IN THE OHIO SUPREME COURT

IN RE: Application of Alice Auclair Jones, Applicant.	) CASE NO. 2018-0496)) On Findings of Fact and Recommendation of) the Board of Commissioners on Character) and Fitness of the Supreme Court of Ohio,) Case No. 668))))

BRIEF OF *AMICI CURIAE*
THOMPSON HINE LLP, FROST BROWN TODD LLC, BRICKER & ECKLER LLP, SQUIRE PATTON BOGGS (US) LLP, PORTER WRIGHT MORRIS & ARTHUR LLP
AND
KEATING MUETHING & KLEKAMP PLL

(NOT IN SUPPORT OF THE POSITON OF ANY PARTY)

Matthew C. Blickensderfer (0073019)

FROST BROWN TODD LLC
300 Great American Tower
301 East Fourth Street
Cincinnati, Ohio 45202
Telephone: 513-651-6800
Fax: 513-651-6981
Mblickensderfer@fbtlaw.com

Attorney for Amicus Curiae
Frost Brown Todd LLC

Thomas L. Feher (0038575)
Frank R. DeSantis (0030954)
Karen E. Rubin (0030339)
THOMPSON HINE LLP
3900 Key Center
127 Public Square
Cleveland, Ohio 44114
Telephone: 216-566-5500
Fax: 216-566-5800
Tom.Feher@ThompsonHine.com
Frank.DeSantis@ThompsonHine.com
Karen.Rubin@ThompsonHine.com

Attorneys for Amicus Curiae
Thompson Hine LLP

(*continued on next page*)

Randolph C. Wiseman (0021992)
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215
Telephone: 614-227-2300
Fax: 614-227-2390
rwiseman@bricker.com
Attorney for Amicus Curiae
Bricker & Eckler LLP

Pierre H. Bergeron (0071402)
SQUIRE PATTON BOGGS (US) LLP
201 E. Fourth Street, Suite 1900
Cincinnati, OH 45202
Telephone: 513-361-1200
Fax: 513-361-1201
pierre.bergeron@squirepb.com
Attorney for Amicus Curiae
Squire Patton Boggs (US) LLP

Robert W. Trafford (0024447)
Charles C. Warner (0023052)
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street, Suite #2900
Columbus, Ohio 43215
Telephone: 614-227-2100
Fax: 614-227-2200
rtrafford@porterwright.com
cwarner@porterwright.com
Attorneys for Amicus Curiae
Porter Wright Morris & Arthur LLP

James R. Matthews (0043979)
KEATING MUETHING & KLEKAMP PLL
One East 4th Street, Suite 1400
Cincinnati, OH 45202
Telephone: 513-579-6400
Fax: 513-579-6457
JMatthews@KMKLAW.com
Attorney for Amicus Curiae
Keating Muething & Klekamp PLL

****

Brian G. Dershaw
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street # 1800
Cincinnati, OH 45202
Attorney for Relator
Cincinnati Bar Association

David C. Greer
BIESER, GREER & LANDIS, LLP
6 North Main Street # 400
Dayton, OH 45402
Attorney for Applicant
Alice Auclair Jones

Brian S. Sullivan
DINSMORE & SHOHL LLP
255 E. Fifth Street # 1900
Cincinnati, OH 45202
Attorney for Amicus Curiae
Dinsmore & Shohl LLP

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INTRODUCTION

This matter raises important questions regarding the interpretation of the Ohio Rules of Professional Conduct and the prohibition against the unauthorized practice of law in light of three key policy issues: (1) the right of clients to be represented by the lawyer of their choice; (2) the directive against placing undue geographic restrictions on the ability of established legal professionals to practice their profession and serve their clients; and (3) the ability of Ohio and its law firms to attract valued citizens and employees.

Amici curiae Thompson Hine LLP ("Thompson Hine"), Frost Brown Todd LLC, Bricker & Eckler LLP, Squire Patton Boggs (US) LLP, Porter Wright Morris & Arthur LLP and Keating Muething & Klekamp PLL (collectively "Amici") take no position on Applicant's particular situation and whether the facts particular to her do or do not justify denial of her application. In general, however, it is Amici's position that it is inappropriate to interpret Ohio's rules against the unauthorized practice of law so as to prohibit a lawyer licensed in another jurisdiction from continuing to provide legal services temporarily, while the lawyer's application for admission without examination is pending.

Those seeking admission in Ohio pursuant to Rule I § 9 of the Rules for the Government of the Bar demonstrate their intent to be subject to the disciplinary jurisdiction of this Court. Continuing to serve clients pending completion of the formal admission process in Ohio is not inconsistent with such intent and, more important, is entirely consistent with the ethical obligations incumbent on all attorneys.

The interpretation that the Board of Commissioners on the Unauthorized Practice of Law (the "Board") has adopted in its Recommendation does not protect against any identifiable threat of harm; that interpretation is, however, detrimental to policies that this Court and the legislature have embraced, which benefit clients, the profession, the state and its citizens.

THE IDENTITY AND INTEREST OF *AMICI CURIAE*

Each of the Amici maintains a substantial legal practice in Ohio. Several also have offices in other states, and several may be described as "national" law firms, handling matters and serving clients across the country and throughout the world.[1]

Law firms represent an industry that is an important part of the Ohio economy. In 2017, the legal sector employed approximately 39,000 Ohioans, paying $2.4 billion in wages on revenue of $6.91 billion. *See Law Firms in Ohio*, IbisWorld Industry Report at 18 (Mar. 2018).[2]

Like other law firms, a key factor in the ability of Amici to grow and sustain their businesses and service their clients is the ability to attract and retain "lateral" attorneys — that is, lawyers who are already experienced in a particular area, and who have clients that these lawyers are already providing services to. Many such lawyers are recruited from outside Ohio. They may move to the state because of job opportunities or other circumstances that require their relocation. In either event, the Board's interpretation of Rule 5.5 is a substantial impediment to such

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[1] Thompson Hine, founded in Cleveland in 1911, has almost 300 attorneys in its four Ohio offices: in Cincinnati, Cleveland, Columbus and Dayton. The firm also has dozens more attorneys in its offices located in Atlanta, New York and Washington, D.C.

Frost Brown Todd LLC is a 500-lawyer firm with twelve offices in eight states. Nearly 200 of those attorneys work in three Ohio offices, located in Cincinnati, Columbus and West Chester.

Bricker & Eckler LLP is a 167-lawyer firm with six offices exclusively in Ohio.

Squire Patton Boggs (US) LLP has grown since its founding in Cleveland in 1890 to a 1,500-lawyer global firm with 47 offices in 20 different countries. The firm's offices in Cincinnati, Columbus, and Cleveland are home to more than 200 Ohio lawyers.

Porter Wright Morris & Arthur LLP, founded in 1846, presently has four Ohio offices – Columbus, Cleveland, Cincinnati, and Dayton – and also has offices in Pittsburgh, Washington, D.C. and Naples, Florida.

Keating, Muething & Klekamp ("KMK") is a 100+ lawyer firm with its only offices in Cincinnati.

[2] Available at http://filehost.thompsonhine.com/uploads/Law_Firms_in_Ohio_Industry_Report_d62f.pdf

recruiting efforts and the ability of the relocating lawyers to serve clients. The Board's interpretation mandates that potential lateral hire candidates who want to come to Ohio to live, work and pay taxes can only do so if they choose to give up their practice and livelihoods for the eight-to-ten months it takes to process their admission applications. It prohibits them from continuing to serve clients (including existing clients), although they have been licensed elsewhere for at least five years, and although they fully meet the requirements for admission to the Ohio bar without examination. A regulatory structure that unduly restricts lawyer mobility – without an overriding need to do so and without a clear resulting benefit – is contrary to the interests of clients, the state, the organized bar and the firms such as these Amici that serve clients and help drive Ohio's economy.

For these reasons, and from this perspective, Amici submit this brief, urging the Court to find that lawyers who join law firms in Ohio may practice temporarily pending their admission without examination.

STATEMENT OF FACTS

Although not taking a position in support of either the Applicant or Relator, Amici adopt and incorporate by reference the Statement of Facts set out in the Applicant's Brief in Support of Objections to the Findings and Recommendation of the Board of Commissioners on Character and Fitness.

ARGUMENT IN SUPPORT

I. Proposition of Law: Rule 5.5 of the Ohio Rules of Professional Conduct should not be interpreted to prohibit a lawyer who is qualified and who has applied for admission without examination from practicing with an Ohio law firm pending processing of that application.

A. Rule 5.5 Can and Should be Interpreted to Permit Temporary Practice by Attorneys Moving to Ohio Who Have Sought Admission Pursuant to Gov. Bar. R. I § 9.

For many years, lawyers have been eligible to join the Ohio bar without examination, provided that they have been licensed in another jurisdiction and have maintained their licensure there for at least five years. That rule is codified in this Court's 1972 adoption of the Rules for the Government of the Bar, including Rule I § 9. This Rule reflects the apparently-long-held understanding that lawyer conduct standards are similar throughout the nation, and that having been admitted and having maintained a license elsewhere for at least five years is evidence that the candidate is presumptively qualified to practice here.

This understanding is also reflected in Rule 5.5(c) of the Ohio Rules of Professional Conduct, modeled after the ABA Model Rule on "temporary practice." Rule 5.5(c) expressly (and appropriately) permits practice in Ohio by a lawyer who is admitted, practices and is in good standing in another United States jurisdiction, as long as any of the following apply:

(1) the lawyer associates with an active lawyer admitted in Ohio;

(2) the services are related to a litigation matter pending in Ohio;

(3) the services are related to an alternative dispute resolution proceeding here related to the lawyer's practice in his or her home jurisdiction; or

(4) the lawyer engages in non-litigation activities that relate to the lawyer's existing practice in his or her home jurisdiction.

As discussed below, these rules reflect the fact that modern legal practice is often inherently "national." For example, it has been held that lawyers from outside Ohio do not engage in

the unauthorized practice of law by representing out-of-state lending institutions in negotiating and documenting loans made to persons and entities in Ohio secured by property located in Ohio. *See* Adv. Op. 90-12 (Bd. of Comm'rs on Griev. & Disc. Aug. 17, 1990). Likewise, lawyers licensed in Ohio can counsel their clients on the law of another jurisdiction without fear of violating the rules against unauthorized practice in either state. *See* Charles Wolfram, *Modern Legal Ethics* 867 (1986) ("no distant state has the power to prohibit the lawyer from advising a client, in the lawyer's own state, about the distant state's law.").

This understanding, combined with Gov. Bar. Rule I § 9, suggests that established lawyers from other jurisdictions should be able to practice their profession in Ohio while they await admission without examination, including serving their existing clients in another state, so long as they meet one of the listed criteria. Those criteria include being associated with licensed Ohio attorneys, which would apply to lateral recruits coming to Ohio to practice in the established Ohio offices of law firms such as Amici.

As demonstrated in this case, however, such a conclusion might be viewed as conflicting with comment 4 of Rule 5.5, which suggests that a lawyer who "establishes an office or other systematic and continuous presence in this jurisdiction" violates Rule 5.5(b)(1). What constitutes either "establishing" an office or "other systematic and continuous presence" is not defined in the comment. However, the Board's interpretation suggests that Rule 5.5(b)(1) would be violated if a lawyer who has applied for admission does work for a client after joining an Ohio office of an Ohio law firm. This leads to anomalous results.

For example, an applicant who is licensed in Indiana, who applies to be admitted in Ohio without examination, can continue serving clients while remaining in Indiana and awaiting admission here. If that lawyer came to Ohio to work for a client and worked with a licensed Ohio attorney (one of the categories in Rule 5.5 (c)), there would be no Rule violation. But if the same

lawyer did the same thing after having joined the office of that Ohio law firm and then applied for admission without examination, the Board's application of comment 4 would indicate that the lawyer's practice here could be considered the unauthorized practice of law. The only difference leading to such a drastically different result is having formed an intent to practice in a different geographic location.

Whether the particular facts of this case do or do not fit into the language of comment 4 is open to debate, and the Board's position may be more consistent with the comment's precise language than the Applicant's position here. However, what is significant is that comment 4 is just that: a comment. It is not the Rule and it does not have the force of a Rule. *See, e.g.*, ORPC Preamble, "Scope" at ¶ 14 ("Many of the comments use the term 'should.' Comments *do not add obligations to the rules* but provide guidance for practicing in compliance with the rules.") (emphasis added).

The Rules' drafters understood that they could not address every situation that might arise. As noted in the Preamble, "within the framework of [the Rules of Professional Conduct] … many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment ***guided by the basic principles underlying the rules***." *Id*. at ¶ 9 (emphasis added). Likewise, it is recognized in the Preamble that in some situations the purpose of the Rules suggests a result different than their express language: "The Ohio Rules of Professional Conduct are rules of reason. They should be interpreted ***with reference to the purposes of legal representation and of the law itself***." *Id.* at ¶ 14 (emphasis added).

It is with these guiding principles in mind that this Court should interpret Rule 5.5 and its application. Interpreting and applying comment 4 to prohibit attorneys from temporarily continuing their practice pending admission when they have moved to existing firms in Ohio and

sought admission, is contrary to the express permission to practice found in Rule 5.5. Moreover, such a prohibition is contrary to important principles of client choice and client service. Again, as was noted nearly 30 years ago in Advisory Opinion 90-12:

> The Code of Professional Responsibility discourages us from placing unreasonable territorial limitations upon the right of a lawyer to handle the legal affairs of his client or **upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters**. Code of Professional Responsibility, EC 3-9. Moreover, Ethical Consideration 8-3 states that **clients and lawyers should not be penalized by undue geographical restraints** upon representation in legal matters, and the bar should improve licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.

Id. (emphasis added).

As discussed below, lateral attorneys applying for admission pursuant to Gov. Bar Rule I § 9 have the right to handle the legal affairs of the clients that want to hire them and existing clients in need of continuing service. Prohibiting client work pending approval of the lawyer's admission application harms clients. Indeed, because abandoning a client is an ethical violation in itself, many applicants could find themselves with the Hobson's choice of either violating their home state's rules by refusing to continue as counsel, or violating Rule 5.5 if they do continue.[3] There is no good reason for forcing such impossible choices.

Because of these direct conflicts with other important policies and rules, the Court should not apply comment 4 to prohibit temporary practice pending admission by lateral attorneys who seek admission without examination pursuant to Gov. Bar Rule I § 9.

[3] As discussed below, an applicant's relocation is often not a matter of true "choice." Many lawyers are required to relocate for various reasons, including family changes. Lawyers are not somehow immunized from such circumstances by virtue of their license to practice.

B. Practice Pending Admission Does Not Pose a Threat of any Harm that the Rules against Unauthorized Practice are Meant to Address.

As the Panel noted in its Report and Recommendation ("Rept."), which the Board adopted, the Court "has not directly addressed the issue of whether Rule 5.5 permits an attorney licensed in another jurisdiction to practice pending admission in Ohio so long as the attorney does not practice Ohio law." (Rept. at 3.) However, nothing in the record (or in the experience of Amici) suggests that practicing "Ohio law" presents a different risk than practicing any other kind of law. Amici do not identify any harm addressed by the rules against the unauthorized practice of law that is avoided by prohibiting temporary practice pending admission.

One of the purposes of the prohibition against unauthorized legal practice is to "protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation" by non-lawyers. *Cleveland Bar Assn. v. CompManagement, Inc.*, 2004-Ohio-6506, ¶ 40, 104 Ohio St. 3d 168 (2004). "[L]imiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." Prof. Cond. R. 5.5, cmt. 2. The intent is to prevent individuals who are "not licensed to practice law" from harming the public. R.C. § 4705.07.

But lawyers who are already licensed elsewhere do not present such dangers of "unskilled representation." They have already been accepted as members of a bar, and applicants pursuant to Gov. Bar Rule I § 9 have also maintained a license for at least five years. For out-of-state lawyers seeking admission in Ohio, the purpose of Ohio's unauthorized practice rules is different: to ensure that their past history is examined and that these lawyers formally subject themselves to the disciplinary authority of this Court.

For these reasons, courts have imposed sanctions on lawyers licensed in another state when they have come to Ohio, set up shop and practiced *without ever* ***attempting*** *to gain admission*. *See, e.g., Cleveland Bar Ass'n v. Misch*, 82 Ohio St. 3d 256 (1998) (lawyer in good stand-

ing in Illinois who provided advice on consulting basis to clients of Ohio law firm while living in Ohio, but who had never sought admission to the bar, engaged in unauthorized practice of law); *Cleveland Bar Ass'n v. Moore*, 2000-Ohio-253, 87 Ohio St. 3d 583 (2000) (lawyer in good standing in Pennsylvania who shared offices in Cleveland and advised clients for eight years without seeking Ohio admission engaged in unauthorized practice of law). Such lawyers clearly present the danger that the unauthorized practice rules (as to lawyers) are designed to guard against: unvetted lawyers who fly under the disciplinary radar.

But those cases do not fit the situation of relocating lawyers, licensed elsewhere, who come to Ohio and promptly seek admission to the bar of this state. Those lawyers, unlike the lawyers in *Misch* and *Moore*, are not attempting to avoid pre-admission scrutiny or evade the disciplinary authority of this Court. Rather, they are figuratively approaching the bench and asking to become part of the bar. Allowing such lawyers to practice here – temporarily and conditionally – while their applications for admission are pending, does not pose a serious or unacceptable risk of harm to the public or to the lawyers' existing clients.

If there were a clear harm from allowing such a temporary form of practice, then an interpretation of Rule 5.5 prohibiting such conduct might fulfill the purposes of the Rules. But no such harm is apparent.

C. Prohibiting Licensed Lawyers from Serving Clients Disregards and Improperly Impinges Upon Client Choice.

A client's ability to choose and maintain a continuing relationship with counsel of the client's choice has been called "an inviolable right." *Reamsnyder v. Jaskolski*, 1985 Ohio App. LEXIS 8533, at *8 (6th Dist. Aug. 23, 1985). It "is an important public right and a vital freedom that should be preserved" when at all possible (for instance against an unnecessary disqualification challenge). *Banque Arabe et Internationale D'Investissement v. Ameritrust Corp.*, 690 F. Supp. 607, 613 (S.D. Ohio 1988).

The Ohio Rules of Professional Conduct and advisory opinions interpreting the rules are likewise imbued with the policy of protecting a client's choice of counsel. For instance, Rule 5.6 prohibits both firm agreements restricting a lawyer's right to practice after termination and settlement agreements conditioned on a restriction on a lawyer's right to practice. But as comment 1 makes clear, the concern that the rule addresses is not only professional autonomy, but the unacceptable result of "limit[ing] the freedom of clients to choose a lawyer." *See also* Adv. Opinion 98-5 at 2 (Bd. of Comm'rs on Griev. & Disc. April 3, 1998) (when lawyers depart a firm, client choice is paramount; conduct that "interferes with the client's choice of counsel" is impermissible).

The effect of the Board's interpretation of Rule 5.5 is to divest non-Ohio clients of their chosen counsel in a stringent way. If their duly-licensed lawyers merely move across the Ohio River, for instance – in pursuit of opportunity, to join a spouse, or for any other reason – clients may lose their services for the considerable length of time that it takes to obtain admission here without examination. That loss of trusted counsel could well include critical events that cannot be delayed pending the completion of the process.[4]

That harm must be juxtaposed against the fact that temporary practice pending admission presents none of the dangers addressed by the rules against unauthorized practice. The lawyers in question are trained legal professionals by definition, and so there is no danger to the public of a layperson handling a legal matter. Likewise, under Rule 8.5(a) of the Ohio Rules of Professional Conduct, these attorneys are subject to discipline both in Ohio and in the state where they already are licensed. Moreover, by permitting admission without examination based on licensure

[4] And the converse is also true: Ohio clients may also be abandoned and harmed if and when Ohio-licensed lawyers move across the same river.

elsewhere and five years of practice, the settled policy of the state is that this level of licensure and practice are sufficient.

D. Blocking Licensed Lawyers From Gainful Employment in Ohio for Any Significant Period of Time Pending Admission is Contrary to Ohio's Public Policy.

While less-directly connected to the ethics issues addressed by the parties to this dispute, Amici note that the Board's interpretation of Rule 5.5 also affects larger public policy issues. Various policies and initiatives that our legislature is considering or has already enacted demonstrate that it is Ohio's policy to attract highly-skilled people to join our communities (sometimes called "brain gain").[5] Adopting a restrictive interpretation of Rule 5.5 that discourages educated professionals from moving to Ohio – because they could be forced to cease their legal practice – is contrary to the state's policy of attempting to attract and retain people who will contribute to our state's economy as neighbors, citizens and taxpayers. Particularly in the absence of a clear articulation of any harm caused by welcoming lawyers licensed elsewhere and permitting them to practice temporarily while they actively seek admission, the interpretation of Rule 5.5 embraced by the Board seems out of alignment with other policies of the state.

E. Ohio's Approach Should be Consistent with the Trend Toward Easing Restrictions on Temporary Practice Pending Admission.

As technology advances and the globalization of our economy increases, the significance of one's geographic location decreases. Like many "knowledge workers" – those whose main

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[5] For instance, in 2009, the legislature enacted R.C. § 175.31, which created the "Grants for Grads" program, administered by the Ohio Housing Finance Agency, to provide down payment and closing cost assistance grants to college graduates who purchase their first home in Ohio. Similarly, new legislation, House Bill 396, has recently been introduced in the 132nd General Assembly to create a "STEM Degree Loan Repayment Program," aimed at retaining science, technology, engineering and math graduates through a program of student loan repayment. The bill is currently before the House of Representatives' Finance Committee. *See also* Patrick McGuire, *et. al*., *Brain Drain in Ohio; Observations and Summaries with Particular Reference to Northwest Ohio* (University of Toledo Urban Affairs Center Feb. 2006) (describing "brain drain" phenomenon).

capital is knowledge, and who think for a living – lawyers are physically able to provide their services from anywhere, at any time. The American Bar Association's amendment of Model Rule 5.5 in 2002 to address "multijurisdictional practice" was in express recognition of this fact of modern legal practice. *See generally* Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 – an Interim Assessment*, 43 Akron L. Rev. 727 (2010). Our own Rules of Professional Conduct are consistent with that ability, both *via* the incorporation of Rule 5.5, and as further recognized in Advisory Opinion 2017-05 (Bd. of Prof'l Cond. June 9, 2017), which approves of "virtual law offices."

The decreasing importance of geographical limitations is also coupled with increasing worker mobility, including lawyer mobility. Unlike legal professionals of past generations, today's lawyers will likely change firms several times during their careers. *See* Mark Weber, *Seven Changes in the Legal Job Market Impacting New Lawyers*, Nat'l L. J., Mar. 30, 2018 (noting that "most entry level lawyers will change jobs within their first three years of practice, and most likely several times during their career.").

Acknowledging this reality, the American Bar Association's House of Delegates, in August 2012, adopted the Model Rule on Practice Pending Admission. As the ABA Commission on Ethics 20/20 noted, lawyers may need to change locations for many valid reasons, and may find "it necessary to quickly establish a practice in a jurisdiction where they are not otherwise admitted." *Id*. at 1. For example:

> [A] lawyer may need to relocate in order to accommodate the needs of a client who has moved to a new jurisdiction. Or the lawyer may receive a job opportunity in a jurisdiction other than the jurisdiction of original licensure or be transferred to another jurisdiction, often requiring relocation within a very short timeframe. Lawyers also frequently have to relocate due to changes in personal circumstances, such as the relocation of a spouse or domestic partner due to military deployment or other professional opportunities. In sum, lawyers increasingly need to relocate during their careers, often more than once and frequently without much notice.

Id.

As noted by the Commission, the process for lawyers who seek admission without examination can take considerable time. *Id*. at 2. This holds true in Ohio; based on Amici's experience, the process (even when it goes smoothly) usually takes approximately nine months. And "this time-consuming process can adversely affect lawyers' ability to represent their existing clients effectively…." *Id*. This also accords with Amici's experience, as lateral hires – fully licensed elsewhere, and with clients whom they wish to continue servicing – must effectively put down their practices and essentially work as paralegals (or not at all) while awaiting approval of their applications.

These factors led the ABA to adopt the Model Rule on Practice Pending Admission, which establishes a window of time (to be designated by the adopting jurisdiction) during which "a lawyer currently holding an active license to practice law in another U.S. jurisdiction and who has been engaged in the active practice of law for three of the last five years, may provide legal services in this jurisdiction through an office or other systematic and continuous presence." Among other things, the ability to practice temporarily is conditioned under the Model Rule on the prompt submission of a complete application for admission, a clean disciplinary record and the reasonable expectation of being able to fulfill the jurisdiction's requirements for admission.

Some jurisdictions already allow temporary practice pending admission, including the District of Columbia and Missouri. *See* D.C. Ct. of Appeals R. 49(c)(8) ("Limited Duration Supervision by D.C. Bar Member"); Mo. Sup. Ct. R. 8.06 ("Temporary Practice by Lawyers Applying for Admission to the Missouri Bar"). New York has similarly adopted a rule permitting temporary practice pending registration for in-house lawyers. *See* N.Y. Comp. Codes R. & Regs., tit. 22, § 522.7 (2011) (30-day window for practice pending application for registration). The ABA Commission on Ethics 20/20 "inquired about and did not learn of any problems caused

by these provisions." There is no reason to expect that Ohio's experience would be any different, and no reason to make Ohio a more difficult place in which to practice and flourish than any of the jurisdictions adopting such reforms.

CONCLUSION

Adopting an interpretation of Model Rule 5.5 and comment 4 that prohibits any form of temporary practice while a lawyer licensed elsewhere actively pursues admission in Ohio without examination is inconsistent with important policies of the state: client choice; attracting and retaining highly skilled professionals who wish to locate here; and promoting legal industry growth through recognizing the present-day realities of lawyer mobility. In the absence of any articulable harm resulting from permitting temporary practice pending admission, the Court should better align the Rules of Professional Conduct to the state's policies and approve such temporary practice either as being within the present scope of Rule 5.5 or should consider amendment of the Rule so as to permit such practice.

Respectfully submitted,

/s/ Matthew C. Blickensderfer
Matthew C. Blickensderfer (0073019)

FROST BROWN TODD LLC

300 Great American Tower
301 East Fourth Street
Cincinnati, OH 45202
Telephone 513-651-6800
Fax 513-651-6981
Mblickensderfer@fbtlaw.com

Attorneys for Amicus Curiae
Frost Brown Todd LLC

/s/ Thomas L. Feher
Thomas L. Feher (0038575)
Frank R. DeSantis (0030954)
Karen E. Rubin (0030339)

THOMPSON HINE LLP

3900 Key Center
127 Public Square
Cleveland, OH 44114
Telephone 216-566-5500
Fax 216-566-5800
Tom.Feher@ThompsonHine.com
Frank.DeSantis@ThompsonHine.com
Karen.Rubin@ThompsonHine.com

Attorneys for Amicus Curiae
Thompson Hine LLP

(*continued on next page*)

/s/ Randolph C. Wiseman
Randolph C. Wiseman (0021992)

BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215
Telephone: 614-227-2300
Fax: 614-227-2390
rwiseman@bricker.com

Attorney for Amicus Curiae
Bricker & Eckler LLP

/s/ Pierre H. Bergeron
Pierre H. Bergeron (0071402))

SQUIRE PATTON BOGGS (US) LLP
201 E. Fourth Street, Suite 1900
Cincinnati, OH 45202
Telephone: 513-361-1200
Fax: 513-361-1201
pierre.bergeron@squirepb.com

Attorney for Amicus Curiae
Squire Patton Boggs (US) LLP

/s/ Robert W. Trafford
Robert W. Trafford (0024447)
Charles C. Warner (0023052)

PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street, Suite 2900
Columbus, OH 43215
Telephone: 614-227-2100
Fax: 614-227-2200
rtrafford@porterwright.com
cwarner@porterwright.com

Attorneys for Amicus Curiae
Porter Wright Morris & Arthur LLP

/s/ James R. Matthews
James R. Matthews (0043979)

KEATING MUETHING & KLEKAMP PLL
One East 4th Street, Suite 1400
Cincinnati, OH 45202
Telephone: 513-579-6400
Fax: 513-579-6457
JMatthews@KMKLAW.com

Attorney for Amicus Curiae
Keating Muething & Klekamp PLL

CERTIFICATE OF SERVICE

A copy of the foregoing Brief of *Amici Curiae* Thompson Hine LLP, Frost Brown Todd LLC, Bricker & Eckler LLP, Squire Patton Bogs (US) LLP, Porter Wright Morris & Arthur LLP and Keating Muething & Klekamp PLL was sent via U.S. mail, postage prepaid, to the following, on the 12th day of June, 2018:

Brian G. Dershaw
TAFT STETTINIUS & HOLLISTER LLP
425 Walnut Street # 1800
Cincinnati, OH 45202
Attorney for Relator
Cincinnati Bar Association

David C. Greer
BIESER, GREER & LANDIS, LLP
6 North Main Street # 400
Dayton, OH 45402
Attorney for Applicant
Alice Auclair Jones

Brian S. Sullivan
DINSMORE & SHOHL LLP
255 E. Fifth Street # 1900
Cincinnati, OH 45202
Attorney for Amicus Curiae
in Support of Applicant
Dinsmore & Shohl LLP

/s/ Thomas L. Feher
On behalf of Amici Curiae

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