

April 30, 2002

Commission on Multi-Jurisdictional Practice
c/o John A. Holtaway
ABA Center for Professional Responsibility
541 No. Fairbanks Ct., 14th Floor
Chicago, Illinois 60611

Re: Comments by the ABA Section of International Law and Practice Responding to the Interim Report and Addressing the "Common Sense Proposal"

Dear Mr. Positan and Members of the Commission:

The ABA Section of International Law and Practice (SILP) is writing in response to the Commission's Interim Report and to request that its name be added to the list of entities supporting the "Common Sense Proposal." It also takes this opportunity to register its suggestions with respect to the Commission's treatment of temporary practice of foreign lawyers.

Endorsement of the "Common Sense Proposal"

The "Common Sense Proposal" endorsed by a number of entities states: "None of us abandon any of our previously stated MJP positions, each of which may differ to some degree." See <http://www.acca.com/advocacy/mjp/commonsenseproposal.html>.¹ The issues in which SILP is most interested are the issues involving international law and practice, including issues affecting the practice of law by U.S. lawyers outside of the U.S. and the practice of law by foreign lawyers in the U.S. SILP has previously submitted to the Commission its testimony of February 1, 2001, its supplemental testimony of June 1, 2001 and its June 30, 2001 responses to the Commission's follow-up questions. See http://www.abanet.org/cpr/mjp-written_comments.html. As these submissions explain, SILP's primary focus has been to encourage widespread adoption of the ABA Model FLC Rule. As noted above, SILP is pleased with that portion of the Interim Report that endorses the ABA Model FLC Rule and further agrees that there should be clarity concerning the temporary practice rules for foreign lawyers. With respect to temporary practice, SILP previously endorsed the APRL proposal and expressed the view that the temporary practice rules that are adopted should also apply to foreign lawyers.

¹ The text of the Common Sense Proposal is attached to this letter.

Although international practitioners are interested in the rules regarding temporary practice, SILP recognizes that the issue of temporary practice affects the entire U.S. legal profession and not just international practitioners. SILP further recognizes that the policies the Commission adopts will be driven by the needs of the public and the entire bar and its clients, not just international practitioners and their clients. Nevertheless, SILP did not want to remain silent and have its silence interpreted as a lack of support for the Common Sense Proposal. Accordingly, SILP requests that its name be added to the list of entities who support the “Common Sense Proposal.”

Responding to the Interim Report

Recommendation 5 of the Commission’s Interim Report addressed issues of particular concern to SILP.² First, the Commission concluded that “The ABA should encourage jurisdictions that have not adopted a foreign legal consultant rule to do so consistent with ABA policy.” SILP endorses this recommendation wholeheartedly, and emphasizes that U.S. states should adopt the Model Rule on Foreign Legal Consultants (“Model FLC Rule”--which is ABA policy) and adhere to it, particularly with respect to its “scope of practice” provisions. In this way, inconsistent state definitions of “scope of practice” will be avoided and enhance understanding of the rule and its application abroad.

Recommendation 5.1 stated that the “ABA should amend either its Model Rule for the Licensing of legal Consultants [hereafter the Model FLC Rule] or Rule 5.5 of the Model rules of Professional Conduct to identify circumstances where it is not unauthorized practice of law for a lawyer admitted in a non-United States jurisdiction to perform services for a client in a United States jurisdiction. SILP endorses this recommendation also. SILP agrees with the Commission that it is desirable to clarify the rules of temporary practice that apply to foreign lawyers in the U.S.

At the conclusion of Recommendation 5.1, the Commission solicited input about whether it was preferable to include a temporary practice provision in the Model FLC Rule or in Model Rule 5.5.³ SILP believes that both approaches would be acceptable if adopted by the states. While both approaches have advantages and disadvantages, SILP recommends that temporary practice by foreign lawyers be addressed in Model Rule of Professional Conduct 5.5, rather than in an amendment to the Model FLC Rule.

The advantage of including a temporary practice provision in the Model FLC Rule is that foreign lawyers might consider it logical to include the temporary practice scope

² Recommendation 5 is attached to this letter as an Appendix .

³ Appendix L to the Interim Report, which is attached, was titled “Foreign Lawyers Proposed Model Rule Amendment.” It contained language that might be included in either the Model FLC Rule or Model Rule 5.5.

of practice rules with the scope of practice provisions applicable to foreign lawyers who become established in the U.S. One disadvantage of this approach is that it would require those states that have already adopted the ABA Model FLC Rule to go back and amend the rule. Furthermore, the current experience with the Model FLC Rule suggests that it is difficult to interest the relevant state authorities in the Model FLC rule.

The advantage of including such a provision in ABA Model Rule 5.5 is that it would increase the likelihood of state consideration of this issue, which is the thrust of Recommendation 5.1. SILP expects that because of the Ethics 2000 Commission, virtually every state will soon consider whether and how to amend its rules of conduct for lawyers. Thus, if the Commission recommends a change to Rule 5.5 to address temporary practice by foreign lawyers, there is a mechanism by which that recommendation is likely to come to the attention of the relevant state authorities. The disadvantages of including this provision in Rule 5.5 is that foreign lawyers may not immediately realize that they should consult Rule 5.5 to determine the acceptable scope of temporary practice. Moreover, state authorities might “miss” the issue, even if the meaning of the word “jurisdiction” in highlighted in the comment to Rule 5.5

In sum, SILP agrees with the Commission that it is appropriate to clarify the scope of temporary practice for foreign lawyers. SILP agrees that this could be handled by amending either the Model FLC Rule or Model Rule of Professional Conduct 5.5. SILP prefers the Model 5.5 approach because its experience has shown that , in many states, it is easy for the Model FLC Rule to fall through the cracks because there is no entity with a particular interest in this rule that has the responsibility for developing bar admission rules. Accordingly, SILP recommends that instead of amending the Model FLC Rule, the words “United States” be deleted when they appear before the word “jurisdiction” in Appendix J to the Interim Report, which is the Commission’s Proposed Rule 5.5.⁴ or that the Commission adopt the “Common Sense Proposal,” as explained below.

TEMPORARY PRACTICE BY FOREIGN LAWYERS

SILP endorses the use of the word “jurisdiction,” rather than “U.S. jurisdiction”, in multijurisdiction practice rules such as ABA Rule 5.5. This would permit lawyers licensed outside of the U.S. to engage in temporary practice within the U.S. SILP believes that, as in the case of interstate U.S. practice and foreign legal consultant practice, ethics and liability rules and their enforcement are sufficient to protect consumers. Accordingly, we further recommend that: (i) the jurisdictions from which foreign lawyers may come meet the tests of the FLC Rule about educational requirements, ethical rules and supervision; and (ii) any limits on the local work of registered foreign legal consultants apply to those foreign lawyers temporarily in the

⁴ Appendix J is attached to this letter.

U.S., e.g., limits on the preparation of instruments to be recorded. In short, the limits contained in the ABA-approved Model FLC Rule for establishment in U.S. states by foreign lawyers should also be applicable to temporary practice.

Please do not hesitate to contact me if you have questions.

Sincerely yours,

Robert E. Lutz
Chair
ABA Section of
International Law & Practice

The Common Sense Proposal, available at
<http://www.acca.com/advocacy/mjp/commonsenseproposal.html>



the in-house bar associationSM

A COMMON SENSE PROPOSAL FOR MULTIJURISDICTIONAL PRACTICE

We, the undersigned, come together and stand together to embrace common ground on a critical issue facing the profession - multijurisdictional practice (MJP). Many of us have already expressed separate "reform" positions to the ABA Commission on MJP or to state bar groups considering the issue. Although we represent lawyers from many different practice settings and with many different perspectives - we have concluded that we share a common belief that what we agree upon is far greater than what divides us by way of differences.

None of us abandon any of our previously stated MJP positions, each of which may differ to some degree. But we are all concerned that the ABA MJP Commission's interim report's reliance on a problematic and perplexing panoply of safe harbor amendments to Model Rule 5.5 is a misdirected means of advocating the MJP reform that the profession must enact. There exists a common consensus amongst large segments of the profession -- which is demonstrated by our diverse organizations' support of this Coalition -- that our profession must enact a more straightforward rule authorizing MJP, under which our clients, the public, our profession, and MJP practitioners can flourish. Any such rule should be simple, easy to define, hard to amend, and capable of enforcement from state to state. We believe that our proposed rule, provided below as an amendment to Rule 5.5, offers an appropriate model for consideration.

The essence of our approach is to authorize MJP practice, making appropriate exceptions and providing appropriate protections for the public and the profession, rather than forcing lawyers through the sieve of unauthorized practice rules and numerous safe harbors. The coalition does support and call for the implementation of many of the other important recommendations of the ABA MJP Commission draft report, including those portions pertaining to changes needed to related enforcement provisions in Model Rule 8.5, Rule 22 of the Model Rules for Lawyer Disciplinary Enforcement, proposals concerning a model pro hac vice standard that would harmonize current state rules for the temporary admission of non-host-state litigators in local host state court actions, and so on.

As of 12/10/01

The American Corporate Counsel Association (ACCA)

The Association of the Bar of the City of New York (ABCNY)

The Association of Professional Responsibility Lawyers (APRL)
The Colorado Bar Association (CBA)
The Denver Bar Association
The Federal Communications Bar Association (FCBA)
The Law Practice Management Section of the American Bar Association
The National Organization of Bar Counsel (NOBC)
The Real Property, Probate & Trust Section (RRPT) of the American Bar Association

RULE 5.5: AUTHORIZED MULTIJURISDICTIONAL PRACTICE OF LAW BY NON-ADMITTED LAWYERS AND UNAUTHORIZED PRACTICE OF LAW BY ADMITTED LAWYERS AND NON-LAWYERS

- a. A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.
- b. **A lawyer admitted to practice in another jurisdiction, and in good standing in all jurisdictions in which the lawyer is admitted, but not in this jurisdiction, may engage in the Authorized Multijurisdictional Practice of Law in this jurisdiction. Authorized Multijurisdictional Practice of Law occurs when:**
 1. The lawyer is authorized by law or order to appear before a tribunal or administrative agency pro hac vice in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or
 2. **Other than engaging in conduct governed by paragraph (1):**
 - (i) The lawyer is an employee of a client and limits his or her practice of law to acting on the client's behalf or on behalf of the client's organizational affiliates.
 - (ii) The lawyer is present and acting in this jurisdiction for a client on a temporary basis and does not establish an office or other systematic and continuous presence in this jurisdiction for the practice of law or hold himself or herself out as authorized to practice law in this jurisdiction.
- c. **The Authorized Multijurisdictional Practice of Law does not constitute the unauthorized practice of law as otherwise defined in this jurisdiction.**
- d. **A lawyer shall not assist another person in the unauthorized practice of law.**

