Chair's Forum: "Bench" marking Issues in Professionalism

John H. McGuckin, Jr.
Executive Vice President, General Counsel & Secretary
Union Bank of California, N.A.

The Honorable Linda Copple Trout
Chief Justice
Idaho Supreme Court

The Honorable Randall T. Shepard
Chief Justice
Supreme Court of Indiana

The Honorable E. Norman Veasey
Chief Justice
Supreme Court of Delaware

Faculty Biographies

John H. McGuckin, Jr.

John H. McGuckin, Jr is executive vice president, general counsel, and secretary for Union Bank of California, N.A..

Prior to joining The Bank of California, Mr. McGuckin worked in the Bank of America legal division and was in private practice. During this time, he specialized in the areas of probate administration and litigation, estate planning, taxation, community property, and family law. Mr. McGuckin is a frequent author and speaker on compliance, corporate law department management, corporate governance, and legal ethical topics.

As a member of the board of directors of ACCA, Mr. McGuckin has held several offices, including chair of the advocacy committee. He is currently ACCA's vice chair of the board and is slated to be ACCA's chair in 2003-2004. Mr. McGuckin was the first in-house counsel elected to the board of governors of the Sate Bar of California, serving a three- year term. He had previously chaired the State Bar's Committee on continuing legal education and served on the State Bar's legal trust fund (IOLTA) commission. He was vice president and treasurer of the State Bar of California, chairing the administration and finance committee.

Mr. McGuckin is a *magna cum laude* and *Phi Beta Kappa* graduate of Harvard College and received his JD from Harvard Law School.

The Honorable Linda Copple Trout
Chief Justice
Idaho Supreme Court

The Honorable Randall T. Shepard

Randall T. Shepard became Chief Justice of the Indiana Supreme Court in l987, then the youngest chief justice in the United States.

Justice Shepard also practiced law, served as a trial judge, was executive assistant to the Mayor of Evansville, Indiana, and served as special assistant to the U.S. Under Secretary of Transportation in Washington DC.

He is past chair of the ABA's section of legal education and admissions to the bar, which oversees accreditation of America's 180 law schools. He formerly chaired the ABA's Appellate Judges Conference, representing 700 federal and state judges, and was first vice president of the Conference of Chief Justices. Justice Shepard has authored over 700 opinions for his court and 29 law review articles.

Justice Shepard holds an AB, *cum laude,* from Princeton University, a JD from Yale Law School, and an LLM from the University of Virginia.

The Honorable E. Norman Veasey

E. Norman Veasey became Chief Justice of Delaware on April 7, 1992 and his term expires on April 7, 2004. He was the president of the Conference of Chief Justices and the chair of the board of the National Center for State Courts during the 1999-2000 term. He is currently the chair of the ABA special committee on the evaluation of the rules of professional conduct. He is a judicial fellow of the American College of Trial Lawyers.

Prior to taking office as Chief Justice, he practiced law with the Wilmington, Delaware, law firm of Richards, Layton and Finer, where he concentrated on business law, corporate transactions, litigation, and counseling. He served at various times as managing partner and the chief executive officer of the firm. During 1961-63, he was deputy attorney general and chief deputy attorney of the State of Delaware. He is a former president of the Delaware State Bar Association. He was the editor of Volume 48 of *The Business Law* of the ABA and was chair of that section.

He is director of the Institute for Law and Economics at the University of Pennsylvania, a member of the American Law Institute, a member of the International Advisory Board of the Centre for Corporate Law and Securities Regulation, and numerous other professional organizations.

Chief Justice Veasey received his AB from Dartmouth College and his LLB from the University of Pennsylvania Law School. At Penn Law School he was a member of the board of editors and the senior editor of the *University of Pennsylvania Law Review.* He was awarded an Honorary Doctor of Laws Degree from Widener University in 1993 and the University of Delaware in 2003.

MJP REFORM TALKING POINTS

Why Support Approval of MJP Commission Recommendations?

- The recommendations affirm the state's regulation of the legal practice and modernize the rules while maintaining high professional standards. Times have changed and the environment in which we practice has changed from the norms that were in place when the rules were first written.

- Allows a lawyer admitted in one jurisdiction to provide legal services elsewhere "on a temporary basis" in connection with matters that are not related to dispute resolution. The proposed rule would allow lawyers "on a temporary basis" to represent transactional clients in other jurisdictions if their services "arise out of or are reasonably related to the lawyer's practice" in a lawyer's home jurisdiction. In a national economy, where client matters routinely cross state lines, clients reasonably expect lawyers to be able to travel to other jurisdictions. Clients do not want to have to hire separate counsel in each of several jurisdictions when a matter touches upon more than one jurisdiction.

- Permits in-house counsel to establish a practice in a state in which they are not licensed, but where their client has a facility. (This special exemption from admission requirements exists only for employed counsel, does not extend to privileges to appear before a tribunal or court unless admitted pro hac vice, and may be subject to state bar corporate counsel registration requirements.)

- By and large, these changes only codify existing practices by lawyers who are admitted and in good standing in their home state(s) of admission, but whose regular work occasionally takes them to other states as they pursue client matters. These practices empirically impose no threat or danger according, to the files of disciplinary bar counsel. These reforms will not produce great or unanticipated change.

- Michigan and Virginia have had temporary practice authorizations for many years with no adverse impact.

- For the legal profession to continue to be the preferred provider of the highest quality services for our clients, we must meet their modern expectations for wired borderless service. Lawyers must be as mobile as our clients, quicker and more competent to respond than other non-legal specialists, and as versatile in meeting ever-changing client needs as our legal education and professional responsibility allow. There is no threat to our professionalism or

to the public interest to authorize lawyers in good standing to move across state lines making temporary practice incursions, as their clients and ongoing practices demand. Indeed we threaten our clients and profession if we don't figure out how to properly authorize MJP.

- The National Organization of Bar Counsel, the ABA Standing Committee on Ethics, the Association of Professional Responsibility Lawyers, the American Corporate Counsel Association, numerous ABA sections (Business Law, Law Practice Management, International Law & Practice, Small and Solo Practitioners, Real Estate and Environmental Law, etc.), and perhaps most significantly, a growing number of state and local bar associations have all voiced support for these recommendations: these proposals are not radical, they are practical, they apply to all lawyers, are needed by all clients, and serve the interest of regulators who need to enforce professional standards on all lawyers working in the state to protect the public.

Brief Summary of the ABA's MJP Commission Recommendations

1. Affirmed the principle of state judicial regulation of the practice of law.
2. Revised Model Rule 5.5 of the ABA Model Rules of Professional Conduct (new title: Unauthorized Practice of Law/Multijurisdictional Practice of Law) to provide:
   5.5(a): a lawyer may not practice law in a jurisdiction, or assist another in doing so, in violation of the regulation of the legal profession in that jurisdiction.

   5.5(b): prohibits a lawyer from establishing an office or other systematic and continuous presence, or holding out to the public or otherwise representing that the lawyer is authorized to practice law in a jurisdiction in which the lawyer is not admitted, unless permitted to do so by law or another provision of Rule 5.5.

   5.5(c): identifies specific circumstances in which a lawyer who is admitted in a United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may practice law on a temporary basis in another jurisdiction. These would include instances relating to the following practice areas:

   * Work on a temporary basis in association with a lawyer admitted to practice law in the jurisdiction, who actively participates in the representation.
   * Services ancillary to pending or prospective litigation or administrative agency proceedings in a state where the lawyer is admitted or expects to be admitted pro hac vice or is otherwise authorized to appear.
   * Representation of clients in, or ancillary to, an alternative dispute resolution ("ADR") setting, such as arbitration and mediation.
   * Non-litigation work that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

5.5(d): creates a "permanent" practice exception for a lawyer to render services in a jurisdiction in which the lawyer is not licensed to practice law so long as the lawyer is an employee of the client (in-house counsel) or a lawyer who provides services pursuant to an authorization of federal or other law (such as military lawyers or certain tax lawyers).

3. Amended Rule 8.5 of the ABA Model Rules of Professional Conduct in order to clarify the authority of states to discipline lawyers licensed in other jurisdictions who practice law within the state pursuant to the provisions of Rule 5.5 or other law.
4. Amended Rules 6 and 22 of the ABA Model Rules for Lawyer Disciplinary Enforcement to promote effective disciplinary enforcement when lawyers engage in multijurisdictional practice of law; renewed efforts to encourage states to adopt Rule 22, which provides for reciprocal discipline.
5. Promotes interstate disciplinary enforcement mechanisms and adopts and promotes other measures to enhance professional regulation and disciplinary enforcement with respect to lawyers who, pursuant to the above recommendations, practice law in jurisdictions other than those in which they are licensed.
6. Clarified that a lawyer admitted in another U.S. jurisdiction may practice "on a temporary basis" in a jurisdiction with a lawyer admitted in that jurisdiction who actively participates in the matter. This is in accord with the general rules on affiliating with local counsel already in place in most states. The locally admitted lawyer is presumptively competent to advise on local law and will be responsible to the local courts. The local lawyer must "actively participate" in the matter. Nominal association is insufficient.
7. Provided lawyers engaged in dispute resolution with authority "on a temporary basis" to render legal services in a jurisdiction incidental to pending or contemplated proceedings. Lawyers can freely gain pro hac vice admission to courts in which they are not generally admitted. The proposed rule would allow lawyers to render legal services in a jurisdiction prior to gaining pro hac vice admission in that jurisdiction or another jurisdiction when the lawyer reasonably believes that he or she will be able to gain such admission. This authority is necessary because a lawyer may need to investigate a possible matter before appearing or conducting depositions or interviews. The authority also extends to preliminary work in another jurisdiction when the matter will be brought in a jurisdiction in which the lawyer is admitted.
8. Finally, the rule would afford the same authority in connection with pending or impending proceedings that are not court-based, but rather alternate dispute resolution proceedings arising out of or are reasonably related to the lawyer's home state practice. The rule would both allow a lawyer to provide legal services in a jurisdiction incident to such pending or potential proceedings and also authorize the lawyer to appear in an ADR proceeding should one be held. (If the ADR proceeding is court-affiliated and pro hac vice admission required, the lawyer would have to gain admission.)
9. Created two circumstances under which lawyers may establish an office in a jurisdiction in which they are not admitted: a.) The first circumstance is when the lawyer is employed by the lawyer's client and is rendering legal services solely to the

employer or its organizational affiliates. This authority cannot be used for representation in a tribunal that requires general or pro hac vice admission. The purpose of this authority is to allow in-house lawyers to establish an office without having to gain general admission to the bar in the offices jurisdiction. Comment [17] of the ABA proposal recognizes that a jurisdiction adopting the proposal may subject the lawyer "to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education." b.) Finally, lawyers will be permitted to establish a presence for the practice of law in a jurisdiction notwithstanding that they are not admitted in that jurisdiction if authorized to do so by federal or other law (this narrow exception applies to some tax lawyers, JAG lawyers, etc.).

What are likely objections and responses?

The phrase "on a temporary basis" is not precise.

Response:

It is true that "on a temporary basis" is not precise but ethics rules often use standards rather than bright lines when the circumstances require it, as here. The alternatives are less appealing. At the one extreme, we could allow lawyers admitted anywhere to establish permanent offices anywhere, but we do not recommend that and there was no significant support for what in effect would be nationwide admission. The opposite alternative would be to forbid lawyers admitted anywhere ever to provide legal services anywhere else, no matter how fleeting the presence. But the courts have routinely rejected that notion. The courts have opted instead for a standard that permits occasional presence in other jurisdictions. It's easier and more enforceable to create a standard for courts and bar regulators to define appropriate temporary practices than to have to try to define prohibited permanent practices. The rule does offer several examples of specifically authorized temporary practices for guidance.

Further it's clear that "systematic and continuous" presence in the other jurisdiction, even short of establishing a physical office there, is forbidden by the rule and not within the meaning of "temporary" language.

In *In re Waring*, 221 A.2d 193, 197 (N.J. 1966), the court wrote: "Multistate relationships are a common part of today's society and are to be dealt with in common sense fashion. While the members of the general public are entitled to full protection against unlawful practitioners, their freedom of choice and the selection of their own counsel is to be highly regarded and not burdened by technical restrictions which have no reasonable justifications." Id. at 197. Similarly, in Florida Bar v. Savitt, 363 So.2d 559, 560 (Fla. 1978), the court expressly permitted a law firm's out-of-state lawyers to engage in "transitory professional activities incidental to essentially out-of-state transactions . . ."

The scope of the authority afforded transactional lawyers, which requires only that their services "arise out of or are reasonably related" to home state practice, is too broad.

Response:

This is not the only requirement. The work also must be performed "on a temporary basis." See above. In addition, Comment [14] gives further definition to the meaning of the quoted language with examples of what would satisfy the test. The client may have been previously represented by the lawyer, or be a resident or have substantial contact with the lawyer's home jurisdiction. The matter the lawyer is handling for the client may have a substantial connection to that jurisdiction or may involve the law of that jurisdiction. These are just a few examples that will guide courts as they interpret the language. Again, lawyers would be prevented from the provisions of Rule 5.5(b)(1) from exploiting this language to establish a "systematic and continuous presence" in another jurisdiction, even if not physically present there.

Furthermore, the proposed rule means to recognize the need of transactional lawyers for authority to cross state lines in representing their clients given the absence of pro hac vice admission. Case law recognizes the legitimate interests of clients in using lawyers of choice for interstate matters. The interests of the other jurisdiction are further protected by Rule 8.5, which extends disciplinary authority over the out-of-state lawyer, and amendments to the rule governing reciprocal discipline in Recommendation 4 (Report 201D)

Why should in-house attorneys get a separate special treatment and a separate exception to the permanent practice prohibition?

American corporations do business on a national and international level and they do large quantities of sophisticated legal work, Many such companies, for reasons of economy and service, choose to employ, rather than retain legal counsel. As "house" counsel an in-house attorney located in one state may be called upon to advise on an HR matter in a factory or office in another state, negotiate a contract with a customer or vendor in another state, or advise on a whole range of litigation or transactional matters which occur company-wide. It's not unusual for the client to decide to reassign an in-house attorney on a temporary or permanent basis to some other corporate location. Significant transactions or litigation may require temporary relocation or regular and repeated trips which can't be called "temporary Practice" to another state.

The consumer protections typically provided by the institutional bars are generally unnecessary for in-house attorneys and their corporate clients. In-house attorneys don't hold themselves out for retention to the public and prevent no threat to public interests. The attorney's sole client is her employer. That client has a broad range of actions it can

take if an attorney's work is not satisfactory without needing to invoke the protections afforded individual legal consumers by the institutional bar. Thus, many of public protection concerns commonly invoked, as reasons to uphold the permanent practice prohibition shouldn't prevent an exception for in-house counsel.

Other Resources

1) ABA's Multijurisdictional Practice Report titled "Client Representation in the 21st Century," Final Report as adopted August 12, 2002.
http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf

2) ACCA's Policy Statement
http://www.acca.com/public/accapolicy/admtoprac.html

3) The In-house Case For The Multijurisdictional Practice of Law in The United States
http://www.acca.com/public/accapolicy/accaposition.html

4) Navigating The Civil And Criminal Whistleblower Provisions Of The Sarbanes-Oxley Act
http://www.acca.com/protected/pubs/docket/ma03/whistle1.php

5) ABA's Independence of the Judiciary: Judicial Compensation
http://www.abanet.org/poladv/priorities/judcom.html

6) The SEC's Final Rule 17 CFR Part 205:
http://www.sec.gov/rules/final/33-8185.htm

7) The New Sarbanes-Oxley Attorney Responsibility Standards
http://www.acca.com/protected/pubs/docket/mj03/standard1.php

8) ACCA Comments to SEC Section 307 Rules Governing Attorney Conduct:
http://www.acca.com/advocacy/307comments2.pdf

9) ABA Adopts New Model Rules Affecting In-House Practice:
http://www.acca.com/protected/comments/abamodelrules.pdf

10) GATS: A Handbook for International Bar Association Member Bars (May 2002):
http://www.ibanet.org/pdf/gats.pdf

