



State Bar Association of North Dakota MJP Task Force

Report of the Multi-Jurisdictional Task Force to the
State Bar Association of North Dakota

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*Amended and Approved by the Board of Governors
State Bar Association of North Dakota
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MJP Task Force**

**Preliminary Report
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Introduction

Multi-jurisdictional practice (MJP) happens when a lawyer provides legal services in a jurisdiction where he or she is not admitted to practice. The issue became the focus of national attention and debate among the organized bar when the California Supreme Court determined that a New York law firm had engaged in the unauthorized practice of law when it represented a California subsidiary of its New York client in an arbitration in California. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*, 949 P. 2d 1 (1998). Inexplicably, we think, the 1986 North Dakota Supreme Court opinion that the California Supreme Court relied upon as precedent for its decision had failed to raise the collective consciousness of the legal community. In *Ranta v. McCarney*, 391 N.W. 2d 161, 164 (N.D. 1986), the North Dakota Supreme Court held that a Minnesota lawyer could not recover any fees for legal work performed in North Dakota.

In June, 2001, during the general assembly of the 102nd annual meeting of the State Bar Association of North Dakota, the membership passed a resolution authorizing the Association's Board of Governors to establish and fund a task force to study the multi-jurisdictional practice of law. The study resolution charged the task force with issuing a report and recommendations to the Board of Governors and the membership at the June, 2002 annual meeting.

The MJP Task Force

In July, 2001, the State Bar Association of North Dakota, under the leadership of the current President, Daniel J. Crothers, formed the SBAND MJP Task Force to carry out the mandate of the study resolution. Mr. Crothers appointed members to the Task Force to represent the interests of the practicing bar, business entities and in-house counsel, the courts, the public and the State Board of Law Examiners. The Task Force Chair, Paul Richard, is a current member of the State Board of Law Examiners and a past president of the State Bar Association.

SBAND President Crothers made MJP his presidential year project. After creating and convening the MJP Task Force, he traveled around the state to each of the seven district bar associations to present information about MJP and the Task Force's work and to seek input from the Association membership. Mr. Crothers served as a

member of the Task Force and, at each meeting, he reported on the members' concerns about cross-border practice.

In advance of the Task Force's first meeting, Chair Paul Richard published the meeting schedule in the Association's magazine, newsletter and website, and announced that each meeting would be a town-hall gathering, open to all members of the Association.

The organizational meeting of the Task Force was held on August 10, 2001. Before that meeting, each member was provided with extensive study materials on the MJP issue, including the reports of other states' study groups, reports of ABA entities and the work product and recommendations of every major professional organization that weighed in on the issue.

The Chair assigned topics for further study to three subcommittees: (1) ABA Ethics 2000 Commission/ ABA MJP Commission recommendations; (2) reciprocal admissions issues; and (3) transactional practice/ expanded *pro hac vice* rules. Each subcommittee, after convening separately, reported back to the full Task Force with recommendations. The Task Force thereafter met on October 21, 2001 in Minot, on December 7, 2001 in Grand Forks, and on February 8, 2002 in Fargo. The Task Force reviewed an earlier draft of this preliminary report at the February 8, 2002 meeting.

The Task Force's Methodology

The Task Force began its work with lengthy discussions about North Dakota's present rules and statutes regulating out-of-state lawyers. The practice of law in this state is currently strictly controlled by law and court rules. Section 27-11-01 N.D.C.C. prohibits the practice of law in this state without admission to the state bar and an annual license. The North Dakota Supreme Court has said the purpose of §27-11-01 is to protect our citizens from unlicensed and unauthorized practice of law and to prevent the harm caused by "unqualified persons performing legal services for others." *State v. Niska*, 380 N.W. 2d 646,650 (N.D. 1986). Violation of §27-11-01 is a Class A misdemeanor.

Along with the North Dakota statutes regulating the practice of law, Rule 5.5 of the North Dakota Rules of Professional Conduct prohibits practicing law in violation of state regulations and provides that the unauthorized practice of law (UPL) is grounds for discipline.

Twelve years before the California Supreme Court announced it in *Birbrower*, the North Dakota Supreme Court said it is irrelevant whether an individual practicing law in this state is a competent attorney licensed to practice in another state. *Ranta, supra*, 391 N.W. 2d at 163. The rules and statutes defining unauthorized practice simply do not draw a distinction between lawyers who are duly licensed in another state and lay persons. *Id.* at 163-65.

There was a general perception among the members of the Task Force that the current regulatory scheme in Rule 5.5 and Chapter 27-11 does not reflect the present realities of the legal profession and is not being enforced. The rules were developed before faxes, before the internet, and before cross-border practice became commonplace in North Dakota. Not only are attorneys who are not admitted in this state routinely allowed to perform legal services in this state for their clients in other states, but North Dakota attorneys are routinely traveling to other states to handle transactions and to conduct discovery. At least until *Birbrower*, very few lawyers were even aware that there was an issue of unauthorized practice in conducting their daily business. As SBAND President Dan Crothers reported to the Task Force after his exchanges with the local associations, most lawyers simply do not regard these activities as inappropriate. The need for reform of the rules was evident.

In undertaking its study of the MJP issue, the Task Force was guided and informed by the fundamental principles articulated by the Honorable Gerald W. VandeWalle, Chief Justice of the North Dakota Supreme Court, in his testimony before the ABA MJP Commission. Chief Justice VandeWalle, as Chair Elect of the ABA section of Legal Education and Admissions to the Bar and current President of the Conference of Chief Justices, is a respected national voice on the very issues of qualifications for admission to the bar that are at the heart of MJP considerations. In his remarks to the ABA MJP Commission in early 2001, he cautioned that any proposal to revise the MJP rules must preserve certain core concepts to protect the public and the profession:

- A national system of accreditation of law schools that seeks to ensure that all law schools prepare new members of the profession for the practice of law by educating them about the theory and philosophy of law and its institutions, providing instruction in basic lawyering skills, and instilling an understanding of a lawyer's ethical responsibilities as a representative of clients, an officer of the legal system, and a public citizen with special responsibilities for the quality of justice. Whatever position the Commission ultimately adopts on the subject of multijurisdictional practice should be consistent with the Council's safeguarding these interests by continuing to apply its accreditation standards in a rigorous manner.
- Standards for admission to practice that are designed and enforced in a manner that will protect consumers of legal services by ensuring that individuals who are licensed to practice law have the knowledge, skills and values to provide competent and ethical representation. If this Commission were to recommend the adoption of a system of national licensure or universal reciprocal admission, any such system would need to guard against the dilution of the admission standards that the states' highest courts have established under their respective constitutions or statutes in order to protect the public. Any recommendations the Commission makes should take into account that the states' highest appellate courts have shown, through their

administration standards, that they have both the expertise and the proven ability to establish and enforce standards of admission effectively.

- Standards and procedures, in those jurisdictions that have chosen to adopt them, for continuing legal education or other mechanisms for ensuring that attorneys who have been admitted to practice expand their professional knowledge and refine their professional skills.
- Appropriate criteria, procedures and enforcement mechanisms for disciplining attorneys who violate standards of professional conduct.

The North Dakota Board of Law Examiners echoed Chief Justice VandeWalle's recommendation that multi-jurisdictional practice solutions should "not dilute that ability of each state's supreme court to assure that the citizens of their states continue to receive competent and ethical legal representation." In its July 10, 2001 letter to the ABA MJP Commission, the State Board of Law Examiners summarized the four fundamental principles that should be considered in the MJP debate:

- Each state has the right to set minimum education standards for the practice of law within the state.
- Each state Supreme Court retains the right to establish admission standards, including character and fitness criteria.
- Acceptable standards for continuing legal education must be maintained.
- Each state Supreme Court must retain disciplinary authority over lawyers practicing within the state.

The Task Force was unanimous in its view that the core values the Chief Justice and the North Dakota Board of Law Examiners had identified should be incorporated in its final recommendations. The members of the Task Force recognize that the integrity of the admission process and the protection of the public depend upon maintaining a state-based licensure system accountable to the state Supreme Court.

The Task Force thus considered and unanimously rejected the so-called national licensure or "driver's license" approach once advocated by the American Corporate Counsel Association, which would have allowed lawyers to practice in North Dakota and other jurisdictions upon meeting the licensure requirements in one jurisdiction. The Task Force similarly rejected the "green card" option once proposed by the Association of Professional Responsibility Lawyers, which would have permitted cross-border practice upon a showing of admission in one state, plus good character and fitness.

At the December 7, 2001 meeting, after extended debate concerning the Interim Report of the ABA MJP Commission, the Task Force determined that the Commission's proposed amendments to Rule 5.5 of the ABA Model Rule of

Professional Conduct were not acceptable as drafted. Consequently, the Task Force revised the Commission's draft Rule 5.5 at the December 7 and February 8 meetings to reflect their consensus views. These consensus positions are outlined in the recommendations below.

On March 23, 2002, the Board of Governors of the State Bar Association amended and approved the Task Force Report and accepted the Task Force's recommendations regarding proposed revisions to Rule 5.5 and 8.5. The Board of Governors amended Rule 5.5(d) to add a provision requiring a lawyer practicing law under one of the safe harbors in subparts (b) and (c) of Rule 5.5 to disclose to the client that the lawyer is not licensed in this jurisdiction.

Task Force Recommendations

The SBAND MJP Task Force reached consensus on the following general principles:

1. Some changes are needed in the current attorney regulatory scheme in North Dakota to protect the public interest in high quality legal services while at the same time giving clear guidance to lawyers about the kinds of legal work that can be performed in North Dakota by lawyers who are not admitted in the state.
2. Reaffirm support for the principle in current law that the state Supreme Court regulates the legal profession through standards for admission to practice and licensure, and reaffirm that a lawyer may not practice law in North Dakota in violation of the North Dakota rules and statutes regulating the legal system.
3. It is appropriate to identify "safe harbors" along the lines of the Ethics 2000 Commission proposal to allow a lawyer admitted in another jurisdiction to perform legal services in North Dakota on a temporary basis where there is no unreasonable risk to the lawyer's clients, the public or the courts. However, the proposed language in the MJP Commission's proposed draft Rule 5.5 (b) that purports to grant *carte blanche* permission for MJP on a temporary basis for *all* legal services that do not create an unreasonable risk of harm to the public is too broad and ambiguous to be enforceable.
4. Barriers that impede an out-of-state lawyer's ability to conduct investigation and discovery in North Dakota incident to litigation in the lawyer's home state should be eliminated; i.e., these activities should be protected by a safe harbor in the draft North Dakota Rule 5.5.
5. The current *pro hac vice* procedures for litigation should be expanded to include arbitration, mediation and other alternative dispute resolution

proceedings as well as to include appearances before administrative agencies or governmental bodies.

6. Serving as a mediator, arbitrator or other ADR neutral does not constitute the practice of law and is covered by the safe harbor for work that can be performed by a non-lawyer in the draft North Dakota Rule 5.5.
7. For transactions for which *pro hac vice* admission is not available, an out-of-state lawyer should be covered by a safe harbor while working on a transaction pending in the lawyer's home state, but association with a licensed attorney should be required where the transaction is pending in or substantially related to North Dakota.
8. Corporate counsel and governmental attorneys should be free to perform legal work for their employers while temporarily in the state under the safe harbor for in-house counsel in the North Dakota version of Model Rule 5.5 (see attached draft Rule), but in-house counsel who establish an office or other permanent presence in the state must comply with registration rules or become admitted to practice in the state.
9. Support adoption of registration rules, whereby an attorney duly admitted and in good standing in another jurisdiction may register and pay an annual fee to the State Board of Law Examiners identical to the fee paid by licensed North Dakota attorneys of comparable longevity. Registered attorneys should be subject to the same continuing legal education requirements as prescribed for North Dakota attorneys and subject to all the rules of discipline and disciplinary enforcement of this state.
10. Support the use of admission on motion rules to facilitate cross-border admission, recommend adopting the model "admission on motion" rule proposed by the ABA section of Legal Education and Admission to the Bar and work toward regional reciprocal admission arrangements with Minnesota, Montana, South Dakota and Wyoming.
11. No safe harbor allows lawyers to hold themselves out to the public as licensed to practice law in North Dakota when they are not licensed.
12. Support amendment of Rule 8.5 as proposed by the ABA MJP Commission to better address multi-jurisdictional practice, disciplinary enforcement and reciprocal discipline. Lawyers should be subject to discipline for violating the rules of any jurisdiction in which they practice, whether admitted or not. Any lawyer performing legal services in North Dakota is subject to the North Dakota Rules of Professional Conduct and subject to discipline by the State Disciplinary Board and the North Dakota Supreme Court. *See attached draft North Dakota Rule 8.5.*

The Task Force's Draft Rule 5.5

The ABA MJP Commission released its Preliminary Report in November, 2001. The full text of the Commission's report and Rule draft proposals are available on the worldwide web at http://www.abanet.org/cpr/mjp-final_interim_report.doc.

The Task Force unanimously concurred that the MJP Commission's draft Rule 5.5 needed to be significantly revised and rewritten. Specifically, the Task Force recommended omitting subpart (b) of the MJP Commission's draft as an overly broad exception that all but swallows the general rule set forth in subpart (a). The Task Force held the unanimous view that North Dakota Rule 5.5 should define specific "safe harbors" for practice by out-of-state lawyers, but should not carve out a general exception that engulfs the rule. By omitting subpart (b) of the MJP Commission's draft rule, the Task Force intended to return to the philosophy of the ABA Ethics 2000 Commission's proposed Rule 5.5.

The attached North Dakota Rule 5.5 embodies the Task Force's consensus views. An explanation of each subpart of the proposed North Dakota rule follows:

Subpart (a) (general rule)

Subpart (a) states the general rule that each state judiciary may regulate the legal profession within the borders of the jurisdiction. The Task Force concurs with the general proposition that a lawyer must be licensed to practice law within the jurisdiction and recommends retention of subpart (a) as proposed in the MJP Commission's Draft Rule 5.5(a).

Subpart (b) (safe harbors for temporary work)

Subpart (b) of the North Dakota proposed Rule 5.5 is loosely based on subpart (c) of the MJP Commission Draft. North Dakota Draft Rule 5.5 (b) creates a series of five safe harbors for out-of-state lawyers performing services in this state on a temporary basis. Each of the safe harbors will be discussed separately.

Subpart (b) (1) (in-house counsel in North Dakota on a temporary basis)

Subpart (b)(1) of Draft North Dakota Rule 5.5 is premised upon the general rationale underlying the MJP Commission's Draft Rule 5.5 (d)(1), allowing in-house corporate counsel and governmental lawyers to represent their employers without being admitted in North Dakota. However, the Task Force reached consensus that this safe harbor for in-house counsel ought to be temporary, and hence it is one of the *temporary* safe harbors under subpart (b) of the North Dakota Draft Rule 5.5. The Task Force concluded that out-of-state corporate counsel who establish an office or other permanent presence in North

Dakota must register under revised Admission to Practice Rule 3 or seek licensure in this state. *See Draft North Dakota Rule 5.5 (c)(1)(in-house counsel who establish permanent presence must register) and Draft Admission to Practice Rule 3(attached).*

Subpart (b)(2)(non-litigation work ancillary to the lawyer's representation of a client in the lawyer's home state)

The Task Force concurs with the philosophy expressed in the MJP Commission's Report that there ought to be a temporary safe harbor for non-litigation services ancillary to the out-of-state lawyer's work in his or her home state. North Dakota's Draft Rule 5.5 (b)(2) covers transactions that are not contained by the safe harbors for litigation, administrative agency proceedings, and ADR proceedings. The safe harbor in subpart (b)(2) is intended to provide broad protection to several kinds of work in the host state that are related to the lawyer's work in the home state such as negotiations, contracts, and meetings with clients or other parties to a transaction. The Task Force concurs with the MJP Commission's conclusion that for these kinds of temporary legal services, it should be sufficient to rely on the lawyer's home state as the "jurisdiction with the primary responsibility to ensure the lawyer has the requisite character and fitness to practice law." The Task Force also agrees with the notion that a client should be able to have a single lawyer conduct all aspects of a transaction, even if he or she must travel to other states.

The Task Force recommends, however, that the safe harbor for work in connection with out-of-state transactions should not be extended freely to transactions that are pending in or substantially related to North Dakota. For these in-state transactions, the Task Force would require admission of the out-of-state lawyer, or association with a local lawyer as co-counsel in the representation of the client in the transaction. *See North Dakota Draft Rule 5.5 (b)(4) (transactions pending in or substantially related to North Dakota) and Draft Admission to Practice Rule 3.*

Subpart (b)(3)(matters for which pro hoc vice admission is available)

The Task Force reached the unanimous conclusion that *pro hoc vice* admission should be required for out-of-state lawyers representing clients in all matters pending in a North Dakota tribunal, administrative agency, or ADR proceeding. In support of this conclusion, the Task Force recommends adoption of the model *pro hoc vice* rule proposed by the ABA Litigation Section. *See MJP Commission Report at p 81-85.* *Pro hoc vice* admissions should be expanded to cover administrative agency proceedings and ADR proceedings in North Dakota.

Subpart (b)(4)(transactions pending in or substantially related to North Dakota)

The Task Force drew a distinction between lawyers conducting temporary legal services in the state in connection with out-of-state transactions and those transactions that are pending in or substantially related to North Dakota. The safe harbor for work in connection with out-of-state transactions in subpart (b)(2) should not be extended to transactions that are pending in North Dakota, in the Task Force's opinion. For these transactions, the Task Force would require the out-of-state lawyer to associate with a North Dakota lawyer as co-counsel in the representation of the client.

Subpart (b)(5)(services that can be performed by a non-lawyer)

The Task Force recommends the concept set forth in the MJP Commission Draft Rule 5.5 (c)(2), which would allow a temporary "green light" for out-of-state lawyers performing services that can be performed by a non-lawyer (e.g. ADR neutrals, debt collectors). The Task Force concluded that the public is adequately protected in these instances by the over-arching provisions of proposed Rule 8.5, which subjects all lawyers performing any services in this state to the Rules of Professional Conduct. If, for example, an out-of-state lawyer performing as an ADR neutral committed misconduct, he or she could be disciplined for the misconduct, even if serving as the neutral was not UPL under the subpart (b)(5) exception. It should be noted that whereas an out-of-state lawyer representing a client in ADR proceedings pending in another jurisdiction is covered by the safe harbor in proposed Rule 5.5 (b)(5), an out-of-state lawyer representing a client in an ADR proceeding *in* North Dakota must comply with the expanded rules for *pro hoc vice* admission. See *North Dakota Draft Rule 5.5 (b)(3) (matters for which pro hac vice admission is available)*.

Subpart (c)(out-of-state lawyers who establish a permanent presence in this state)

The Task Force created two categories of allowable multijurisdictional practice for out-of-state lawyers who establish an office or other permanent presence in the state: 1) in-house counsel who comply with registration rules, and 2) lawyers performing services pursuant to federal or state law or court rule.

Subpart (c)(1)(corporate counsel in the state permanently)

The Task Force reached consensus that the safe harbor for in-house counsel in subpart (b)(1) ought to be temporary. Out-of-state corporate counsel who establish an office or other permanent presence in North Dakota must

comply with the registration rules under Rule 3 of the North Dakota Admission to Practice rules or must seek licensure in this state. Registered attorneys would have to satisfy the requirements to become and remain a member of the State Bar Association of North Dakota, with the exception of the requirement of passing the bar examination.

Subpart (c)(2)(work authorized by federal or state law or court rule)

The Task Force agrees that an out-of-state lawyer may perform legal services in the jurisdiction when authorized to do so by federal law or by state law or court rule. The Task Force concurs that a safe harbor must exist for legal work authorized by law and accepted this part of the MJP Commission's Draft Rule 5.5 (d)(2) without change.

Subpart (d)(out-of-state lawyers prohibited from holding themselves out as authorized to practice law/disclosure requirement)

The Task Force reached consensus that the MJP Commission's Draft Rule 5.5 (e), prohibiting an out-of-state lawyer from holding himself or herself out as authorized to practice law in a state where the lawyer is not admitted to practice, should be included in the North Dakota rule without change. The Board of Governors of the State Bar Association amended subpart (d) to require out-of-state lawyers practicing law under one of the safe harbors in subparts (b) and (c) to disclose to their clients that they are not licensed in this state.

Subpart (e)(assisting another in unauthorized practice prohibited)

The Task Force retained subpart (e) based on current North Dakota Rule 5.5 (b) and based on the Ethics 2000 Commission's Draft Rule 5.5 (c).

Conclusion

The Task Force recognizes our state's legitimate interest in controlling who may provide legal services within its borders. The Task Force started and ended its study process with its express commitment to the core principles articulated by Chief Justice VandeWalle to protect the public and the profession. The State Supreme Court has demonstrated its ability to establish and enforce effective standards of admission to practice.

The Task Force believes its recommendations permitting temporary practice through safe harbor provisions along the lines of the Ethics 2000 Commission proposal, when coupled with expanded *pro hac vice* procedures, registration for in-house counsel, revised admission-on-motion rules and provisions for reciprocal discipline, will address most of the current concerns regarding multi-jurisdictional practice while maintaining our present state Supreme Court-based licensure system.

Respectfully submitted by:

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