HECTOR: Yeah. I think what you see here
12 in the common sense proposal is a couple of the corners
13 were knocked off in order to reach consensus among the
14 impressive list of organizations on the back. I think
15 if you ask us personally, I think pro hoc, especially
16 as somebody who manages litigation, I think pro hoc
17 would be an essential element that should be retained
18 even under a scheme like this.

19 JUDGE WALLACE: Thank you. Yes.

20 MR. SIMPKINS: Does your group have any
21 opinion with respect to the foreign educated attorneys
22 issue?

23 MR. HECTOR: I don't have an association
24 position on that. I can give you a smart aleck answer
25 that other than Louisiana, if you came from a civil law

1 background, I think that would be, might be more
2 problematic than if you came from a common law
3 background in another country but I'm strictly playing
4 amateur night now. So I don't have an association
5 position.

6 JUDGE WALLACE: Yes.

7 MR. TU: My, my question relates to opinion
8 fourteen. Some attorneys have argued that the ABA's
9 proposed safe harbor for in house attorneys is not
10 necessary because we have opinion fourteen, and other
11 attorneys, myself included, feel that opinion fourteen
12 is too narrow. It's a lot narrower than the new
13 proposed rules. I think you indicated that the ABA's
14 rule and the New Jersey State Bar's rule and opinion
15 fourteen differ by only a few words but I think they're
16 very significant words and I'll elaborate a little bit
17 on this point.

18 One is that opinion fourteen talks about full
19 time employment for employer. That seems to carve out
20 the whole class of attorneys who are working in house
21 but on a part time basis, that they're not, they can't
22 benefit from the safe harbor in that situation.

23 The second thing is that there's language
24 about a single employer which at least raises a
25 question as to what that means. If you have other

1 income from someone else, does that also remove you
2 from the safe harbor. For example, I'm in house
3 counsel at Fiseom (phonetic) but I also teach on an
4 adjunct basis at Rutgers Law School. Now they don't
5 pay me hardly anything but nevertheless --

6 UNIDENTIFIED: Maybe not monetarily.

7 MR. TU: But nevertheless, they are my
8 employer and that would suggest -- now I don't have a
9 problem because I am admitted in New Jersey but if I
10 were availing myself of that safe harbor, the fact that
11 I teach on an adjunct basis might suggest that that
12 safe harbor is not available. So my, my question to
13 you is are these, from the NJCCA stand point and for
14 your constituency, would you say that the narrower rule
15 should apply or that the ABA proposed 55, 5.5 safe
16 harbor should apply?

17 MR. HECTOR: Well like any good lawyer in a
18 spot, I'll choose the third group which is, which is
19 this. I think if someone's employed part time by a
20 corporation, the real question to be answered in my
21 mind is what are they doing with the rest of their
22 time. If for the rest of their time they're holding
23 themselves out for the private practice of law, I think
24 they still have to be admitted to practice in New
25 Jersey to do that. Perhaps this might be a dress in a

1 draft by saying that the total amount of your
2 compensation for rendering legal services comes from a
3 corporation. In your case, that would cover, you know,
4 teaching. You're providing legal services or -- in a
5 broader sense, perhaps but --

6 MR. TU: There's some, there's some question.
7 There's at least some question as to what -- because
8 when you talk about practice of law, at least under, I
9 forget the rule number, but law professors are
10 considered to be practicing law. So teaching law is
11 practicing law.

12 MR. HECTOR: So do you have anybody in the
13 faculty of Rutgers University Law School who's not
14 admitted in New Jersey?

15 UNIDENTIFIED: Most of them are not.

16 MR. TU: Yes.

17 MR. HECTOR: Okay. Well I'll -- and there
18 was another question. I'm sorry. I forgot. Was that
19 the main question?

20 MR. TU: The main question was whether you
21 felt that opinion fourteen was sufficient in its
22 current form or whether it should be broadened as
23 proposed by the ABA.

24 MR. HECTOR: Well, in the other way --

25 MR. TU: Well the ABA rule doesn't require

1 for instance single employer.

2 MR. HECTOR: Right.

3 MR. TU: Right. It doesn't -- there's no
4 language in there about full time employment so I
5 regard that as broader and the State Bar's proposed
6 rule tracks more closely with opinion fourteen and is
7 actually I think narrower than the ABA rule.

8 MR. HECTOR: Well generally speaking,
9 broader, broader is better but you still have to
10 confront those situations where what are you doing the
11 rest of the time.

12 One other interesting problem brought up by
13 the ABA version is that sometimes people work as in
14 house counsel for, you know, there's one office but
15 there's five different corporations floating around
16 that office and sometimes they're doing services for
17 one corporation and sometimes another. That actually
18 happens fairly frequently in the real estate
19 development business and we've been contacted by in
20 house counsel in real estate development who've had
21 that problem here in this state. So I think to the
22 extent that the ABA version offers a broader umbrella
23 for that I think is a good thing.

24 Those of us who work for stodgy old economy
25 companies who've been around forever, you know, think

1 in terms of one company. But it's not uncommon for one
2 office to have a couple of different companies which
3 are very much related and have interlocky (phonetic)
4 ownership and all of that, you know, within one office
5 suite. So I think that would be a useful change
6 actually. Yes, Your Honor.

7 JUDGE: One of the questions that has come up
8 when you mention admission on motion is what experience
9 requirement should you have and how do you define it.
10 That's pretty easy when you're talking about a trial
11 attorney but I think it's (indiscernible) when you're
12 talking about someone who works in a corporate
13 capacity. (indiscernible) suggestion either as to how
14 you define practice of law in that context and also how
15 you would verify that, in fact, that person is doing
16 whatever you consider to be practice of law?

17 MR. HECTOR: Okay, I'll just proceed from my
18 understanding, the bias given what I do and who I
19 represent which is I think that in house practice as a
20 lawyer should count just every bit as much as, as a
21 practice as a trial attorney.

22 JUDGE: (indiscernible) attorney happens to
23 be employed by a corporation but not the legal
24 department? What would you do then?

25 MR. HECTOR: I fully agree with the notion

1 that whatever the person should have been doing, he
2 should have been lawyering in some form. Not merely
3 the fact that they have a law degree and happen to work
4 for a corporation. We have people in our company that
5 have law degrees who don't work in the law department.
6 You know, they spent five years in investor relations.
7 One of our lawyers does that now. I wouldn't count
8 that as experience towards admission by motion. You
9 know, somebody functioning as a lawyer in the law
10 department on the other hand, I would definitely
11 consider legal experience.

12 As a matter of fact, unless you're a huge law
13 department, we're very much jacks of all trades and
14 masters at none. We might have a better shot at
15 passing the bar exam five years out than someone who's
16 specialized because on any given day, we have to answer
17 questions about HR or distribution contracts or
18 litigation or environmental law. So, and we don't
19 pretend to be experts in those usually but we get
20 around the map a little bit. So you definitely get a
21 broad experience.

22 JUDGE: What about attorneys who function in
23 house as perhaps not as attorneys by title but by
24 action, they are practicing law? They're giving advice
25 and counsel and legal direction to HR field support.

1 MR. HECTOR: A lawyer who works in HR for
2 example?

3 JUDGE: Right. And reports in to the
4 corporate vice president of HR with a dotted line to an
5 associate general counsel. Hypothetically speaking.

6 MR. HECTOR: Hypothetically speaking. Well
7 perhaps the practical answer to that would be whatever
8 scheme you set up to attest to the person's legal
9 experience. You know, if you can name other members of
10 the legal profession who will write recommendations
11 based on the legal interactions they've had with that
12 person. If you could get recommendations from EEOC
13 hearing officers before whom that person might have
14 appeared. If you could get recommendations from
15 outside counsel who they may have worked with on more,
16 you know, on larger matters which required litigation.

17 I think the focus should be can you get
18 attestations from legal professionals, whether it's
19 Judges or fellow attorneys that can document that
20 person's legal work. You know, sometimes -- I don't
21 think it should just hinge on the title because you're
22 right, sometimes lawyers get in other functions where
23 they don't have that title but the substance of what
24 they're required to do day to day, you know, a lawyer
25 may work in the real estate department of a corporation

1 but, but they're constant flow of work would be
2 closings, real estate closings or investitures. Isn't
3 that to be as much as a real estate lawyer as someone
4 who is in the law department doing that? I would say
5 yes.

6 So, you know, my approach would be to look at
7 the substance of what that person is doing and if the
8 substance of what they're doing is legal work, then
9 that should take precedence over whatever their title
10 was or organizational.

11 JUDGE: If it walks like a duck.

12 MR. HECTOR: Exactly.

13 MR. FRANCIS: Do I, do I understand correctly
14 from your response to Judge Wallace about the pro hoc
15 vice admission that the association would limit its
16 proposed rule to work that a non-New Jersey attorney
17 did for his New Jersey corporation as corporation, not
18 for an officer or employee? For example, a matrimonial
19 dispute, a real estate closing.

20 MR. HECTOR: Right.

21 MR. FRANCIS: He would have to have pro hoc
22 vice admission for that.

23 MR. HECTOR: Absolutely. Yeah, because
24 you're getting off the reservation once you do that.
25 If the whole notion is -- at that point you're

1 representing the public because you're not representing
2 that corporate officer for the company, you're
3 representing him for themselves. And I think you've
4 crossed that line into public representation.

5 MR. FRANCIS: Well what about going to court
6 for that corporation? Not for an officer but for the
7 corporation.

8 MR. HECTOR: No. We had taken the position
9 that, you know, unless and until the administrative
10 office of the courts changed the pro hoc vice rule,
11 that an out of state attorney still has to comply with
12 it.

13 JUDGE WALLACE: Yes.

14 UNIDENTIFIED: What percentage of your
15 members are not presently members of the New Jersey
16 State Bar and what percentage do you think would take
17 advantage of a motion admission rule if one were
18 adopted?

19 MR. HECTOR: Question number one, I honestly
20 wish I knew the answer to that. We've been trying to
21 figure out how to do that although I actually have a
22 sneaky plan for this year. Those of us who are
23 admitted in other states, as I am, I'm admitted in New
24 York as well, we have CLE requirements first of all and
25 a certain number of ethics so we're trying to put

1 together an ethics session that will enable those
2 people to knock off their CLE requirements in one day.
3 We're hoping that's how we can find out which one of
4 our members are not, you know, at least admitted in
5 other states. Anything else would be admitted in New
6 Jersey.

7 I'd have to give you a guess but I would say
8 it's a fairly high percentage of our membership is
9 probably not admitted in New Jersey but admitted in
10 some other state. You know, it's not as high as fifty
11 percent but if you tell me thirty percent of our
12 membership was not admitted in New Jersey, I wouldn't
13 be surprised and I wouldn't be surprised if the number
14 was higher than that.

15 UNIDENTIFIED: And what percentage of those
16 do you think would take advantage of the motion
17 admission rule?

18 MR. HECTOR: I think if they had sufficient
19 years experience, I think a lot of them would. I
20 absolutely think a lot of them would. And I think most
21 of them would say any sane individual who's been
22 through a bar exam once doesn't want to do it again if
23 they can help it. And I think people with requisite
24 experience would. Because, especially if they're gonna
25 continue to be in the state. I mean it would enable

1 them to become part of the professional community which
2 right now they cannot be. Even though they walk like a
3 duck, talk like a duck, officially they're not --

4 UNIDENTIFIED: Do they pay the same fees to
5 the fund? Are they required to pay the fees to the
6 funds as corporate counsel?

7 MR. HECTOR: Out of state attorneys? No.
8 They don't have to pay any fees, which is another
9 opportunity for the state to build up its funds if they
10 want to set up this form of admission for in house
11 counsel. They can build up the treasury a little bit.

12 JUDGE WALLACE: All right. Any other
13 questions?

14 UNIDENTIFIED: What kind of enthusiasm do you
15 think you'd get out of you law department if they were
16 admitted in New Jersey? One of the concerns that I've
17 had are the, whether we would lose some what's been
18 called core values if, if we open up by admission on
19 motion or we adopted something similar to the NJP
20 proposed rules. Pro bono services, continuing
21 education, bar association functions, volunteering for
22 bar committees, Supreme Court committees, all those
23 kind of activities. Would they, would attorneys still
24 volunteer to do that, in house counsel volunteer to do
25 that? Would they actively participate?

1 MR. HECTOR: The -- one of the main drives in
2 New Jersey Corporate Counsel Association is actually
3 right now to voluntarily and affirmatively provide our
4 members with opportunities to do pro bono work now
5 since we're not under the state bar requirements unless
6 you're a state bar member and the way we've done that
7 is to try and put in house counsel together. There's
8 an outfit called Pro Bono Partnership and they identify
9 non profit corporations which need legal work done and
10 to many in house counsel who, whose focus of work is
11 more in that area, we try and match them up for
12 attorneys interested in doing pro bono work. Because
13 frankly, some in house counsel feel much more
14 comfortable doing that than, you know, being a tax
15 lawyer in some big corporation than taking on the
16 rigors of landlord tenant court where they haven't a
17 clue what's going to go on.

18 I -- the guy that I work for living in
19 private practice, I don't know if I should say this
20 here. I work for a firm in New York and we also have
21 an office here with a full time staff at 60 Park Place
22 and we got the pro bono notices and I did pro bono
23 cases when we were under that particular system. I
24 can't speak for the entire in house (indiscernible). I
25 think some people, if they're gonna get assigned a case

1 in traffic court, they'd be scared that they wouldn't
2 know what to do. I think it'd be, depending in what
3 the counsel's area of expertise was, I think they'd
4 feel conflicted depending on what it was.

5 On the other hand, both our national
6 organization and our state organization, we think of
7 our obligations as a profession is to encourage our
8 members to engage in pro bono work. We've all been
9 very fortunate. However much we like to complain, we
10 go to work every day. We're blessed and we recognize,
11 at least institutionally, we need to give something
12 back. Now does that mean that some people won't be
13 dragged kicking and screaming if that becomes a
14 requirement? No. But certainly institutionally, we
15 would support, support that.

16 JUDGE WALLACE: Any other questions? Thank
17 you very much, Mr. Hector.

18 MR. HECTOR: Thank you.

19 JUDGE WALLACE: We certainly enjoyed your
20 presentation. We'll consider your points as raised.

21 Now it's approaching our lunch hour. I don't
22 know -- I know I had no other person listed on my list
23 for speaking, however, there may be members of the
24 public that had intended to make a presentation. Is
25 there anyone else that wanted to make a presentation

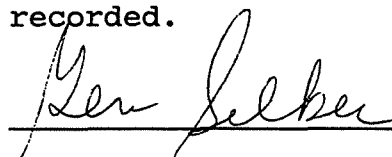
1 this morning? All right, what we'll do is we'll recess
2 for lunch and just in the event that someone may come
3 in for the afternoon session, we will reconvene shortly
4 after one and then if there are no other presenters,
5 we'll recess shortly thereafter.

6 Thank you very much for the presenters that
7 did come and bring us very fruitful information.

8 (Off the record)
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CERTIFICATION

1 I, Geri Silber, the undersigned transcriber do
2 hereby certify that the foregoing Transcript of
3 Proceedings in the Supreme Court of New Jersey, on
4 March 7, 2002, on tape number 1, index number from 0001
5 to end, and on tape number 2, index number from 0001 to
6 6990, is prepared in full compliance with the current
7 transcript format for Judicial Proceedings and is a
8 true and accurate transcript of the proceedings as
9 recorded.
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