

AGENDA ITEM

MAY 113

American Bar Association's
Model Court Rule on Provision of
Legal Services Following
Determination of Major Disaster –
Report and Recommendation

DATE: April 21, 2008

TO: Members of the Board of Governors
Members of the Board Committee on Operations

FROM: State Bar Staff

RE: ABA's Model Court Rule on Provision of Legal Services Following
Determination of major Disaster – report and recommendation to
take no action at this time.

EXECUTIVE SUMMARY

The ABA's model court rule re provision of legal services following determination of major disaster was referred by the Chief Justice and the Judicial Council to the State Bar for consideration. Staff has studied the model court rule and recommends that no action be taken at this time. If the Board concurs, the recommendation will be transmitted to the Supreme Court.

The ABA's House of Delegates adopted the model court rule to address the devastation and disruption that major disasters like Hurricane Katrina can have on the legal systems of affected states. The model court rule anticipates and makes comprehensive provision for the response of the highest courts of two kinds of jurisdictions to a major disaster. The first type of jurisdiction is one in which the major disaster occurs. The second type of jurisdiction is one that is not affected by the major disaster. The highest court of a jurisdiction affected by the disaster would be able to respond by authorizing attorneys from other jurisdictions to practice law temporarily in the affected jurisdiction under specified circumstances. The highest court of an unaffected jurisdiction would be able to authorize displaced attorneys from the affect jurisdiction to practice law temporarily in the unaffected state.

Although the spirit behind the model court rule is commendable, its provisions may unnecessarily lock in the California Supreme Court's response to a major disaster. A case-by-case approach would offer more flexibility to the Court. With the case-by-case approach, no action is needed on the model court rule. If the Board approves, the recommendation will be transmitted to the Supreme Court.

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BACKGROUND

After the devastation caused by Hurricanes Katrina and Rita in 2005, the American Bar Association formed a task force on Hurricane Katrina. That task force reported that there is a need for a model rule that would allow out-of-state lawyers to provide pro bono legal services in a jurisdiction affected by a major disaster and allow lawyers in the affected jurisdiction whose legal practices were disrupted to practice law temporarily in an unaffected jurisdiction. The task force envisioned a model rule that could be implemented by the highest courts of both kinds of jurisdictions – one affected by the major disaster and another not affected by the disaster – on an emergency basis. The ABA's Standing Committee on Client Protection agreed to draft a model rule for this purpose.

The ABA's client protection committee drafted a model rule of professional conduct and a model court rule. The consensus of ABA entities that commented on the drafts was that the issues to be addressed were administrative matters involving the facilitation of providing temporary legal services. This was not viewed as being an ethics issue, so the model court rule was supported over a model rule of professional conduct. On February 12, 2007, the ABA's House of Delegates adopted that ABA model court rule on provision of legal services following determination of a major disaster.

In March 2007, the ABA's client protection committee sent the model court rule to California's Chief Justice Ronald M. George for consideration. Chief Justice George and the Judicial Council referred the model court rule to the State Bar for consideration because of the State Bar's role in admissions of attorneys to practice and managing the multijurisdictional practice (MJP) program that allows qualified non-California attorneys to practice law in this state on a limited basis. The staff working group who studied the ABA's model court rule consists of representatives from the offices of Admissions, Special Admissions, Professional Competence, General Counsel, and Legal Services, Access and Fairness Programs.

DISCUSSION

1. Analysis of the Model Court Rule on Provision of Legal Services Following Determination of a Major Disaster

The model court rule anticipates and makes comprehensive provision for the response of the highest courts of two kinds of jurisdictions to a major disaster. The first type of jurisdiction is one in which the major disaster occurs. The second type of jurisdiction is not affected by the major disaster. The highest court of a jurisdiction affected by the disaster would be able to respond by authorizing attorneys from other jurisdictions to practice law temporarily in the affected jurisdiction under specified circumstances. The highest court of an unaffected jurisdiction would be able to authorize displaced attorneys from the affected jurisdiction to practice law temporarily in the unaffected state.

A state supreme court's adoption of the model court rule is a preliminary step. Actual authorization to practice of law temporarily under the model court rule is triggered by a determination that the highest court of an affected jurisdiction must make when a major disaster occurs in the jurisdiction. When the highest court of the affected jurisdiction makes a determination that an emergency affects the justice system in all or part of the court's state as a result of the major disaster, a lawyer who is authorized to practice law in another U.S. jurisdiction, and who is not restricted from practicing law in any jurisdiction, may temporarily provide legal services in the affected state on a pro bono basis through specified types of legal services program. In an unaffected jurisdiction, the highest court may make such a determination, but only after the highest court of the affected state makes the determination for the affected state, in which case a lawyer who is licensed and principally practices law in the affected state, and who is not restricted from practicing in any jurisdiction, may temporarily practice law in the unaffected state with specified limitations. In addition, the model court rule provides for duration of authority for the temporary practice, waiver of pro hac vice fees, discipline of attorneys, registration with the clerk of the highest state court, and notification to clients.

A commendable effort is made in the rule to anticipate in advance the need for legal services that could arise from future disasters. However, by prescribing in advance the response that will be made to a major disaster, the resulting model court rule appears to be quite restrictive. Listed below are examples of provisions in the model court rule that raise questions about its application in California:

- a. Determination that a major disaster exists in the jurisdiction. The model court rule provides that the highest court of an affected state must make a determination when an emergency affects the justice system as a result of a natural or other major disaster in all or part of the state. After the affected state's highest court makes the determination, the highest court

of an unaffected state would also need to make the determination in order for the rule to be implemented in the unaffected state. State supreme courts do not normally make this type of determination, and they need not do so in order to be responsive to a major disaster. For example, after Hurricane Katrina, the California Supreme Court issued a responsive order without making this type of determination.

b. Designated legal services programs and pro bono services. The rule describes the legal services programs through which out-of-state attorneys would provide pro bono services. The described programs may not be consistent with California's designation of comparable programs in this state. Furthermore, pro bono legal services by attorneys from other jurisdictions might not be needed in California after a major disaster occurs in this state.

c. Temporary practice of law and provision of legal services. Provision (b) of the model court rule applies to the affected jurisdiction. Under provision (b), after the highest court in the affected state makes the determination, under certain conditions a lawyer authorized to practice law in an unaffected jurisdiction "may provide [pro bono] legal services in this jurisdiction on a temporary basis". Provision (c) applies to unaffected jurisdictions. Under provision (c), after the unaffected state's highest court makes the appropriate determination, under certain conditions a lawyer authorized to practice law in an affected jurisdiction "may provide legal services in this jurisdiction on a temporary basis." This wording of the quoted language is vague because it leaves room for interpretation and questions as to which law may be practiced by the authorized attorney - is it the law of the attorney's jurisdiction, or California law, or both?

d. Duration of the authority to temporarily practice. A state supreme court's determination under provisions (b) or (c) does not include the duration of the temporary authorization. Under provision (d) the state supreme court must make a second determination that the conditions caused by the major disaster in the affected state have ended. With that second determination, provision (b)'s authorization to practice law in the affected state ends for attorneys from unaffected jurisdictions, unless they have not completed the pro bono representation of existing clients. The authorization under provision (c) for attorneys to temporarily practice law in the unaffected jurisdiction ends 60 days after the court's declaration. These provisions stand in contrast to the response of most state supreme courts after Hurricane Katrina. Most responsive state supreme courts issued orders specifying a fixed period of time, subject to extension, during which attorneys from Louisiana, Mississippi or Alabama were authorized to practice law. In response to Hurricane Katrina, the California Supreme Court's order fixed end-date for the temporary practice of law by

attorneys from Louisiana and other affected states. This approach worked reasonably well in California.

e. Court appearances pro hac vice. The model court rule contains a provision (e) that waives fees where there is pro hac vice authorization to appear in court. The pro hac vice provision goes beyond what most responding courts ordered after Hurricane Katrina. It is questionable whether this provision would be necessary after a major disaster in California.

f. Registration with the clerk of this Court. Provision (f) states that lawyers who temporarily provide legal services in the authorizing jurisdiction under the rule must register with the clerk of the supreme court. This departs from the process chosen in California after Hurricane Katrina, when the California Supreme Court ordered affected lawyers to file a registration form with the State Bar instead of the clerk of the Court.

g. Comments to the model court rule. Comments 3 and 4 reference the ABA's model rule of professional conduct 5.5 on multijurisdictional practice of law (MJP). Comment 4's reference is for interpretation of the meaning of a specific phrase in the model court rule. However, the California Supreme Court has adopted four MJP rules of court that differ substantively from the ABA's model rule of professional conduct 5.5 for MJP. Further analysis would be required to determine the extent to which the Comments are appropriate for California.¹

The model court rule may not be suitable for California with its geographic size and large number of licensed attorneys. It is unlikely that California would have a disaster as big as the model rule anticipates. It is also questionable whether the California Supreme Court would find it necessary to open up the practice of law in California as much as the model court rule would authorize. Finally, there is nothing in the model court rule that the California Supreme Court cannot already do in appropriate circumstances.

2. The Southern California Area Wildfires of October 2007.

Beginning on about October 20, 2007, major wildfires broke out in Southern California (most were in San Diego County, others occurred in San Bernardino County and Los Angeles County). Taken all together, these wildfires could be

¹ A supreme court's adoption of one or more MJP rules allows attorneys who are not authorized to practice law in a certain jurisdiction, but who are authorized to practice in another jurisdiction, to practice law in the court's jurisdiction on a temporary basis in limited circumstances. As of June 2007, 34 states had adopted some type of MJP rules. Eight states adopted the Model Rule 5.5. Twenty-six states adopted an MJP rule that differs from the model MJP rule. The California Supreme Court authorizes MJP through four rules of court, not through a rule of professional conduct.

viewed as constituting a major disaster for the affected counties. Within a week after the wildfires broke out, the State Bar received inquiries from outside of California asking whether pro bono assistance was needed along the lines of the ABA's model court rule. It was the assessment of Bar staff that any legal assistance called for by the fires could be provided internally within California. The California Supreme Court and local courts responded to the disaster on a per-situation basis without issuing a broader order along the lines of either the Hurricane Katrina order or the model court rule.

RECOMMENDATION

It is recommended that no action on the model court rule is needed at this time. The existing case-by-case approach offers more flexibility by allowing the Court to tailor its response to the particular disaster. For example, the Court's tailored order in response to Hurricane Katrina in 2004 worked well. More recently, the state court system's response to the Southern California fires of October 2007 worked well for that particular disaster.

FISCAL AND PERSONNEL IMPACT:

There is no fiscal impact to the State Bar.

BOARD BOOK/ADMINISTRATIVE MANUAL UPDATE:

There is no known impact on the Board Book.

STATE BAR RULES IMPACT

None known.

PROPOSED BOARD COMMITTEE RECOMMENDATION:

Should the Board Committee on Operations concur with the proposed recommendation, the following resolution would be in order:

RESOLVED, that the Board Committee on Operations recommends that the Board of Governors recommend that no action need be taken on the American Bar Association's Model Court Rule on Provision of Legal Services following Determination of a Major Disaster, and with direction that the recommendation be transmitted to the Supreme Court for whatever action it deems appropriate.

Should the Board of Governors concur with the recommendation of the Committee on Operations, the following resolution would be in order:

RESOLVED that, upon recommendation of the Board Committee on Operations, the Board of Governors hereby recommends that no action need be taken on the American Bar Association's Model Court Rule on Provision of Legal Services following Determination of a Major Disaster, and directs staff to transmit the recommendation to the Supreme Court for whatever action it deems appropriate.

Attachments:

- (1) ABA's Model Court Rule on Provision of Legal Services Following Determination of Major Disaster
- (2) California Supreme Court Order in the Matter of the Practice of Law by Attorneys Displaced by Hurricanes Katrina and Rita