

The ABA's Multiple Actions on Multijurisdictional Practice

BY ROY SIMON

For the legal ethics field, the Summer of 2002 was one of the most significant on record. The three weeks ending August 15, 2002 saw no less than six major developments. In late July, Congress passed and President Bush signed the landmark Sarbanes-Oxley Act to clamp down on corporate fraud, partly by imposing new whistle blowing obligations on lawyers who practice before the SEC. At the same time, the ABA's Presidential Task Force on Corporate Responsibility, appointed in March of this year to study issues arising out of events at Enron and elsewhere involving misleading financial statements and executive misconduct, issued a Preliminary Report recommending amendments to ABA Model Rules 1.2, 1.6, 1.13, 1.16 and 4.1, including an amendment to the confidentiality rule (Rule 1.6) that would *require* lawyers to disclose corporate misconduct when necessary to prevent felonies or other serious crimes, including violations of the federal securities laws.

In early August, the ABA Commission on Billable Hours issued a scathing report addressing the unintended negative consequences of the billable hour system, including adverse effects on pro bono, ethics, mentoring, and professional development. Soon afterwards, the ABA Section of Litigation issued a comprehensive set of Ethical Guidelines for Settlement Negotiations covering: (a) settlement negotiations generally, (b) issues relating to lawyers and their clients, and (c) issues relating to negotiations with opposing parties. At the ABA's August 2002 Annual Meeting, the House of Delegates amended Rule 7.2 of the ABA Model Rules of Professional Conduct to permit reciprocal referral arrangements between lawyers and nonlegal professionals. Finally, and perhaps most significant of all, the ABA House of Delegates adopted a sweeping series of measures designed to facilitate and regulate the multijurisdictional practice of law, commonly known as "MJP." This article focuses exclusively on the ABA's multi-faceted actions on MJP.

Background

In 1998, the California Supreme Court decided *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal.4th 119 (1998). Based on California's unauthorized practice statute, the decision denied legal fees to a New York law firm for all time spent physically in California advising a California client on California law while preparing to conduct a California arbitration. In *dicta*, the *Birbrower* case added that a lawyer could even engage in the unauthorized practice of law electronically (*e.g.*, by phone, fax, or e-mail) without being physically present in California. The decision sent shockwaves through the legal community, and in July 2000 the ABA established the Commission on Multijurisdictional Practice (the "MJP Commission") to study the ways in which the states regulate the legal work of lawyers in jurisdictions where the lawyers are not admitted to practice.

After soliciting public comments and holding public hearings around the country, the MJP Commission issued a Report containing nine specific recommendations. At the ABA's August 2002 Annual Meeting, the House of Delegates overwhelmingly approved all nine recommendations with little or no change. The

ABA's actions will have no effect unless adopted by the states, but given the enthusiastic support by delegations from nearly every state - including New York - many states seem likely to embrace the changes in the near future.

Amendments to ABA Model Rule 5.5

The epicenter of the ABA's action was an amendment to Rule 5.5 of the ABA Model Rules of Professional Conduct. The old Rule 5.5 - almost identical to New York's DR 3-101(B) provided simply that lawyer "shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction." The new version of Rule 5.5 keeps that language but adds four new paragraphs that narrow the prohibition and create numerous broad exceptions. A new Rule 5.5(b) prohibits out-of-state lawyers from engaging in only two specific types of conduct: (1) opening an office (or establishing some other systematic and continuous presence) to practice law; or (2) holding out to the public that the lawyer is admitted to practice law in the jurisdiction.

Apart from those two prohibitions, Rule 5.5 now permits most types of temporary law practice. Specifically, an out-of-state lawyer who is not disbarred or suspended from practice in any jurisdiction may provide legal services "on a temporary basis" in any of the following circumstances: (1) the lawyer associates local counsel who "actively participates in the matter"; (2) the legal services are "reasonably related to a pending or potential proceeding before a tribunal" if either the out-of-state lawyer or a person the lawyer is assisting is authorized to appear in the proceeding "or reasonably expects to be so authorized"; (3) the legal services are "reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding" if the services are "reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice" and are not services requiring pro hac vice admission; or (4) are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Finally, a lawyer in good standing in any United States jurisdiction may provide legal services in a jurisdiction where he is not licensed if the services are either (1) "provided to the lawyer's employer or its organizational affiliates" (as long as the services do not require pro hac vice admission); or (2) "authorized by federal or other law..." (*e.g.*, patent law or IRS regulations).

Expanded jurisdiction and reciprocal discipline

States that adopt the amended version of ABA Model Rule 5.5 will naturally want some assurance that out-of-state lawyers who harm clients in the host state can be held accountable for their actions. The ABA responded to this concern in two main ways. First, an amendment to ABA Model Rule 8.5 added the following powerful sentence: "A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction." Thus, out-of-state lawyers who take advantage of the new privileges accorded by amended Rule 5.5 must, in exchange, submit to discipline in the foreign jurisdiction if they engage in professional misconduct.

To make sure that disciplinary authorities have express jurisdiction to bring charges against out of-state lawyers, the ABA simultaneously amended Rule 6 ("Jurisdiction") of the ABA's Model Rules of Lawyer Disciplinary Enforcement. As amended, Rule 6 provides that "any lawyer not admitted in this jurisdiction

who practices law or renders or offers to render any legal services in this jurisdiction, is subject to the disciplinary jurisdiction of this court and the board."

Of course, before states go to the trouble of charging out-of-state lawyers with in-state disciplinary violations, they need some assurance that any discipline imposed will have some teeth. The problem with attempting to impose discipline on an out-of-state lawyer is that the state imposing discipline cannot take away the out-of-state lawyer's license - only the state that has granted the license can take it away. The state imposing discipline on an out-of-state lawyer could impose a fine, or could enjoin the out-of-state lawyer from practicing or offering to practice in the jurisdiction in the future, but up to now a foreign state could not strip an out-of-state lawyer of his home state license. That may now change. In addition to amending Rule 6 of the Model Rules of Lawyer Disciplinary Enforcement to give foreign states jurisdiction to discipline out-of-state lawyers who practice or offer to practice in the foreign state, the ABA also amended Rule 22 ("Reciprocal Discipline and Reciprocal Disability Inactive Status").

As amended, Rule 22 provides that the foreign jurisdiction's "final adjudication" that the lawyer was "guilty of misconduct" in the foreign jurisdiction "shall establish conclusively the misconduct" for purposes of a disciplinary proceeding in the lawyer's home state. Based on that finding of misconduct, the court in the lawyer's home state "shall impose the identical discipline" without a further hearing unless "the face of the record" of the foreign state's disciplinary proceedings "clearly" demonstrates one of three circumstances: (1) The foreign procedure was "so lacking in notice or opportunity to be heard" that it deprived the disciplined lawyer of due process; or (2) The "proof establishing the misconduct" was so weak that the home state court cannot accept it as a final conclusion (meaning that the home state will have to hold further hearings); or (3) the discipline meted out by the foreign jurisdiction would result in "grave injustice," or would offend "public policy" of the home state jurisdiction. The amended rule expressly states that "[t]he burden is on the party seeking different discipline in this jurisdiction to demonstrate that the imposition of the same discipline is not appropriate." If the disciplined lawyer fails to meet that burden, then the lawyer's home state "shall impose the identical discipline" without any further proceedings.

As I read amended Rule 22, it basically restates the "Full Faith and Credit Clause" of the United States Constitution in the context of disciplinary proceedings. (That clause, found in Article IV, §1, provides in part that "Full Faith and Credit shall be given in each State to the... judicial proceedings of every other state.") Thus, if a foreign state's highest court renders a "final adjudication" finding misconduct and imposing the sanction of disbarment on an out-of-state lawyer, then the home courts in those states that adopt amended Rule 22 must implement the disbarment order against the lawyer unless the face of the foreign state's record reveals one of the exceptional circumstances enumerated in Rule 22 (i.e., lack of due process, lack of evidence, a grave injustice, or a violation of the home state's public policy). Whether my reading is correct will not be known until (a) a foreign state "disbars" a lawyer who is not licensed there, and (b) the home state's disciplinary authorities petition the courts to carry out the disbarment order, and (c) the disciplined lawyer challenges (probably on due process grounds) the home state court's right to impose disbarment on the basis of the foreign state's record without taking any further testimony. Time will tell.

More uniform pro hac vice admission

The ABA also adopted a Model Rule on Pro Hac Vice admission, which is intended to bring uniformity to the disparate pro hac vice procedures now followed by the states. The lengthy new model rule governs admission both to courts and to administrative agencies. An out-of-state lawyer who applies for pro hac vice admission submits to the jurisdiction of the admitting court for "all conduct relating in any way to the proceeding" during the pendency of the application. Once the application is granted, the out-of-state lawyer submits to the court's jurisdiction both for all conduct within the state (whether or not related to the proceeding) and for all conduct outside the state "arising out of or relating to the application or the proceeding." Thus, an out-of-state lawyer who applies for or gains pro hac vice admission "may be disciplined in the same manner as an in-state lawyer." Perhaps most significantly - and in keeping with the expanded rights to temporary practice by out-of-state lawyers - the model pro hac vice rule authorizes a wide array of legal services that are not covered by existing pro hac vice procedures in most states.

For example, an out-of-state lawyer may: (1) render legal services "regarding or in aid of" any proceeding for which the lawyer is admitted (e.g., take depositions in Iowa for a case pending in New York); (2) travel to a state where she is not admitted to consult with a lawyer who is admitted in that state concerning a pending or potential proceeding involving the in-state lawyer's client; (3) consult with a person in another state about retaining the out-of-state lawyer for a pending or potential proceeding, no matter where the proceeding is (or will be) located; (4) render legal services in a foreign state in preparation for a potential proceeding to be filed in the foreign state or elsewhere, as long as the out-of-state lawyer reasonably believes he is eligible for admission pro hac vice where the proceeding is anticipated to be filed; (5) render legal services, while physically outside a foreign state, when requested by a client located within the foreign state regarding a potential or pending proceeding filed in any state; (6) render legal services "to prepare for and participate in an ADR procedure regardless of where the ADR procedure is expected to take or actually takes place." An overarching provision states that an out-of-state lawyer may undertake the enumerated services in connection with a potential proceeding in which the lawyer reasonably expects to be admitted pro hac vice, even if ultimately no proceeding is filed or if pro hac vice admission is denied.

Three separate provisions in the Model Rule on Pro Hac Vice Admission are designed to keep out-of-state lawyers from eating the lunch of in-state lawyers: (1) a "no solicitation" provision states that "[n]othing in this Rule authorizes out-of-state lawyers to solicit, advertise, or otherwise hold themselves out in publications as available to assist in litigation in this state"; (2) a "temporary practice" provision makes clear that the Model Rule authorizes out-of-state lawyers to practice in the foreign state "only on a temporary basis"; and (3) a court is expressly authorized to deny admission to an applicant who "has engaged in such frequent appearances as to constitute regular practice in this state."

Easier admission "on motion"

For lawyers who engage in transactional work (for which pro hac vice admission is not available), and for litigators who are appearing (or desire to appear) more frequently than the "temporary" limitation allows, and for lawyers who want to move from one state to another, the ABA has adopted a Model Rule for Admission by Motion, which provides that any applicant who meets eight specified requirements may be admitted to practice without taking the local bar exam. The eight requirements are that the lawyer seeking admission on motion must: (a) be admitted to practice law elsewhere in the United States or its

territories; (b) be a graduate of an ABA-approved law school; (c) "designate the Clerk of the jurisdiction's highest court for service of process"; (d) be in "good standing in all jurisdictions where admitted"; (e) not be "the subject of a pending disciplinary matter in any other jurisdiction"; (f) possess adequate "character and fitness"; and (g) have been "primarily engaged in the active practice of law" elsewhere in the United States or its territories "for five of the seven years immediately preceding" the application date.

The rule goes on to define "the active practice of law" to include activities performed after bar admission (never before bar admission) such as (1) representing clients; (2) serving as a lawyer with a local, state, or federal agency or with the military; (3) teaching law at an ABA-approved law school; (4) serving as a judge or judicial law clerk in any court of record; (5) serving as corporate counsel. However, the "active practice of law" does not include any work that "constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located." Moreover, any applicant who has failed the bar examination in the past five years in the state where he seeks admission on motion "shall not be eligible for admission on motion."

Greater rights for foreign lawyers

Finally, in a nod to increasing globalization, the ABA undertook two actions to facilitate limited or temporary law practice by lawyers admitted only in foreign countries. First, the ABA urged states that have not already done so to adopt the ABA's existing Model Rule for the Licensing of Legal Consultants, which allows foreign lawyers to advise on foreign law without passing a state's bar examination or obtaining full admission to the bar. (New York has already adopted a rule authorizing foreign legal consultants - see 22 N.Y.C.R.R. Part 521.)

Second, the ABA adopted a new Model Rule for the Licensing of Legal Consultants which permits the states to conform their already existing rule to the Model Rule. The rule identifies circumstances in which it is not the unauthorized practice of law for a lawyer who is admitted only in a foreign jurisdiction to provide legal services on a temporary basis for a client in the United States. This measure sparked some controversy, especially given the difficulties of bringing disciplinary charges against foreign lawyers who may be thousands of miles away, but the ABA adopted it partly to smooth the way for U.S. lawyers who want greater rights to open offices and practice temporarily overseas.

Conclusion

The ABA's thoughtful approach to multijurisdictional practice bears careful consideration in New York. If New York were to adopt all of the changes, our legal markets would of course be open to far more out-of-state and overseas lawyers than they are now. But if other states widely adopt the proposed changes - and the nearly unanimous support for the changes in the ABA House of Delegates suggests that they will adopt them - the changes will open vast markets for New York lawyers as well. In the end, given the high quality of law practice in New York, lawyers from the Empire State are likely to come out ahead.

Roy Simon is a Professor of Law at Hofstra University School of Law, where he teaches Lawyers' Ethics and serves as Director of Hofstra Institute for the Study of Legal Ethics. He is also the author of SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED, which is published annually by West. The 2002 edition is now available at www.westgroup.com.