

March 11, 2002

Wayne J. Positan
Chair
Multijurisdictional Practice Commission
American Bar Association
541 North Fairbanks Court, 14th Floor
Chicago, IL 60611

Re: Further Comments on the MJP Commission's Interim Report

Dear Wayne:

As you know, CrossingtheBar.Com previously submitted comments to your commission concerning its interim report. Those comments, as well as CrossingtheBar.Com's comments on the "Common Sense Proposal on Multijurisdictional Practice", are available on the Internet at <http://www.crossingthebar.com>.

Professor Gillers sent me an e-mail following the submission of my comments concerning the commission's interim report. As I had criticized the commission's "safe harbor" recommendations as vague and unenforceable, he essentially told me to "suggest something better." I indicated that I would try. This letter contains my further suggestions. I fully accept that what is good for the goose is good for the gander and I am happy to hear your or other commission members' criticisms of my suggestions. I do recognize just how difficult it is to come up with workable solutions that will satisfy everyone. Essentially, mission impossible.

The bench and bar are looking to the commission for workable, practical and politically feasible solutions. Candidly, the commission is in the best possible to do this. My comments and suggestions, and those of many others, are not as fully informed as yours will be. You have had the opportunity to listen to and study the comments of a broad range of individuals and groups interested in various aspects of MJP. My personal thanks to you and each of the other commissioners, the reporter, and ABA staff for the tremendous amount of work all of you have done and will continue to do to try to develop improvements in this very important area of the law and professional responsibility.

I will not repeat my prior comments and recommendations. I agree with and support many of the recommendations contained in the commission's interim report. The focus of these comments is the "safe harbor" issue. What rules should the ABA recommend to the various U.S. jurisdictions to permit multijurisdictional law practice without the requirement that lawyers obtain a full and unrestricted license to practice law in each of the jurisdictions in which they wish to practice? How can greater multijurisdictional law practice be authorized without undue bureaucracy and red tape while continuing to ensure that the public is adequately and properly protected from incompetent and unethical lawyers?

The commission's interim report takes the approach that the ABA should recommend that U.S. jurisdictions adopt amendments to their lawyer ethics rules and unauthorized practice of law statutes that will permit out-of-jurisdiction lawyers to engage in a variety of legal work without being licensed to practice law in the host jurisdiction. The so called "Common Sense Proposal" rejects the "safe harbor" approach and offers as an alternative a rule change that would permit out-of-jurisdictional lawyers to practice law in other jurisdictions (1) if authorized by law or order to appear before a tribunal or administrative agency or when preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized, (2) the lawyer is an employee of a client and acts on the client's behalf or on behalf of the client's organizational affiliates, or (3) the lawyer performs services for a client in the host jurisdiction on a temporary basis, does not establish a systematic and continuous presence in that jurisdiction for the practice

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of law and does not hold out to the public that the lawyer is licensed to practice law in that jurisdiction.

I understand several states (Michigan, Rhode Island and Virginia) have rules or statutes that allow out-of-state lawyers to practice law within their borders on a temporary basis without being members of their bars. I also understand Colorado is working on a similar rule and that Nevada is working on a rule that would essentially establish a pro hac vice procedure for transactional lawyers akin to pro hac vice procedures that every U.S. jurisdiction has for trial lawyers.

I believe broad exceptions to UPL restrictions for temporary law practice will not be acceptable to most state bars, lawyer regulatory agencies and Supreme Courts. I may be wrong. We'll see. My suggestion, perhaps already made by others, is to recommend an ethics rule and/or statute (as necessary in each jurisdiction) that requires lawyers who wish to practice law on a temporary basis without being fully admitted to practice to register with that jurisdiction, pay a fee, and agree to various conditions and restrictions in doing so.

I can already hear the objections and criticisms. That's too bureaucratic. What about the lawyers who refuse to register and go ahead and practice law in a jurisdiction in which they are not licensed to practice law anyway? Hear me out.

First, we should start with the most practical exceptions. Ones that most people will consider reasonable. If the registration process proves its metal, jurisdictions can add new components to the registration rule. Eventually, based on experience, all jurisdictions will have a decent "you only have to register to do X, Z and Y" rule. This will be progress. In ten years, I would hope we would have essentially uniform MJP rules in every U.S. jurisdiction. For the scofflaws among us, we need to enforce the liberalized rules. Engaging in law practice without a license or being registered should result in serious sanctions, not slaps on the wrist. Lawyers, of any group besides judges, should be role models for compliance with the law.

My registration concept would result in a rule essentially along the following lines:

Proposed ABA Model Rule of Professional Conduct 5.5: Unauthorized Practice of Law

- (a) A lawyer shall not practice law in a jurisdiction when doing so violates the statutes, rules or regulations concerning the unauthorized practice of law in that jurisdiction.
- (b) A lawyer admitted to practice law in another United States or a foreign jurisdiction, but not in this jurisdiction, may register with [the state bar or other appropriate lawyer regulatory agency] to engage in the following activities which shall not constitute the unauthorized practice of law so long as the lawyer complies with all requirements and conditions of registration:
 - (1) Pretrial discovery or pretrial, trial or appellate negotiations in this jurisdiction concerning a lawsuit or administrative proceeding the lawyer is involved in as counsel of record, an assistant to counsel of record or associated counsel which has been filed in a U.S. or foreign jurisdiction the lawyer is licensed to practice in;
 - (2) Representation of a client residing or domiciled in any U.S. or foreign jurisdiction in which the lawyer is licensed to practice in any private arbitration or mediation in this jurisdiction as counsel of record, an assistant to counsel of record or associated counsel.
- (c) A lawyer shall not assist another person in the unauthorized practice of law.

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Acknowledgement of Receipt

I, [appropriate regulatory agency official], acknowledge receipt of the foregoing registration request and agreement and fee of _____ (print name). The fee is for a twelve month period from the date of this acknowledgement.

Dated this _____ day of _____, _____.

[Signature of appropriate regulatory agency official]

My concept is that registration would be entirely voluntary. If a lawyer registers, he or she gets to engage in the activities permitted under the rule. If a lawyer does not register, he or she is subject to all existing unauthorized practice of law restrictions in the jurisdiction. People could check with the appropriate regulatory agency as to whether lawyer X, Y or Z was registered.

Note too that the benefit of this registration process is the ability to spell out, in detail, what temporary and transitory mean in the registration request and agreement from.

I have not included as permitted activities many of the "safe harbors" the commission has included in its interim report or recommended by other groups. Again, I would start out relatively slow in rolling out what registrants can do. I endorse the commission's recommendation of a uniform pro hac vice rule covering both state court and state administrative proceedings. I believe corporate counsel should be subject to a separate admission procedure which does not require the passage of a bar examination. I endorse the commission's recommendation of a model admission on motion rule.

I do not want to make this letter any longer than it already is so I will stop. I hope my suggestions are of some assistance to the commission. As indicated, I do not believe most states will want to totally open their borders to out-of-jurisdiction lawyers on the premise that they will voluntarily constraint themselves to only engage in "temporary" practice as outlined in a new Rule 5.5. I believe a registration process makes the most sense. The scope of activities permitted under the registration rule and process can be expanded as jurisdictions obtain experience under it and find that it works well. Out-of-jurisdiction lawyers should pay something for the privilege of being able to engage in certain law practice activities in a jurisdiction they are not licensed to practice in. They should also have other options: admission on motion, pro hac vice admission, and corporate counsel admission.

In closing, I wanted to mention that I started CrossingtheBar.Com in September 1999 and have maintained it since that time in order to provide lawyers and other interested persons with Internet access to accurate, up-to-date information on the multijurisdictional practice of law. With an average of approximately 3800 unique visitors each month (the equivalent of the active memberships of some state bars), I think my web site shows that there is a lot of interest in Internet access to this information. I would greatly appreciate it if the ABA would consider assisting me, by sponsorship or otherwise, to continue to improve this source of information on the multijurisdictional practice of law. Collecting, organizing, analyzing and updating the admission, pro hac vice, corporate counsel, and UPL rules and regulations and case law of all U.S. jurisdictions is a big job. It gets even bigger when the statutes, rules and regulations and case law of other countries are added to the mix. If the organized bar pitched in, we could create a truly comprehensive Internet resource on domestic and international MJP that would benefit lawyers, judges and other interested persons everywhere for many years to come.

Sincerely yours,

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Chair
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/s/

George A. Riemer
President
Ethics Northwest, Inc.
19642 SW 56th Court
Tualatin, OR 97062
webmaster@crossingthebar.com