

Multijurisdictional Practice in Virginia

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In August 2004, the Virginia State Bar formed a Multijurisdictional Practice Task Force to develop new rules and revise rules to better accommodate limited practice in Virginia by lawyers licensed only in other U.S. jurisdictions or in foreign countries. The impetus for this task force came from recommendations issued in 2002 in the final report of the American Bar Association Commission on Multijurisdictional Practice and recommendations from another ABA panel tracking the General Agreement on Trade in Services (GATS).

In its final report issued in 2002, the ABA Commission on Multijurisdictional Practice (ABA MJP Commission) made several recommendations. Among these were: revision of Rules 5.5 (unauthorized practice of law) and 8.5 (disciplinary authority) in accordance with revisions adopted by the ABA to Model Rules 5.5 and 8.5; adoption of a foreign legal consultant rule consistent with the ABA Model Foreign Legal Consultant Rule; adoption of a *pro hac vice* rule consistent with the ABA Model *Pro Hac Vice* Rule; and adoption of a temporary practice rule for foreign attorneys, again, consistent with the ABA Model Rule.

The recommended revisions to the Model Rules of Professional Conduct were prompted by concerns expressed by the ABA MJP Commission in its final report with regard to increasing multijurisdictional practice and the importance of creating consistent rules and enforcement throughout the country for this practice:

The predicate for this national study undertaken by the American Bar Association was the dynamic change and evolution in nature and scope of legal practice during the past century, facilitated by a transformation in com-

munications, transportation and technology. In the early twentieth century, states adopted "unauthorized practice of law" (UPL) provisions that apply equally to lawyers licensed in other states and to nonlawyers. These laws prohibit lawyers from engaging in the practice of law except in states in which they are licensed or otherwise authorized to practice law. UPL restrictions have long been qualified by *pro hac vice* provisions, which allow courts or administrative agencies to authorize an out-of-state lawyer to represent a client in a particular case before the tribunal. In recent years, some jurisdictions have adopted provisions authorizing out-of-state lawyers to perform other legal work in the jurisdiction.

Jurisdictional restrictions on law practice were not historically a matter of concern, because most clients' legal matters were confined to a single state and a lawyer's familiarity with that state's law was a qualification of particular importance. However, the wisdom of the application of UPL laws to licensed lawyers has been questioned repeatedly since the 1960s in light of the changing nature of clients' legal needs and the changing nature of law practice. Both the law and the transactions in which lawyers assist clients have increased in complexity, requiring a growing number of lawyers to concentrate in particular areas of practice rather than being generalists in state law. Often, the most significant qualification to render assistance in a legal matter is not knowledge of any given state's law, but knowledge of federal or international law or familiarity with a particular type of business or personal transaction or legal proceeding.

Additionally, modern transportation and communications technology have enabled clients to travel easily and transact business throughout the country and even internationally. Because of this globalization of business and finance, clients sometimes now need lawyers to assist them in transactions in multiple jurisdictions (state and national) or to advise them about multiple jurisdictions' laws.

Although client needs and legal practices have evolved, lawyer regulation has not yet responded effectively to that evolution. As the work of lawyers has become more varied, specialized and national in scope, it has become increasingly uncertain when a lawyer's work (other than as a trial lawyer in court) implicates the UPL law of a jurisdiction in which the lawyer is not licensed. Lawyers recognize that the geographic scope of a lawyer's practice must be adequate to enable the lawyer to serve the legal needs of clients in a national and global economy. They have expressed concern that if UPL restrictions are applied literally to United States lawyers who perform any legal work outside the jurisdictions in which they are admitted to practice, the laws will impede lawyers' ability to meet their clients' multistate and interstate legal needs efficiently and effectively.

Client Representation in the 21st Century, Report of the Commission on Multijurisdictional Practice, American Bar Association Center for Professional Responsibility, Aug. 12, 2002, p. 3.

The Model Foreign Legal Consultant Rule responded in part to the concern of foreign lawyers that, while American lawyers

enjoyed a broad right of practice in other countries (or sought such a right in countries that did not afford it), foreign lawyers generally could not engage in the practice of law in the United States, even if limited to advising on the law of their own countries, without attending an accredited American law school, sitting for the bar examination and becoming a full member of the bar. The ABA identified both a need for a streamlined admissions process for foreign lawyers seeking to establish a law practice providing limited legal services and a need for greater uniformity. Both the ABA and the United States Trade Representatives are asking the states to adopt foreign legal consultant (FLC) rules. Experience with these FLC rules in other states has revealed few if any disciplinary problems. Twenty-six jurisdictions currently have a foreign legal consultant rule.

General Agreement on Trade in Services

In May, 2003, an ABA GATS Task Force was appointed to track negotiations on a little-known international trade agreement that could have a major impact on how much lawyers from the United States and other countries may practice in foreign jurisdictions. The General Agreement on Trade in Services (GATS) is among a number of agreements that were reached in conjunction with the creation of the World Trade Organization in 1994. Legal services are among the trade issues covered by GATS. The agreement calls for member nations, including the United States, to develop rules that will make it possible for lawyers from one country to practice in other countries. The agreement currently requires "transparency"—a foreign lawyer must be able to determine to what extent a host member permits a foreign lawyer to practice, and any restrictions or qualifications that apply. Member nations must publish "national treatment" rules, which explain how a host member treats domestic lawyers differently from foreign lawyers.

Negotiations for the U.S. are coordinated by the Office of the U.S. Trade Representative (USTR). U.S. representa-

tives at GATS negotiations are basing their position with regard to regulating foreign lawyers on state ethics codes that already govern American lawyers. The USTR has indicated that the U.S. negotiators do not intend to displace state regulation of lawyers and have made efforts to consult with U.S. lawyers and to solicit input from U.S. jurisdictions regarding standards regulating foreign lawyers. Once these state standards form the basis of a trade agreement that the United States negotiates with other countries, however, the states will have less flexibility to change them. In August 2004, WTO members agreed to submit offers to the negotiations by May 2005. The U.S. plans to submit its offer, which will include a revised section on legal services, by this deadline. It is expected that member countries will continue to actively negotiate during the summer and fall of 2005.

Professor Laurel Terry is liaison from the ABA Center for Professional Responsibility to the ABA GATS task force. She wrote in the February 2005 issue of *The Bar Examiner*:

Logic also suggests that even without international MJP regulation, there already may be significant activity by foreign lawyers in the U.S. One of the goals of the GATS is to facilitate and regularize this type of international legal services work. International MJP obviously raises important regulatory issues and concerns for U.S. states. But the failure of U.S. states to consider international MJP issues also raises important questions and concerns, such as U.S. clients' possible loss of access to their U.S. lawyers overseas and the possibility that international MJP may occur in the U.S. in

an unregulated, rather than a regulated context.

The Work of the Virginia State Bar Multijurisdictional Task Force

The VSB MJP Task Force has carefully considered the recommendations of the ABA MJP Commission and the ABA GATS Task Force. In addition, representatives from the VSB Task Force and officers of the Virginia State Bar met in Atlanta in August 2004 to discuss these recommendations with leaders from other state bars, leaders of the European Union Bar Association, representatives of International Bar Association, the ABA GATS Task Force and the ABA International Law Section. In November 2004, many of these same representatives met again in Washington D.C. to have a dialogue with representatives of the USTR, including Chris Melly, the chief U.S. negotiator on legal services. The VSB MJP Task Force is making the revisions it considers necessary to existing rules, as well as developing new rules to accommodate these recommendations. Since August 2004, the task force has created a Foreign Legal Consultant Rule, which was approved by the Virginia State Bar Council in February 2005 and which is now pending with the Supreme Court of Virginia for review and approval. The task force has drafted revisions to Virginia Rules of Professional Conduct 5.5 and 8.5 and an entirely new *pro hac vice* rule. The proposed revisions to Rules 5.5 and 8.5 will likely be presented to Bar Council for approval in October 2005 or February 2006. The *pro hac vice* rule is still under revision and review.

The proposed FLC Rule regulates non-U.S. attorneys who seek to establish a system-

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atic and continuous foreign consultancy practice in Virginia. Rule 5.5 regulates temporary practice by both non-U.S. and U.S. lawyers not admitted in Virginia. Rule 8.5 creates disciplinary authority over both non-U.S. and U.S. attorneys not admitted in Virginia and choice of law provisions. Though not identical, the proposed rules are similar to and consistent with the ABA recommendations and recommendations from the U.S. Trade Representative.

The Proposed Foreign Legal Consultant Rule

The Foreign Legal Consultant Rule allows Virginia clients access to foreign law expertise with accountability; foreign legal consultants (FLCs) will be subject to Virginia's ethics rules and the Virginia State Bar's disciplinary system. Under this rule, the FLC's practice will be limited to the law of his/her admitting country, other foreign countries where the FLC has expertise and public and private international law. The FLC cannot appear as counsel for or prepare pleadings for another before a Virginia court, cannot prepare legal instruments effecting transfer of real estate in the U.S., cannot prepare will or trust instruments or any instrument relating to administration of a decedent's estate in the U.S., cannot prepare any legal instrument relating to marital or parental relations in the U.S. or custody or care of children of a U.S. resident, cannot hold out as being a member of the Virginia State Bar and cannot render advice on the law of Virginia, the District of Columbia, or any other state or territory of the U.S. without association of a licensed lawyer duly qualified to render such advice (other than by virtue of a FLC rule admission).

The FLC can be a member, partner or shareholder in a Virginia law firm. He/she must have a Virginia office and provide to the Virginia State Bar a Virginia address of record for service of disciplinary process.

Temporary Practice by a Foreign Lawyer Under the Proposed Revisions to Rule 5.5

Rule 5.5, as revised, is patterned after ABA Model Rule 5.5. It regulates unauthorized

practice of law in Virginia by non-Virginia licensed attorneys, both those from other U.S. jurisdictions and those licensed in foreign countries. In contrast, ABA Model Rule 5.5 does not cover attorneys licensed in foreign countries. Instead, the ABA has a separate model rule addressing temporary practice in the U.S. by non-U.S. attorneys. The ABA Model rules are similar, but not identical, to Virginia's proposed Rule 5.5. Under current law, unauthorized practice of law by attorneys or non-attorneys is regulated and monitored by the Virginia State Bar's Standing Committee on the Unauthorized Practice of Law (the UPL Committee) and governed by Virginia's Unauthorized Practice of Law Rules, the Definition of the Practice of Law in Virginia, and Part 6, § I (C), Rules of Supreme Court of Virginia. If adopted, proposed Rule 5.5 would make practice by non-Virginia licensed lawyers, other than as authorized by the rule, a disciplinary matter—Part 6, § I (C), Rules of Supreme Court of Virginia would be eliminated and the UPL Committee would deal only with unauthorized practice of law by non-attorneys.

The scope of practice allowed under proposed Rule 5.5 would be on a "temporary and occasional basis" only (similar to what is currently allowed under Part 6, § I (C), Rules of Supreme Court of Virginia) and: in association with a licensed Virginia lawyer who actively participates in the matter; (2) services related to a pending or potential proceeding in Virginia or another jurisdiction if the lawyer is authorized to appear or expects to be so authorized; (3) services related to mediation or arbitration in Virginia or another jurisdiction if such services are related to the lawyer's practice in his/her licensing jurisdiction and do not require *pro hac vice* admission; or (4) services related to representation of a client in the foreign lawyer's licensing jurisdiction or which are governed by international law or law of a non-U.S. jurisdiction.

The proposed rule prohibits a lawyer from establishing an office or other systematic presence in Virginia except as authorized by other Rules of Professional Conduct or other law. The proposed rule retains the long-standing restrictions regarding the

employment of a lawyer whose license has been suspended or revoked.

Disciplinary Authority and Choice of Law Under Proposed Revisions to Rule 8.5

Proposed Rule 8.5 addresses disciplinary authority and choice of law in disciplinary cases and provides enforcement authority for Rule 5.5. It expands the Virginia State Bar's disciplinary authority to include any lawyer who provides or holds out to provide legal services in Virginia, regardless of where the lawyer is licensed. Under this rule a lawyer not admitted in Virginia, who provides or holds out to provide legal services in Virginia, shall consent to appointment of the Secretary of the Commonwealth as his/her agent for disciplinary service of process. Under proposed Rule 8.5, the choice of law to be applied in a disciplinary matter will be: (1) the rules of the court, agency or tribunal if the conduct in question occurred in connection with a matter before such court, agency or tribunal; (2) for any other conduct, the rules of the jurisdiction where conduct occurred; or (3) the Virginia Rules of Professional Conduct, if the lawyer provides or holds out to provide legal services in Virginia. The ABA Model Rule provides for a choice of law where the conduct had its "predominant effect;" however, the task force chose not to include this in the Virginia rule revision because it believed that where the conduct occurred provided a brighter line for enforcement than the "predominant effect" test.

Nine states have adopted ABA Model Rules 5.5 and 8.5, in whole or in part, and fifteen others have endorsed and submitted proposed revisions consistent with ABA recommendations to their highest courts.

Proposed Revisions to Rule 1A:4 Regarding *Pro Hac Vice* Practice

Revisions to Virginia's *Pro Hac Vice* Rule (Rule 1A:4, Rules of the Virginia Supreme Court) are currently under consideration by the task force. Proposed revisions to the rule seek to clarify the procedure for admittance *pro hac vice* of non-Virginia

lawyers. Included in these proposed revisions is a recommendation that a limit be placed on the number of times an attorney, licensed in another U.S. jurisdiction, can appear *pro hac vice* in Virginia courts (the current recommendation is five cases within the year preceding current application). It is envisioned that the Office of the Executive Secretary of the Supreme Court of Virginia, in cooperation with the clerks of the trial courts of the commonwealth, would maintain a central repository of information about *pro hac vice* admissions and make the information available electronically to trial judges who will be ruling on motions for *pro hac vice* admission. Also, there is a recommendation to impose a fee for each *pro hac vice* application. There is ongoing discussion about the use to which the funds generated by the fees would be put. The proposed revisions would require a written motion for admission *pro hac vice* and would set out specific admission standards. The proposed rule would not permit foreign country lawyers to appear *pro hac vice*.

Conclusion

The task force believes adoption of these new rules and proposed revisions to existing rules will address the recommendations of the ABA Task Force, as well as respond to the exigencies of the U.S. Trade Representative for proposals to GATS. In addition, the proposed rules and revisions are necessary, as a practical matter, to keep up with reality that the practice of law has become globalized and multijurisdictional. ☞