

REPORT

BACKGROUND

In the summer of 2005, Alabama, Louisiana and Mississippi were devastated by Hurricanes Katrina and Rita. The physical damage done in those jurisdictions was catastrophic but the storms also damaged and crippled their legal systems. In response, then American Bar Association President Michael S. Greco formed the ABA Task Force on Hurricane Katrina (the “Task Force”). One of the most significant early efforts of the Task Force was advocating the suspension of unlicensed practice of law rules by various states impacted by the hurricane so that lawyers from other jurisdictions could volunteer to provide pro bono legal services in the affected jurisdictions.¹

The Task Force soon recognized the need for a model rule that would allow out-of-state lawyers to provide pro bono legal services in an affected jurisdiction and lawyers in the affected jurisdiction whose legal practices had been disrupted by a major disaster to practice law on a temporary basis in an unaffected jurisdiction. Both the highest court of a jurisdiction affected by the major disaster and the highest courts of jurisdictions not affected by the disaster could implement the Rule on an emergency basis. In February 2006, the Task Force approached the ABA Coordinating Council for the Center for Professional Responsibility and requested assistance in drafting such a model rule. In light of its jurisdictional statement that includes the multijurisdictional practice of law and the unlicensed practice of law, the Standing Committee on Client Protection (the “Committee”) agreed to undertake the project.

With the assistance of Professor Stephen Gillers, Chair of the ABA Joint Committee on Lawyer Regulation and former member of the Commission on Multijurisdictional Practice, the Committee spent the next several months researching the issues and the law and preparing drafts of model rules. On September 6, 2006, the Committee circulated for comment to all ABA entities and other interested parties a proposed new Model Rule of Professional Conduct 5.8 (Provision of Legal Services Following Determination of Catastrophic Event) and a Model Court Rule with the same title. The ABA entities and other interested parties were requested to comment on the substance of the Model Rule/Model Court Rule and whether the topic should be addressed in a Model Rule of Professional Conduct or in a Model Court Rule.²

It was the consensus of the responding entities, including the Standing Committee on Ethics and Professional Responsibility, that the issues to be addressed were administrative matters involving the temporary practice of law and that they should be addressed in a Model Court Rule. The Standing Committee on Ethics and Professional Responsibility believes that the proposed Model Court Rule, if adopted, would effectively facilitate the provision of legal services in urgent

¹ *In the Wake of the Storm: The ABA Responds to Hurricane Katrina*. Report of the ABA Task Force on Hurricane Katrina. www.abanet.org/katrina

² The Committee received comments from numerous ABA entities including: the Standing Committees on Ethics and Professional Responsibility, Professional Discipline, Professionalism, Pro Bono and Public Service, Legal Aid and Indigent Defendants, Delivery of Legal Services, the Commissions on Interest on Lawyers’ Trust Accounts and Law and Aging, the Task Force on GATS Legal Services Negotiations, the National Organization of Bar Counsel and the Association of Corporate Counsel.

situations, such as the occurrence of natural disasters. The Ethics Committee also believes that because the creation of a mechanism for making legal services available is not an ethical, but essentially an administrative and operational concern of each state's highest court, it is appropriate that the subject be addressed by a Model Court Rule, rather than a Rule of Professional Conduct, and supports its adoption by the House of Delegates. The Ethics Committee agrees that proposed amended Comment [14] to Model Rule of Professional Conduct 5.5, which serves as an important cross-reference to any such rule of court, is a necessary and helpful addition to the Model Rules, and supports its adoption by the House of Delegates as well.

MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER

An emergency affecting the justice system, as a result of a natural or other major disaster, may for a sustained period of time interfere with the ability of lawyers admitted and practicing in the affected jurisdiction to continue to represent clients until the disaster has ended. A natural or other major disaster includes, for example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event caused by terrorists or acts of war. When this happens, lawyers from the affected jurisdiction may need to provide legal services to their clients, on a temporary basis, from an office outside their home jurisdiction. In addition, lawyers in an unaffected jurisdiction may be willing to serve residents of the affected jurisdiction who have unmet legal needs as a result of the disaster or whose legal needs temporarily are unmet because of disruption to the practices of local lawyers.

Lawyers from unaffected jurisdictions may offer to provide these legal services either by traveling to the affected jurisdiction or from their own offices or both, provided the legal services are provided on a pro bono basis through an authorized not-for-profit legal services organization or such other organizations specifically designated by the highest court of the affected jurisdiction.

Under the Model Court Rule, the highest court in the affected jurisdiction shall determine whether an emergency affecting the justice system as a result of a natural or other major disaster has occurred in the jurisdiction, or in a part of the jurisdiction, for purposes of triggering paragraph (b) of the Model Court Rule. The regulation of the practice of law by the judicial branch of government, which includes jurisdictional limits on legal practice, is a fundamental principle recently re-affirmed as policy by the American Bar Association.³ The court in making a determination whether an emergency affecting the justice system has occurred can take judicial notice of any Presidential proclamations or declarations by the governor or executive officer of an affected jurisdiction.

Paragraph (b) permits lawyers authorized to practice law in an unaffected jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, to provide pro bono legal services to residents of the affected jurisdiction following determination of an emergency affecting the justice system and the provision of legal services. Lawyers permitted to provide legal services pursuant to this Model

³ Report 201A, *Regulation of the Practice of Law by the Judiciary*, adopted August 12, 2002.

Court Rule must do so without fee or other compensation, or expectation thereof. Their service must be provided through an established not-for-profit organization that is authorized to provide legal services either in its own name or that provides representation of clients through employed or cooperating lawyers. The rules governing the not-for-profit organization will determine who should be considered an eligible client in light of the circumstances caused by the disaster.

Alternatively, the Court may instead designate other specific organizations through which these legal services may be rendered. Under paragraph (b), an emeritus lawyer from another United State jurisdiction may provide pro bono legal services on a temporary basis in this jurisdiction provided that the emeritus lawyer is authorized to provide pro bono legal services in that jurisdiction pursuant to that jurisdiction's emeritus or pro bono practice rule. Lawyers may also be authorized under paragraph (b) of this Rule to provide legal services on a temporary basis in an affected jurisdiction, or to provide legal services on a pro bono basis to the citizens of an affected jurisdiction who have been displaced to and are temporarily residing in an unaffected jurisdiction.

Lawyers authorized to practice law in an affected jurisdiction, as determined by the highest court of the affected jurisdiction, and whose practices are disrupted by a major disaster there, are authorized under paragraph (c) to provide legal services on a temporary basis in the jurisdiction adopting the Model Court Rule. Those legal services must arise out of and be reasonably related to the lawyer's practice of law in the affected jurisdiction. The Court in the affected jurisdiction shall determine when a major disaster has occurred in another jurisdiction but only after such a determination and the geographical scope of the disaster have been made by the highest court of that other jurisdiction. The authority to engage in the temporary practice of law in an unaffected jurisdiction pursuant to paragraph (c) shall extend only to those lawyers who principally practice in the area of a jurisdiction determined to have suffered an emergency affecting the justice system and the provision of legal services.

Emergency conditions created by major disasters end, and when they do, the authority created by the Model Court Rule also ends with appropriate notice to enable lawyers to plan and to complete pending legal matters. Under paragraph (d), the highest court in the affected jurisdiction determines when those conditions end only for purposes of the Model Court Rule. The authority granted under paragraph (b) shall end upon such determination except that lawyers assisting residents of the affected jurisdiction under paragraph (b) may continue to do so for such longer period as is reasonably necessary to complete the representation. The authority created by paragraph (c) will end 60 days, or as otherwise enacted in the Rule, after the highest court in an unaffected jurisdiction makes such a determination with regard to an affected jurisdiction. The parameters created by the Model Court Rule are intended to be flexible and the highest court in a jurisdiction has the discretion to extend the time period during which out-of-state lawyers may provide pro bono legal services in an affected jurisdiction or during which lawyers displaced by a disaster may practice law on a temporary basis in an unaffected jurisdiction.

Paragraphs (b) and (c) do not authorize lawyers to appear in the courts of the affected jurisdiction. Court appearances are subject to the *pro hac vice* admission rules of the particular court. The highest court may, in a determination made under paragraph (e)(2), include authorization for lawyers who provide legal services in the jurisdiction under paragraph (b) to

appear in all or designated courts of the jurisdiction without need for such *pro hac vice* admission. If such an authorization is included, any *pro hac vice* admission fees shall be waived. A lawyer who has appeared in the courts of an affected jurisdiction pursuant to paragraph (e) may continue to appear in any such matter notwithstanding a declaration under paragraph (d) that the conditions created by the major disaster have ended. Furthermore, withdrawal from a court appearance is subject to Rule 1.16 of the Rules of Professional Conduct.

AMENDMENT TO COMMENTARY OF RULE 5.5 OF THE *RULES OF PROFESSIONAL CONDUCT*

Following the occurrence of a major disaster, lawyers practicing law outside the affected jurisdiction will begin to research what legal services they may provide on a temporary basis to the citizens of the affected jurisdiction. In addition, not-for-profit legal organizations within the affected jurisdiction will begin to research what legal services out-of-state lawyers may provide in their jurisdiction on a temporary basis. At some point, the lawyers and not-for-profit organizations will consult the *Rules of Professional Conduct*. While Rule 5.5 of the *Rules of Professional Conduct* is titled “Unauthorized Practice of Law: Multijurisdictional Practice of Law,” Rule 5.5 does not directly address the provision of pro bono legal services by out-of-state lawyers in a jurisdiction affected by a major disaster nor does it address the temporary practice of law in an unaffected jurisdiction by displaced lawyers principally practicing in the affected jurisdiction. The *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster* does address these issues. Upon the suggestion of the Standing Committee on Ethics and Professional Responsibility, whose jurisdictional statement includes recommending to the ABA House of Delegates amendments to the *Rules of Professional Conduct*, the Committee recommends that Comment [14] to Rule 5.5 of the *Rules of Professional Conduct* be amended to include a cross-references to the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*.

CONCLUSION

Following Hurricanes Katrina and Rita, thousands of lawyers from across the United States were inspired to offer their legal expertise on a pro bono basis to the citizens of the affected jurisdictions. Unfortunately, in some instances, the delivery of those pro bono legal services was hampered by the existence of unlicensed practice of law statutes and rules. The Committee believes that the adoption of the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster* will allow lawyers to provide temporary pro bono legal services and that it will allow lawyers whose legal practices have been disrupted by major disasters to continue to practice law on a temporary basis in an unaffected jurisdiction. The Model Court Rule will facilitate the delivery of pro bono legal services while at the same time insuring the proper regulation of the lawyers providing those legal services in an affected jurisdiction and those displaced lawyers practicing law on a temporary basis in an unaffected jurisdiction

Janet Green Marbley, Chair
Standing Committee on Client Protection
February 2007