



Ethics Committee Newsletter

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MESSAGE FROM THE CHAIR

Mary Ellen Ternes
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This is our first newsletter after the 15th Section Fall Meeting in Pittsburgh, where the Ethics Committee began its year with an excellent panel session—summarized herein by our new vice chair, Peggy P. Love, Ethics Counsel for U.S. EPA (love.peggy@epa.gov).

It has been with great appreciation that I've taken the reins from our former chair, Arden E. Shenker (ashenker@ashenkeresq.com) to assist our Section's Ethics Committee in producing the quality CLE we've been known for over the years. Arden did a fabulous job leading this committee and has agreed to continue to serve on the committee as vice chair At Large. We remain grateful for his support and continued service. Of course, I would have been very worried if our vice chairs hadn't also agreed to continue their service for another year (and hopefully more). They are:

- Jeffrey A. Meyers (jmeyer@nkm.com)—Committee Newsletter;
- Anthony Cotter (Anthony.cotter@ocfl.net)—Membership;
- Scott J. Sachs (ssachs@fwgb.com)—Programs;
- Vicki Wright (vwright@kdlegal.com)—Public Service;
- Thomas M. Skove (tskov@ralaw.com)—Technology;

- Van Kirk McCombs, II (vkm@vkmlaw.com)—*The Year in Review*.
- And our new vice chair, Peggy P. Love (love.peggy@epa.gov)—Committee Newsletter.

The Ethics Committee has a busy year ahead. Our program for the 37th Annual Conference on Environmental Law, held in Keystone, Colorado on March 14-16, 2007, focused on the Model Rules of Professional Responsibility and legal ethical duties arising in cutting edge areas giving rise to social and moral Implications such as nanotechnology.

This rapidly developing practice area beings with it many layers of ethical duties which add to the layers of complexity created by the application of Model Rule 1.1, 1.2, 1.6 and Sarbanes Oxley. In addition, there are other authorities giving rise to scientific and ethical duties such as the reauthorization of the 21st Century National Research and Development Act, the EPA's Human Studies Research Board review and its Risk Assessment Forum, and the International Network on Public Communication of Science and Technology (PCST).

The Ethics Committee is also planning another thought provoking CLE training session for the 16th Section Fall Meeting to be held in Phoenix, Arizona, Sept. 17-20, 2008. More to come on that.

We have also thought about other means of service, and are considering possible teleconference topics. If you have any ideas about how our Ethics Committee

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Peggy P. Love and Jeffrey A. Meyers,
Editors

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might serve the needs of our Section members, please contact me or any of our vice chairs. I'm looking forward to a wonderful term and lots of conference planning.

**THE GAVEL HAS NOW BEEN
PASSED TO . . .**

After serving as committee chair for two years, Arden Shenker of Shenker & Bonaparte, Portland, Oregon, passed the gavel to Mary Ellen Ternes of McAfee & Taft, Oklahoma City, Oklahoma. We are extremely grateful for his hard work and dedication to the Committee and his willingness to stay on as vice chair At Large.

We welcome the new committee chair whose energy and dedication to the committee has been demonstrated over the years and in particular through her role as vice chair of the committee Newsletter/*Trends*.

**ROUND UP . . . LIVELY CLE
SESSION PRESENTED AT THE
15TH SECTION FALL MEETING**

The Ethics Committee presented a CLE session at the 15th Section Fall Meeting held in Pittsburgh, Pennsylvania, on Sept. 28, 2007, on the topic: "The Ethical Lawyer: Rules and Responsibilities in a Multi Jurisdictional Practice World—Avoiding the Gong!" The session moderator was Tom Skove, Roetzel & Andress, and the panelists included Tom Ross, University of Pittsburgh, and Peggy Love, Deputy Ethics Official, Office of General Counsel, U.S. Environmental Protection Agency.

The expert panel provided the audience with a background of the importance of the issue in today's practice and a summary of the pertinent ABA Model Rules of Professional Conduct, including revised Rule 5.5, Unauthorized Practice of Law: Multijurisdictional Practice of Law, and rule 8.5, Disciplinary Authority: Choice of Law. A series of short

scenarios were then presented where the expert panel decided whether or not to give the attorney the ‘gong’ for violating the MJP rules. (A take off from the “Gong Show”). The session initiated a lively discussion and left some attendees wondering whether or not they were violating the rules in their practice.

The following excerpts from the materials provided at the conference and summary of the scenarios presented may, too, have you wondering if you should be given the “gong” for violating the MJP rules.

Background

Environmental, energy, and resources law often presents disputes that involve parties in various states and require attorneys to practice law outside of their respective home states. Lawyers in the United States are usually licensed to practice law within an individual state by the highest court of that state and they are not authorized to practice on a national basis. The unauthorized practice of law (UPL) includes practice by lawyers in a state in which they are not licensed.

States having restrictions against the UPL subject lawyers to sanctions for practicing law in a state where they are not licensed. For example, the Tennessee statute on UPL empowers an officer of the state, such as the attorney general, to seek an injunction, civil penalties, and restitution against violators (TENN. CODE ANN. 23-3-103(c)).

“Practice of Law” Defined

However, states differ in their interpretation of what is meant by the “practice of law.” In general terms, a state license to practice law permits a lawyer to offer a range of services, including courtroom advocacy. There is also a practice of “federal law” that is often involved in multistate practice. The Supreme Court of Ohio found in *Cleveland Bar Association v. Misch* (1998) 82 Ohio St. 3d 256, that drafting buy-sell agreements and applications for financing, negotiating with the Ohio Department of Taxation, and preparing a notice of appeal for an Ohio Board of Tax Appeals constituted the rendering of legal services that “necessarily involved considerations of state as well as federal insolvency law.”

In *Disciplinary Counsel v. Pavlik* (2000) 89 Ohio St. 3d 458, the Ohio Supreme Court addressed the reverse situation—what an in-state lawyer should do to avoid “aiding” such violations by his or her associated out-of-state counsel or environmental consultant. The court stated that it was “not blind to the inter-jurisdictional realities of modern legal practice,” and recognized five methods by which an out-of-state attorney can perform legal services in Ohio: admission without examination, registration for corporate status, admission for pro hac vice, the limited practice of law by foreign legal consultants, and partnerships among lawyers licensed in different jurisdictions.

None of these methods will be entirely satisfactory in all circumstances. For example, to be admitted without examination, the attorney has to have an intention to practice law in Ohio actively on a continuing basis, and will be subject to the state’s continuing legal education rules. Registration for corporate status is also quite limited, in that it only permits an attorney to represent a non-governmental Ohio employer, and such attorney cannot practice for any Ohio court or agency.

The World is Becoming Flat

In today’s environment the world is becoming flat, and it is possible for a lawyer to sit in his or her office or home and transact business or provide legal representation on behalf of a client across state lines, across countries, and even across continents, using a variety of electronic communications. Many law firms have branch offices in different states, and an attorney licensed in California may be assigned to work out of a firm’s New York office to handle client matters that involve New York and other jurisdictions. Firms may have a national practice in specialized fields, such as Superfund litigation or negotiations with the U.S. Environmental Protection Agency (EPA) regarding Superfund consent decrees. Others may focus on water law or pesticides and toxic substances.

Multi-jurisdictional Practice (MJP) Concerns

The practice of law and, in particular environmental law, is prone to multi-jurisdictional practice (MJP). The issue of MJP has created concerns about the propriety of advising clients about the laws of states where the

lawyer is not licensed and the decision by some states to sanction lawyers who provide such legal services. Such concerns were fueled by a 1998 California Supreme Court Decision, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*, 949 P.2d 1 (Cal. 1998), which held that lawyers not licensed in California violated California's misdemeanor unauthorized practice of law provision when they assisted a client in connection with a California arbitration. The court refused to award lawyer fees to a New York firm that rendered legal services to a client in San Francisco. The state law was subsequently amended to allow out-of-state lawyers to obtain pro hac vice admission to participate in California arbitration proceedings.

Not all courts agreed with the *Birbrower* decision. In *Fought & Co. V. Steel Engineering & Erection, Inc.*, 951 P.2d 487 (Hawaii 1998), the Hawaii Supreme Court held that an Oregon law firm, which did work in connection with litigation filed in Hawaii, was not engaged in the unauthorized practice of law in Hawaii and was entitled to fees for its work. The court distinguished *Birbrower* on the grounds that (1) the Oregon lawyers did their work in Oregon, not Hawaii, and (2) the client was represented in the Hawaiian courts by Hawaiian counsel.

The UPL provisions differ from state to state and have not kept up with the changes in the practice of law. Lawyers are understandably confused and remain concerned about the application of the UPL provisions to their legal practice.

American Bar Association (ABA) Commission on Multijurisdictional Practice

The American Bar Association (ABA) Commission on Multijurisdictional Practice was appointed in July 2000 to study and report on the application of current ethics and bar admission rules to the MJP of law. The recommendations of the commission to reaffirm state control over the licensing of attorneys and establishing regulations for MJP were adopted by the House of Delegates in 2002.

The revised Model Rule 5.5 permits MJP in limited circumstances. First, the revised rule allows lawyers

AMERICAN BAR ASSOCIATION SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

Calendar of Section Events

EPA Region 2 Conference

June 3, 2008

New York, New York

(Cosponsored with EPA Region 2, New York State Bar Association, New Jersey State Bar Association, New York City Bar, and Fordham Law School)

Global Warming II: How the Law Can Best Address Climate Change (36th National Spring Conference on the Environment)

June 6, 2008

Baltimore, Maryland

(Cosponsored with the ABA Standing Committee on Environmental Law)

16th Section Fall Meeting

Sept. 17-20, 2008

Phoenix, Arizona

Interdisciplinary Solutions to Instream Flow Problems

Oct. 7-9, 2008

San Antonio, Texas

(Cosponsored with the Instream Flow Council)

27th Annual Water Law Conference

Feb. 19-20, 2009

San Diego, California

38th Annual Conference on Environmental Law

March 12-15, 2009

Keystone, Colorado

***For more information, visit
www.abanet.org/environ/.***

to obtain admission to a tribunal pro hac vice. Second, it permits in-house lawyers admitted in one jurisdiction to perform services for their corporate client or its affiliate in other jurisdictions. Third, it allows lawyers to perform services, such as discovery and investigations that are related to a matter in the jurisdiction in which they are licensed. Fourth, lawyers gain protection against UPL claims by associating local counsel. The commission noted that several states have adopted exceptions to unauthorized practice laws that permit occasional interstate practice by an out-of-state lawyer in connection with the lawyer's practice. The interstate practice need not involve a specific matter of a client in the lawyer's home jurisdiction but, rather, may involve a client who contacted the out-of-state lawyer because of that lawyer's national reputation.

Comment 16 to the revised Model Rule 5.5 states that Rule 5.5(d)(1) applies to government lawyers and others who are employed to render legal services to the employer. Under the revised rule, government lawyers admitted in another United States jurisdiction, and are not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to access the lawyer's qualifications and the quality of the lawyer's work.

The Report of the ABA Commission on Multijurisdictional Practice (Aug. 2002) explains that the revised Model Rule 8.5 clarified the "authority of a jurisdiction to discipline lawyers licensed in another jurisdiction who practice law within their jurisdiction pursuant to the provisions of Rule 5.5 or other law," making clear that state disciplinary boards have jurisdiction over lawyers who practice in a jurisdiction without being admitted in the jurisdiction.

The Scenarios Presented

The revised Model Rules 5.5 and 8.5 provide general guidelines for handling MJP issues, but as you will witness from the series of short scenarios presented at this session, even the brightest lawyers may find themselves violating the Model Rules of Professional Conduct.

1. The facts of the first scenario involved Cohen, who was fired as CEO of GTech, Inc., a Rhode Island corporation. He contacted Tuchman, a lawyer with offices in Illinois and licensed to practice law in Illinois but not Rhode Island. Tuchman prepared and delivered to Cohen a summary of Cohen's rights under his Employment Agreement with GTech. The document prepared by Tuchman also summarized a Stock Option Agreement (SOA) between Cohen and GTech. Although the SOA provided in fact for only a six-month exercise period, Tuchman's report stated that the option exercise period was one year. Soon thereafter, Cohen, with the assistance of another attorney, took over the settlement negotiations with GTech. Tuchman did no further work on the matter.

Cohen negotiated a Settlement Agreement with GTech and subsequently attempted to exercise his stock options. Unfortunately, Cohen's attempted exercise fell outside the agreement's six-month exercise period and GTech refused to honor the option.

Cohen then sued Tuchman and his law firm alleging two causes of action, one of which alleged that Tuchman and the firm had engaged in the "unauthorized practice of law" in Rhode Island.

The court granted the defendants motion for summary judgment on the unauthorized practice of law claim because one defendant's actions in drafting a summary and abstract of plaintiff's rights under the employment agreement and the stock option agreement was not the practice of law. *See Cohen v. GTech Corp.*, 2006 R.I. Super. LEXIS 146 (R.I. Superior Ct. Oct. 27, 2006).

2. In the second case, Bolte, a long-time member of the Wisconsin bar, went on inactive status and moved to Colorado. He was approached by Koscove, a

Colorado resident, who sought his help regarding Koscove's mineral lease with ARCO. Bolte explained to Koscove that he was not licensed to practice law in Colorado and that he would be thus unable to appear in court and that she would have to hire a Colorado licensed lawyer to pursue any legal redress. Koscove and Bolte agreed that he would review and analyze the various lease documents and that Bolte would be paid \$5,000 per month and given a car and computer to use, and a percentage of any recovery by Koscove under the ARCO lease. At Bolte's recommendation, Koscove retained a Colorado lawyer who filed a claim against ARCO in federal court.

Koscove subsequently received approximately \$2,000,000 from ARCO; she paid Bolte \$400,000 representing the agreed upon percentage of the recovery. After the case settled, Koscove consulted with another lawyer and through this lawyer advised Bolte that he would not be entitled to any further fees after the \$400,000 payment. When Bolte refused to waive his further fee claims, Koscove filed a civil action in Colorado state court against him to recover the payment.

Koscove also filed a grievance against Bolte with the Wisconsin disciplinary authorities alleging a violation of Rule 5.5.

The court held that a public reprimand is sufficient discipline for Bolte's misconduct in this matter and that he be directed to pay the costs of this disciplinary proceeding which presently total \$23,345.64. *See In Matter of Bolte*, 699 N.W. 2d 914, 285 Wisc. 2d 569 (2005).

3. The issue presented in the third scenario was whether plaintiff attorney is entitled to fees for his representation of defendant companies although he failed to become a member of the New York bar.

See Spanos v. Skouras Theatres Corporation, Theatre & Cinema, Inc., Philhamboro, Inc., Youngstown Theatre Corporation and Modern Playhouses, Inc., 364 F.2d 161; 1966 U.S. App. LEXIS 6812; 10 Fed. R. Serv. 2d (Callaghan) 1601; 10 Fed. R. Serv. 2d (Callaghan) 1606, where the

appellate court awarded legal fees to plaintiff out-of-state attorney and remanded the case for further proceedings because plaintiff had failed to apply for a special appearance before the federal court.

4. In this last scenario, the issue presented was whether two Chicago attorneys were engaged in the unauthorized practice of law in the State of Georgia and had practiced law in the U.S. Bankruptcy Court for the Northern District of Georgia, Atlanta Division, without being admitted to the Georgia bar, and whether their sharing of compensation was proper. The court exercised its discretion to deem the Illinois lawyers to be so admitted to the bar of this court. No disgorgement of fees was required and no further disciplinary or other proceedings with regard to the representation were necessary. *See In Re: Loveless Babies, JR., and Alma Bernice Babies*, 315 B.R. 785; 2004 Bankr. LEXIS 1572.

Summary

This lively interaction of real life examples of situations served as a reminder to attendees that environmental, energy, and resources law often results in attorneys practicing law outside of their respective home states. This simple reality along with the growth of the virtual law office, the expansions of mega law firms and our increasingly mobile and virtual society challenge today's attorney to comply with the Rules of Professional Responsibility regarding MJR.

For further information on this topic, you may want to visit the ABA's Center on Professional Responsibility's online library of documents related to MJR at www.abanet.org/cpr/mjr/. In addition, the committee's "Final Report-Introduction and Overview" provides good overview of the subject. The "Charts on State Adoption of MJR Proposals" may also be helpful.

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