

# **FINAL REPORT**

State Bar of Georgia  
Committee on Multijurisdictional Practice  
January, 2003

## I. Introduction

In 2001, the State Bar of Georgia created its Committee on Multijurisdictional Practice and gave it the charge to “study the issue of multijurisdictional practices and report any recommendations to the Executive Committee and Board of Governors.”<sup>1</sup> Numerous ethical issues arise when lawyers engage in activities that touch more than one state. The Committee’s efforts, like those of other state bar associations, the American Bar Association and other groups, are intended to bring into focus the interstate and international realities of practicing law today and to suggest how, if at all, the Georgia Rules of Professional Conduct and other regulations that govern the bar need to change to adapt to those realities.

The practice of law in the twenty-first century frequently takes Georgia lawyers across state lines. Lawyers with lawsuits pending in Columbus take depositions in Alabama. Lawyers with a client in Clayton may find that the client needs a lawsuit filed in North Carolina. Those lawyers may need to do some investigating and some consultation in North Carolina before filing. A transaction may take other lawyers from Atlanta to New York, where they negotiate the sale of property in Georgia or consummate the acquisition of goods in New York for their Georgia client. An Atlanta-based tax specialist may be contacted by a prospective client from California. In-house counsel residing in Georgia may find himself traveling to, or at least conversing with, other employees who need legal advice in many far-flung jurisdictions.

Literally dozens of law firms in Georgia have branch offices in other states which are populated

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<sup>1</sup>The current members of the Committee are co-chairs Dwight J. Davis and Christopher A. Townley, members Raymond G. Chadwick Jr., John Aubrey Chandler, Roger J. Dodd, Charles J. Driebe, Paula J. Frederick, Benjamin M. Garland, George E. Hibbs, Linda A. Klein, Earle F. Lasseter, Patrick E. Longan, Edward Jerome Tarver, and Holle Weiss-Friedman. The Reporter for the Committee is Patrick E. Longan, the Executive Committee Liaison is N. Harvey Weitz, and the Staff Liaison is State Bar General Counsel William P. Smith III.

by lawyers from that state. The U.S. economy is a national (and indeed an international) economy, and it should come as no surprise that the practice of law can cross state boundaries. Yet, of course, lawyers are licensed by individual states and are bound not to “practice law” in states where they are not licensed.<sup>2</sup> Indeed, Georgia lawyers are currently prohibited from forming partnerships with “non-lawyers,” a term which could include licensed lawyers from other states who reside in other states. The tension between the interstate scope of many lawyers’ practices and the state-by-state regulation of their activities is what underlies the attention in recent years to the question of “multijurisdictional practice.”

The profession seemed to have reached an uneasy compromise between the nature of modern law practice and the state-by-state limits that are vestiges of an earlier time. Lawyers came to believe that their interstate activities were no problem as long as they did not set up an office in another state or hold themselves out as able to practice in another state. Litigators realized that they needed to be admitted pro hac vice in order to appear in a court in another state, but they thought nothing of doing investigations and discovery in other states. Transactional lawyers lost no sleep over assisting with interstate business deals, in person or otherwise. In-house counsel came to believe that they could advise their employer-client wherever their advice was needed. Lawyers perceived no threat of discipline or other sanctions

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<sup>2</sup>See Georgia Rule of Professional Conduct 5.5 (“A lawyer shall not...practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction....”). See also OCGA 15-19-51 (forbidding the unauthorized practice of law).

for these activities, which seemed to be natural, indeed inevitable, aspects of modern practice.

Then came *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1 (Cal. 1998). In that case, New York lawyers assisted a California client with a dispute in California. The New York lawyers came to California several times to consult with the client and to arbitrate the dispute. Some limited services were rendered in New York. After the client's claim was arbitrated, the client sued its lawyers for malpractice, and the firm counterclaimed to recover its fee. The Supreme Court of California held that the Birbrower firm had practiced law in California without authorization and barred the firm from recovering for services other than the ones performed in New York. The Court also noted that a lawyer might practice law "in California" merely by giving advice by telephone, fax, or e-mail. The *Birbrower* case awakened lawyers and bar leaders to the risk that the "accepted wisdom" regarding interstate practice might be wrong, and financially dangerous.

The organized bar turned its attention to these issues. The American Bar Association's Ethics 2000 Commission initially made some recommendations but then chose to stay action until the ABA's Commission on Multijurisdictional Practice completed its work. In June, 2002, the Commission issued its final report and recommendations, and those recommendations were approved by the ABA the House of Delegates in August, 2002 (with a few alterations accepted by the Commission).<sup>3</sup> These changes, if they are adopted by individual States, will have dramatic effects on the ability of lawyers to practice law across State lines and to gain admission in other States. State bar associations across the country have already issued various reports and

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<sup>3</sup>A complete set of the recommendations and supporting documentation can be found on the ABA Multijurisdictional Practice Commission's web site, <http://www.abanet.org/cpr/mjp-home.html>.

recommendations about multijurisdictional practice.

The State Bar of Georgia MJP Committee met several times and conducted a series of town hall meetings around the state to educate members of the bar about the issues surrounding multijurisdictional practice and to solicit their views. Members of the Committee made presentations in Atlanta, Macon, Savannah, and Amelia Island. Articles by the Reporter for the Committee appeared in publications of the State Bar of Georgia, the Atlanta Bar Association, and the Savannah Bar Association. The reaction of attendees at these meetings was telling. Before hearing about the issues and reflecting on them, several lawyers were skeptical that there was a problem—or more accurately, felt it was someone else’s problem and not theirs. But the attendees soon heard how these issues affect all lawyers. We heard from sole practitioners who had problems domesticating child support orders in other states. We heard from a district attorney who described problems he had had in investigating in other states and trying to seize stolen goods out of state. In short, after a full discussion, everyone who attended the meetings concluded that changes should be made and that, with one exception, all of the ABA recommendations should be adopted.

With the input of the Bar, and with the benefit of the debate that surrounded the ABA proposals and those of other states, the State Bar of Georgia Committee on Multijurisdictional Practice is now prepared to make its recommendations. This Report summarizes the recommendations that were approved at the ABA Annual meeting in August. The recommendations of the State Bar of Georgia Committee on Multijurisdictional Practice follow each of the ABA recommendations. The entire text of the changes approved by the ABA House of Delegates, along with the report of the ABA MJP Commission, is attached to this Report as

Appendix A. This Report also includes a discussion of the closely related issue of whether Georgia lawyers can form partnerships with lawyers who have not passed the Georgia bar and recommends some changes that would make it clear that such partnerships are permissible.

II. ABA MJP Commission Recommendations and Georgia Committee Recommendations

**A. ABA Recommendation One: The ABA affirms its support for the principle of state judicial regulation of the practice of law.**

State Bar of Georgia MJP Committee Recommendation: AGREED; no action necessary.

The MJP Commission considered a number of proposals to replace or at least modify the existing state-by-state system of licensing and regulating lawyers. Among these proposals, for example, was a national compact under which a lawyer admitted in one state could provide temporary services in all other states and could become a member of the bar of another state by undergoing a character check but without passing a bar exam. Another proposal would treat a law license like a driver's license and would permit a lawyer licensed in one state to set up shop in another state simply by registering to do so. The Commission rejected these ideas and instead recommended continuation of the state-by-state regulation of lawyers. The Commission based this recommendation on the conclusion that the proponents of such drastic reform had not made the case that some type of "national" law license was necessary or would benefit clients. The Commission, however, qualified its recommendation repeatedly with language such as "at the present juncture" and "given the present state of knowledge," and it noted that the case for a national law license "may be made over time." The issue is not dead, and one can confidently

predict that it will arise again. For now, the states' role in licensing lawyers appears safe.

**B. ABA Recommendation Two: The ABA adopts proposed amendments to Rule 5.5 of the ABA Model Rules of Professional Conduct.**

State Bar of Georgia MJP Committee Recommendation: AGREED; adopt new Model Rule 5.5.

Multijurisdictional practice is presently regulated under the Georgia Rules of Professional Conduct under Rule 5.5(a) and Rule 8.5, both of which track the ABA Model Rules of Professional Conduct. Model Rule 5.5(a) forbids lawyers in one state “to practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.” The comment recognizes that “[t]he definition of the practice of law is established by law and varies from one jurisdiction to another.”<sup>4</sup> It also states that the purpose of the rule is to protect “the public against rendition of legal services by unqualified persons.” The assumption is that the public will be harmed by lawyers from one state “practicing law” in other states because they do not have sufficient training or experience with respect to other states’ laws.

Rule 5.5(a) has been criticized on several grounds. First, its underlying assumption is at best only partially true. State laws are not as idiosyncratic as they once were. Uniform statutes have lessened the differences. Even where state laws differ, the differences are not hard to

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<sup>4</sup>The American Bar Association is currently engaged in an attempt to set forth a uniform definition of the practice of law. For more information on this effort, see John Gibeut, *Another Try, ABA Task Force Takes Shot at Defining the Practice of Law*, A.B.A.J. (December 2002) (<http://www.abanet.org/journal/redesign/12ndef.html>).

ascertain. The laws of all the states are available now instantaneously to any lawyer with a modem and a Lexis or Westlaw account. The public may not need as much protection from out-of-state lawyers as this rule assumes—particularly when the client knows of the lawyers’ qualifications or lack thereof. Second, it does not reflect the reality of modern legal practice. Lawyers routinely render services across state lines, apparently without doing great harm. To keep such a rule on the books but ignore it is unseemly. Third, for clients whose lawyers are so cautious that they refuse to practice temporarily in another state, the rule may drive up costs. The interstate character of litigation and transactions must be dealt with in today’s economy. Another lawyer must be found, educated and paid, perhaps needlessly, if the Georgia lawyer declines to risk practicing temporarily in another state.

The ABA has approved major changes to Rule 5.5. The first change was to expand the Rule’s title, from “Unauthorized Practice of Law” to “Unauthorized Practice of Law; Multijurisdictional Practice of Law.” New Rule 5.5(b) forbids a lawyer not admitted in a jurisdiction from establishing a continuous and systematic presence in the state (such as by having an office) and from representing that he or she is licensed in the jurisdiction. Rule 5.5(c) and (d) then describes circumstances under which lawyers admitted in another jurisdiction may provide legal services on a temporary basis.

First, a lawyer admitted in another state is permitted to provide temporary services if “they are undertaken in association with a lawyer admitted to practice in this jurisdiction and who actively participates in the matter.” This type of arrangement has been traditionally accepted. It combines the “foreign” lawyer’s greater knowledge of the client’s legal affairs, or that lawyer’s special expertise, with the “host” lawyer’s superior knowledge of local law. The

one caveat is that the arrangement must not be pro forma. The local lawyer must have some truly active role in the representation because otherwise there is merely the appearance of client protection without the reality.

Second, the visiting lawyer is permitted to render temporary services if they “are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized.” This language covers a multitude of situations. For the out-of-state litigator who has been admitted pro hac vice by court order, it would merely codify current practice, in effect with various details in every state. Litigators routinely represent clients in lawsuits in other jurisdictions with the permission of the court. The court’s right to assess the lawyers’ abilities to act in the matter, or to condition that right (such as requiring the engagement of local counsel), is thought to provide the public the protection it needs. The new rule would extend that protection to activities that may precede the filing of the case and an application for pro hac vice admission, such as interviewing witnesses or meeting with clients. The revised rule also permits a lawyer handling a case in his or her home jurisdiction to travel temporarily to another to take depositions, review documents, or conduct other activities necessary to litigating the case at home. Finally, the rule protects the junior associate who is working in another state but who may not seek pro hac vice admission if that lawyer is assisting a senior lawyer who will do so or who has done so.

Third, a lawyer may render temporary services in another jurisdiction if they “are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceedings in this or another jurisdiction, if the services arise out of or are reasonably

related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission." This rule would address the issues of pre-ADR investigation and ADR proceedings. The problem with regulating a lawyer's involvement in pre-ADR investigations and ADR proceedings is that often there is no procedure for pro hac vice admission because there is no court involved. The Commission concluded that some provision needed to be made for ADR in part because the site of an ADR proceeding may have nothing to do with the location of the dispute or the parties, so knowledge of local law may be irrelevant. Even if local law applies, the need for a local lawyer may be outweighed by another concern. The purpose of ADR, to resolve disputes without litigation, may be impeded if parties cannot use their usual counsel and are forced to employ a stranger.

Fourth, transactional lawyers may practice temporarily in another state if their activities "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." This exception is quite broad and includes activities such as meetings in other states regarding transactions at home and representing home state clients who have transactions in other states. Because the rule is not limited, however, to transactions or clients that relate to the home state, but rather to the lawyer's practice in the home state, the possibilities are even broader. For example, a lawyer whose practice yields an excellent reputation for doing a particular type of transaction might find himself or herself asked by an out-of-state client to perform such work for an out-of-state transaction. Because that work relates to the lawyer's practice, this rule would permit it.

Fifth, new Rule 5.5(d)(1) would permit in-house counsel licensed in another state to perform work for their employer or its organizational affiliates (other than work for which pro

hac vice admission would be required). There is no requirement that such work be “temporary.”

The rationale for this change is that the employer of an in-house counsel does not need the protection of the bar from its own employee. The lawyer almost certainly was hired with full disclosure to the client of the origin of the lawyer’s license. The client also is very likely to be a sophisticated consumer of legal services. The bar does not need to regulate this practice, and in-house counsel who are already engaged in it deserve the peace of mind that comes from knowing that they are not violating the rules of professional conduct by rendering legal services wherever the company needs them.

Finally, new Rule 5.5(d)(2) permits a lawyer to render services, on a temporary basis or otherwise, if they “are services that the lawyer is authorized by federal or other law to provide in this jurisdiction.” For example, federal prosecutors and federal patent attorneys would not be subject to discipline for unauthorized practice as long as they have the necessary federal authority to conduct their activities.

Because the State Bar of Georgia MJP Committee has concluded that new Rule 5.5 would conform the rules of professional conduct to existing practice, without endangering the public, it recommends that Georgia adopt the changes to Model Rule 5.5 approved by the ABA.

**C. ABA Recommendation Three: The ABA adopts proposed amendments to Rule 8.5 of the Model Rules of Professional Conduct.**

State Bar of Georgia MJP Committee Recommendation: AGREED; adopt new Model Rule 8.5.

Rule 8.5(a) also is part of the current regulation of multijurisdictional practice. It provides that a lawyer admitted in one state “is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.” In other words, the rules contemplate that the “home” state bar will devote resources to investigate and discipline its lawyers for transgressions in other states. Given the limited resources available for disciplinary enforcement, it is difficult to believe that harm to citizens of other states will be a high priority. Furthermore, under Rule 8.5(b), a lawyer’s conduct in a non-litigation matter is judged not under the standards where the conduct occurs but under the standards of the lawyer’s home state. Such a rule seems to give too little weight to the interest of the host state in regulating the conduct of visitors.

The ABA has changed Model Rule 8.5. In exchange for expanded rights to practice out of the state where they are licensed, lawyers are expected to subject themselves to the regulation of those “host” states. Rule 8.5 regulates who will discipline lawyers for ethical violations and gives guidance on the choice of law. New Rule 8.5(a) adds a sentence to ensure that lawyers who practice temporarily in a state are subject to its disciplinary processes: “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.” With respect to choice of law, Rule 8.5(b) expands the prior version of the rule, which provided that conduct in a litigated matter is governed by the rules of the court in which the matter is litigated. The new rule substitutes “tribunal” for “court.” As to other matters, the old model rule chose the law of the state where the lawyer was licensed if the lawyer was licensed only in one place. The new rule gives more weight to the interests of a “host” state in which a lawyer temporarily performs services and would choose the “rules of the jurisdiction in which the lawyer’s conduct occurred,

or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to that conduct.” The new Rule provides a lawyer a safe harbor if the lawyer complies with the rules of a jurisdiction “in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur” even if that belief turns out to be incorrect.

**D. ABA Recommendations 4: The ABA adopts proposed amendments to Rules 6 and 22 of the ABA Model Rules of Disciplinary Enforcement.**

State Bar of Georgia MJP Committee Recommendation: AGREED; adopt in substance the ABA MJP Commission Recommendation 4 with respect to reciprocal discipline. That change should be effected through amendment to Georgia Rule of Professional Conduct 9.4.

Rules 6 and 22 of the ABA Model Rules of Disciplinary Enforcement deal with reciprocal discipline. The ABA MJP Commission recognized that, although a “host” state may be given authority to discipline a visiting lawyer by the changes in Rule 8.5(b), its power is limited. For example, the host state did not grant the lawyer his or her license and thus has no power directly to disbar an offending lawyer. To make the discipline in the “host” state meaningful, the ABA MJP Commission concluded that the “home” state would have to be constrained to mete out the same discipline absent unusual circumstances.

That would require changes to existing Georgia procedures. The current Georgia Rule of Professional Conduct on this point, Rule 9.4, provides that “[d]isbarment or suspension by another jurisdiction is a ground for discipline in the State of Georgia” and provides further that Georgia will not re-try the underlying charge of misconduct. The commentary to Rule 9.4, however, states that the “rule does not necessarily adopt the disciplinary sanction imposed by the other jurisdiction as the sanction in Georgia. The lawyer will be able to present mitigating evidence in the Georgia proceedings, including evidence as to the rule and the procedure used in the other jurisdiction.” Thus, under existing Georgia procedures, sanctions short of disbarment or suspension are not cause for discipline in Georgia, and Georgia disciplinary authorities will independently assess the propriety of the sanction imposed. In contrast, the new versions of the model rules on reciprocal discipline would require the lawyer’s home state to impose the identical discipline as the other state—even discipline short of suspension or disbarment--unless the first decision was made without due process, the record shows a clear lack of proof of the misconduct, the discipline would cause a grave injustice or violate the public policy of the home state, or the reason for the discipline no longer exists.

The State Bar of Georgia MJP Commission recommends amendment of Georgia Rule of Professional Conduct 9.4 and its comments to reflect the substance of ABA MJP Commission Recommendation 4. In particular, Rule 9.4(a) should be amended to provide that any discipline in another state, even short of disbarment or suspension, is grounds for discipline in Georgia. Rule 9.4(b) should be amended to specify the limited circumstances under which Georgia would not impose the identical discipline as the other jurisdiction. Those circumstances would track the recommendations of the ABA MJP Commission and would be that:

(1) The procedure in the other jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or (2) There was such infirmity of proof establishing the misconduct as to give rise to a clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or (3) The discipline imposed would result in grave injustice or be offensive to the public policy of [Georgia]; or (4) The reason for the original Rule 4-104 type proceeding no longer exists.”

By giving greater deference to the action taken by the “host” state, Georgia would reinforce the incentives for its lawyers to abide by the applicable rules of conduct even when they practice temporarily in another jurisdiction.

**E. ABA Recommendation 5: The ABA adopts procedures to improve the use of the National Regulatory Data Bank of information about lawyers and encourage states to adopt a numbering system and a reporting requirement to facilitate interstate sharing of information.**

State Bar of Georgia MJP Committee Recommendation: AGREED; (1) adopt the Martindale-Hubbell International Standard Lawyer Numbering System; (2) use the National Lawyer Regulatory Data Bank; and (3) require lawyers immediately to report to the State Bar of Georgia changes of law license status or discipline in other jurisdictions.

Reciprocal discipline can be effective only if all jurisdictions are able to track the status of its lawyers in other jurisdictions. The universal numbering system, and the use of the National Data Bank, both facilitate that process. Imposing the duties to report any changes in status, such as being admitted or resigning from another bar, and to report any discipline imposed elsewhere, would also make the system of reciprocal discipline more efficient and better able to accomplish its purposes.

**F. ABA Recommendation 6: The ABA adopts the proposed Model Rule on Pro Hac Vice Admission.**

State Bar of Georgia MJP Committee Recommendation: AGREED; adopt the Model Rule of Pro Hac Vice Admission.

Under the ABA MJP Commission's proposals, as is already the case, lawyers who represent others in court must be admitted to practice pro hac vice in the courts of a state where the lawyer is not licensed. The court's supervision is deemed to be enough protection for the public. Georgia has simple procedures for the admission of lawyers pro hac vice to the Supreme Court (Supreme Court Rule 4), the Court of Appeals (Court of Appeals Rule 9), and the Superior Courts (Superior Court Rule 4.4). Because the standards and procedures for pro hac vice admission differ from state to state, and even from judge to judge, however, the ABA has proposed this model rule to facilitate the process. In the name of uniformity, the State Bar of Georgia MJP Committee supports this proposal.

The proposed uniform rule would require the out-of-state lawyer to file a verified application and would permit the court to deny the application only for specified reasons, such as that the admission would be “detrimental to the prompt, fair and efficient administration of justice” or that the applicant “has engaged in such frequent appearances as to constitute regular practice in this state.” The proposal lists the information that any applicant for pro hac vice admission must provide, and it requires that any lawyer admitted under its provisions subjects himself or herself to the authority of the courts and the State Bar with respect to Rules of Professional Conduct, discipline, contempt and sanctions. The Rule also covers the authority of lawyers who prepare or consult in anticipation of a suit being filed, and authorizes the out-of-state lawyer to engage in such activities (just as new Rule 5.5 would) if the lawyer reasonably believes he is eligible for pro hac vice admission in the host state.

**G. ABA Recommendation 7: The ABA should adopt the proposed Model Rule on Admission by Motion.**

State Bar MJP Committee Recommendation: no recommendation; this matter has been decided by the Supreme Court of Georgia.

The MJP Commission began its work with the recognition that the practice of law today almost inevitably requires lawyers to engage in activities on a temporary basis in other states. Another fact of today’s world is that lawyers are mobile and frequently desire to move from one state to another, for personal or professional reasons. Until December, 2002, Rule 2-101 of the

State Bar of Georgia<sup>5</sup> required experienced lawyers to take bar examinations and otherwise qualify for admission to the bar as if they were new law school graduates. The ABA MJP Commission proposed to make admission in a new state uniform and easier, on the assumption that an experienced lawyer from another state is likely to render competent service in a new state. In particular, the new model rule would permit admission on motion for someone licensed in another state, territory or the District of Columbia if the lawyer holds a professional degree in law (J.D. or LL.B.) from an ABA-accredited law school, has been primarily engaged in the active practice of law for five of the previous seven years, is in good standing in every jurisdiction where he or she is licensed, is not the subject of any discipline or any pending disciplinary matter, has the requisite character and fitness, and agrees to designate the Clerk of the jurisdiction's highest court as agent for service of process.

On December 12, 2002, the Supreme Court of Georgia amended the Rules Governing Admission to the Practice of Law to add a new Part C. The new provisions permit an experienced lawyer licensed in another jurisdiction to be admitted to the Georgia Bar without examination if certain conditions are met. Among the conditions is that the applicant must have been "admitted by examination to membership in the bar of the highest court of another United States jurisdiction which has comity for bar admissions purposes with the State of Georgia." Because the Supreme Court has so recently addressed this issue, the State Bar Multijurisdictional Practice Committee has no recommendation on this part of the ABA's set of proposals.

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<sup>5</sup>“(a) No person may be admitted to the bar as an active, emeritus or inactive member, or licensed as an attorney to practice law in this State without examination....(d) There shall be no admission to the Bar of Georgia by comity.”

**H. ABA Recommendations 8 and 9: The ABA encourages jurisdictions to adopt the ABA Model Rule for the Licensing of Legal Consultants and the proposed Model Rule for Temporary Practice by Foreign Lawyers.**

State Bar of Georgia MJP Committee Recommendation: AGREED; adopt Model Rule 8 And 9 for Practice by Foreign Lawyers.

Most of the proposals of the ABA MJP Commission deal with American lawyers who want to practice in a state where they are not licensed, either permanently or temporarily. A related problem is the foreign-trained lawyer who wants to practice on a regular basis or temporarily in a U.S. jurisdiction. In 1993, the ABA approved its Model Rule for the Licensing of Foreign Legal Consultants to govern the admission of foreign lawyers seeking to establish a practice in the U.S. as a legal consultant on the law of their home country. Georgia has adopted a set of rules in Part D of the Supreme Court of Georgia Rules Governing Admission to the Practice of Law. These rules, however, differ from the Model Rule as proposed by the ABA in at least two respects and also may conflict with obligations of the United States under the GATS treaty in some respects. First, foreign legal consultants in Georgia are required to reapply for fitness review each year and pay a fee of \$2000. Second, the Georgia rules do not explicitly permit foreign legal consultants to associate with Georgia lawyers as partners or as employees. To ensure uniformity with other states and compliance with obligations under GATS, the State Bar MJP Commission recommends that Georgia adopt the ABA Model Rule on the Licensing of

## Foreign Legal Consultants.

Georgia does not have a rule that would permit temporary practice in Georgia by a lawyer licensed in a foreign country. The new proposed rule on temporary practice by foreign lawyers would authorize some temporary activities by lawyers who are licensed in a foreign country and who are “subject to effective regulation and discipline by a duly constituted professional body or public authority.” Such lawyers could not establish an office or otherwise engage in systematic and continuous presence for the practice of law in the state, nor could they hold themselves out as licensed to practice law in that state. Temporary practice would be permitted if: (a) a lawyer licensed in the jurisdiction actively participates in association with the foreign lawyer; (b) the activities relate to a pending or potential proceeding outside the U.S. in a jurisdiction where the consultant is or reasonably expects to be licensed; (c) the activities are in or reasonably related to an ADR proceeding if the services are reasonably related to the lawyer’s practice where the lawyer is admitted; (d) the matter is not in litigation or ADR and is performed for a client who has an office or who resides in a jurisdiction where the consultant is authorized to practice; (e) the activities arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice; or (f) the matters are governed primarily by international law or a non-U.S. jurisdiction. These provisions closely track, but are not in all respects identical to, the temporary activities that American lawyers can perform temporarily in states where they are not licensed. The purpose of the new rule, like the revisions to Rule 5.5, is to facilitate and legitimize the temporary activities of outside lawyers in circumstances where there is little threat to the public.

### III. Recommendation Regarding Partnerships With Non-Georgia Lawyers

During its study of the issues surrounding multijurisdictional practice, the State Bar MJP Committee became aware of a related problem with the existing Rules of Professional Conduct. Under Rule 5.4(b), a Georgia lawyer is prohibited from forming a partnership with a nonlawyer if any of the activities of the partnership consists of practicing law. The term “nonlawyer,” however, is not defined in the terminology section of the Rules of Professional Conduct. If one were to define “nonlawyer” to mean anyone not licensed to practice law in Georgia, then there are many Georgia lawyers who are unwittingly violating the Rules. Numerous Georgia firms operate as partnerships and have branch offices in other states. The partners in those offices are lawyers, but usually not Georgia lawyers. No harm befalls a client of the firm as a result of that association. Each lawyer remains bound to conform to the rules of conduct where he or she is licensed. Indeed, the arrangement benefits clients because it facilitates representation in other jurisdictions. Yet, as with many of the rules on multijurisdictional practice, the rules may not have kept up with reality, and all of these partnerships might be in technical breach of the rules. The MJP Committee proposes to resolve this ambiguity.

The underlying problem is that there are at least four categories of people whose activities may warrant regulation. Members of the Georgia Bar are one category, and people who are not licensed anywhere to practice law are another. Two other categories might be described as “domestic lawyers,” lawyers who are duly licensed only in one or more United States jurisdictions other than Georgia, and “foreign lawyers,” who are duly licensed only by foreign authorities. To make the Rules more precise with respect to these different categories of people, the MJP Committee recommends that the Supreme Court adopt the following definitions

for the terminology section of the Rules of Professional Conduct:

- (1) **Nonlawyer** – A person not authorized to practice law by either the:
  - (a) Supreme Court of Georgia or its Rules (such as pro hac vice admission), or
  - (b) duly constituted and authorized governmental body of any other State or Territory of the United States, or
  - (c) duly constituted and authorized governmental body of any foreign nation.
- (2) **Domestic Lawyer** – A person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States but not authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia.
- (3) **Foreign Lawyer** – A person authorized to practice law by the duly constituted and authorized governmental body of any foreign nation but not authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia.
- (4) **Lawyer** – A person authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia.

With this new set of definitions, Rule 5.4(b) would not prohibit partnerships with lawyers licensed in other domestic or foreign jurisdictions. The changes, therefore, would solve the problem that came to the Committee’s attention.

The new definitions, however, could not be added without an examination of other places where the term “nonlawyer” appears, to ensure that there are no unintended consequences from the new definitions. The term “nonlawyer” appears in Comment 1 to Rule 4.2, in Rule 5.3 (and Comment 1 thereto), in Comment 1 to Rule 5.5, in Rule 5.7(b), and in Rule 8.4. In each of these places, the term appears to mean persons who are not licensed anywhere as lawyers, and therefore the new definition would merely codify existing understanding. The term also appears in Rules 6-301(b) and 6-303 of Chapter 3 of Part VI of the State Bar of Georgia Handbook and in Rule 14-2(b), 14-3.1(a), and 14-4.1(a) and (d) of Part XIV. In each of these places, the accepted meaning of “nonlawyer” conforms to the new proposed definition.

One Rule of Professional Conduct would need to be amended if the new definitions are accepted. Rule 5.4(b)(3) permits nonlawyers to share in certain compensation or retirement plans. The Rule is intended to make sure that the rules against sharing fees do not prohibit law firms from basing some compensation or retirement plans on profits. With the new, more precise definitions, that rule might be read to mean that only employees who are not licensed anywhere to practice law may share in these plans. That interpretation would exclude, for example, associates in branch offices in other states from participating in such plans. That is not the purpose of the changes to the definitions. Rule 5.4(b)(3), therefore, should be amended to read that “a lawyer or law firm may include nonlawyer or domestic or foreign lawyer employees in a compensation or retirement plan....”

The new definitions, like most of the proposals from the ABA, are intended to bring the Rules of Professional Conduct into line with existing practices. Partnerships between Georgia lawyers and lawyers licensed in other jurisdictions are neither controversial nor troublesome, and these changes would make it clear that they are permissible.

#### IV. Conclusion

The State Bar of Georgia MJP Committee has been honored to work on this important project. The overriding purposes of our recommendations are to see that the best legal services are available to the citizens of this State and to ensure that consumers and the courts are protected from inappropriate activities by lawyers. It is with that hope, and in that spirit, that we respectfully submit these recommendations.

