
The U.S. MJP Situation and Other Recent Rule Changes

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Summary of Talk



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- **Background about U.S. Lawyers**
 - **The ABA Multijurisdictional Practice (MJP) Commission**
 - **The ABA Ethics 2000 Commission**
 - **Implementation Status of the Model Rules**
 - **Resources**
 - **A “Top 10” List of the Ethics Rule Changes**

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Lawyers are Licensed by Individual U.S. States

- In the U.S., one needs a law license to practice law (*i.e.* to give legal advice) or it is “UPL”
- Lawyers are licensed by the Supreme Court of a particular state(s)
- States (usually the state Supreme Court) adopt ethics & other lawyer regulatory rules
- Some federal regulation exists (*Sarbanes Oxley*)

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Does State Regulation Make Life More Difficult?

YES BUT...

- The federal system is part of the U.S. identity
- There are constitutional reasons why this situation would be difficult to change
- The ABA recently reaffirmed the principle of state judicial regulation of lawyers

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Chronology of ABA Activity

- **1908**: ABA “Canons of Legal Ethics”
- **1969**: ABA “Model Code”
 - Almost universally followed (49 states)
- **1983**: ABA “Model Rules”
 - 40 States adopted, but with wide variations
- **1986-1999**: The ALI’s Restatement Project
- **Ethics 2000**: revises the ABA Model Rules
 - *Feb. 2002*: ABA adopts most Ethics 2000 rules
 - *Aug. 2002*: ABA adopts MJR rules 5.5 & 8.5
 - *Aug. 2003*: post-Enron - Rules 1.6 and 1.13

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The ABA MJR Commission

- Was created in 2000 to study MJR issues and recommend solutions
- **Extensive Process**: 8 public hearings; many written comments; posted on website
- **Results**
 - Draft Report issued November 2001
 - Final report issued in May 2002
 - Amended final report adopted in August 2002 without objection

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Testimony from Clients' Perspectives

Clients have:

- A wide range of specialized legal needs
- Both global and multi-state needs



Don't want piecemeal representation

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Testimony from Lawyers' Perspectives

- Lawyers are engaged in unlicensed MJP
- Lawyers need MJP rules in order to provide competent representation
- Solos and all size firms engage in MJP
- Disciplinary authorities want to be able to hold MJP lawyers accountable

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So....what did the ABA MJP
Commission propose?

ABA MJP Commission Website
www.abanet.org/cpr/mjp-home.html

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Nine ABA MJP Recommendations

- | | |
|--|--|
| #1. Affirms state judicial regulation of lawyers | #5. Improves interstate disciplinary enforcement |
| #2. Adds UPL <i>safe harbors</i> to Model Rule 5.5 | #6. Adopts a <i>Model Pro Hac Vice Admission Rule</i> |
| #3. Amends Rule 8.5 to allow more discipline | #7. Adopts a <i>Model Rule on Admission by Motion</i> |
| #4. Revises the Model Rule re reciprocal discipline | |

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8-9: The Foreign Lawyer MJP Recommendations

- **Adopt the ABA Model Foreign Legal Consultant (FLC) Rule (Rec. 8)**
 - **Allows permanent practice**
 - **Includes scope of practice provisions**
 - **Allows partnership with local lawyers**
- **Adopt the ABA Model Rule for Temporary Practice by Foreign Lawyers (Rec. 9)**
 - **Covers temporary practice**
 - **A counterpart to the revisions to Rule 5.5**

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Some Important Points about these ABA Recommendations

- **The MJP Report was viewed as striking a balance in the “middle of the road”**
- **Some advocated more extreme change, but ultimately supported the ABA**
- **The ABA MJP Commission viewed its recommendations as a “package deal”**
- **Some recommendations provide the quid-pro-quo for other recommendations**

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Implementation Efforts

- ABA Joint Committee on Lawyer Regulation is helping implementation
- Committee chairs: DE Supreme Court Justice Randy Holland; now Prof. Steve Gillers
- Conference of Chief Justices has encouraged states to adopt uniform rules
- Committee webpage shows current status



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MJP State Adoption Status

- Many states have turned to Ethics 2000 first
- As of August 1, 2006:
 - 28 states had adopted Model Rule 5.5 changes
 - 26 states have an FLC rule
 - 4 states have adopted a *Rule for Temporary Practice by Foreign Lawyers*
- State supreme courts need to know that someone wants these rules

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State Adoption Status of Domestic MJP

- Many states have turned to Ethics 2000 first
- As of August 1, 2006:
 - 28 states adopted Model Rule 5.5 changes
 - Rule 5.5 changes are pending in 6 states
 - 18 states are still studying Rule 5.5
- Because the foreign lawyer MJP recommendations are not Model Rule amendments, it is easy for overlook them
- This has happened to other kinds of MJP

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Adoption Status of the ABA FLC Rule

- 26 states have an FLC rule, including:
 - 3 new FLC rules (PA, ID, TX)
 - 1 Revision of an existing FLC rule (GA)
- 1 New FLC rule is pending (VA)
- 3 states have said they won't revise their rule
- 17 states are still considering the issue (and 5 more may be considering the issue)
- 21 states did not include ABA MJP Rec. #8 in their reports
- 0 states have rejected the FLC rule concept

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Adoption Status of ABA MJP Rec. #9

- 4 states adopted a temporary practice rule for foreign lawyers, format differs (FL, GA, PA, NC*)
- 2 states have a rule pending (LA, VA)
- DC Opinion says its ok, but asks for a rule
- 19 states are still considering the issue (and 6 more may be considering the issue)
- 18 states did not include ABA MJP #9 in their reports
- 1 state considered the issue and decided not to recommend this type of rule (AZ)

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Points I Make When “Selling” the Foreign Lawyer MJP rules

- MJP is now global, as well as multistate
- Clients and lawyers need global MJP, just as they need interstate MJP
- Omitting Recs. 8 & 9 may hurt US clients
- It's better to have foreign lawyers here and regulated than here and unregulated
- Rec's provide a basis for action against foreign lawyers who exploit clients or act improperly
- Steps have begun to facilitate international reciprocal discipline

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What Does this all Mean?

- **MJP implementation is still taking place**

BUT....

- **It is easy for foreign MJP to fall through the cracks**
- **Advocates of these rules should contact our supreme courts and MJP Committees**

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The Ethics 2000 Commission

- **Created in 1997**
- **Chaired by Delaware Chief Justice Veasey**
- **Elaborate process (still on the Internet)**
 - **8 public hearings**
 - **25 committee meetings**
 - **Up to nine drafts of rules**
- **Extensive academic and lawyer participation**

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The Ethics 2000 Changes

- **Goal:**
 - Maximum review, but minimal revision
- **What Types of Changes Occurred?**
 - Significant policy changes
(*e.g., confidentiality*)
 - Changes that address new problems
(*e.g., the Internet*)
 - Changes to address drafting ambiguities (*e.g., the conflicts rule*)

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Ethics 2000 Implementation Efforts

- ABA Joint Committee on Lawyer Regulation is helping implementation
- As of August 8, 2006:
 - 27 states had revised their ethics rules
 - 15 states have issued committee reports
 - 8 states are reviewing their rules
- There is now more uniformity in format, but still variation in content

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Resources



- Ethics 2000 Changes & Reporters' Notes,
<http://www.abanet.org/cpr/ethics2k.html>
- MJP Commission Webpage,
<http://www.abanet.org/cpr/mjp/home.html>
- ABA Joint Committee Webpage,
http://www.abanet.org/cpr/jclr/jclr_home.html
- ABA 5th Annotated Model Rules (sold by the
ABA Center for Professional Responsibility)

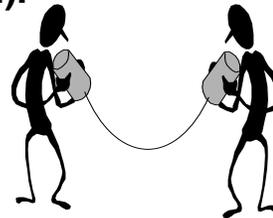
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Prof. Terry's "TOP 10" List of Changes to the ABA Model Rules of Professional Conduct

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Change Number 10

- **Solicitation**: The ABA Model Rules retain the prohibition on in-person solicitation.
- The comment to Model Rule 7.3 now prohibits real-time Internet chat.
- **BUT...** a lawyer may now solicit other lawyers (in-house counsel).



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Change Number 9

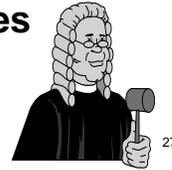
- **Errant Fax**: You have to tell the sender you got a misdirected fax; the new comment to Rule 4.4 does not say that there is anything wrong with using the information or reading it (it leaves this to substantive law).



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Change Number 8

- **Rule 4.2's “No Contact” Provision:** This rule now allows you to ask the court for permission to contact a represented person if you think it’s important.
- The comment now states that consent is not needed to talk to former employees.
- This rule was the subject of much comment by the Conference of Chief Justices and federal prosecutors.



Change 7: Client With Diminished Capacity



- The ABA revised Rule 1.14

- It provides better guidance regarding impaired clients

Change 6: Third-Party Neutrals

- Rule 2.4 sets forth the obligations of a lawyer who serves as an arbitrator or mediator
- It requires disclosure that a lawyer is not representing the parties to the proceeding
- The rule cross-references the conflicts of interest rules for judges (Rule 1.12)



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Change Number 5

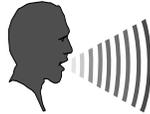
- Sex with Clients: Model Rule 1.8(j) is a new “[no] sex with clients” rule.
- The comment explains how to apply this rule to corporate clients.



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Change 4: Confidentiality - Take 1

- The rule was revised to allow disclosure to prevent death or serious bodily harm

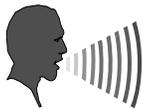


- A new exception allows an attorney to seek advice about the ethics rules
- In 2002, the ABA rejected an exception to allow disclosure of financial fraud

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Change 4: Confidentiality - Take 2

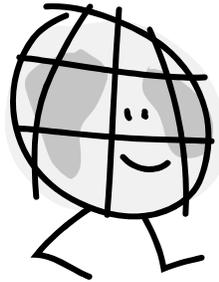
- After Enron and Sarbanes Oxley, the ABA revisited Rule 1.6's exceptions
- In 2003, the ABA approved a financial fraud exception to Rule 1.6
- The ABA also revised the corporate counsel rule (1.13) and required "reporting up the ladder"



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Change Number 3

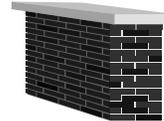
- **UPL:** If you are a national expert, you can now travel all over without having to get admitted. Rule 5.5 also has safe harbors for corporate counsel and for litigation-related activities.



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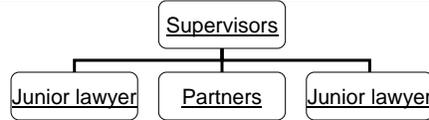
Change 2: Conflicts of Interest

- The structure is completely different (and more user-friendly) but the substance is similar
- Some conflicts are “nonconsentable”
- Other conflicts are permissible if:
 - The client provides informed consent; AND
 - the lawyer *reasonably* believes that he or she can provide competent and diligent representation
- Conflict waivers must be confirmed in writing
- Screens (Chinese walls) are not permitted



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Change 1: Duty to Supervise



- Rule 5.1 now **REQUIRES** partners and supervisors to have **SYSTEMS** in place to ensure ethical compliance
- Rule 5.1 also makes supervisor lawyers responsible for junior lawyers' ethics violations that a partner orders, ratifies or could have mitigated

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Other Provisions of Interest

- New Rule 1.18 applies confidentiality and conflicts rules to "Prospective Clients"
- There is a new "Terminology" section
- Fee agreements can still be oral but must list expenses & the scope of the contract
- The ABA rejected the concept of disciplining law firms (cf. NY, NJ)



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CONCLUSION

- **The Ethics 2000 recommendations were intended to update the ABA Model Rules**
- **The ABA MJP recommendations were intended to adapt the rules to 21st Century**
- **Most states have considered Ethics 2000 before the MJP recommendations**
- **Those who want foreign lawyer MJP rules should advise state supreme courts**
- **Change happens slowly in the U.S.**