

Q&A



LAWYER LIABILITY AND ETHICS

Movement Underway to Allow Lawyers to Practice in Any State



Joseph Brophy

The Association of Professional Responsibility Lawyers (APRL) is an association of over 400 lawyers and law professors who advise and represent lawyers on ethics matters. On April 18, 2022, the APRL sent a proposal to the ABA to revise ER 5.5 (unauthorized practice of law) advocating that a lawyer admitted in any United States jurisdiction should be able to practice law and represent willing clients without regard to the geographic location of the lawyer or the client, without regard to the forum where the services are to be provided, and without regard to which jurisdiction's rules apply at a given moment in time.

A few years ago, this would be unthinkable. But given the recent changes to ethical rules in many jurisdictions aimed at reducing the cost of legal services, including Arizona's removal of barriers to lawyers and nonlawyers co-owning businesses that engage in the practice of law, and the justification for those changes (reduction of legal costs and a dim view of the economic protectionism and reduction of competition caused by certain ethical rules), there is reason to believe that this effort may gain traction.

The APRL's proposed revision to ER 5.5 offers a regulatory model that would be similar, though not identical, to the way that drivers' licensing works in our nation. Although each jurisdiction implements its own scheme for granting drivers' licenses, those licenses are, of necessity, recognized in every U.S. jurisdiction. Drivers are expected to inform themselves of the laws in jurisdictions to which they travel.

The current state-based model originated over 200 years ago when the need for legal services was locally based, email and video calls/hearings did not exist, and before online research made it easy for lawyers to become competent with local laws and rules. Under the proposed rule, lawyers would be required to disclose the jurisdictions they're licensed in, which APRL says will enhance public protection. Moreover, the judiciary would still have the authority to regulate who appears before them in court, and lawyers would be held responsible for disciplinary issues in the relevant jurisdiction.

The APRL argues that not only is there a lack of evidence that lawyers are harming the public by working across state lines, but also that there is no evidence clients prioritize the location of their lawyer when deciding who to retain. Moreover, one of the problems driving the "access to justice"

problem that exists in every jurisdiction in the country is the unavailability of lawyers in a client's geographic area, particularly in rural areas. This problem is compounded by geographical restrictions on admission and the fact that often when lawyers in rural areas retire, no one replaces them.

Additionally, unemployed and underemployed lawyers may not be able to afford to pay a second state's admission fees, repeatedly satisfy CLE requirements, and so forth. Yet those lawyers may be competent and would otherwise be available at a reasonable fee but for current ethical and regulatory restrictions. Forcing unemployed lawyers who are competent and licensed in at least one state to take an additional bar examination, pay additional bar dues, and be challenged again about their character and fitness for the ability to serve underserved legal communities in another jurisdiction is illogical according to the APRL.

One of the justifications for the geographical limitations imposed by the current regulatory structure is attorney competence. But that justification makes little sense given that once a lawyer is licensed in a jurisdiction, he may practice in almost any area he chooses or in multiple areas. A newly minted lawyer immediately after passing the bar could take on a family law case, a car-accident lawsuit, and an employment contract negotiation. The lawyer in this scenario might not be the best lawyer for the job, but the Rules of Professional Conduct assume that the lawyer can educate himself about the subject matter and competently handle the case. The APRL says that assumption should not disappear because of an arbitrarily drawn state line.

What the APRL calls the "Competency Fallacy of Rule 5.5" dictates that a lawyer licensed in State A, who has devoted their entire career to personal injury work for example, would not be competent to represent the car-accident victim described above (without the association of local counsel) because the lawyer is presumed to be incapable of knowing or coming to understand the law of State B. That presumption is at odds with reality. Instead, if that State A-licensed lawyer wanted to be able to regularly represent clients with personal injury cases in State B, the lawyer would have to obtain a second license to practice law, a license issued by State B.

Interestingly, there is already a template and support for what the APRL is suggesting. Many states, including Arizona via Ariz. R. Sup. Ct. 39(d), have enacted rule revisions to accommodate military spouse lawyers who frequently move across state lines to relieve the burdens of repeatedly

MEMBER SPOTLIGHT DON LOOSE

Loose Law Group, P.C.



HOW LONG HAVE YOU BEEN A MEMBER OF THE MCBA?

Since 1985.

HAVE YOU EVER BEEN INVOLVED WITH ANY SECTIONS OR DIVISIONS?

Not yet.

HOW LONG HAVE YOU BEEN PRACTICING LAW?

Since 1980 (first two years in Michigan).

WHAT WAS YOUR FIRST AREA OF PRACTICE?

After law school, I worked two years at a preeminent business law firm in Troy, Michigan. My job was to research legal issues and write legal memorandums, primarily to the partners but occasionally to the clients. The experience provided a solid foundation for my legal career.

WHAT DO YOU SEE AS THE FOCUS FOR THE MCBA THIS YEAR?

Strengthening connections in the Maricopa County legal community and continuing to provide top level CLE classes and webinars.

WHAT ISSUES DO YOU SEE FACING ATTORNEYS IN ARIZONA?

How to navigate in the post-pandemic

legal world, including adaptation to videoconference and telephonic hearings, increasing use of electronic communications, and managing clients' varied expectations.

IF YOU HADN'T BEEN A LAWYER, WHAT ELSE WOULD YOU BE?

I've always loved to fly, have a pilot's license, and probably would have been an airline pilot.

IF YOU COULD BE ANY FICTIONAL CHARACTER—ON TV, IN BOOKS, IN MOVIES—WHO WOULD IT BE AND WHY?

Good question. I'd say Jack McCoy (Sam Waterston) in the old Law and Order series because of his unwavering views of right and wrong, tireless devotion to his profession, and obvious human vulnerabilities.

WHAT'S THE STRANGEST JOB YOU'VE EVER HELD?

Maybe not too strange, but the grossest job I've ever had was as a dishwasher in a restaurant kitchen, scraping half-eaten food off of patrons' plates. ■

Hon. Aryeh Schwartz Investiture



MCBA Treasurer Hon. Glenn Allen presents a gavel to Hon. Aryeh Schwartz on Friday, June 10.

getting licensed in new states. That effort has received support from the ABA and the Conference of Chief Justices. The APRL points out, correctly, that there is nothing special about the relatively small subset of military spouse lawyers that makes them more ethical or competent as a lawyer by virtue of having married a member of the military.

The "access to justice" movement is all the rage these days at the ABA, and it has received a sympathetic ear from Arizona's

Supreme Court, which has consistently been in front of other jurisdictions on these issues—Arizona was the second state to modify the rules to accommodate military spouse lawyers. We have likely not heard the end of this effort. ■

Joseph Brophy is a partner with Jennings Haug Keleher McLeod in Phoenix. His practice focuses on professional responsibility, lawyer discipline and complex civil litigation. He can be reached at JAB@jhkmlaw.com.