



DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1777 NORTH KENT STREET
ROSSLYN, VIRGINIA 22209-2194

REPLY TO
ATTENTION OF:

January 30, 2002

Army Standards of Conduct Office

Mr. J. Holtaway
American Bar Association
Commission on Multijurisdictional Practice
541 North Fairbanks Court
Chicago, Illinois 60611-3314

Subject: Additional Informal Comments for the Commission on Multijurisdictional Practice

Dear Mr. Holtaway:

Within the Judge Advocate Legal Service, The Judge Advocate General of the Army is responsible for approving and overseeing the professional credentials of almost 4700 attorneys. These attorneys include 615 state Army National Guard attorneys, fifty-six of whom are full-time Active Guard and Reserve (AGR) (Title 10 or Title 32 USC), and 589 are part-time, drilling officers. Also, he has disciplinary responsibility for 1,453 active duty attorneys, 408 Army civilian attorneys, and 2181 Army Reserve attorneys.

On behalf of The Judge Advocate General, I am submitting these additional comments on the proposed amendments to Model Rule 5.5, currently under consideration by the American Bar Association's Commission on Multijurisdictional Practice (the "MJP Commission"). The Army strongly urges the MJP Commission to include in the text of Model Rule 5.5 clear and unambiguous language providing "safe harbors" for federal and *state* National Guard attorneys practicing outside their licensing jurisdictions. Military attorneys must be protected whenever they advise or represent (1) their employing agencies or (2) individual clients with premobilization, postmobilization, legal assistance, or defense matters.

The MJP Commission's November 2001 interim report proposed safe harbor provisions to Model Rule 5.5 (Unauthorized Practice of Law (UPL)). Proposed Model Rule 5.5 generally protects in-house counsel advising or representing their employers, but does not protect attorneys advising or representing individual clients under employers' programs. Thus, there is no clear protection for military defense and legal assistance attorneys who, while performing official duties, represent individuals but not their employing agency.

Furthermore, *state* National Guard attorneys do not receive clear protection because the draft language touches only federal law or state law of *the attorney's licensing state*. I recommend amending Model Rule 5.5 to clearly extend protection to *state* National Guard attorneys because many *state* National Guard attorneys are assigned to units outside of their licensing or residency states. They often perform unpaid official work for their clients across multiple state lines. Finally, *state* National Guard units may train away from their home station for periods typically ranging from two weeks to six months.

The National Guard operates as a state agency as frequently as it does a federal agency. Determining when National Guard attorneys are acting in their federal or in their state capacity is often a highly technical, perplexing effort involving an analysis of fiscal law, mixed statutory and regulatory issues, and principles of state control.

State National Guard lawyers' mandatory bar membership and good-standing requirements (based on federal and state statutes and regulations) vary by duty assignment, e.g.:

- Active Guard and Reserve (AGR) military attorneys serving in a Title 10 USC status are active duty military attorneys, and are required to be members of at least one bar, before they can work on federal issues.
- AGR military attorneys serving in a Title 32 USC status on full-time National Guard duty in each state (there is one AGR military attorney per state) are required to be members of the bar of the state in which they work.
- Other military attorneys who perform weekend drills in a Title 32 USC status or perform annual duty in a Title 10 USC status may or may not be licensed in the state in which they perform their duty. Some National Guard members live and practice law in one state but perform their military legal duties in other states.

Recommended Action. The final provisions of Model Rule 5.5 should be crystal clear and specifically reference customary exceptions for military and government lawyers, which unfortunately are rarely considered under state UPL laws and ethics regulations. The following recommendation replaces the two safe harbor provisions which the Army recommended on July 30, 2001, and should be classified with non-temporary, cross-jurisdictional situations controlled by Model Rule 5.5(d) (MJP November 2001 version).

Add a Third Safe Harbor to Model Rule 5.5(d):

(3) Federal Lawyers and State National Guard Lawyers. When a lawyer

(a) Acts officially on behalf of either

- (1) A federal agency or
- (1) A state National Guard agency; or

(b) When

- (1) A federal lawyer or
- (2) A state National Guard lawyer

(a) Provides premobilization, postmobilization, or legal assistance services (pursuant to 10 U.S.C. sec. 1044, et. seq., state law, or directives or regulations implementing

federal or state law); or

(a) Provides advice or practices in the fields of criminal justice, nonjudicial punishment, or other adverse administrative actions.

This matter is of vital interest to the Army and the Judge Advocate Legal Service, which includes state National Guard lawyers. Our multi-jurisdictional practice of law in the interest of national defense distinguishes us from our corporate or private civilian counterparts, and justifies the additional safe harbor protection.

Thank you for considering this request. Should the Committee require additional information, my point of contact is Colonel Garth K. Chandler, Chief, Army Standards of Conduct Office. He can be reached at (703) 588-6707/6715 or by email at Garth.Chandler@hqda.army.mil. He plans to attend the hearing on Friday, February 1, 2002, in Philadelphia.

Sincerely,

Original signed

Michael J. Marchand
Major General, U.S. Army
The Assistant Judge Advocate General