

# ABA Commission Reports On Multijurisdictional Practice

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**T**he ABA's Commission on Multijurisdictional Practice has issued its final recommendations for the control of multijurisdictional practice by lawyers. The Commission defines multijurisdictional practice ("MJP") as "the legal work of a lawyer in a jurisdiction in which the lawyer is not admitted to practice." The Commission's report will be submitted to the ABA's House of Delegates in August.

The Commission makes ten specific recommendations, the last of which is a general call to the ABA to continue its work in monitoring developments relating to MJP. The other nine recommendations are summarized in this review by me. The Commission's most significant recommendations: 1) retain the present system of lawyer regulation by the lawyer's state of admission; 2) liberalize the rules permitting temporary legal services in another state.

## **Recommendation 1.**

The Commission recommends that the ABA affirm its support for the principle of state regulation of the practice of law.

The Commission believes in the preservation of the present system under which the states' judicial branches regulate the practice of law and place jurisdictional limits on legal practice. Without empirical evidence showing how elimination of the current system would affect law practice, the Commission cannot recommend elimination of the existing jurisdictional limits on law practice.

The Commission recognizes that many lawyers advocate a system under which lawyers would be permitted to practice nationally. This could be accomplished in various ways. One way would be the adoption by each state of a uniform statute which would enable any US lawyer to practice in that state, both permanently and temporarily. Another would be a national compact among the states enabling a lawyer licensed in one state to practice in another without taking an additional bar exam, upon proof of good standing and good character. Still another - the "driver's license" model - would create a uniform national registration system for all lawyers, enabling a lawyer admitted in one state to open an office and practice in any other state.

Some lawyers reject a nation-wide system but advocate a loosening of restrictions to permit lawyers to practice on a temporary basis in a state in which they are not licensed "as long as they do not establish an office in that state and so long as they are in good standing in the states of admission."

In the present state of knowledge, the ABA should not recommend elimination of jurisdictional limits on law practice. Given the support for the present system by a large segment of the bar, a stronger case must be made for change before a new system can be endorsed.

## **Recommendation 2.**

ABA Model Rule 5.5 presently provides that a lawyer shall not practice law in a jurisdiction whose regulations would be violated by the practice, or assist a non-lawyer in the performance of any activity constituting the unauthorized practice of law ("UPL"). The Commission supports these principles.

But the Commission proposes the adoption of several new provisions in MR 5.5.

The effect of these new provisions is to recognize and define the temporary work which a lawyer may do in a state other than the lawyer's home state:

1. A lawyer who is not admitted in a jurisdiction shall not open an office in that jurisdiction, establish a "systematic and continuous presence" in the jurisdiction, or hold out or represent to the public that the lawyer is admitted to practice in that jurisdiction.
2. A lawyer admitted and in good standing in one state may provide legal services "on a temporary basis" in another state if those services:
  - a) are undertaken in association with a lawyer admitted in that state who actively participates in the matter; (or)
  - b) are in or "reasonably related to" a pending or potential proceeding in that or another state if the lawyer is authorized by law "or order," or reasonably expects to be so authorized, to appear in that proceeding; (or)
  - c) are in or reasonably related to a pending or potential arbitration, mediation or other ADR proceeding in that other state, if the services arise out of or are reasonably related to the lawyer's practice in the state of admission and are not services for which that other state requires admission *pro hac vice*; or
  - d) are not within b. and c. above, but arise out of or are reasonably related to the lawyer's practice in the state of admission.
3. A lawyer admitted and in good standing in one state may provide legal services in another state:
  - a) to the lawyer's employer "or its organization affiliates" if the other state does not require *pro hac vice* admission for those services; or
  - b) b.if the services in the other state are authorized by federal or other law.

### **Recommendation 3.**

ABA Model Rule 8.5 deals with issues of disciplinary authority and choice of law. At present, the Rule limits the right to discipline to those states in which a lawyer is admitted to practice. A lawyer admitted in two states may be disciplined by both, regardless of where the lawyer's conduct occurs. In deciding conflicts issues between the two states, the present Rule applies: 1) the law of the tribunal if the lawyer's conduct is in connection with a judicial proceeding;

2) for other conduct, the law of the state in which the lawyer principally practices, or, if the lawyer's conduct has "its predominant effect" in another state in which the lawyer is admitted, the rules of that state.

The Commission recommends amending MR 8.5 as follows:

1. A lawyer may be disciplined in a state in which the lawyer is admitted, regardless of where the conduct occurs. A lawyer is also subject to discipline by the authorities in a state in which the lawyer provides or offers to provide any legal services. A lawyer may be subject to more than one jurisdiction for the same conduct.
2. Choice of law issues shall be resolved as follows:
  - a) for conduct in connection with a "matter pending before a tribunal," the rules of the jurisdiction in which the tribunal sits shall apply, unless the rules of the tribunal provide otherwise;
  - b) b.for any other conduct, the rules of the jurisdiction in which the lawyer 's conduct occurred shall apply, but if the predominant effect of that conduct "is in a different jurisdiction," the rules of that jurisdiction shall apply.
3. A lawyer shall not be subject to discipline by any jurisdiction if his conduct conforms to the rules of a jurisdiction "in which the lawyer reasonably believes the predominant effect of the lawyer 's conduct will occur."

### **Recommendation 4.**

This recommendation would affect both Rule 6 and Rule 22 of the ABA's Model Rules of Lawyer Disciplinary Enforcement. (Note: these Rules are distinct and separate from the ABA's Model Rules of Professional Conduct.)

Rule 6 deals with jurisdiction by a state to impose discipline. The rule gives disciplinary authority to a court and/or board of a state over any lawyer who is, or was formerly, admitted to practice in the state.

The Commission's recommendation is that the Rule be amended to make it clear that discipline may be imposed by a jurisdiction not only upon lawyers admitted there but also lawyers not admitted in the jurisdiction but practicing law or rendering legal services there.

Rule 22 of the Model Rules of Lawyer Disciplinary Enforcement applies after a state has imposed discipline upon a lawyer. It requires a lawyer who has been disciplined in another state to notify

disciplinary counsel in the lawyer's state(s) of admission of the disciplinary action. It also requires disciplinary counsel to file a copy of the disciplinary order with the court or board. The court or board will then give the lawyer an opportunity to show that identical discipline is not warranted in the state of admission by reason of: grave injustice, a violation of due process or of public policy, or other specified reasons. The burden of proof is on the lawyer. If the court or board rejects the lawyer's proof, the disciplinary action in the first state is deemed conclusive.

The Commission recommends that Rule 22 be amended to make it clear that discipline in the "home" jurisdiction is to be imposed "based upon the record" in the jurisdiction which imposed the discipline. However, the "home state" may impose a different discipline from the "host state."

The Commission also recommends that the ABA renew its efforts to encourage all states to adopt the Model Rules of Lawyer Disciplinary Enforcement.

#### **Recommendation 5.**

The Commission recommends that the ABA encourage interstate discipline by funding its National Lawyer Regulatory Data Bank to automate the dissemination of reciprocal disciplinary information, and by:

1. promoting adoption by the state supreme courts of the Martindale Hubbell International Standard Lawyer Numbering System®;
2. encouraging the states to implement Recommendation 21.2 of the 1992 McKay report requiring all lawyers licensed by a jurisdiction to register annually and list all other jurisdictions in which they are licensed to practice, as well as report all changes in licensing status, such as new admissions, discipline imposed, resignations, etc.;
3. through its website, providing direct online reporting to the Regulatory Data Bank of public regulatory actions involving lawyers' licenses;
4. making available publicly on its website, selected information from the Data Bank, such as a lawyer's name, date of birth, identification number and regulatory actions involving the lawyer's license.

#### **Recommendation 6.**

The Commission recommends that the ABA adopt the proposed Model Rule on Pro Hac Vice Admission. Two Sections of the ABA have worked with the International Association of Defense Counsel (IADC) to develop the proposed Rule, which would unify all *pro hac vice* applications.

At present, courts and administrative agencies in all the states make their own provision for admitting lawyers from other states to appear as counsel *pro hac vice*, usually in conjunction with locally admitted counsel. The process does not allow the out-of-state lawyer to practice regularly in the jurisdiction.

Most *pro hac vice* applications are made directly to the court or agency involved and there is little or no general procedural structure to control or unify applications within a state or among the states.

The proposed Rule defines the role of in-state counsel in a *pro hac vice* application, creates a uniform application procedure (including standards for admission and revocation), imposes an application fee and subjects the applicant to regulation by the state's authorities.

An Appendix to the Rule sets forth those matters which the applicant must include in his application for *pro hac vice* admission.

**Recommendation 7.**

The Commission recommends that the ABA adopt the proposed Model Rule on Admission by Motion.

This proposed Model Rule is distinct and separate from the present ABA Model Rules of Professional Responsibility. The Rule would provide for expeditious admission upon motion in a second state of a lawyer admitted in the home state. Admission on motion is not an alternative to the multijurisdictional practice standards in proposed MR 5.5, because "no lawyer can realistically be admitted to every state bar, even on motion." The new motion rules will be helpful to those lawyers who want to relocate their practice or to practice regularly in more than one jurisdiction.

A lawyer-applicant would be eligible for admission on motion in a new state if the lawyer: were admitted to practice in any jurisdiction; held a JD or LLB degree from an ABA- accredited law school; had been primarily engaged in active practice for five of the seven years preceding the date of the application; submitted evidence of a passing score on the Multistate Professional Responsibility Examination (MPRE); established membership in good standing in all states of admission; were not currently subject to discipline or the object of a pending disciplinary matter in any other jurisdiction; demonstrated the character and fitness required for practice in the new jurisdiction; and designated the Clerk of the jurisdiction's highest court for service of process.

The Rule defines "active practice" to include the practice of private-client law, service with a government agency, teaching, service as judge or law clerk and employment as corporate counsel. An applicant who had failed the bar exam in the new jurisdiction within five years of the date of application would not be eligible for admission on motion.

**Recommendation 8.**

The Commission recommends that the ABA encourage the states to adopt the Model Rule for the Licensing of Legal Consultants.

A "legal consultant" is a foreign lawyer, i.e., "a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors of law...and are subject to effective regulation and discipline by a duly constituted professional body or public authority."

The Rule enables a foreign lawyer to be recognized as a licensed legal consultant and to render limited legal services, not including court appearances, real estate transactions, or the preparation of wills.

**Recommendation 9.**

The Commission recommends that the ABA adopt the proposed Model Rule for Temporary Practice by Foreign Lawyers.

This Rule would enable lawyers admitted and in good-standing in non-US jurisdictions to perform services "on a temporary basis" within the US, provided the services were undertaken in association with a lawyer admitted within the jurisdiction who participated actively in the matter, or in other limited circumstances.

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