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Attn: Wayne J. Positan, Esquire, Chair  
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Re: Proposed Rule 5.5 (c)(5) Safe Harbor for Transactional Lawyers

Dear Commissioners:

The Section of Business Law regards the safe harbors for business lawyers in your Interim Report's proposed Rule 5.5 as critically important to our members and to all lawyers whose practices extend beyond dispute resolution. So that you will have our suggestions during your meetings in Philadelphia we are submitting these comments preliminary to a later comprehensive response to the Interim Report.

A copy of our Section's earlier Position Statement is attached for your convenience. We are gratified that many of our suggestions have been incorporated in the Interim Report's recommendations.

The Interim Report's proposed Rule 5.5 does not, however, contain the safe harbor for transactional and counseling practice that we proposed in Point 3 of our Position Statement. Instead, the safe harbor in proposed Rule 5.5(c)(5) would only cover (a) services for a client with a residence or office in the lawyer's home jurisdiction and (b) services arising from or related to "a matter that has a substantial connection to" the lawyer's home jurisdiction.

This in essence limits host state services, on a temporary basis, to either services for home state clients or services on home state matters. Such a limited safe harbor unjustifiably restricts the scope of many lawyers' present counseling and transactional practices, and unnecessarily limits clients' freedom of choice of counsel. Therefore, we ask that you consider substituting the following subparagraph (c)(5) to specifically allow a non-admitted lawyer to provide on a temporary basis:

"services that . . .

(5) are not within paragraph (c)(3) or (c)(4) and are performed with respect to a matter that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is authorized to practice."

This is the same formulation that we previously suggested. It is also substantially the same standard as set forth in §3 of the Restatement (Third) of the Law Governing Lawyers. As such, it is likely to enjoy wide support.

A lawyer's temporary presence in a host state to negotiate an acquisition or merger or to counsel a client as to a matter within the lawyer's expertise surely poses no more risk to the "client, the public or the courts" (the general standard under proposed Rule 5.5(b)) than other activities for which there are specific safe harbors. For example, without any restriction to home state clients or home state matters, proposed Rule 5.5 permits temporary presence in a host state for services

- in connection with private arbitrations,
- in anticipation of litigation, or ancillary to litigation in a third jurisdiction, or
- in matters governed primarily by federal law.

While we agree that these and the other safe harbors in the proposed Rule are appropriate, we believe that the narrower restrictions in the safe harbor for the counseling and transactional practice involving primarily issues of state law are anomalous, unnecessary, and not in the best interests of the bar or clients.

The major differences between the Interim Report's safe harbor in paragraph (c)(5) and the Section's proposal are

- elimination of any client locational requirement, and
- requiring only that the matter arise out of or be reasonably related to the lawyer's practice in the home jurisdiction.

The change we propose would permit the counseling or transactional lawyer who has built a regional expertise in a field governed primarily by state law to represent a client in a host jurisdiction temporarily. For example, consider a Chicago lawyer who has established a regional reputation as an expert in mergers and acquisitions from a practice based in Illinois. Under our Section's proposal, that lawyer would be able to go temporarily into Indiana and counsel a privately held Indiana company in connection with a proposed merger with a privately held Delaware corporation. The matter is reasonably related to the lawyer's practice in the home state. Under the Interim Report's version of Rule 5.5, however, this activity would fall outside any safe harbor, since the matter has no connection to Illinois. Furthermore, the restrictive wording of the Interim Report's (c)(5) safe harbor, contrasted with the more expansive wording of the dispute resolution safe harbors, could be read to imply that the general standard in proposed Rule 5.5(b) ("unreasonable risk to the interests of the lawyer's client, the public, or the courts") is to be read narrowly when applied to the counseling and transactional practice. We hope you will agree that with us that it should not be.

The Section of Business Law continues to study this issue. We shall follow closely the further deliberations of the Commission, as well as the work of the Ethics 2000 Commission and of other groups who have made or may in the future make comments or proposals. We expect to present our views and comments on the Interim Report at your March hearings.

We commend your work on this important issue and your thoughtful and helpful Interim Report. We thank you for your consideration of these and our other comments and suggestions.

Sincerely,

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Harold S. Barron  
Chair-elect