March 20, 2008

Rule 49. Unauthorized Practice of Law.

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

(b) Definitions. The following definitions apply to the interpretation and application of this rule:

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

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

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

(B) Preparing or expressing legal opinions;

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

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

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

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

(3) "In the District of Columbia" means conduct in, or conduct from an office or location within, the District of Columbia.

(4) "Hold out as authorized or competent to practice law in the District of Columbia" means to indicate in any manner to any other person that one is competent, authorized,

or available to practice law from an office or location in the District of Columbia. Among the characterizations which give such an indication are "Esq.," "lawyer," "attorney at law," "counselor at law," "contract lawyer," "trial or legal advocate," "legal representative," "legal advocate," and "judge."

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

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

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

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

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

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

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

(3) Practice Before a Court of the United States: Providing legal services in or reasonably related to a pending or potential proceeding in any court of the United States if the person has been or reasonably expects to be admitted to practice in that court, provided that if the practitioner has an office in the District of Columbia, the practitioner expressly gives prominent notice in all business documents of the practitioner's bar status and that his or her practice is limited consistent with this section (c).

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

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

(A) Such representation is confined to appearances in proceedings before tribunals of that department or agency and other conduct reasonably ancillary to such proceedings;

(B) Such representation is authorized by statute, or the department or agency has authorized it by rule and undertaken to regulate it;

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

(D) If the practitioner does not have an office in the District of Columbia, the practitioner expressly gives written notice to clients and other parties with respect to any proceeding before tribunals of that department or agency and any conduct reasonably ancillary to such proceedings of the practitioner's bar status and that his or her practice is limited consistent with this section (c).

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

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

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

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

District of Columbia Court of Appeals, and has complied fully with District of Columbia Court of Appeals Rule 49 and, as applicable, Super. Ct. Civ. R. 101, (10) explaining the reasons for the application, (11) acknowledging the power and jurisdiction of the courts of the District of Columbia over the applicant's professional conduct in or related to the proceeding, and (12) agreeing to be bound by the District of Columbia Court of Appeals Rules of Professional Conduct in the matter, if the applicant is admitted *pro hac vice*.

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

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

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

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

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

(8) Limited Duration Supervision By D.C. Bar Member: Practicing law from a principal office located in the District of Columbia, while an active member in good standing of the highest court of a state or territory, and while not disbarred or suspended for disciplinary reasons or after resignation with charges pending in any jurisdiction or court, under the direct supervision of an enrolled, active member of the District of Columbia Bar, for one period not to exceed 360 days from the commencement of such practice, during pendency of a person's first application for admission to the District of Columbia Bar; *provided* that the practitioner has submitted the application for admission within ninety (90) days of commencing practice in the District of Columbia, that the District of Columbia Bar member takes responsibility for the quality of the work and complaints concerning the services, that the practitioner or the District of Columbia Bar member gives notice to the public of the member's supervision and the practitioner's bar status, and that the practitioner is admitted *pro hac vice* to the extent he or she provides legal services in the courts of the District of Columbia.

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

(A) Where the person is an enrolled, inactive member of the District of Columbia Bar who is employed by or affiliated with a legal services or referral program in any matter that is handled without fee and who is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court; provided that, if the matter requires the attorney to appear in court, the attorney shall file with the court having jurisdiction over the matter, and with the Committee, a certificate that the attorney is providing representation in that particular case without compensation.

(B) Where the person is a member in good standing of the highest court of any state, is not disbarred or suspended for disciplinary reasons and has not resigned with charges pending in any jurisdiction or court, and is employed by the Public Defender Service, or is employed by or affiliated with a non-profit organization located in the District of Columbia that provides legal services for indigent clients without fee or for a nominal processing fee; provided that the person has submitted an application for admission to the District of Columbia Bar within ninety (90) days after commencing the practice of law in the District of Columbia, and that such attorney is supervised by an enrolled, active member of the Bar who is employed by or affiliated with the Public Defender Service or the non–profit organization.

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

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

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

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

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

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

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

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

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

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

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

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

(d) The Committee on Unauthorized Practice of Law.

(1) The court shall appoint a standing committee known as the Committee on Unauthorized Practice of Law consisting of at least six, and not more than twelve, members of the Bar of this court and of one resident of the District of Columbia who is not a member of the Bar. The Chair and Vice Chair shall be designated by the court. Each member shall serve for the term of three years and until their successors have been appointed. In case of vacancy caused by death, resignation or otherwise, a successor appointed shall serve the unexpired term of the predecessor member. When a member holds over after the expiration of the term for which appointed, the term the member serves after the expiration of the term for which the member was appointed shall be part of a new term. No member shall be appointed to serve longer than two consecutive regular three year terms, unless special exception is made by the court.

(2) Subject to the approval of the court, the Committee shall adopt such rules and regulations as it deems necessary to carry out the provisions of this rule. The Committee may subpoena the respondent, witnesses and documents upon application to the court by the Chair or the Chair's designee. The Committee may appear in its own name in legal proceedings addressing issues relating to the performance of its functions and compliance with this Rule. The members of the Committee shall receive such compensation and necessary expenses as the court may approve.

(3) Rules of Procedure.

(A) Officers, members, and duties.

(i) The Chair shall preside at all meetings of the Committee; and in the Chair's absence, the Vice Chair shall preside.

(ii) The Chair, Vice Chair, and members shall investigate matters of alleged unauthorized practice of law and alleged violations of court rules governing same, and if warranted, the Committee shall take such actions as are provided in these rules.

(iii) In addition to the duties described herein, the Committee shall determine whether to approve the legal programs identified in Rule 48.

(iv) A deputy Clerk of this court shall be designated by the court to serve as Executive Secretary to the Committee and shall provide such staff and secretarial services as may be needed.

(B) Meetings.

(i) Any matter under investigation by the Committee shall remain confidential until initiation of formal proceedings under section (3)(D) hereof. So as to ensure this confidentiality, the Committee shall meet in executive session. At least eight meetings shall be called each year.

(ii) The Committee shall meet at the call of the Chair. A special meeting of the Committee shall be held if a majority of its members request such a meeting by notifying the Executive Secretary.

(iii) Members who are unable to attend a meeting shall so notify the Chair or the Executive Secretary at least two days in advance of the meeting.

(iv) The Chair shall determine the order of business.

(v) A quorum shall consist of four members, and all decisions shall be made by a majority of those members present and voting.

(vi) In appropriate circumstances, as may be determined by the Chair, a telephone or electronic vote of a majority of members polled, numbering no less than four Committee members concurring in a decision, shall constitute a Committee decision. Any such decision shall be recorded in the minutes of the next Committee meeting.

(vii) Minutes of all Committee meetings shall be prepared under the direction of the Executive Secretary, with copies of same furnished to all members of the Committee and to the chief judge or a judge designated by the chief judge.

(C) Investigation.

(i) Whenever a complaint is filed with the Committee or upon its own volition, the matter shall be assigned by the Chair, on a random basis or as the Chair otherwise determines may be appropriate, to a Committee member for preliminary investigation. This investigation shall consist of an analysis of the complaint, a survey of the applicable law, and discussions with witnesses and/or the respondent. It shall not be deemed a breach of the confidentiality required of an assigned matter for the Committee or one of its members to reveal facts and identities in pursuit of the investigation of the matter.

(ii) At the next regular meeting of the Committee, the Committee shall hear a report of the investigating member for the purpose of determining what action, if any, shall be taken by the Committee. Complaints shall be investigated and reported upon within six weeks. Delays shall be brought to the Chair's attention by the Executive Secretary.

(iii) If the Committee concludes that formal proceedings are necessary to assist its determination, such may be held as specified in section (3)(D) below.

(D) Formal Proceedings.

(i) To assist the Committee in performing its functions it may take sworn testimony of witnesses and/or the respondent.

(ii) Formal proceedings before the Committee shall be commenced by written notice to the respondent informing the respondent of the nature of the respondent's conduct which the Committee believes may constitute the unauthorized practice of law. The respondent shall be given 15 days to respond. Upon receipt of this response (or if no response is submitted), the matter shall be scheduled for a hearing. A copy of Rule 49 shall also be transmitted to the respondent with the written notice.

(iii) The respondent may request permission to present evidence and witnesses in addition to the respondent's own testimony, but such proffers shall be allowed only in the discretion of the Committee. The respondent may be accompanied by counsel. To avoid harassment, the Committee may in its discretion limit the participation of the respondent and counsel in presentation of evidence by persons complaining of violations of this Rule 49. Formal

rules of evidence shall not apply. The Chair may apply to the court for issuance of a subpoena to any witness or to the respondent.

(iv) When appropriate, a post-hearing conference may be held between respondent and the investigation Committee member (or another Committee member designated by the Chair) for the purpose of informing the respondent of the findings of the Committee and action it proposes.

(E) Actions by the Committee.

(i) During any stage of the investigation or formal proceedings the Committee may dispose of any matter pending before it by any of the following methods:

(ii) If no evidence of unauthorized practice is found, the matter shall be closed and the complainant notified.

(iii) If the respondent agrees to cease and desist from actions which appear to constitute the unauthorized practice of law, the matter may be closed by formal agreement, consent order, or both, with notification of such action given to the complainant. Such formal agreement or consent order may require restitution to the clients of fees obtained by the respondent.

(iv) If warranted, the Committee may initiate proceedings to enforce this Rule under section (e), provided, however, that action pursuant to this subsection is preceded by the formal proceedings specified in section (d)(3)(D) above.

(v) The Committee may also refer cases to the Office of the United States Attorney for investigation and possible prosecution or to other appropriate authorities.

(F) Closed Files.

Upon the closing of a file by the Committee, the file shall be retained in the records of the court.

(G) Opinions.

(i) The Committee may by approval of a majority of its members present in quorum provide opinions, upon the request of a person or organization, as to what constitutes the unauthorized practice of law. Such opinions shall be published in the same manner as opinions rendered under the Rules of Professional Conduct.

(ii) Conduct of a person which was undertaken in good faith, in conformity with, and in reliance upon a written interpretation or opinion of the Committee requested by that person shall constitute a prima facie showing of compliance with Rule 49 in any investigation or proceeding before the Committee or the Court of Appeals.

(e) Proceedings Before The Court of Appeals.

(1)(A) The Committee may initiate an original proceeding before the Court of Appeals for violation of this Rule 49. The proceeding shall be initiated by a petition served on the respondent or his designated counsel.

(B) The Court may, on motion of the Committee or sua sponte, appoint a special counsel to represent the Committee and to present the Committee's proof and argument in such proceeding.

(2) Violations of the provisions of this Rule 49 shall be punishable by the Court of Appeals as contempt and/or subject to injunctive relief. The Court of Appeals holds the power to include within its remedy compensation to persons harmed by violation of this Rule or of an injunction entered under it.

(3) Such proceedings shall be conducted before a judge of the District of Columbia designated by the Chief Judge of the Court of Appeals under the D.C. Code, and shall be governed by the Rules of the Superior Court of the District of Columbia.

(4) Decisions of the designated judge are final and effective determinations which are subject to review in the normal course, by the filing of a notice of appeal by any party with the Clerk of the Court of Appeals within 30 days from the entry of the judgment by the designated judge.

COMMENTARY

The following Commentary provides guidance for interpreting the Rule and acting in compliance with it, but in proceedings before the court or the Committee on Unauthorized Practice the text of the Rule shall govern.

Commentary to § 49 (a):

Section (a) states the general prohibition of the rule, formerly set forth in Rule 49 (b)(1). It is intended to retain the essential meaning of the original text as adopted by the Court of Appeals. It adds for clarification that the Rule applies unless an exception is provided.

The Rule is applied first by determining whether the conduct in question falls within the definitions of practicing law or holding out to practice law in the District of Columbia. If the conduct falls within those definitions, such conduct by a person not admitted to the Bar is a violation of the Rule, unless there is an express exception covering the conduct.

While one has a right to represent oneself, there is no right to represent or advise another as a lawyer. Authority to provide legal advice and services to others is a privilege granted only to those who have the education, competence and fitness to practice law. When one is formally recognized to possess those qualifications by admission to the Bar, he or she is authorized to practice law.

The rule prohibits both the implicit representation of authority or competence by engaging in the practice of law, and the express holding out of oneself as authorized or qualified to practice law in the District of Columbia.

This rule against unauthorized practice of law has four general purposes:

(1) To protect members of the public from persons who are not qualified by competence or fitness to provide professional legal advice or services;

(2) To ensure that any person who purports or holds out to perform the services of a lawyer is subject to the disciplinary system of the District of Columbia Bar;

(3) To maintain the efficacy and integrity of the administration of justice and the system of regulation of practicing lawyers; and

(4) To ensure that that system and other activities of the Bar are appropriately supported financially by those exercising the privilege of membership in the District of Columbia Bar.

See also the commentary to section (b)(2), below, concerning the activities of persons relating to legal matters where a license to practice law is not required.

Competence and fitness to practice law are safeguarded by the examination and character screening requirements of the admissions process, and by the disciplinary system. The Bar further protects the interests of members of the public by maintaining a clients' security fund through membership dues.

Commentary to § 49 (b):

Although section (b) of the original rule included definitions, not all of the essential terms were defined. The current section (b) follows the conventional approach of rules and statutes in defining such terms.

Commentary to § 49 (b)(2):

As originally stated in sections (b)(2) and (3) of the prior Rule, the "practice of law" was broadly defined, embracing every activity in which a person provides services to another relating to legal rights. This approach has been refined, in recognition that there are some legitimate activities of non-Bar members that may fall within an unqualifiedly broad definition of "practice of law."

The definition set forth in section (b)(2) is designed to focus first on the two essential elements of the practice of law: The provision of legal advice or services, and a client relationship of trust or reliance. Where one provides such advice or services within such a relationship, there is an implicit representation that the provider is authorized or competent to provide them; just as one who provides any services requiring special skill gives an implied warranty that they are provided in a good and workmanlike manner. *See, e.g., Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192, 1200 (D.C.1984); *Carey v. Crane Service Co., Inc.*, 457 A.2d 1102, 1107 (D.C.1983).

Recognizing that the definition of "practice of law" may not anticipate every relevant circumstance, the Rule adopts four methods of definition: (1) the more refined definition focusing on the provision of legal advice or services and a client relationship of trust or reliance; (2) an enumerated list of the most common activities which are rebuttably presumed to be the practice of law; (3) this commentary; and (4) opinions of the Committee on Unauthorized Practice of Law where further questions of interpretation may arise. See section (d)(3)(G) below.

The definition of "practice of law," the list of activities, this commentary and opinions of the Committee on Unauthorized Practice of Law are to be considered and applied in light of the purposes of the Rule, as set forth in the commentary to sections (a) and (b).

The presumption that one's engagement in one of the enumerated activities is the "practice of law" may be rebutted by showing that there is no client relationship of trust or reliance, or that there is no explicit or implicit representation of authority or competence to practice law, or that both are absent.

While the Rule is meant to embrace every client relationship where legal advice or services are rendered, or one holds oneself out as authorized or competent to provide such services, the

Rule is not intended to cover conduct which lacks the essential features of an attorney-client relationship.

For example, a law professor instructing a class in the application of law to a particular, real situation is not engaged in the practice of law because she is not undertaking to provide advice or services for one or more clients as to their legal interests. An experienced industrial relations supervisor is not engaged in the practice of law when he advises his employer what he thinks the firm must do to comply with state or federal labor laws, because the employer does not reasonably expect it is receiving a professional legal opinion. See also the exception for Internal Counsel set forth in section (c)(6). Law clerks, paralegals and summer associates are not practicing law where they do not engage in providing advice to clients or otherwise hold themselves out to the public as having authority or competence to practice law. Tax accountants, real estate agents, title company attorneys, securities advisors, pension consultants, and the like, who do not indicate they are providing legal advice or services based on competence and standing in the law are not engaged in the practice of law, because their relationship with the customer is not based on the reasonable expectation that learned and authorized professional legal advice is being given. Nor is it the practice of law under the Rule for a person to draft an agreement or resolve a controversy in a business context, where there is no reasonable expectation that she is acting as a qualified or authorized attorney.

The Rule is not intended to cover the provision of mediation or alternative dispute resolution ("ADR") services. This intent is expressed in the first sentence of the definition of the "practice of law" which requires the presence of two essential factors: The provision of legal advice or services and a client relationship of trust or reliance. ADR services are not given in circumstances where there is a client relationship of trust or reliance; and it is common practice for providers of ADR services explicitly to advise participants that they are not providing the services of legal counsel.

While payment of a fee is often a strong indication of an attorney-client relationship, it is not essential.

Ordinarily, one who provides or offers to provide legal advice or services to clients in the District of Columbia implies to the consumer that he or she is authorized and competent to practice law in the District of Columbia. It is not sufficient for a person who is not an enrolled, active member of the District of Columbia Bar merely to give notice that he is not a lawyer while engaging in conduct that is likely to mislead consumers into believing he is a licensed attorney at law. Where consumers continue to seek services after such notice, the provider must take special care to assure that they understand that the person they are consulting does not have the authority and competence to render professional legal services in the District of Columbia. *See In re: Banks*, 561 A.2d 158 (D.C. 1987).

The Rule also confines the practice of law to provision of legal services under engagement for another. One who represents himself or herself is not required to be admitted to the District of Columbia Bar.

The conduct described in section (b)(2)(F) concerning the furnishing of attorneys is not intended to include legitimate or official referral services, such as those offered by the District of Columbia Bar, bar associations, labor organizations, non-fee pro bono organizations, and other court-authorized organizations.

Commentary to § 49 (b)(3):

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

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

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

A lawyer is engaged in the practice of law in the District of Columbia when the lawyer provides legal advice from an office or location within the District. That is true if the lawyer practices in a residence or in a commercial building, if all of the lawyer's clients are located in other jurisdictions, if the lawyer provides legal advice only by telephone, letter, email, or other means, if the lawyer provides legal advice only concerning the laws of jurisdictions other than the District of Columbia, or if the lawyer informs the client that the lawyer is not authorized to practice law in the District of Columbia and does not provide advice about District of Columbia law. A lawyer in the District of Columbia who advises clients or otherwise provides legal services in another jurisdiction may be subject to the rules of that jurisdiction concerning unauthorized practice of law.

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

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

Commentary to § 49 (b)(4):

As a regulation with a purpose to protect the public, the rule requires that representation of non-Bar members must avoid giving the impression to persons not learned in the law that a person is a qualified legal professional subject to the high ethical standards and discipline of the District of Columbia Bar.

The listing of terms, which normally indicate one is holding oneself out as authorized or qualified to practice law, is not intended to be exhaustive. The definition of "hold out" is intended to cover any conduct which gives the impression that one is qualified or authorized to practice. *See In Re: Banks*, 561 A.2d 158 (D.C. 1987).

A person or a law firm may hold out that person as authorized or competent to practice law in the District of Columbia by describing that person as a "contract lawyer." *See* Opinion 16-05 of the District of Columbia Court of Appeals Committee on Unauthorized Practice of Law. In general, Rule 49 applies to contract lawyers to the same extent that it applies to other lawyers.

Where a member of the public correctly understands that a person is not admitted to the District of Columbia Bar but is nonetheless offering to perform services functionally equivalent to those performed by a lawyer, that person is subject to sanction under the consumer protection statutes of the District of Columbia. *See Banks v. D.C. Dept. of Consumer and Regulatory Affairs*, 634 A.2d 433 (D.C. 1993).

Commentary to § 49 (c)(1):

Section (c)(1) is designed to state expressly what has been implicit in prior interpretations and application of the Rule; and it removes the implication of former section (c)(2) that representatives of the federal government must become members of the District of Columbia Bar or appear pro hac vice. Attorneys employed by departments, agencies and courts of the federal government are entitled to advise and represent their employers as part of their official duties. Such advice and representation includes both internal consultation and external representation in contact with the public and the courts. Permission for employees of the government of the District of Columbia to practice in the District is more limited. See section (c)(4).

Commentary to § 49 (c)(2):

Section (c)(2) substantially refines former section (c)(4). It is intended to provide only a limited exception to the requirement for admission to the District of Columbia Bar for persons who practice before federal fora in circumstances where all three conditions are met.

The United States Supreme Court has held that states may not limit practice before a federal agency, or conduct incidental to that practice, where the agency maintains a registry of practitioners and regulates standards of practice with sanctions of suspension or disbarment.

Sperry v. State of Florida, 373 U.S. 379 (1963). By contrast, a person advertising patent advice and search services who is not on the Patent Office registries of attorneys and agents is subject to the jurisdiction of the District of Columbia Court of Appeals through its Committee on the Unauthorized Practice of Law. *In re Amalgamated Development Co., Inc.*, 375 A.2d 494 (D.C. 1977). *See also Kennedy v. Bar Assoc. of Montgomery County*, 316 Md. 646, 561 A.2d 200 (1989); *In re Jones*, 163 Bankr. 665, 1994 Bankr. LEXIS 150 (D. Conn.1994); and *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 171 (2nd Cir. 1966).

As the seat of the national government, the District of Columbia is naturally the place where people locate to provide representation of persons or entities petitioning federal departments or agencies for relief. Inasmuch as such activity would often constitute the practice of law, the Supremacy Clause of the United States Constitution, case law, and comity between the District and federal governments counsel a deference to federal departments and agencies that determine to allow persons not admitted to the Bar to practice before them. At the same time, experience under this Rule has shown that some persons have abused the deference set forth in the original rule by engaging in misleading holding out or practicing law in proceedings other than those of the authorizing federal fora.

With respect to persons who hold out and purport to provide legal representation before federal fora from locations outside the District of Columbia, the Rule does not apply because the activity, even if the practice law, is not carried on within the District of Columbia. See section (b)(3) and the commentary thereto.

Section (c)(2) is designed to permit persons to practice before a federal department or agency without becoming members of the Bar, where the agency has a system in place to regulate practitioners not admitted to the Bar, and where the public is adequately informed of the limited nature of the person's authority to practice.

Where there is doubt whether a federal agency undertakes to regulate the quality or integrity of practitioners before it, there is necessarily doubt under section (c)(2)(B) whether this exception would apply to allow persons practicing before the agency who are not admitted to the Bar to engage in any practice of law in the District of Columbia. In order to resolve such doubt, the Committee will refer to an agency any complaints it should receive concerning practitioners before the agency who are not admitted to the Bar. If the agency does not take any action, or advises that it will not take any action, on the referred complaint in 90 days following the referral, the Committee will inform the agency that it presumes the agency does not undertake to regulate the conduct of practitioners before it; and the Committee will then proceed to consider the complaint under the provisions of Rule 49.

Under the third condition, (C), a person seeking to practice under the (c)(2) exception must include the indicated notice on all letterhead, business cards, formal papers of all kinds, promotions, advertisements and any other document submitted or expression made to any third party, the public or any official entity.

Experience under the Rule has indicated that, in many instances, persons seeking representation involving jurisdiction of federal departments and agencies also have rights to plead their claims before the courts. Advising persons whether they have rights to pursue their claims beyond federal agencies into the courts, or representing entities in challenges to or review of federal agency action in federal courts, would, without more, not require that the advisor be a member of the District of Columbia Bar, as such advice is reasonably ancillary to representation before the agency and is subject to the jurisdiction of the federal courts. See § 49 (c)(3). The exception set forth in (c)(2) does not, however, otherwise authorize active advice to, or representation of persons in the courts.

Commentary to § 49 (c)(3):

Practice before the courts of the United States is a matter committed to the jurisdiction and discretion of those entities. If a practitioner has an office in the District of Columbia and is admitted to practice before a federal court in the District of Columbia but is not an active member of the D.C. Bar, the practitioner may use the D.C. office to engage in the practice of law before that federal court, but only if the practitioner provides clear notice in all business documents that the practitioner is not a member of the D.C. Bar and that the practice is limited to matters before that federal court (or to other matters within the scope of other exceptions in section (c)). This exception applies only if a person's entire practice falls within section (c); if any part of the person's practice is not covered by an exception, Rule 49 requires a practitioner with an office in the District of Columbia to be an active member of the D.C. Bar. The rules of federal courts in the District of Columbia may or may not authorize admission on a regular or *pro hac vice* basis of an attorney with an office in the District of Columbia if the attorney is not a member of the D.C. Bar.

Commentary to § 49 (c)(4):

Section (c)(4) addresses the persistent question whether a person employed by the District of Columbia and admitted in another jurisdiction may perform the services of a lawyer for the District government without being admitted to the District of Columbia Bar. The section gives the person 360 days to be admitted, which is ample time if application is made promptly. Like the exception for lawyers employed by the United States, the section also requires that the person be authorized by her or his agency to perform such services.

Commentary to § 49 (c)(5):

The former rule did not contain an exception for private practice before District of Columbia fora similar to the exception set forth for practice before departments and agencies of the United States. In recognition, however, that the same considerations may exist for allowing persons not authorized as lawyers to represent members of the public before some District of Columbia fora, as exist before some federal agencies, this provision has been added. Like the federal-agency provision, this exception requires satisfaction of all three enumerated conditions.

Commentary to § 49 (c)(6):

Section (c)(6) is intended to state explicitly and clearly an accepted interpretation of the original rule.

The provision of advice, and only advice, to one's regular employer, where the employer does not reasonably expect that it is receiving advice from an authorized member of the District of Columbia Bar, and no third party is involved as client or otherwise, is considered to be the employer's provision of advice to itself; and, accordingly, it is not considered practicing law.

For example, an internal personnel manager advising her employer on the requirements of equal employment opportunity law, or a purchasing manager who drafts contracts, fall within this exception, as they do not give the employer a reasonable expectation that it is being served by an authorized member of the District of Columbia Bar. Similarly, a lawyer on the staff of a trade association who gives only advice concerning leases, personnel and contractual matters, would be covered by the exception if, in fact, the lawyer does not give the employer reason to believe she is an authorized member of the Bar.

This exception is a limited one arising from the position of the lawyer, the confinement of the lawyer's professional services to activities internal to the employer, and the absence of conduct creating a reasonable expectation that the employer is receiving the services of an authorized member of the Bar.

Commentary to § 49 (c)(7):

The District of Columbia courts are open to attorneys from other jurisdictions who have an incidental need to appear in proceedings before them.

As the Court of Appeals has observed, however:

> ... appearance pro hac vice is meant to be an exception to the general prohibition against practicing law in the District without benefit of membership in the District of Columbia Bar. As an exception, it is equally clear, that it is designed as a privilege for an out-of-state attorney who may, from time to time, be involved in a particular case that requires appearance before a court in the District.

Brookens v. Committee on Unauthorized Practice of Law, 538 A.2d 1120, 1124 (D.C.1988).

Super. Ct. Civ. R. 101 requires that persons seeking admission pro hac vice in the Superior Court must associate with an enrolled, active member of the District of Columbia Bar who has continuing responsibilities as associated counsel.

The fact that an attorney is associated with a law firm that maintains an office in the District of Columbia does not, of itself, establish that that attorney is maintaining an office in the District of Columbia.

Experience under the Rule has indicated that the pro hac vice exception has occasionally been abused to allow persons who regularly operate from a location within the District of Columbia or its surrounding jurisdictions to engage regularly in litigation practice before the courts of the District. Additionally, the original provision has been erroneously interpreted by some practitioners to permit regular practice of law in the District of Columbia by an attorney admitted only in another jurisdiction upon the assertion that the person is a practicing litigator who appears no more than five times per calendar year in the courts.

The original provision has been modified in order to avoid abuse while continuing to serve the original purpose of the provision, viz., to permit attorneys to appear in the District of Columbia courts incidentally or during their initial application for admission after moving into the District.

The original frequency limitation has been retained and applied to applications. A specific sworn declaration has been added for applicants for pro hac vice admission to assure full compliance with this Rule 49 and Super. Ct. Civ. R. 101 at the application stage.

The fee for admission has been increased in order more closely to approximate the value of the privilege to practice before the District of Columbia courts. The power of the courts to deny or withdraw admission is expressly set forth.

Commentary to § 49 (c)(8):

Section (c)(8) is designed to provide a one-time grace period within which attorneys admitted in other jurisdictions who come to practice law in the District of Columbia as their principal office may continue to practice law under the active supervision of a member of the District of Columbia Bar, while they promptly pursue admission to the Bar. This section is intended, conversely, to make it clear that a person admitted to the bar of another jurisdiction may not come to the District of Columbia and practice law under the supervision of a member of the Bar indefinitely while waiting for the period for admission on waiver to be satisfied.

This section does not affect the limitation of pro hac vice applications to five per calendar year, as provided in section (c)(7) above. A person practicing under this provision may not apply to appear pro hac vice in District of Columbia courts more than five times in any calendar year.

Neither this section, nor other sections of the Rule are intended to prohibit lawyers admitted and in good standing to the bars of other jurisdictions from providing professional services to their clients in the District of Columbia, where the principal offices of those lawyers are located elsewhere and their presence in the District is occasional and incidental to a practice located elsewhere.

With respect to Rules 5.1 through 5.3 of the Rules of Professional Conduct, the provisions of this rule are controlling over the conduct of a person performing the services of a lawyer where the elements of the practice of law are present, i.e., where there is a client relationship of trust or reliance, or an indication of authority or competence to practice law in the District of Columbia. This means that, where either of those elements is present, a person may not participate indefinitely in the delivery of legal services as a lawyer under the supervision of a member of the District of Columbia Bar; he or she must become a member of the Bar within the period specified in this section.

Commentary to § 49 (c)(9):

Section (c)(9) consolidates the provisions of former sections (c)(5) and (c)(7) relating to practice by attorneys for legal services organizations and the Public Defender Service. It adds a provision, on request of the United States Department of Justice, allowing government lawyers to participate in providing legal services pro bono publico. Where persons practice under this exception, they should give formal notice to the court and the parties of doing so.

A form of certificate for such notice is appended to the Rule, addressing the three alternatives under (c)(9) and adding a certificate for pro bono representation under the limited duration supervision exception of (c)(8).

In all circumstances the conduct and practice privileges of counsel are subject to the full authority of the courts in which they practice.

Commentary to § 49 (c)(10):

Section (c)(10) is intended to give express authorization to the number of individual- and group-assistance programs, services and projects that are operated under the direct approval of the courts of the District of Columbia.

Commentary to § 49 (c)(11):

Section (c)(11) consolidates the provisions of former sections (c)(6) and (c)(8) relating to practice by attorneys for corporations.

Commentary to § 49(c)(12):

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

This exception (c)(12) contains three important provisos, each of which is based on provisos for the *pro hac vice* exception in section (c)(7). First, the lawyer must be authorized to practice law by the highest court of a state or territory or by a foreign country, and must not be disbarred or suspended for disciplinary reasons, or have resigned with charges pending, in any jurisdiction or court. Second, the lawyer may begin to provide such services in no more than five ADR proceedings in the District of Columbia in each calendar year. An ADR proceeding would not count as a new ADR proceeding for purposes of this limit if it is ancillary to a judicial proceeding in which a lawyer is admitted pro hac vice (for example, when the court orders or encourages the parties to try to resolve the matter through ADR). Similarly, this limit of five new ADR proceedings annually would not apply so long as the lawyer's participation in an ADR proceeding in the District of Columbia is temporary and incidental to his or her practice in another jurisdiction. Third, the lawyer may not maintain a base of operations in the District or Columbia or otherwise practice here, unless the lawyer qualifies under another exception in Rule 49(c).

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

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

Commentary to § 49(c)(13):

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

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

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

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

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

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

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

A lawyer whose principal office is outside the District of Columbia and who provides pro bono services in the District of Columbia on an incidental and temporary basis under Rule 49(c)(13) is not required to comply with the application, supervision, and notice requirements of the exception in Rule 49(c)(9)(B) for provision of pro bono services. The (c)(9)(B) exception facilitates the provision of pro bono services by lawyers whose principal office is in the District of Columbia and who qualify for another exception to Rule 49, such as the exception in Rule 49(c)(2) for certain U.S. government practitioners. Consistent with its purpose to encourage the provision of pro bono services, the exception in Rule 49(c)(9) does not impose additional obligations on lawyers who are permitted under another exception to provide pro bono services in the District of

Columbia. In particular, unlike lawyers who are authorized to provide pro bono services only under the (c)(9) exception, lawyers who provide pro bono services under the (c)(13) exception are not required to apply for admission to the D.C. Bar, to be supervised by a D.C. Bar member, or to provide notice of their bar status. Clients who obtain services on a pro bono basis from lawyers practicing under the (c)(13) exception are protected to the same extent as clients who pay lawyers a fee to provide services under the (c)(13) exception.

Commentary to § 49 (d):

Section (d) sets forth the mandate, powers and procedures of the Committee on Unauthorized Practice of Law. The United States Court of Appeals for the District of Columbia Circuit has observed:

> The Committee members' work is functionally comparable to the work of judges.... They serve as an arm of the court and perform a function which traditionally belongs to the judiciary.
>
> ... the Committee acts as a surrogate for those who sit on the bench. Indeed, were it not for the Committee, judges themselves might be forced to engage in the sort of inquiries [authorized by Rule 49].

Simons v. Bellinger, 643 F.2d 774, 780-81 (D.C. Cir. 1980).

The provisions of section (d) retain virtually all of the language of the original rule concerning establishment of the Committee and its rules of procedure. Section (d)(3)(G) adds specific authority for the Committee to issue opinions to facilitate understanding and enforcement of the rule.

It is expected that most matters considered by the Committee will be resolved within its informal and formal proceedings.

Commentary to § 49 (e):

Section (e) clarifies the procedures and effect of proceedings commenced by the Committee, and sets forth expressly the relief available in the Court of Appeals in formal proceedings initiated by the Committee, and the method for appealing a decision of the designated hearing judge.

The powers and procedures provided in sections (d) and (e) are not the exclusive means for enforcing the provisions of this Rule. Bar Counsel may initiate an original proceeding before the Court of Appeals for contempt where it alleges that the respondent has violated Rule 49 by practicing law while disbarred; *In re Burton*, 614 A.2d 46 (D.C. 1992); and it may rely on unauthorized law practice in opposing reinstatement of an attorney suspended from the Bar; *Matter of Stanton*, 532 A.2d 95 (D.C. 1987). The courts of the District of Columbia have subject matter jurisdiction to consider original complaints of unauthorized practice of law initiated by

private parties, and to issue relief if such practice is found. *J.H. Marshall & Assoc., Inc. v. Burleson*, 313 A.2d 587 (D.C. 1973).