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Memorandum

To: ABA Entities, Courts, Bar Associations (state, local, specialty, and international), Law Schools, Disciplinary Agencies, Individuals, and Entities

From: ABA Commission on Ethics 20/20 Working Group on Uniformity, Choice of Law, and Conflicts of Interest¹

Re: For Comment: Issues Paper Concerning Multijurisdictional Practice

Date: March 29, 2011

I. Introduction

The American Bar Association Commission on Ethics 20/20 is examining the impact of globalization and technology on the legal profession. It is clear that these developments are driving continued growth of cross-border legal practice both within the United States and between the United States and other nations. One of the Commission's objectives is to examine existing rules and laws governing cross-border practice and determine whether to propose amendments to existing ABA policies in this area or to develop alternative approaches.

The Commission already has released documents that identify two possible options. First, the Commission released an issues paper concerning the ABA Model Rule on Admission by Motion.² That issues paper asks whether the Model Rule, which sets out a process by which a lawyer licensed in one U.S. state or jurisdiction can gain admission to practice law in another state or jurisdiction, should be liberalized. Second, the Commission released a memorandum concerning the rules that govern foreign lawyers who seek to practice in the United States on a limited or temporary basis.³

The Commission now seeks feedback on two additional options that are not mutually exclusive. In seeking comments on these two additional options, the Commission is not suggesting that it has reached any conclusions about these issues. Rather, the Commission expects to use any comments that it receives to supplement the research that the Commission has completed and to facilitate the development of various reports and proposals that the Commission might draft.

¹ Members of the Working Group are: Stephen Gillers (Chair and Commission Member), Hon. Elizabeth B. Lacy (Commission Member), Theodore Schneyer (Commission Member), Doug Ende (National Organization of Bar Counsel), Donald B. Hilliker (ABA Center for Professional Responsibility), Janet Green Marbley (ABA Standing Committee on Client Protection), James McCauley (ABA Standing Committee on Ethics and Professional Responsibility), and John P. Sahl (ABA Standing Committee on Professional Discipline). Andrew M. Perlman serves as Chief Reporter, and Dennis A. Rendleman and John A. Holtaway provide counsel.

² http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/admission_motion.authcheckdam.pdf

³ http://www.americanbar.org/content/dam/aba/migrated/ethics2020/pdfs/discussion_draft.authcheckdam.pdf

First, the Commission could propose amendments to Model Rule 5.5(c)-(d) (multijurisdictional practice) that would authorize more domestic cross-border legal practice than the Model Rule currently allows for U.S.-licensed lawyers. Second, the Commission could consider other mechanisms that might be employed within our current regulatory structure and that might better facilitate ethical domestic and international cross-border practice. For example, the Commission could examine whether procedures similar to those used in other parts of the world might be worth adapting for the United States, such as interstate compacts and mutual recognition of licenses.

II. ABA Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice)

On August 12, 2002, the American Bar Association House of Delegates adopted Rule 5.5 of the Model Rules of Professional Conduct in the form proposed by the ABA Commission on Multijurisdictional Practice (MJP Commission). The MJP Commission's proposal was the product of a thorough examination of a wide range of issues relating to domestic and international cross-border legal practice.⁴ The black letter provisions of Model Rule 5.5 have remained unchanged since that time⁵ and currently provide as follows:

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

⁴ Report 201B, American Bar Association, Commission on Multijurisdictional Practice, Report to the House of Delegates, <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201b.authcheckdam.pdf>.

⁵ In 2007, a sentence to Comment [14] was added to reflect the existence of the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

The 2002 amendments to the Model Rule have facilitated cross-border legal practice throughout the United States. Lawyers, however, have an even greater need to engage in domestic cross-border practice now than when the House of Delegates adopted the MJP Commission's proposal nearly ten years ago. This development suggests that the Commission should review the current Model Rule to determine if it has accomplished its intended goals and decide whether any new efforts in this area might be advisable.⁶ To that end, the Commission seeks information regarding the following questions:

- In states that have adopted Model Rule 5.5, have any problems emerged?⁷ For example, are out-of-state lawyers who practice on a temporary basis more likely to be the subject

⁶ In its final report, the MJP Commission concluded that precisely such work would have to be undertaken. It advised that the ABA would have to "evaluate the implementation and impact of its policies relating to multijurisdictional practice, coordinate the continued study of multijurisdictional practice and monitor developments in the United States and in international practice, and make such additional recommendations as appropriate to govern the multijurisdictional practice of law that serve the public interest." Introduction and Overview, American Bar Association, Commission on Multijurisdictional Practice, Report to the House of Delegates, at 15.

⁷Forty-four United States jurisdictions now have some form of Model Rule 5.5. See http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf. Fourteen jurisdictions have adopted a rule identical to the ABA Model Rule, and thirty jurisdictions have adopted a rule similar to ABA Model Rule 5.5. Of the thirty jurisdictions that have adopted a rule similar to ABA Model Rule 5.5, some of the differences between what has been adopted and the ABA Model Rule are as follows:

- Eight jurisdictions (CT, ID, KY, ME, NJ, NC, SC, and TN) require that the temporary legal services provided in the host jurisdiction be reasonably related to the representation of an *existing client* in the jurisdiction where the lawyer is licensed. The Model Rule provides that the services need only be reasonably related to the lawyer's practice in the jurisdiction where the lawyer is licensed.

of disciplinary complaints, disciplinary sanctions, or legal malpractice actions than home jurisdiction lawyers? If the answer is yes, what type of conduct has led to discipline or malpractice claims?

- In states that have not adopted Model Rule 5.5 or have adopted a more restrictive version of the Model Rule, what concerns have motivated this more restrictive approach to cross-border legal practice? Is there any evidence that these concerns exist in states that have adopted Model Rule 5.5?

- Should the Commission consider recommending further liberalization of Model Rule 5.5 to make domestic cross-border practice easier? If so, what specific amendments are worth considering? (Suggestions for particular language changes are especially welcome.) For example, should a lawyer be permitted to practice in a jurisdiction under Rule 5.5(d) while the lawyer pursues admission through one of the procedures that the jurisdiction authorizes, such as admission by motion, in-house counsel registration, or passage of that jurisdiction's bar examination? The following underlined language is one possible approach (bracketed portions would vary depending on a jurisdiction's preferences for time limits and its available admission options):

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

- (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or**
- (2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.**
- (3) are provided for no more than [365] days, but only if the lawyer submits an application for admission by motion, by examination, or as in-house counsel within [90]**

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- Six jurisdictions (DE, DC, FL, GA, PA, and VA) expressly allow temporary practice by foreign (non-U.S.) lawyers. In addition, North Carolina's rule appears to permit such temporary practice by omitting reference to the words "U.S. jurisdiction."
 - Four jurisdictions (CT, NV, NJ, and SC) require out-of state lawyers to register in the host jurisdiction and pay a fee.
 - Two jurisdictions (NM and ND) require the out-of-state lawyer to associate with an in-state lawyer in transactions involving issues specific to the host jurisdiction's law.
 - Two jurisdictions (MN and WI) provide that the lawyer would not be disciplined in the state in which the lawyer is licensed for engaging in conduct in the host jurisdiction that is permitted in the home jurisdiction.
 - One jurisdiction (SD) requires the out-of-state lawyer to obtain a sales tax license and to pay applicable taxes.

Of the remaining jurisdictions, two states have declined to adopt Model Rule 5.5; one state has a recommendation pending to adopt a version of Rule 5.5 that does not authorize multijurisdictional practice; and four states are still studying whether to adopt a version of Rule 5.5 that authorizes multijurisdictional practice.

days of first providing legal services in this jurisdiction, fulfills all of this jurisdiction's requirements for that form of admission, and has not previously been denied admission to practice in this jurisdiction pursuant to this jurisdiction's character and fitness requirements. If the lawyer seeks admission as in-house counsel, the lawyer's services must be limited to those that may be provided by in-house counsel in this jurisdiction. Prior to admission by motion or examination, the lawyer may not appear before a tribunal in this jurisdiction that requires pro hac vice admission unless the lawyer is granted such admission. The authority in this paragraph shall terminate immediately if the lawyer's application for admission is denied prior to 365 days.

The Commission seeks feedback on this possible approach, including whether any additional requirements should be added. For example, the Rule could also require the lawyer to notify the jurisdiction's disciplinary authority of the lawyer's intent to practice under this provision as soon as the lawyer begins practicing in the jurisdiction (i.e., before the end of the 90 day window specified for the submission of an application for admission.) The out-of-state lawyer could also be required to affiliate with, or be supervised by, a lawyer licensed in the jurisdiction while the out-of-state lawyer awaits an admission decision. Moreover, the limitation on past denials of admission could be broadened to include any type of denial, including a past failure to pass the jurisdiction's bar examination. Finally, to avoid misleading potential clients regarding the lawyer's admission status, clarifying language could be added to Comment [20], which already advises out-of-state lawyers that they may have an obligation to disclose their admission status in certain situations.

Notably, the District of Columbia has adopted a provision that is similar to the Rule 5.5(d)(3) approach described above. It permits a lawyer licensed in another jurisdiction to practice within the District of Columbia for up to 360 days as long as the lawyer submits an application for admission to the Bar of the District of Columbia within 90 days of establishing a practice in the District of Columbia and the lawyer is supervised by a D.C.-licensed lawyer. *See D.C. App. R. 49(c)(8)*. The District of Columbia has not reported any problems arising out of the existence of this Rule.

III. Alternative Approaches to Multijurisdictional Practice

Rather than relying on a professional conduct rule to regulate multijurisdictional practice, several alternatives exist. For example, one United States jurisdiction – Colorado – regulates multijurisdictional practice within its rules governing admission to the bar (rather than in its rules of professional conduct) and provides for more permissive multijurisdictional practice than Model Rule 5.5. Moreover, some countries have adopted interstate compacts and forms of mutual recognition that permit lawyers to move between jurisdictions with greater ease than is typically found within the United States. These approaches are described below.

A. The Colorado Approach

Colorado has adopted a rule governing admissions to the bar (Rule 220) that permits a lawyer who is licensed in another U.S. jurisdiction to practice freely in Colorado on a temporary basis (subject only to pro hac vice requirements) as long as the lawyer does not take up residence in Colorado or establish an office there.⁸ Rule 220 provides as follows:

⁸<http://www.coloradosupremecourt.com/pdfs/Registration/Rule%20220.%20Out-of-State%20Attorney%20--%20Conditions%20of%20Practice.pdf>

Colorado Rule 220: Out-of-State Attorney – Conditions of Practice

(1) An attorney who meets the following conditions is an out-of-state attorney for the purpose of this rule:

(a) The attorney is licensed to practice law and is on active status in another jurisdiction in the United States;

(b) The attorney is a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice;

(c) The attorney has not established domicile in Colorado; and

(d) The attorney has not established a place for the regular practice of law in Colorado from which such attorney holds himself or herself out to the public as practicing Colorado law or solicits or accepts Colorado clients.

(2) An out-of-state attorney may practice law in the state of Colorado except that an out-of-state attorney who wishes to appear in any state court of record must comply with C.R.C.P. 221 concerning *pro hac vice* admission and an out-of-state attorney who wishes to appear before any administrative tribunal must comply with C.R.C.P. 221.1 concerning *pro hac vice* admission before state agencies.

(3) An out-of-state attorney practicing law under this rule is subject to the Colorado Rules of Professional Conduct and rules of procedure regarding attorney discipline and disability proceedings and those remedies set forth in C.R.C.P. 234(a).

(4) An out-of-state attorney who engages in the practice of law in Colorado pursuant to Rule 220 shall be deemed, for the purposes of Colorado Revised Statutes, Title 12, Article 5, Sections 101, 112, and 115, to have obtained a license for the limited scope of practice specified in this rule.

B. Canada’s Interprovincial Compact Model

Lawyers licensed in one Canadian province or territory who want to practice in another province or territory in Canada can now generally do so with ease as a result of three agreements adopted by the provincial law societies. The agreements create avenues for lawyers to work permanently in all provinces and territories without the need for further bar examination, and temporarily in all provinces. Lawyers may also be licensed in multiple jurisdictions.

1. Temporary Mobility

The 2002 National Mobility Agreement⁹ (“NMA”) permits lawyers in common law provinces to provide legal services in or with respect to the law of another signatory province for up to 100 days in a calendar year without a permit. Such lawyers must be entitled to practice in their home province; have liability insurance and defalcation coverage; have no outstanding criminal or disciplinary proceedings; and have no restrictions or limitations on their right to practice. Lawyers exercising “temporary mobility” do not have to advise the host jurisdiction that they are providing legal services on a temporary basis.

Lawyers who are not eligible for mobility without a permit under these conditions may apply for a permit from the host provincial law society. A lawyer becomes ineligible for

⁹ http://www.flsc.ca/en/pdf/mobility_agreement_aug02.pdf

“temporary mobility” if he or she establishes an “economic nexus” with a jurisdiction. In that case, he or she may apply to transfer to the jurisdiction under the permanent mobility provisions of the NMA (discussed in the next section). An “economic nexus” is established when a lawyer “does anything inconsistent with temporary mobility,” including:

- Providing legal services for more than 100 days
- Opening an office from which the lawyer serves the public
- Opening and operating a trust account in the jurisdiction
- Becoming a resident of the jurisdiction

2. Permanent Mobility (Transfer)

Under the NMA, lawyers who are entitled to practice in a signatory common law province and who are “of good character” may transfer permanently to another common law province without having to take transfer examinations or any other examination. They still must meet any qualifications that ordinarily apply for lawyers to be entitled to practice law in the jurisdiction in question.¹⁰ They also must certify that they have reviewed and understood certain materials required by the jurisdiction.¹¹

3. Quebec Mobility

Because the province of Quebec is a civil law, French-language jurisdiction, a further and separate protocol is required. In 2008, the governing body for lawyers in Quebec introduced a new membership category to permit lawyers from other Canadian jurisdictions to work in Quebec. In particular, “Canadian Legal Advisors” are lawyers licensed in Canadian common law jurisdictions who may become members of the Barreau du Quebec with the right to practice federal law, the law of their home jurisdiction, and public international law. A March 2010 agreement recognized this new category and created a path for implementation of a form of reciprocal mobility for Quebec members of the Barreau in all other provinces and territories.¹²

C. The European Union’s System of Mutual Recognition

In 1998, the European Parliament and the Council of the European Union adopted the Lawyers Establishment Directive.¹³ The Directive is based on the Treaty that established the

¹⁰ See, for example, the process for lawyers from other Canadian provinces wishing to transfer into Ontario at <http://rc.lsuc.on.ca/jsp/membershipServices/transfersNationalMobility.jsp>

¹¹ Under an agreement signed in 2006, Canada’s three northern territories – Yukon Territory, Northwest Territories and Nunavut – accepted the permanent (transfer) mobility provisions of the National Mobility Agreement, but they have not accepted the NMA’s temporary mobility provisions. http://www.flsc.ca/en/pdf/mobility_agreement_nov06.pdf

¹² http://www.flsc.ca/en/pdf/mobility_agreement_jul10.pdf

¹³ See Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0005:EN:HTML> .

European Union (E.U. Treaty).¹⁴ The Directive applies to E.U. countries whose admission requirements range from very stringent to lenient, and it applies to both civil law and common law jurisdictions.

The Directive allows European lawyers from one E.U. country (home jurisdiction) to establish themselves permanently in another E.U. country (host jurisdiction) and practice law there.¹⁵ The lawyer must register with the appropriate host jurisdiction authority so that the host authority can ensure that the lawyer abides by the host jurisdiction's rules of professional conduct. The Directive permits the lawyer to practice home jurisdiction law, E.U. law, international law, and even the law of the *host* jurisdiction. Although the lawyer is subject to some practice limitations with respect to certain kinds of court and uniquely "local" work, the lawyer is otherwise permitted to practice law in the host jurisdiction under his or her home title. Use of the host jurisdiction's professional titles is forbidden until the lawyer fulfills the requirements for doing so. The requirement that the lawyer use the home title is to ensure transparency to consumers and to avoid any possible confusion about a lawyer's licensing status.

To gain the ability to use the host jurisdiction's professional titles, the Directive requires the lawyer to practice the host jurisdiction's law "effectively and regularly" for three years. After that time, the lawyer is presumed to have obtained the necessary skills to become "fully integrated" into the host country's legal profession. The lawyer must then provide the appropriate host jurisdiction authority with proof of compliance with the three year practice requirement. At that point, the lawyer is officially licensed in the host jurisdiction.

Many lawyer regulatory authorities within the E.U. originally opposed this system. The E.U. Treaty (and interpretations of it by the European Court of Justice), as well as pressure from the European Commission, resulted in its creation. Opposition, however, has largely dissolved, and there have been very few disciplinary complaints or problems associated with the new system.

D. The Australian Model

Australia, which has a state/territory-based licensing scheme that is analogous to the system in the United States, has adopted laws that allow a lawyer licensed in one Australian state or territory to practice in other states and territories.¹⁶ In terms of enforcement, the Australian system differs from that in the United States. Specifically, there is co-regulatory authority between the Offices of the Legal Services Commissioner and the bar (the law councils or law society).¹⁷

In 1992, the Commonwealth passed a Mutual Recognition Act that enabled a lawyer

¹⁴ Notably, the E.U. Treaty applies only to E.U. citizens. Thus, a U.S. citizen who has qualified as a lawyer in one E.U. country may not use this directive to practice in another E.U. country.

¹⁵ An E.U. lawyer who wants to stay in the home jurisdiction while qualifying as a lawyer in another E.U. country can use the Recognition of Professional Qualifications Directive 2005 to do so. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:255:0022:01:EN:HTML>.

¹⁶ See e.g., http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/lra_mobility .

¹⁷ See, e.g., Legal Professions Act 2004, http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/.

registered in one jurisdiction to practice in another. The Act required the lawyer to register in the host state or territory and obtain a local practicing certificate. The 1992 Act was adopted by all Australian States and Territories.

In 1998, an Interstate Practice Certificate system was created to enable a lawyer from one Australian state/territory to practice in another without having to be admitted in the second state/territory. The Australian Capital Territory, Northern Territory, New South Wales, Queensland, Victoria, South Australia, Tasmania, and Western Australia have adopted this system.

In 2004, the National Legal Profession Model Bill was published. The Model Bill provided the states and territories with a template to draft legislation that would permit seamless practice by a lawyer from one jurisdiction to another. Lawyers only need a practice certificate from one jurisdiction. If they establish an office in another jurisdiction, they must simply notify the other jurisdiction that they are doing so. The legislatures of the Australian Capital Territory, New South Wales, Victoria, Queensland and the Northern Territory have adopted Legal Professions Acts based upon the Model Bill. In 2008, Western Australia passed legislation following the Model Bill, but substantive provisions have not yet been implemented. The same is true of Tasmania, which adopted legislation in 2007. In South Australia legislation has been drafted but has not yet been enacted.

E. Questions Concerning Alternative Approaches

The approaches described above suggest that there are plausible alternatives or supplements to the existing regulatory structures for cross-border practice within the United States. As part of its examination of these approaches, the Commission seeks input regarding the following questions:

- What advantages or disadvantages would such approaches have relative to the current regulation of cross-border practice in Model Rule 5.5 and admission by motion procedures? For example, would new difficulties or challenges arise for disciplinary authorities with regard to continuing legal education requirements or trust account rules if any of the above alternatives were adopted?
- Should the Commission consider proposing a system similar to Colorado's?
- Should the Commission develop a white paper that explores in detail whether the development of interstate compacts similar to those in Canada or forms of mutual recognition as in Europe and Australia would be feasible alternatives or supplements to Model Rule 5.5?

IV. Conclusion

The practice of law has become increasingly national and transnational in the years since the American Bar Association adopted Model Rule 5.5. In light of these trends, the Commission seeks input into whether amendments to the Model Rule or other action, such as a white paper that examines interstate compacts and forms of mutual recognition, would be advisable. Any responses to the questions posed in this paper, as well as any comments on related issues, should be directed by **June 1, 2011**, to:

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Comments received may be posted to the Commission's website.