

March 15, 2002

ABA Commission on Multijurisdictional Practice
Attn: Wayne J. Positan, Esquire, Chair
541 N. Fairbanks Court
Chicago, IL 60611

Re: Comments on INTERIM REPORT (November 2001)

Dear Chair Positan and Commissioners:

As you know, the Standing Committee's jurisdiction includes recommending amendments to, or clarifications of the Model Rules of Professional Conduct. We have, in accordance with our mission, reviewed the Interim Report of your Commission and related information, giving particular attention to the Model Rules of Professional Conduct proposals, Rules 5.5 and 8.5.

Rule 8.5

The Standing Committee wholeheartedly supports the need for revisions in the UPL restrictions still in effect in many jurisdictions, as well as the need for broader and better informed disciplinary authority. Accordingly, we agree with your Recommendation 7.3, to establish an effective National Lawyer Regulatory Data Bank capable of receiving from and providing to lawyer regulatory and admissions bodies adequate electronic information concerning lawyers. We also approve and support proposed Rule 8.5 that is Appendix N to the Interim Report. This includes support for the substance of the MJP Commission's additional reference to reciprocal enforcement in Comment [1] to Rule 8.5.

Rule 5.5 Proposals

The Standing Committee believes that Rules of Professional Conduct will be accepted by the profession and the public only if they:

- (1) Satisfy a need for client protection or maintenance of some other important professional or public goal;
- (2) Provide clear guidance to lawyers as to what they may and may not do;

- (3) Establish reasonable standards that are consistent with legitimate professional practices;
- (4) Are enforceable because they are likely to be followed by the legal profession and enforced by regulatory agencies.

As your Report notes, current UPL regulations fall far short of these principles. Antiquated and out of step with client expectations and legitimate accepted practices, UPL restrictions seriously disadvantage clients and impose unnecessary burdens and costs on the provision of legal services. Many of the restrictions are neither enforced nor enforceable.

In determining the extent of regulation needed to protect clients, the general public and the justice system from incompetent or unethical practitioners, the Standing Committee took into account the vast improvements that have occurred in the quality of legal education and bar admission standards in virtually every jurisdiction. This has served to achieve a more uniform level of competence in the practice of lawyers throughout the United States.

Also weighed in the balance were the protections afforded in each jurisdiction by Rule 8.5(a) (Disciplinary Authority) and Rule 8.5(b) (Choice of Law). Taken together, these provisions effectively grant jurisdiction to regulate all lawyers who practice in a jurisdiction whether or not admitted, and bring them in most instances under the jurisdiction's Rules of Professional Conduct. These factors form part of the background for determining what regulation is needed to protect the interests of clients, the public and the courts.

The Standing Committee has reviewed much of the information your splendid efforts have produced. We also have analyzed drafts of Model Rule 5.5 proposed by your MJP Commission, the E2K Commission, the coalition of NOBC, ACCA, APRL and others ("the Coalition"), as well as suggestions from bar associations and ABA Sections and Divisions. Our conclusion based on all the factors noted above is that Rule 5.5 in **Attachment I** to this letter, from our perspective, best embodies the characteristics of an effective Rule of Professional Conduct. We believe that it provides the clearest guidance to lawyers and the necessary safeguards of clients and the public. It identifies specific circumstances in which interjurisdictional practice is authorized rather than providing exceptions to UPL.

In taking account of the four principles described above that render a rule effective and acceptable – *client protection, clarity, consistency* and *enforceability* – the Standing Committee would also eliminate the broad general standard in MJP's paragraph (b). Regarding *transactional and counseling activities* in a host jurisdiction we

recommend a standard similar to ALI Restatement (Third) of the Law Governing Lawyers, § 3, along with some added guidelines.

The standard we suggest provides:

A lawyer admitted to practice and in good standing in another jurisdiction, but not licensed to practice in this jurisdiction may...provide legal services in this jurisdiction other than those referred to in paragraph (b)(1) [*i.e., pro hac vice*] if the lawyer :...

(ii) temporarily provides the services with respect to a matter arising out of or reasonably related to the lawyer's practice in another jurisdiction in which the lawyer is authorized to practice....¹

Adopting a standard that is substantially similar to the standard in the Restatement has benefits over other choices. Each standard in ALI Restatements of the Law is chosen because it is considered to be the majority rule in an area of the law, or the best of several competing rules that jurisdictions have adopted. Restatement standards, including those in the Restatement of the Law Governing Lawyers, are applied frequently by courts. Thus, there is a greater likelihood of gaining uniform acceptance of the ABA's Model Rule, by including a counseling and transactional provision, that is substantially similar to § 3 of the Restatement.

For your convenience, **Attachment II** to this letter contains a fuller explanation of our proposal and compares it with other proposed versions of Rule 5.5. At this time, the Standing Committee has no other suggestions to make concerning the MJP Commission's recommendations. We appreciate the serious consideration we know you will give to our suggestions. One of our members, Peter Moser, will be attending the Commission's March 21st hearing, and will be happy to respond to any questions. We

¹ The Restatement standard is the following:

§ 3. Jurisdictional Scope of the Practice of Law by a Lawyer

A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:

(3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) [where admitted generally] or (2) [admission before tribunal].

Comment *e* under § 3 supplies factors applicable in determining if the § 3 standard is satisfied and provides several illustrations.

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will also assist in any other way that you wish.

Sincerely,

Marvin L. Karp
Chair