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Comments of a Commissioner

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These comments are solely the views of Peter D. Ehrenhaft, one of the twelve members of the ABA Commission on Multijurisdictional Practice. They are not the official views of the Commission and, indeed, may be modified by the presenter based on the further information the Commission is now gathering from interested parties. These comments are intended to stimulate thought and discussion of the issues and to encourage all sectors of the profession to submit their views to the Commission.

The final deadline for the submission of written materials for the Commission's consideration in the preparation of its Initial Draft Report and Recommendations was June 15, 2001. The draft will be circulated for comments, hopefully by November 2001, and additional materials will then be received. However, submissions received before the Draft is prepared will probably be the most helpful.

I. What is the MJP Commission?

A. Appointed by the President of the ABA in the fall of 2000 and given now two years in which to prepare a Report and Recommendations for the consideration of the House of Delegates at the 2002 Annual Meeting. Members include representatives of ABA Sections, state bars, academe, transactions lawyers, and litigators.

B. We are holding "hearings" and "roundtables" around the United States to obtain input from all segments of the profession. All lawyers are urged to provide the Commission with their points of view on the issues.

C. The impetus for the creation of the Commission came from the increasing realization that:

—Existing rules governing our profession are not being observed by many (perhaps most) lawyers, in part because they are unfamiliar with the rules and because the rules seem to be out

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of step with modern communications and travel technology and the needs and desires of both our clients and our members;

—It is unseemly for lawyers, whose task it is to advise clients how to obey the law, not to comply with the laws that apply to their own profession. But many of those rules are based on a guild mentality that seeks to restrict access to the practice to those who have become masters by complying with various requirements that, objectively viewed, have little function other than to shield existing members of the guild from competition. Our rules must be consistent with the liberal views of our free enterprise economy;

—The concurrent Ethics 2000 review of all of the rules requires a more careful examination of the bases on which, in an Internet Age, we hinder the ability, first, of clients to select counsel wherever that counsel may be located , and, second, of lawyers to seek and provide services in jurisdictions other than the one or more in which they are formally admitted;

—Certain core values of our profession must be preserved. Above all, these include the requirement that whoever offers legal advice must be competent to provide it and that in providing legal services a lawyer owes the client the loyalty—no conflicts of interest—and confidentiality—the attorney-client privilege—that are the hallmarks of our profession;

—Other aspects of lawyer qualification and mobility must be examined, such as Continuing Legal Education requirements, pro bono obligations, client security funds, malpractice insurance.

—Account must also be taken on the views of a number of state courts that a lawyer not admitted to practice in a jurisdiction may be prevented from using the courts of the state to collect a fee for the services he or she provided and which were accepted by the in-state client.

II. The Commission's methodology

A. At the present time, we are simply gathering information and views of all sides. Not surprisingly, many different approaches have been suggested.

B. The most fundamental question is whether the Commission ought to take a top down or bottom up approach.

The former is based on the view that access to the legal marketplace should be as free as possible for the benefit of both clients and lawyers. If we adopt limits on access, each limit should be transparent and necessary—no more restrictive than objectively needed to achieve a valid state interest. The requirement that anyone wishing to be a lawyer must graduate from a law school may be such limit. But must it be an ABA-accredited law school? Must it require three years of study? Another limit may be passing a bar exam. But is that any bar

exam, regardless of content? Are requirements that persons once admitted must complete certain amounts of CLE necessary? If so, how can some of the courses far afield from a lawyer's actual practice qualify? In any event, the top down approach is the one that the U.S. Trade Representative favors in seeking access to foreign markets for U.S. lawyers. Should we adopt the same principle to a District of Columbia lawyer wishing to offer services in Virginia as we ask the Hungarians to adopt for U.S. lawyers hoping to open an office in Budapest?

The latter is based on the view that access to the profession is limited to qualified individuals who have passed certain requirements within the state that admit them to practice. If a person who is a lawyer in another state—or country—wishes to practice law in that state, he must pass the same qualifications unless some safe harbors have been built on this platform that will shelter the outsider. The Ethics 2000 project in Rule 5.5 adopts this approach. We, however, have heard substantial criticism of it because the "safe harbors" are too small or ambiguous. The main vice of this approach is that it is not transparent and places the burden of justifying a harbor on the person seeking it.

C. The principal issues that appear to be at the heart of the matter include:

Should, and if so how may, a state regulate the presence within its borders of a lawyer from another who enters solely for short periods of counseling or negotiation, or to gather evidence for a court case in that state or elsewhere, or to appear as a trial counsel in a court, administrative agency, or arbitration preceeding? Does the in-state residence or office of the client being served provide an adequate basis for requiring registration or local admission or pro hac vice procedures? When does transient entry become presence that might objectively justify registration or other burdens?

Can transient access be based on physical presence only or can or should it also cover provision of in-state legal services from out of state provided by e-mail, telephone, or plain old letter? In that context consider that we heard that Hungary, for example, imposes a VAT of seventeen percent on legal services provided in Budapest by a U.S. lawyer working there. Can this properly be avoided by sending the documents to the Hungarian client by e-mail from London or New York? If we include virtual presence as the equivalent of physical presence, can it be monitored?

In the international arena, it seems that most U.S. lawyers who enter foreign countries to provide transient services for pay in those countries are violating the tourist or business visas under which they enter. Similarly, foreign lawyers entering the United States for a two-week negotiation on behalf of—and paid here by—a U.S. client may be violating the U.S. visas that permitted entry. How can these rules be rationalized?

How to avoid burdening practitioners—particularly those in areas bordering other states with larger cities on the other side, for example, New Jersey lawyers in Camden or Newark faced with the firms of Philadelphia or New York—with local CLE or pro bono work that the visitors ignore?

Is competence the main—indeed, sufficient—criterion on which legal services are to be determined if the principal goal of lawyer regulation is the protection of the public? We have adopted that idea for drivers' licenses, the issuance of which is probably as variable as bar admission. A license issued by one state is accepted in every other for transitory use of the other state's roads—arguably much more dangerous to the local population than whatever a lawyer could do in giving legal advice. If the transient takes up residence in another state, he or she may obtain a local driver's license without re-examination. A new resident failing to obtain a new license within a prescribed time—usually six months—must start from ground zero and pass local road tests.

In-house counsel present another difficult issue. May they practice everywhere because their presumably single client knows that those lawyers are not admitted in each state but assumes that risk? Is that a fair assumption? Similar issues affect federal law practitioners specializing in, for example, federal patent or trademark law, federal government contracts, international trade, and tax.

If each bar in a jurisdiction may take action against a lawyer who provides incompetent legal advice to a resident of that state, defrauds a resident, or misuses client funds, how can it assert that power over the lawyer who only entered on a virtual basis or who was present but is now gone? Does the jurisdiction in which the lawyer is admitted have an obligation or right to take action based on misconduct in another state? Is that idea practical in light of the resources available for discipline of lawyers?

III. The present situation in the United States

A. Because most participants here are more or less familiar with the U.S. system, it is left to last and will only briefly be summarized.

B. The most fundamental points about the U.S. system of lawyer regulation are:

The admission to practice almost any profession in the United States is a matter of state law. The federal government has not intervened and is unlikely to so do. Even federal courts rely on admission to the bar of the states in which they sit in permitting counsel to appear before them. The present attitude of the U.S. Supreme Court regarding the sovereignty of the States even puts into question the

continued viability of *Missouri v. Holland*,[1] under which the federal government's treaty-making powers were held to support federal regulation of an activity otherwise a state domain. Thus, in the current GATS negotiations, the ability of the USTR to assure other WTO members of access to the market for legal services in the United States is in doubt.

The admission of lawyers to practice has historically been a function of courts in which they both admitted lawyers to plead before them and disciplined lawyers who violated ethical and other rules of conduct. The courts continue to be the principal agencies in the states that adopt the laws applicable to admission to practice. This creates two problems in the current world. First, the courts are separate branches of government independent of the legislature or executive. Thus, statutes adopted by a legislature or regulations issued by the executive may not in some states override the rules the courts adopt within their separate sphere of authority. Second, the focus on the qualification of lawyers who appear in court is much too narrow in today's world in which a large majority of the practicing lawyers never appear in any court. Indeed, it is one of the functions of a good transactions lawyer to assure his or her client that the client can avoid court proceedings.

C. Most states admit lawyers to practice in the state if:

—The applicant has graduated from a law school. Many states require that that school be accredited by the ABA. In fact, the ABA was founded to undertake this accreditation function;

—The applicant passes a bar exam that often includes matters of state law and procedure that the applicant will not have learned in law school and which have no bearing on his or her future work. Therefore, special preparatory cram courses are offered and taken by most applicants; and

—The applicant is of good moral character.

The U.S. Supreme Court has barred any citizenship test for admission to the bar and, thus, many foreign lawyers, sufficiently fluent in English, take and pass U.S. bar exams and are admitted. Any requirement that an applicant or practicing lawyer maintain an office within the state in which he or she is admitted is also questionable. Most states excuse members of the bar from paying dues to the local bar if they are not resident.

D. Because of the historic mobility of the U.S. population, states have generally adopted rules that enable a lawyer admitted in one state to be admitted in another without re-examination after the lawyer has been in practice some period of time—usually five years. The procedure of waiver in to the bar of another state is, however, impeded by states that deny such waivers to members of a bar of a another state that does

1. Missouri v. Holland, 252 U.S. 416 (1920).

not require graduation from an ABA-accredited law school. This rule may prevent a member of the California bar, after 20 years of practice and with a national reputation for expertise in a subject, from being admitted in Texas. A further aspect of this rule is that California imposes a reciprocity requirement so that a member of the Texas bar is denied admission in California only because a California lawyer cannot waive in to Texas.

E. Lawyers admitted to practice in a state may be required to participate in Continuing Legal Education (CLE) for a specified number of hours each year, often including a specific component of legal ethics. These requirements, however, are haphazard in their scope and may be met by attending CLE programs wholly outside the state of admission and the areas of the lawyer's actual practice.

F. State rules also impose other obligations on members of the bar, including:

—Accepting pro bono assignments to assist litigants without the funds to retain counsel. This is a particularly complex issue because many lawyers are not competent to provide the type of assistance most needed—in landlord-tenant disputes, abusive behavior towards spouses and children, welfare entitlement, or criminal defense.

—Maintaining trust funds for clients and participating in state-wide pools to compensate litigants who were defrauded by their lawyers.

G. All states have adopted rules regarding the unauthorized practice of law (UPL). These rules prohibit any person from "holding out" to the public that he or she is a "lawyer" or offering "legal services" unless that individual is then a member of good standing in the local bar. Note that the rule does not relate to competence to provide the service; it is solely related to admission. It is a separate ethical rule that constrains all lawyers to offer services only in matters on which they are competent. Thus, a member of the New York bar may not be competent to provide advice on the New York probate law while he or she is practicing in New York, but may be competent to advise on the competition law of the European Union without ever having been in Brussels. Under UPL rules, a lawyer may engage in any legal practice not prohibited, including advice on the law of other countries or international bodies. Moreover, the lawyer may be employed by, employ, or become a partner of any lawyer, including a lawyer from another country. Only the District of Columbia, however, allows members of its bar to become partners with non-lawyers—for example in multi-disciplinary practice with accountants.

H. Virtually no state—other than Michigan—has specific rules regarding transient services by a lawyer admitted elsewhere, or the application of its rules to virtual presence in the state through electronic or mail delivery of legal services. Some recent decisions of state courts,

however, have held that a lawyer not admitted locally may be prevented from using the local courts to recover fees for the services he or she provided to a local client even if the client was aware of the fact that the lawyer was not locally admitted and accepted the services rendered.[2]

I. The issue of transient services is particularly acute in the international context, as many U.S. lawyers travel to foreign countries to advise both U.S. and foreign clients about transactions and dispute resolution issues to which a number of legal regimes may apply. Entry into those countries is usually pursuant to tourist or business visas that prohibit the visitor from engaging in work for pay. The same is true when foreign lawyers enter the United States with tourist or "business" visas.

J. An important issue relates to the ability of a state to assert disciplinary or compensatory jurisdiction over a lawyer in another state or country who does not physically enter the state but solicits and performs services by e-mail or telephone. Can lawyers thereby avoid all local obligations to participate in CLE or perform pro bono services to their competitive advantage over the local lawyers who must comply? How many different obligations of this type can an individual lawyer be expected to assume, particularly as work may be concentrated in one jurisdiction in one year and then in a wholly different one the following? Are state long arm statutes applicable to out-of-state sellers of goods or services who purposefully avail themselves of the right to serve a client in the jurisdiction a sufficient protection of the local resident?

K. Slightly less than one-half of U.S. jurisdictions have adopted a foreign legal consultant (FLC) rule allowing lawyers from other countries to open offices within the state or to become employees or partners of local lawyers. These rules are modeled on the "waive in" rules applied to lawyers from other states and permit practice without examination. They are, however, often flawed by small but inappropriate limitations, the most usual of which allow the FLC to practice only the law "of" the lawyer's "home" jurisdiction, and require that the pre-admission practice have been performed "in" that jurisdiction. FLCs are also prevented from appearing in local courts or drafting instruments to be recorded in the local jurisdiction. As a result, while there are perhaps 500 FLCs who have qualified as such in New York, there are probably fewer than that number in the remainder of the United States. As so many foreign lawyers are sufficiently fluent in English to take and pass a U.S. bar exam, most follow that route to establish their right to practice in the United States—and then have no limits on the scope of their work other than the usual constraints applied to all lawyers in this country. The issue is of importance to U.S.

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2. *See* Birbrower, Montalbano, Condone Frank, P.C. v. Superior Court of Santa Clara County, 949 P.2d 1 (Cal. 1998).

lawyers seeking to establish offices in foreign countries, as those countries often ask what reciprocal rights are available for their own nationals even if few, if any, would actually come to the United States to open an office here. U.S. lawyers are, generally, not sufficiently fluent in foreign languages to enable them to take a local bar exam. Moreover, for the types of work in which U.S. lawyers abroad are engaged, knowledge of the local language is often not necessary; English has become the de facto language of most international transactions, particularly those touching the United States. A contract between Italian and Japanese businesses is also likely to be drawn in English as the one language common to both parties.

L. Clearly a massive overhaul of the existing U.S. rules is required. How extensive the changes will be and how quickly they can be implemented are large question marks. It will be difficult to persuade state bar organizations to change ways that have served well to create the world's largest and, some argue, most effective, system of legal service in the world.