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

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International Institute of Law
Association Chief Executives (IILACE) Annual Meeting
New York, Aug. 18, 2006

Summary of Talk

- 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
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)

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
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 MJP rules 5.5 & 8.5

The ABA MJP Commission

- Was created in 2000 to study MJP 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
Testimony from Clients’ Perspectives

Clients have:

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

Don’t want piecemeal representation

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
So… what did the ABA MJP Commission propose?

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

Nine ABA MJP Recommendations

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

### 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
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

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
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

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
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 it's 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)

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
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

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
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)*

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
Resources

- 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)

Prof. Terry’s “TOP 10” List of Changes to the ABA Model Rules of Professional Conduct
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).

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).
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).

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.
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

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”
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.

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
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.

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).
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.