American Bar Association
Section of Labor and Employment Law
4th Annual Meeting
Chicago, Illinois
November 2010

Multijurisdictional Practice Issues, and Non-Gangster "GATS"

by

Richard T. Seymour*

* Law Office of Richard T. Seymour, P.L.L.C., 1150 Connecticut Avenue N.W., Suite 900, Washington, D.C. 20036-4129. Telephone: 202-862-4320. Cell: 202-549-1454. Facsimile: 800-805-1065. E-mail: rick@rickseymourlaw.net. Copies of a number of my CLE papers are on my web site, www.rickseymourlaw.com.

A. Problems of Out-of-State In-House Labor and Employment Law Counsel

1. The Practical Situation

Both corporate and union in-house counsel routinely travel on behalf of their employers to States in which they are not admitted, to participate in collective bargaining, help handle significant grievances, participate in arbitrations under a collective bargaining agreement, investigate internal complaints, help initiate or respond to unfair labor practice charges, respond to EEOC complaints, train their respective officials, render legal advice, and direct or assist outside counsel.

Similarly, in-house counsel for a variety of tax-exempt associations with local chapters often need to travel to local chapters in various States to perform some of the same types of functions as in-house corporate or union counsel. These can include civil rights organizations, trade associations, organizations of employers, and the like.

The activities of in-house counsel are not the types of activities that have traditionally caused the problems that have led to charges of the unauthorized practice of law ("UPL"), and there are no clients potentially misled about the qualifications of the counsel seeking to be retained. Nevertheless, the traditional wording of ULP provisions in many States could reach such activities.

2. The Resolution

The ABA Commission on Multijurisdictional Practice developed revisions to Model Rule of Professional Conduct 5.5, to provide a safe harbor for in-house counsel while recognizing the interest of State Bars in regulating the practice of law within their own borders.

In 2007 and 2008, the ABA was considering a revision under which in-house counsel would have a safe harbor if they registered with the State Bars of every State in which they were not admitted but engaged in professional activity. A fee would have been charged for the proposal.

There were objections. The Council of the Section of Labor and Employment Law established a task force to address the problems, and ultimately urged significant changes in the proposal. Among other problems, we pointed out the multitude of States in which our in-house members had to carry out their professional responsibilities, and that the expense of paying that many registration fees per attorney would in some instances cost more than the salaries of the attorneys. The result would be either a significant deterioration of the ability of the corporation, union, or organization to continue performing essential legal services, with layoffs of attorneys likely, or cause a significant distortion in allocation of the limited resources of the corporation, union, or organization.

A copy of the Section's August 8, 2008 Statement to the House of Delegates is attached.[1] It was widely circulated. The sponsors of the measure met with our Section's delegates to the House, and we jointly worked out wording that resolved our problems. The Section then co-sponsored the measure, and it passed.

3. The Current Text of Model Rule 5.5

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) 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;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding 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; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

[1] We were not alone in seeing these problems. A copy of the October 10, 2007 statement of the Association of Corporate Counsel on the then version of proposed changes to Model Rule 5.5 is also attached.

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

4. Actions by State Bars

State Bars across the country are considering the changes, and many have amended their rules in conformance with the revised ABA Model Rule 5.5.

The ABA's June 23, 2010 paper, *State Implementation of ABA MJP Policies*, has a State-by-State listing of those States that have adopted rules that are identical or similar to ABA Model Rule 5.5. Some, like Arizona and Connecticut, have additional requirements to be met. Some, like California and Colorado, have their own provisions that differ from those in the ABA's Model Rule.

- Practice Pointer: Before going to a State to engage in any professional activity on behalf of a client where there is no pro hac vice admission or pending litigation—the situation in which these problems most often arise—check that State's rules.

B. GATS

1. What It Is

The General Agreement on Trade in Services, or "GATS," is an international treaty to which the United States is a signatory. The following description is from a June 29, 2010 paper, EMILY C. BARBOUR, LEGISLATIVE ATTORNEY, CONGRESSIONAL RESEARCH SERVICE, TRADE LAW: AN INTRODUCTION TO SELECTED INTERNATIONAL AGREEMENTS AND U.S. LAWS, at 25-27, but with the paragraph indentations required by proper usage:

General Agreement on Trade in Services

> The General Agreement on Trade in Services (GATS) is designed to liberalize trade in services. Unlike international trade in goods, which is largely governed by measures imposed at countries' borders, trade in services tends to be governed mostly by internal regulations. Internal regulations might, for example, restrict the number of drugstores allowed within a geographical area, define technical safety requirements for airline companies, or prohibit banks from selling certain financial products. As this list suggests, the GATS disciplines a wide range of domestic measures, but some of its provisions, including those on market access and national treatment, are limited by the scope of each country's commitments, which are defined in the national schedules and subject to progressive reduction .
>
> If the specific service sector being regulated by a Member's measure is not exempted or excluded from the relevant provisions of the GATS, the GATS disciplines a broad swath of domestic measures affecting trade in that service sector. The GATS does not define "service," however, and, instead, regulates the supply of a service in four "modes": (1) from a service supplier in one Member to a consumer in another Member without travel (e.g., an architecture firm mails blueprints to a consumer overseas), (2) in the territory of one Member to a consumer

of any other Member (e.g., in the U.S. to a foreign tourist), (3) by a service supplier of one Member with a commercial presence in the territory of any other member (e.g., by a commercial bank with branches in a foreign country), and (4) by a service supplier of one Member travelling temporarily to provide services in another Member (e.g., by a consultant on an overseas business trip).

Among the measures that affect trade in services and are subject to the GATS are laws, regulations, procedures, and administration actions that concern the purchase, payment, or use of a service and are issued by a central, regional, or local government. Only measures affecting the supply of services in the exercise of governmental authority are excluded from GATS obligations. By broadly defining "service" and "supply of service," the GATS disciplines not merely measures affecting the supply of the actual service (e.g., a measure regulating the supply of accounting services to an overseas firm) but also measures affecting the production, distribution, marketing, sale, and delivery of that service.

Because the GATS permits Members to specify how they will reduce market access barriers to trade in services, whether a particular measure is GATS-inconsistent generally hinges on the scope of the national schedules of commitments of the Member imposing the measure. Unlike the GATT, under which the nondiscrimination provisions apply to goods from *all* Members, the GATS permits Members to schedule (1) exemptions from the Most Favored Nation (MFN) treatment obligation, and (2) specific service sector commitments to the national treatment obligation. As a result, each Member limits the scope of its obligations not to discriminate between services provided by firms from different Members and between services provided by foreign, rather than domestic, firms. In addition to its basic obligations and Members' national schedules of commitments, the GATS also contains a number of annexes addressing the special situations of individual services sectors.

The GATS does not compel a government to privatize services industries or outlaw government or private monopolies. However, the GATS is concerned with increasing transparency.

Consequently, similar to the Agreements on Technical Barriers to Trade and Sanitary and Phytosanitary Measures, Article III of the GATS requires governments to publish all relevant laws and regulations and to set enquiry points that can provide foreign companies and governments with information about entering and competing in a service sector. This is particularly important because the services sectors may be regulated by multiple government entities at both the national and local levels. Consequently, service providers seeking to do business internationally may be stymied by a lack of transparency in how a country licenses its service providers or regulates service delivery. U.S. service providers continue to cite the lack of transparency in the development and implementation of foreign countries' regulations as a primary obstacle to increasing foreign trade in services. If the policy goals behind the GATS are achieved, Members' will presumably have an improved understanding of all other Members' services regulations.

This paper can be downloaded from http://fpc.state.gov/documents/organization/145587.pdf.

2. The Application of GATS to Legal Services

The May 2002 International Bar Association Handbook on GATS states at p. 6:

Were All Countries Pleased that Legal Services Were Covered by the GATS?

> Legal services were included within the coverage of the GATS despite the objections of some countries. France, for example, did not want legal services to be covered by the GATS. Although the United States initially sought inclusion of legal services in the GATS and preferred a special annex addressing legal services, the annex approach was rejected and, by the conclusion of the GATS negotiations, many U.S. lawyers were unhappy that legal services had been included. Regardless of objections, however, legal services are now part of the GATS.

The Handbook can be downloaded from http://www.personal.psu.edu/faculty/l/s/lst3/IBA%20GATS%20Handbook%20final.pdf.

3. Information from the American Bar Association

The ABA has established a web site for members to keep abreast of these developments, http://www.abanet.org/cpr/gats/home.html. It explains:

> Negotiations for the U.S. are coordinated by the Office of the U.S. Trade Representative. USTR representatives have indicated that they do not intend to displace state regulation of lawyers and have made efforts to consult with U.S. lawyers concerning these events. To date, however, the USTR has heard from relatively few U.S. lawyers concerning these important issues. This website has been established in order to increase awareness about the GATS and the implications it has for the delivery of legal services. Comments on the website and additional submissions are welcome.

C. Foreign Legal Consultants

The ABA has a Model Rule for the Licensing and Practice of Foreign Legal Consultants, which is attached.

According to the ABA's June 23, 2010 paper, *State Implementation of ABA MJP Policies*, several States have adopted rules on the activities of non-U.S. legal consultants. These rules generally apply only to in-house counsel.

These include Alaska, Arizona, California, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Utah, Virginia, and Washington.

A detailed analysis comparing the State rules with the ABA Model Rule, as of May 2006, is provided in CAROLE SILVER• AND NICOLE DEBRUIN, COMPARATIVE ANALYSIS OF UNITED STATES RULES LICENSING LEGAL CONSULTANTS. It can be downloaded from http://www.abanet.org/cpr/mjp/silver_flc_chart.pdf.

D. State Bar Rules on Temporary Practice by Foreign Lawyers

The American Bar Association's House of Delegates adopted in 2002 a resolution on temporary practice within the United States by foreign lawyers. The report can be downloaded

from http://www.abanet.org/cpr/mjp/201j.pdf.

According to the ABA's June 23, 2010 paper, *State Implementation of ABA MJP Policies*, several States have adopted rules on temporary practice of law by foreign attorneys.

These include Delaware, the District of Columbia (incidental legal practice only), Florida, Georgia, Illinois (in-house counsel only), New Hampshire, New Mexico, Pennsylvania, and Virginia.

E. ABA 20/20 Ethics Commission

The 20/20 Ethics Commission is looking at potential revisions of the ethics rules, including multijurisdictional practice, a term that includes multinational practice.

The speakers and their papers at the 20/20 Ethics Commission's August 6, 2010 hearing can be downloaded from http://www.abanet.org/ethics2020/speakers.pdf.