



ASSOCIATION YEAR 2001-2002

AMERICAN BAR ASSOCIATION

Section of Business Law

750 North Lake Shore Drive
Chicago, Illinois 60611

(312) 988-5588

FAX: (312) 988-5578

e-mail: businesslaw@abanet.org

website: www.abanet.org/buslaw

CHAIR

Hon. Thomas L. Ambro
Federal Building Lock Box 32
844 N. King Street
Wilmington, DE 19801-3519
judge_thomas_ambro@ca3.uscourts.gov

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180 E. Pearson, #3507
Chicago, IL 60611

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40th Floor
Los Angeles, CA 90017-5758

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Nashville, TN 37238-3001

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3900 Wisconsin Ave., NW
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Philadelphia, PA 19122-6002

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SECTION DIRECTOR

Susan Daly
Chicago, IL
(312) 988-6244
suedaly@staff.abanet.org

March 13, 2002

ABA Commission on Multijurisdictional Practice
541 N. Fairbanks Court
Chicago, IL 60611

Attn: Wayne J. Positan, Esquire, Chair
John A. Holtaway, Esquire, Counsel

Re: Comments on INTERIM REPORT (November 2001)

Dear Chair Positan and Commissioners:

The Section of Business Law commends the Commission for its excellent work on a difficult issue. In this letter we submit the Section's comments on the Recommendations contained in the Commission's Interim Report. We present first our serious concerns with the limitations on the Interim Report's Rule 5.5 safe harbor for lawyers whose practices involve counseling and transactional work. We believe that these limitations are not in the best interest of practicing lawyers or their clients. Next we offer two modest suggestions with respect to the Interim Report's proposed safe harbor for employed counsel. Finally, we state the Section's position on the other Recommendations.

The Section is hopeful that the Commission will address and answer the Section's concerns, and that the Commission's final report can be presented to the House of Delegates with a broad base of support. Representatives of the Section will be glad to meet with the Commission and/or its staff to discuss these matters further.

I. Transactional and Counseling Practice.

The Section of Business Law represents a large proportion of ABA members who regularly engage in transactional and counseling law practice involving several jurisdictions. Thus, the safe harbor in Rule 5.5 governing transactions and counseling across jurisdictional boundaries is critically important to our 50,000 members and to other lawyers in the United States with similar practices.

The Section agrees with the MJP Commission's general formulation in Rule 5.5(b) that would authorize a nonadmitted lawyer to represent a client on a temporary basis if, along with other safeguards, "the lawyer's services do not create an unreasonable risk to the interests of the lawyer's client, the public or the courts." Although this concept also finds expression in the specific safe harbors in Rule 5.5(c) regarding litigation-related activities and in-house counsel locating in a jurisdiction, the safe harbor accorded lawyers when working on transactions or counseling clients fails to allow adequately for their commonly accepted activities. It attempts to limit host state services, on a temporary basis, either to services for home state clients or services on matters that are connected to the home state. States that by statute or rule allow similar temporary presence have no such limitations.

So limited a safe harbor would unjustifiably restrict the scope of many lawyers' present counseling and transactional practices, and unnecessarily restrict clients' freedom in choice of counsel. For example, many lawyers have developed specialties in practice, such as complex mergers and acquisitions, franchising and specialty insurance counseling, among many others. Their clients may come from other states and countries. These clients expect their specialist lawyers to counsel them, negotiate for them, and engage in transactions on their behalf in numerous jurisdictions in circumstances where the clients feel these lawyers' special expertise to be critical, even though involving issues solely or primarily of state law.

Moreover, requiring the client to be resident in, or the matter to have a substantial connection to the lawyer's home jurisdiction adds no meaningful protection to the interests of the public or the courts, and impairs the interests of clients who wish to use their lawyer's services. A lawyer's temporary presence in a host state to negotiate an acquisition or merger or to counsel a client on a matter within the lawyer's expertise surely poses no more risk 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 quite properly permits temporary presence in a host state for services in connection with a private arbitration (wherever pending), in anticipation of litigation (wherever it might be brought, or even if it is never commenced), ancillary to litigation (wherever pending), 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 much 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.

Members of the Section's Committee on Professional Conduct and many members of the Section's Council would for this reason prefer the approach taken by the so-called "Common Sense" Coalition's proposal. That proposal affords a clear safe harbor that recognizes the practicalities of modern transactional and counseling law practice. If it were added to the version of proposed Rule 5.5(c) set forth in the Interim Report, the Coalition proposal might read as follows:

"services (except those for which pro hac vice admission is required) that...

(x) the lawyer performs for a client in this jurisdiction on a temporary basis, provided the lawyer does not establish a systematic and continuous presence in this jurisdiction for the practice of law and does not hold out to the public that the lawyer is licensed to practice law in this jurisdiction."

We believe that the conduct authorized by this proposal does not "create an unreasonable risk to the interests of the lawyer's client, the public or the courts," while at the same time satisfying the needs of clients and their lawyers. This formulation also has the merit of being clear and unambiguous.

The Section of Business Law recognizes, however, that some feel that such a safe harbor might not gain broad acceptance by the states. As an alternative, therefore, we recommend that the Commission employ the same standard as was adopted by the American Law Institute in § 3 of its Restatement (Third) of the Law Governing Lawyers (2000). Added to MJP Rule 5.5(c), it might read as follows:

"services that...

(x) 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, except for services for which pro hac vice admission is required."

This standard permits the counseling or transactional lawyer who has built regional expertise in a field governed primarily by state law to be present temporarily in the host jurisdiction on a matter that arises out of the lawyer's home state practice. For example, consider a Chicago lawyer who has established an expertise in mergers and acquisitions from a practice based in Illinois. Under the 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 as a merger and acquisition specialist that is based in the lawyer's 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 and involves primarily issues of the state laws of Delaware and Indiana.

We are concerned, moreover, that 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 this should not be the case.

II. Rule 5.5—In-house Counsel

We also suggest that you make the following two (2) changes in the Interim Report's draft Rule 5.5:

- (i) Change paragraph (d)(1) to read:

"(1) if the lawyer is an employee of a client and acts on behalf of the client or its ~~commonly owned~~ organizational affiliates except for work for which pro hac vice admission is required;"

- (ii) Add a Comment regarding representation of an employer that would further explain the permissible extent of the safe harbor and might read:

"Paragraph (d)(1) recognizes that some clients hire lawyers as employees. Given that such a client is unlikely to be deceived about the training and expertise of these lawyers, they may act on behalf of such a client without violating this Rule. These lawyers also may act on behalf of the employer's organizational affiliates (entities that control, are controlled by, or are under common control with the employer). They may in addition act on behalf of the employer's and its organizational affiliates' other employees in connection with the organizational client's matters. Lawyers authorized to practice under this paragraph may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

Reasons for Changes: The first change to paragraph (d)(1) and the comment language, "entities that control, are controlled by, or are under common control with the employer..." are for the purpose of defining "affiliate" in the same way as it is defined for Securities Act purposes. See, e.g., 17 CFR 230.405. The addition of "commonly owned" in the text is incomplete and potentially confusing. In addition, representation of an employer's other employees, but only in connection with the client's matters is noted as permissible. This is to recognize that counsel employed by a corporation may be called upon to advise, for example, senior managers on risks associated with documents required to be filed by the corporation that must be signed by officers in their individual capacities. It does not authorize general private legal services to other employees, but only services ancillary to services rendered to the entity client. The rest of the proposed Comment is based on the Ethics 2000 Commission proposal.

III. Other Recommendations.

The Section's comments on the Interim Report's other Recommendations (as set forth in the Preface to the Report) are as follows:

MJP Commission Recommendation

1. The ABA should affirm its support for the principle of state judicial licensing and regulation of lawyers. (*See* Recommendation 1.)

The Section of Business Law supports this Recommendation.

MJP Commission Recommendation

2. The ABA should amend Rule 5.5(b) of the *ABA Model Rules of Professional Conduct* (Unauthorized Practice of Law) to provide that, as a general rule, it is not the unauthorized practice of law for a lawyer admitted in another United States jurisdiction to render legal services on a temporary basis in a jurisdiction in which the lawyer is not admitted if the lawyer's services do not create an unreasonable risk to the interests of a lawyer's client, the public or the courts. (*See* Recommendation 2.) [APPENDIX J, PAGE 74].

The Section of Business Law supports this Recommendation.

MJP Commission Recommendation

3. The ABA should adopt proposed Rule 5.5(c) of the *ABA Model Rules of Professional Conduct* to identify "safe harbors" that embody specific applications of the general principle of Rule 5.5(b) above. (*See* Recommendation 3.) These would include "safe harbors" relating to the following practice areas:

- Work as co-counsel with a lawyer admitted to practice law in the jurisdiction. (*See* Recommendation 3.1.)
- Professional services that a non-lawyer is legally permitted to render. (*See* Recommendation 3.2.)
- Work ancillary to pending or prospective litigation or administrative agency proceedings. (*See* Recommendation 3.3.)
- Representation of clients in, or ancillary to, an alternative dispute resolution ("ADR") setting, such as arbitration and mediation. (*See* Recommendation 3.4.)

- Non-litigation work ancillary to the lawyer's representation of a client in the lawyer's "home state" (i.e., the jurisdiction in which the lawyer is licensed to practice law) or ancillary to the lawyer's work on a matter that is connected to the law of the home state. (*See Recommendation 3.5.*)
- Services involving primarily federal law, international law, the law of a foreign jurisdiction or the law of the lawyer's home state. (*See Recommendation 3.6, infra.*)

The Section of Business Law, as noted in Part I above, strongly urges changing the safe harbor in bullet point five above for nonlitigation matters, and favors either the Common Sense proposal or the Restatement standard. The Section believes the other safe harbors are appropriate and supports them.

MJP Commission Recommendation

4. The ABA should adopt proposed Rule 5.5(d) of the ABA *Model Rules of Professional Conduct* to identify "safe harbors" relating to work by a lawyer who is an employee of a client or its commonly owned organizational affiliates and work in a "host state" (i.e., a jurisdiction in which the lawyer is not licensed to practice law) that the lawyer is authorized by federal law, state law or court order to render. (*See Recommendations 3.7 and 3.8.*)

With the changes noted in Part II, the Section of Business Law supports both safe harbors.

MJP Commission Recommendation

5. The ABA should adopt proposed Rule 5.5(e) of the ABA *Model Rules of Professional Conduct* to prohibit a lawyer from establishing an office, maintaining a continuous presence, or holding himself or herself out as authorized to practice law in a jurisdiction in which the lawyer is not admitted, unless permitted to do so by law or Model Rule 5.5. (*See Recommendation 3.9.*)

The Section of Business Law supports this Recommendation.

MJP Commission Recommendation

6. With regard to a lawyer seeking to establish a law practice on a permanent basis in a jurisdiction in which the lawyer is not licensed to practice law, the ABA should endorse a model "admission on motion" rule consistent with the rule proposed by the ABA Section of Legal Education and Admissions to the Bar to facilitate the licensing of a lawyer by a host state if the lawyer has been

engaged in active law practice in other United States jurisdictions for a significant period of time. (*See* Recommendation 4.) [APPENDIX K, PAGE 78].

The Section of Business Law supports this Recommendation. The Section would favor an Admissions on Motion Rule that would allow admission on motion of lawyers admitted by any U.S. jurisdiction who meet reasonable active law practice and character and fitness requirements.

MJP Commission Recommendation

7. The ABA should encourage jurisdictions that have not adopted a foreign legal consultant rule to do so consistent with ABA policy. (*See* Recommendation 5.) [APPENDIX H, PAGE 66].

The Section of Business Law supports this Recommendation.

MJP Commission Recommendation

8. With regard to lawyers admitted to practice law outside the United States, the ABA should amend either the *Model Rule for the Licensing of Legal Consultants* or Rule 5.5 of the ABA *Model Rules of Professional Conduct* to identify circumstances where it is not the unauthorized practice of law for a lawyer admitted in a non-United States jurisdiction to perform legal services for a client in a United States jurisdiction. (*See* Recommendation 5.1.) [APPENDIX L, PAGE 80].

The Section of Business Law supports this Recommendation.

MJP Commission Recommendation

9. The ABA should endorse a model *pro hac vice* rule consistent with the one under development by the ABA Section of Litigation, the ABA Section of Torts and Insurance Practice and the International Association of Defense Counsel, to govern the admission of lawyers to practice law before state courts and government agencies *pro hac vice* in jurisdictions in which the lawyer is not licensed. (*See* Recommendation 6.) [APPENDIX M, PAGE 81].

The Section of Business Law supports this Recommendation.

MJP Commission Recommendation

10. With regard to *pro hac vice* admission in federal district court, the ABA should reaffirm its support, in accordance with ABA policy adopted in 1995, for "efforts to lower barriers to practice before U.S. District Courts based on state bar membership by eliminating state bar membership

requirements in cases in U.S. District Courts, through amendment of the Federal Rules of Civil and Criminal Procedure to prohibit such local rules." (See Recommendation 6.1.)

The Section of Business Law supports this Recommendation.

MJP Commission Recommendation

11. The ABA should amend Rule 8.5 of the *Model Rules of Professional Conduct* (Disciplinary Authority; Choice of Law), and adopt and promote other measures to enhance professional regulation and disciplinary enforcement with respect to lawyers who, pursuant to the above recommendations, practice law in jurisdictions other than those in which they are licensed. (See Recommendation 7.)

The Section of Business Law supports this Recommendation.

MJP Commission Recommendation

12. The ABA should amend Rule 8.5 of the *ABA Model Rules of Professional Conduct* in order to better address multijurisdictional law practice. (See Recommendation 7.1.) [APPENDIX N, PAGE 87].

The Section of Business Law supports this Recommendation.

MJP Commission Recommendation

13. The ABA should amend Rules 6 and 22 of the *ABA Model Rules for Lawyer Disciplinary Enforcement* to promote effective disciplinary enforcement when lawyers engage in multijurisdictional practice of law and should renew efforts to encourage states to adopt Rule 22, which provides for reciprocal discipline. (See Recommendation 7.2.) [APPENDIX O, PAGE 90].

The Section of Business Law supports this Recommendation.

MJP Commission Recommendation

14. The ABA should take steps to promote interstate disciplinary enforcement mechanisms. (See Recommendation 7.3.)

The Section of Business Law supports this Recommendation.

MJP Commission Recommendation

15. The ABA should establish a Coordinating Committee on Multijurisdictional Practice to monitor changes in law practice and the impact of regulatory reform, and to identify additional reform that may be needed. (*See* Recommendation 8.)

The Section of Business Law supports this Recommendation.

Once again, the Section commends your work on this important issue and your thoughtful and helpful Interim Report. We and our members would appreciate your favorable consideration of our suggestions for changes in Rule 5.5's safe harbors.

Sincerely,



Harold S. Barron
Chair-Elect