

PROPOSAL TO ADOPT AMERICAN BAR ASSOCIATION (ABA) MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER

Issue

Should the Representative Assembly recommend that the Supreme Court adopt the ABA Model Court Rule on the provision of legal services following determination of a major disaster?

Synopsis

On February 12, 2007, the ABA House of Delegates adopted a Model Court Rule on Provision of Legal Services Following Determination of Major Disaster. The concept for the model rule was prompted by the recognition that planning for disasters such as Hurricane Katrina should include planning for significant needs for legal assistance across state lines to disaster victims.

By unanimous recommendation of the Justice Policy Initiative and the Pro Bono Initiative, the Committee on Justice Initiatives unanimously recommends the adoption of the ABA model rule in Michigan.

Text of Model Court Rule provided by the ABA:

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RULE ____ . PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER

(a) *Determination of existence of major disaster.* Solely for purposes of this Rule, this Court shall determine when an emergency affecting the justice system, as a result of a natural or other major disaster has occurred in:

- (1) this jurisdiction and whether the emergency caused by the major disaster affects the entirety or only a part of this jurisdiction, or
- (2) another jurisdiction but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction. The authority to engage in the temporary practice of law in this jurisdiction pursuant to paragraph (c) shall extend only to lawyers who principally practice in the area of such other jurisdiction determined to have suffered a major disaster causing an emergency affecting the justice system and the provision of legal services.

(b) *Temporary practice in this jurisdiction following major disaster.* Following the determination of an emergency affecting the justice system in this jurisdiction pursuant to paragraph (a) of this Rule, or a determination that persons displaced by a major disaster in another jurisdiction and residing in this jurisdiction are in need of pro bono services and the assistance of lawyers from outside of this jurisdiction is required to help provide such assistance, a lawyer authorized to practice law in another United States jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Such legal services must be provided on a *pro bono* basis without compensation, expectation of compensation or other direct or

indirect pecuniary gain to the lawyer. Such legal services shall be assigned and supervised through an established not-for-profit bar association, *pro bono* program or legal services program or through such organization(s) specifically designated by this Court.

(c) *Temporary practice in this jurisdiction following major disaster in another jurisdiction.*

Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.

(d) *Duration of authority for temporary practice.* The authority to practice law in this jurisdiction granted by paragraph (b) of this Rule shall end when this Court determines that the conditions caused by the major disaster in this jurisdiction have ended except that a lawyer then representing clients in this jurisdiction pursuant to paragraph (b) is authorized to continue the provision of legal services for such time as is reasonably necessary to complete the representation, but the lawyer shall not thereafter accept new clients. The authority to practice law in this jurisdiction granted by paragraph (c) of this Rule shall end [60] days after this Court declares that the conditions caused by the major disaster in the affected jurisdiction have ended.

(e) Court appearances. The authority granted by this Rule does not include appearances in court except:

- (1) pursuant to that court's *pro hac vice* admission rule and, if such authority is granted, any fees for such admission shall be waived; or
- (2) if this Court, in any determination made under paragraph (a), grants blanket permission to appear in all or designated courts of this jurisdiction to lawyers providing legal services pursuant to paragraph (b). If such an authorization is included, any *pro hac vice* admission fees shall be waived.

(f) *Disciplinary authority and registration requirement.* Lawyers providing legal services in this jurisdiction pursuant to paragraphs (b) or (c) are subject to this Court's disciplinary authority and the *Rules of Professional Conduct* of this jurisdiction as provided in Rule 8.5 of the *Rules of Professional Conduct*. Lawyers providing legal services in this jurisdiction under paragraphs (b) or (c) shall, within 30 days from the commencement of the provision of legal services, file a registration statement with the Clerk of this Court. The registration statement shall be in a form prescribed by this Court. Any lawyer who provides legal services pursuant to this Rule shall not be considered to be engaged in the unlawful practice of law in this jurisdiction.

(g) *Notification to clients.* Lawyers authorized to practice law in another United States jurisdiction who provide legal services pursuant to this Rule shall inform clients in this jurisdiction of the jurisdiction in which they are authorized to practice law, any limits of that authorization, and that they are not authorized to practice law in this jurisdiction except as permitted by this Rule. They shall not state or imply to any person that they are otherwise authorized to practice law in this jurisdiction.

Comment

[1] A major disaster in this or another jurisdiction may cause an emergency affecting the justice system with respect to the provision of legal services for a sustained period of time interfering with the ability of lawyers admitted and practicing in the affected jurisdiction to continue to represent clients until the disaster has ended. When this happens, lawyers from the affected jurisdiction may need to provide legal services to their clients, on a temporary basis, from an office outside their home jurisdiction. In addition, lawyers in an unaffected jurisdiction may be willing to serve residents of the affected jurisdiction who have unmet legal needs as a result of the disaster or, though independent of the disaster, whose legal needs temporarily are unmet because of disruption to the practices of local lawyers. Lawyers from unaffected jurisdictions may offer to provide these legal services either by traveling to the affected jurisdiction or from their own offices or both, provided the legal services are provided on a *pro bono* basis through an authorized not-for-profit entity or such other organization(s) specifically designated by this Court. A major disaster includes, for example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event caused by terrorists or acts of war.

[2] Under paragraph (a)(1), this Court shall determine whether a major disaster causing an emergency affecting the justice system has occurred in this jurisdiction, or in a part of this jurisdiction, for purposes of triggering paragraph (b) of this Rule. This Court may, for example, determine that the entirety of this jurisdiction has suffered a disruption in the provision of legal services or that only certain areas have suffered such an event. The authority granted by paragraph (b) shall extend only to lawyers authorized to practice law and not disbarred, suspended from practice or otherwise restricted from practice in any other manner in any other jurisdiction.

[3] Paragraph (b) permits lawyers authorized to practice law in an unaffected jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, to provide pro bono legal services to residents of the affected jurisdiction following determination of an emergency caused by a major disaster; notwithstanding that they are not otherwise authorized to practice law in the affected jurisdiction. Other restrictions on a lawyer's license to practice law that would prohibit that lawyer from providing legal services pursuant to this Rule include, but are not limited to, probation, inactive status, disability inactive status or a non-disciplinary administrative suspension for failure to complete continuing legal education or other requirements. Lawyers on probation may be subject to monitoring and specific limitations on their practices. Lawyers on inactive status, despite being characterized in many jurisdictions as being "in good standing," and lawyers on disability inactive status are not permitted to practice law. Public protection warrants exclusion of these lawyers from the authority to provide legal services as defined in this Rule. Lawyers permitted to provide legal services pursuant to this Rule must do so without fee or other compensation, or expectation

thereof. Their service must be provided through an established not-for-profit organization that is authorized to provide legal services either in its own name or that provides representation of clients through employed or cooperating lawyers. Alternatively, this court may instead designate other specific organization(s) through which these legal services may be rendered. Under paragraph (b), an *emeritus* lawyer from another United State jurisdiction may provide *pro bono* legal services on a temporary basis in this jurisdiction provided that the *emeritus* lawyer is authorized to provide *pro bono* legal services in that jurisdiction pursuant to that jurisdiction's *emeritus* or *pro bono* practice rule. Lawyers may also be authorized to provide legal services in this jurisdiction on a temporary basis under Rule 5.5(c) of the *Rules of Professional Conduct*.

[4] Lawyers authorized to practice law in another jurisdiction, who principally practice in the area of such other jurisdiction determined by this Court to have suffered a major disaster, and whose practices are disrupted by a major disaster there, and who are not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, are authorized under paragraph (c) to provide legal services on a temporary basis in this jurisdiction. Those legal services must arise out of and be reasonably related to the lawyer's practice of law in the affected jurisdiction. For purposes of this Rule, the determination of a major disaster in another jurisdiction should first be made by the highest court of appellate jurisdiction in that jurisdiction. For the meaning of "arise out of and reasonably related to," see Rule 5.5 Comment [14], *Rules of Professional Conduct*.

[5] Emergency conditions created by major disasters end, and when they do, the authority created by paragraphs (b) and (c) also ends with appropriate notice to enable lawyers to plan and to complete pending legal matters. Under paragraph (d), this Court determines when those conditions end only for purposes of this Rule. The authority granted under paragraph (b) shall end upon such determination except that lawyers assisting residents of this jurisdiction under paragraph (b) may continue to do so for such longer period as is reasonably necessary to complete the representation. The authority created by paragraph (c) will end [60] days after this Court makes such a determination with regard to an affected jurisdiction.

[6] Paragraphs (b) and (c) do not authorize lawyers to appear in the courts of this jurisdiction. Court appearances are subject to the *pro hac vice* admission rules of the particular court. This Court may, in a determination made under paragraph (e)(2), include authorization for lawyers who provide legal services in this jurisdiction under paragraph (b) to appear in all or designated courts of this jurisdiction without need for such *pro hac vice* admission. If such an authorization is included, any *pro hac vice* admission fees shall be waived. A lawyer who has appeared in the courts of this jurisdiction pursuant to paragraph (e) may continue to appear in any such matter notwithstanding a declaration under paragraph (d) that the conditions created by major disaster have ended. Furthermore, withdrawal from a court appearance is subject to Rule 1.16 of the *Rules of Professional Conduct*.

[7] Authorization to practice law as a foreign legal consultant or in-house counsel in a United States jurisdiction offers lawyers a limited scope of permitted practice and may therefore restrict that person's ability to provide legal services under this Rule.

[8] The ABA National Lawyer Regulatory Data Bank is available to help determine whether any lawyer seeking to practice in this jurisdiction pursuant to paragraphs (b) or (c) of this Rule is disbarred, suspended from practice or otherwise subject to a public disciplinary sanction that would restrict the lawyer's ability to practice law in any other jurisdiction.

Background

In the wake of hurricanes Katrina and Rita, it is quite conceivable that a major disaster may cause an emergency that affects the provision of legal services. Should such a disaster occur, the adoption of the ABA Model Rule would allow Michigan attorneys to provide pro bono services to clients outside the state, without retribution for the unauthorized practice of law. Additionally, should such a disaster occur within Michigan, attorneys of our state would be permitted to service their clients from satellite offices outside the state. Currently, MCL §600.916 does permit an attorney licensed in another state to temporarily practice law within the State of Michigan; however, the statute does not delineate parameters for such an occurrence.

As of September 2007, one state (Iowa) has adopted the Model Rule. Six other states were considering adoption, including Alabama, Arizona, California, Maryland, New York and North Dakota, as well as the District of Columbia. Since that time, Nevada is also contemplating adoption of such a rule.

Please see the following "report" for additional background material provided by the ABA:
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BACKGROUND

In the summer of 2005, Alabama, Louisiana and Mississippi were devastated by Hurricanes Katrina and Rita. The physical damage done in those jurisdictions was catastrophic but the storms also damaged and crippled their legal systems. In response, then American Bar Association President Michael S. Greco formed the ABA Task Force on Hurricane Katrina (the "Task Force"). One of the most significant early efforts of the Task Force was advocating the suspension of unlicensed practice of law rules by various states impacted by the hurricane so that lawyers from other jurisdictions could volunteer to provide pro bono legal services in the affected jurisdictions.¹

The Task Force soon recognized the need for a model rule that would allow out-of-state lawyers to provide pro bono legal services in an affected jurisdiction and lawyers in the affected jurisdiction whose legal practices had been disrupted by a major disaster to practice law on a temporary basis in an unaffected jurisdiction. Both the highest court of a jurisdiction affected by the major disaster and the highest courts of jurisdictions not affected by the disaster could implement the Rule on an emergency basis. In February 2006, the Task Force approached the ABA Coordinating Council for the Center for Professional Responsibility and requested assistance in drafting such a model rule. In light of its jurisdictional statement that includes the multijurisdictional practice of law and the unlicensed practice of law, the

¹ *In the Wake of the Storm: The ABA Responds to Hurricane Katrina*. Report of the ABA Task Force on Hurricane Katrina. www.abanet.org/katrina

Standing Committee on Client Protection (the “Committee”) agreed to undertake the project.

With the assistance of Professor Stephen Gillers, Chair of the ABA Joint Committee on Lawyer Regulation and former member of the Commission on Multijurisdictional Practice, the Committee spent the next several months researching the issues and the law and preparing drafts of model rules. On September 6, 2006, the Committee circulated for comment to all ABA entities and other interested parties a proposed new Model Rule of Professional Conduct 5.8 (Provision of Legal Services Following Determination of Catastrophic Event) and a Model Court Rule with the same title. The ABA entities and other interested parties were requested to comment on the substance of the Model Rule/Model Court Rule and whether the topic should be addressed in a Model Rule of Professional Conduct or in a Model Court Rule.²

It was the consensus of the responding entities, including the Standing Committee on Ethics and Professional Responsibility, that the issues to be addressed were administrative matters involving the temporary practice of law and that they should be addressed in a Model Court Rule. The Standing Committee on Ethics and Professional Responsibility believes that the proposed Model Court Rule, if adopted, would effectively facilitate the provision of legal services in urgent situations, such as the occurrence of natural disasters. The Ethics Committee also believes that because the creation of a mechanism for making legal services available is not an ethical, but essentially an administrative and operational concern of each state's highest court, it is appropriate that the subject be addressed by a Model Court Rule, rather than a Rule of Professional Conduct, and supports its adoption by the House of Delegates. The Ethics Committee agrees that proposed amended Comment [14] to Model Rule of Professional Conduct 5.5, which serves as an important cross-reference to any such rule of court, is a necessary and helpful addition to the Model Rules, and supports its adoption by the House of Delegates as well.

***MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING
DETERMINATION OF MAJOR DISASTER***

An emergency affecting the justice system, as a result of a natural or other major disaster, may for a sustained period of time interfere with the ability of lawyers admitted and practicing in the affected jurisdiction to continue to represent clients until the disaster has ended. A natural or other major disaster includes, for example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event caused by terrorists or acts of war. When this happens, lawyers from the affected jurisdiction may need to provide legal services to their clients, on a temporary basis, from an office outside their home jurisdiction. In addition, lawyers in an unaffected jurisdiction may be willing to serve residents of the affected jurisdiction who have

² The Committee received comments from numerous ABA entities including: the Standing Committees on Ethics and Professional Responsibility, Professional Discipline, Professionalism, Pro Bono and Public Service, Legal Aid and Indigent Defendants, Delivery of Legal Services, the Commissions on Interest on Lawyers' Trust Accounts and Law and Aging, the Task Force on GATS Legal Services Negotiations, the National Organization of Bar Counsel and the Association of Corporate Counsel.

unmet legal needs as a result of the disaster or whose legal needs temporarily are unmet because of disruption to the practices of local lawyers.

Lawyers from unaffected jurisdictions may offer to provide these legal services either by traveling to the affected jurisdiction or from their own offices or both, provided the legal services are provided on a pro bono basis through an authorized not-for-profit legal services organization or such other organizations specifically designated by the highest court of the affected jurisdiction.

Under the Model Court Rule, the highest court in the affected jurisdiction shall determine whether an emergency affecting the justice system as a result of a natural or other major disaster has occurred in the jurisdiction, or in a part of the jurisdiction, for purposes of triggering paragraph (b) of the Model Court Rule. The regulation of the practice of law by the judicial branch of government, which includes jurisdictional limits on legal practice, is a fundamental principle recently reaffirmed as policy by the American Bar Association.³ The court in making a determination whether an emergency affecting the justice system has occurred can take judicial notice of any Presidential proclamations or declarations by the governor or executive officer of an affected jurisdiction.

Paragraph (b) permits lawyers authorized to practice law in an unaffected jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, to provide pro bono legal services to residents of the affected jurisdiction following determination of an emergency affecting the justice system and the provision of legal services. Lawyers permitted to provide legal services pursuant to this Model Court Rule must do so without fee or other compensation, or expectation thereof. Their service must be provided through an established not-for-profit organization that is authorized to provide legal services either in its own name or that provides representation of clients through employed or cooperating lawyers. The rules governing the not-for-profit organization will determine who should be considered an eligible client in light of the circumstances caused by the disaster.

Alternatively, the Court may instead designate other specific organizations through which these legal services may be rendered. Under paragraph (b), an emeritus lawyer from another United State jurisdiction may provide pro bono legal services on a temporary basis in this jurisdiction provided that the emeritus lawyer is authorized to provide pro bono legal services in that jurisdiction pursuant to that jurisdiction's emeritus or pro bono practice rule. Lawyers may also be authorized under paragraph (b) of this Rule to provide legal services on a temporary basis in an affected jurisdiction, or to provide legal services on a pro bono basis to the citizens of an affected jurisdiction who have been displaced to and are temporarily residing in an unaffected jurisdiction.

Lawyers authorized to practice law in an affected jurisdiction, as determined by the highest court of the affected jurisdiction, and whose practices are disrupted by a major disaster there, are authorized under paragraph (c) to provide legal services on a temporary basis in the jurisdiction adopting the Model Court Rule. Those legal

³ Report 201A, *Regulation of the Practice of Law by the Judiciary*, adopted August 12, 2002.

services must arise out of and be reasonably related to the lawyer's practice of law in the affected jurisdiction. The Court in the affected jurisdiction shall determine when a major disaster has occurred in another jurisdiction but only after such a determination and the geographical scope of the disaster have been made by the highest court of that other jurisdiction. The authority to engage in the temporary practice of law in an unaffected jurisdiction pursuant to paragraph (c) shall extend only to those lawyers who principally practice in the area of a jurisdiction determined to have suffered an emergency affecting the justice system and the provision of legal services.

Emergency conditions created by major disasters end, and when they do, the authority created by the Model Court Rule also ends with appropriate notice to enable lawyers to plan and to complete pending legal matters. Under paragraph (d), the highest court in the affected jurisdiction determines when those conditions end only for purposes of the Model Court Rule. The authority granted under paragraph (b) shall end upon such determination except that lawyers assisting residents of the affected jurisdiction under paragraph (b) may continue to do so for such longer period as is reasonably necessary to complete the representation. The authority created by paragraph (c) will end 60 days, or as otherwise enacted in the Rule, after the highest court in an unaffected jurisdiction makes such a determination with regard to an affected jurisdiction. The parameters created by the Model Court Rule are intended to be flexible and the highest court in a jurisdiction has the discretion to extend the time period during which out-of-state lawyers may provide pro bono legal services in an affected jurisdiction or during which lawyers displaced by a disaster may practice law on a temporary basis in an unaffected jurisdiction.

Paragraphs (b) and (c) do not authorize lawyers to appear in the courts of the affected jurisdiction. Court appearances are subject to the *pro hac vice* admission rules of the particular court. The highest court may, in a determination made under paragraph (e)(2), include authorization for lawyers who provide legal services in the jurisdiction under paragraph (b) to appear in all or designated courts of the jurisdiction without need for such *pro hac vice* admission. If such an authorization is included, any *pro hac vice* admission fees shall be waived. A lawyer who has appeared in the courts of an affected jurisdiction pursuant to paragraph (e) may continue to appear in any such matter notwithstanding a declaration under paragraph (d) that the conditions created by the major disaster have ended. Furthermore, withdrawal from a court appearance is subject to Rule 1.16 of the Rules of Professional Conduct.

AMENDMENT TO COMMENTARY OF RULE 5.5 OF THE RULES OF PROFESSIONAL CONDUCT

Following the occurrence of a major disaster, lawyers practicing law outside the affected jurisdiction will begin to research what legal services they may provide on a temporary basis to the citizens of the affected jurisdiction. In addition, not-for-profit legal organizations within the affected jurisdiction will begin to research what legal services out-of-state lawyers may provide in their jurisdiction on a temporary basis. At some point, the lawyers and not-for-profit organizations will consult the *Rules of Professional Conduct*. While Rule 5.5 of the *Rules of Professional Conduct* is titled "Unauthorized Practice of Law: Multijurisdictional Practice of Law," Rule 5.5 does not directly address the provision of pro bono legal services by out-of-state lawyers

in a jurisdiction affected by a major disaster nor does it address the temporary practice of law in an unaffected jurisdiction by displaced lawyers principally practicing in the affected jurisdiction. The *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster* does address these issues. Upon the suggestion of the Standing Committee on Ethics and Professional Responsibility, whose jurisdictional statement includes recommending to the ABA House of Delegates amendments to the *Rules of Professional Conduct*, the Committee recommends that Comment [14] to Rule 5.5 of the *Rules of Professional Conduct* be amended to include a cross-references to the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*.

CONCLUSION

Following Hurricanes Katrina and Rita, thousands of lawyers from across the United States were inspired to offer their legal expertise on a pro bono basis to the citizens of the affected jurisdictions. Unfortunately, in some instances, the delivery of those pro bono legal services was hampered by the existence of unlicensed practice of law statutes and rules. The Committee believes that the adoption of the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster* will allow lawyers to provide temporary pro bono legal services and that it will allow lawyers whose legal practices have been disrupted by major disasters to continue to practice law on a temporary basis in an unaffected jurisdiction. The Model Court Rule will facilitate the delivery of pro bono legal services while at the same time insuring the proper regulation of the lawyers providing those legal services in an affected jurisdiction and those displaced lawyers practicing law on a temporary basis in an unaffected jurisdiction

Janet Green Marbley, Chair
Standing Committee on Client Protection
February 2007

Opposition

None known.

Prior Action by Representative Assembly

None known.

Fiscal and Staffing Impact on State Bar of Michigan

None known.

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 12, 2008**

Should the Representative Assembly recommend that the Michigan Supreme Court adopt the ABA Model Court Rule on the provision of legal services following the determination of a major disaster?

(a) Yes

or

(b) No