



NEW JERSEY STATE BAR ASSOCIATION

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Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Comments on the Report of the Special Committee on Attorney Ethics and Admissions

Dear Judge Grant:

The New Jersey State Bar Association (NJSBA) appreciates the opportunity to comment on the Report and Recommendations of the Special Committee on Attorney Ethics and Admissions (Special Committee) in connection with proposed changes to the Rules of Professional Conduct. The NJSBA applauds the Special Committee for the thoughtful analysis and consideration given to all of the proposals contained in the report. The NJSBA also thanks the Committee for seeking and considering the NJSBA's comments in every step of its comprehensive approach in this matter.

For convenience, the comments below are aligned to the order and headings of the proposals presented in the Special Committee's report.

I. ADMISSION ON MOTION

The NJSBA remains strongly opposed to admission to practice in New Jersey on motion.

As the NJSBA noted previously, this issue was debated extensively in 2002 in response to a recommendation by the Supreme Court's Ad Hoc Committee on Bar Admissions (known as the Wallace Committee). The Supreme Court rejected that recommendation then, and there is no new information presented that would support the resurrection of that recommendation now. The NJSBA sees no reason to change a policy that has served the bench, bar and public well over the years.

Our opposition continues to rest on the following points, previously submitted to the Special Committee:

- Regulation of the practice of law by the Supreme Court, including admission standards, protects the public from being harmed by persons who have not demonstrated their

- competence to protect the public interest in this state.
- There is no public interest served by diluting New Jersey's criteria for admission to practice law. Current criteria ensures practice is limited to those deemed qualified and competent by the Supreme Court. The public has a right to expect that a lawyer licensed here is familiar with New Jersey law, procedures, rules and customs and is conversant with state disciplinary procedures, traditions of the organized bar as well as often unwritten expectations about how lawyers should behave. New Jersey practitioners meet public expectations in this regard.
- The Supreme Court has established bar admission criteria, including passage of the bar exam, which would be ignored for some bar applicants if admission on motion were permitted.
- When the Wallace Committee made its recommendation, it concluded that admission on motion would "enrich the practice of law in this State ...by increasing the pool of knowledgeable attorneys." Proponents of admission on motion may make the same argument today. Yet, with almost 100,000 lawyers admitted to practice in New Jersey, the NJSBA believes there is a sufficient number of skilled attorneys available to meet client needs.
- Some argue in favor of admission on motion because it may result in reciprocal admission for New Jersey attorneys in neighboring states. However, any decision on bar admission criteria should be based on demonstrated competence and commitment to the jurisdiction where admission is sought, not on self-interest.
- The perceived need for admission on motion has been greatly alleviated through enactment of rules permitting multi-jurisdictional practice, as attorneys in most jurisdictions, including New Jersey, have much greater latitude today to represent clients in litigation, transactions and ADR proceedings in other jurisdictions.

In short, admission on motion does not solve any existing problem. New Jersey already has a skilled and diverse bar capable of delivering a wide variety of legal services. Admission on motion creates unnecessary risks to the public, defeating the very rationale for lawyer licensing.

2. PRACTICE PENDING ADMISSION

The NJSBA disagrees with the Special Committee's assessment of this proposal, and continues to support the adoption of the model rule. It would assist those lawyers who relocate to New Jersey for family or other reasons, but who have a stellar record of practice in their originating state. In addition, it would enable those new lawyers who experience delays in the processing of their bar applications to begin practicing while awaiting final approval.

The NJSBA believes adequate safeguards are in place, akin to *pro hac vice* admission, to protect the public and the integrity of the bar, such as requiring the bar applicant to associate with a local lawyer and limiting the time permitted to practice under the rule to one year. Thus, the lawyer practicing under this rule would only be able to do so for a short time and would work with, and be accountable to, a member of the bar of New Jersey. By contrast, a lawyer admitted on motion, as contemplated above, has no such limitation.

3. IN-HOUSE PRACTICE BY FOREIGN LAWYERS

The NJSBA agrees with the Special Committee's recommendation to adopt this proposal. As noted by the Special Committee, the NJSBA believes sophisticated employers can judge the performance of their employed attorneys and there is little risk of harm to the public. The NJSBA previously noted that the prohibition against a foreign lawyer giving advice on U.S. law, except on the advice of a U.S. licensed lawyer, mitigated against any potential harm. We acknowledge, though, that the Special Committee's recommended restrictions prohibiting a foreign lawyer from giving any advice on U.S. law would provide even further protection. With those protections in place, the NJSBA, once again, supports the proposal.

4. PRO HAC VICE ADMISSION OF FOREIGN LAWYERS

The NJSBA has historically and continues to support this proposal. It adequately balances protection of the public against an individual client's desire for a foreign counsel's involvement by requiring that the foreign lawyer be supervised by a court and be associated with local counsel. The added requirement of the in-state lawyer providing independent advice on U.S. and New Jersey law is further protection for the client. The NJSBA has no objection to the additional conditions recommended by the Special Committee.

5. COMPETENCE WITH TECHNOLOGY – RPC 1.1

The NJSBA agrees with the Special Committee's recommendation not to adopt new language in RPC 1.1 or the proposed comment. While the NJSBA previously indicated it would not be opposed to the adoption of this proposal, the NJSBA is persuaded by the Special Committee's analysis that it would introduce a new element into our rules and would add an additional, unnecessary, burden on attorneys.

6. CONFIDENTIALITY AND COMPETENCE WHEN USING TECHNOLOGY – RPC 1.6

The NJSBA disagrees with the Special Committee's recommendation on this proposal. The NJSBA continues to question the need for this rule, as lawyers are currently not permitted to reveal client information. While the NJSBA agrees attorneys need to be mindful of the security of client information, this rule appears to add a personal obligation on lawyers over matters in which they may not have control, such as firm technology and protocol decisions.

7. NON-LAWYER ASSISTANCE - RPC 5.3

The NJSBA acknowledges that the Special Committee relied, in part, upon its previous support of the proposed language change and additional comments in recommending that they be adopted now. Upon further consideration, however, the NJSBA has concerns that the changes will be interpreted to extend the liability of attorneys in connection with persons outside of their practice and may impose unintended greater standards for attorneys in connection with conduct over which they have little or no control. Attorneys already have an obligation to choose providers with reasonable compatibility to the lawyer's professional obligations and to make reasonable efforts to ensure a provider's conduct is consistent with those obligations. The NJSBA believes these existing standards are sufficient to adequately guide attorneys on their responsibilities when engaging outside third parties. For these reasons, the NJSBA does not support the Special Committee's recommendation of adoption.

8. DEFINITIONS – RPC 1.0

The NJSBA supports the Special Committee's recommendation to replace "email" with "written communication," as the change reflects the realities of modern technology. The NJSBA disagrees with the Committee's reluctance to recommend adoption of the additional comment about a firm's ability to deny access to electronic information by a "screened" lawyer. The NJSBA continues to believe that the additional comment reflects the realities of modern technology and is consistent with a lawyer's duties under RPC 1.6.

9. COMMUNICATION WITH CLIENTS – RPC 1.4

The NJSBA does not agree with the Special Committee's recommendation that this comment is unnecessary. On the contrary, the NJSBA continues to view the comment as a reflection of the realities of modern technology, and therefore, recommends its adoption.

10. DISCLOSURE OF CONFIDENTIAL INFORMATION TO DETERMINE CONFLICTS OF INTEREST – RPC 1.6

The NJSBA supports the Special Committee's recommendation to adopt language to accomplish the above. As the NJSBA previously noted, this framework will provide a welcome clarification to a lawyer's obligations when transitioning from one firm to another.

11. RESPECT FOR RIGHTS OF THIRD PERSONS – RECEIPT OF ELECTRONIC INFORMATION – RPC 4.4(B)

The NJSBA agrees with the Special Committee's recommended language changes. The NJSBA previously expressed concerns about whether the proposed comments imposed heightened standards for attorneys and added more questions than clarity; however, the NJSBA is assured by

the Special Committee's analysis that the rule change simply codifies current law and will provide appropriate additional guidance to lawyers faced with information inadvertently provided to them.

12. CONFLICT OF INTEREST – PROSPECTIVE CLIENTS – RPC 1.18

The NJSBA disagrees with the Special Committee's recommendation to change the term "discussions" to "communications." The NJSBA had previously noted that the language in the proposed comments provide guidance about an attorney's responsibilities under the rule, but the NJSBA believes the mere language change will lead to more mischief and uncertainty about when a communication presents a conflict of interest. The NJSBA notes that attorneys are contacted by potential clients through various means of communications, including email, phone calls and direct personal interviews. The proposed language is not clear about when such communications would rise to the level of a consultation. The NJSBA does not believe that every communication should be considered a consultation under the rule, particularly where there is an uninvited electronic communication. Accordingly, the NJSBA opposes the recommendation of the Special Committee.

13. ADVERTISING – RPC 7.1, 7.2, 7.3

The NJSBA agrees with the Special Committee's recommendation that these rule changes and comments not be adopted. The NJSBA had previously indicated it had no objection to the proposal, but is persuaded by the Committee's comments that such changes would be inconsistent with New Jersey case law or premature without a comprehensive review of all of the current advertising rules in light of the advances in technology, media and the rise of social media. Accordingly, the NJSBA urges the Court to ask the Committee on Attorney Advertising or other appropriate committee to undertake such a review and make suitable recommendations.

14. RESPONSIBILITIES WHEN OUTSOURCING LEGAL SERVICES – RPC 1.1

The NJSBA agrees with the Special Committee's recommendation to decline adoption of the proposed comments. The NJSBA had previously indicated it supported the additional comments, but is persuaded by the Committee's analysis and further consideration that a lawyer's obligations when outsourcing legal services are already well-understood. Moreover, the NJSBA heard from its members, especially those in solo and small firms, that outsourcing specific tasks related to a matter, such as brief writing or preparation of motion papers, is very common. Thus, requiring consent in every instance would provide an additional, unnecessary burden on the actual retained attorney, who is already fully responsible for representation under existing rules.

15. CHOICE OF LAW FOR DETERMINING WHETHER CONFLICT ARISES – RPC 8.5

The NJSBA had previously indicated its support for the addition of this comment, but is persuaded by the Special Committee's explanation that such an official comment is unnecessary.

16. MULTIJURISDICTIONAL PRACTICE & UNAUTHORIZED PRACTICE OF LAW—RPC 5.5

The NJSBA disagrees with the Special Committee's recommendation to not adopt the proposed comments. As noted by the Special Committee, the activities described clearly violate New Jersey's rules. The NJSBA supports the commentary to confirm that these activities are not permissible.

17. NEW RPC REGARDING CIVILITY AND PROFESSIONALISM – RPC 8.4

The NJSBA renews its opposition to the additional language proposed by the Special Committee. In its presentations to the Special Committee in 2014, the Association noted that absent an actual proposal, it was difficult to be precise in response, but that the Association believed this would be an unnecessary additional rule. The NJSBA has now reviewed the rule change proposed by the Special Committee, and renews its previous objections since the RPCs already provide a basis for disciplining extreme discourtesy or unprofessionalism, and disciplinary officials have been able to address such situations.

It should be noted that the NJSBA does not oppose the concept of reinforcing the importance of civility and professionalism; rather, we oppose the proposed language because it is already an obligation of lawyers. As noted by the Special Committee, RPC 3.2 (Expediting Litigation) provides that lawyers "shall treat with courtesy and respect all persons involved in the legal process." What is critical in the Committee's proposal is that this concept would be moved to a section of the RPCs entitled Misconduct. This will have the effect of turning a standard of professionalism into a punitive statement of ethical conduct. The NJSBA does not believe there is any demonstrated need for such a change.

Instead of reinforcing existing rules, the NJSBA believes the new language will add another layer of enforcement to a multi-layered system without an enforcement framework, leading to more confusion and less clarity. Although the Special Committee believes the framework will evolve, until that happens, there will be even more uncertainty in the practice of law, coupled with the specter of punitive action, with, again, no evidence that making a lack of civility more punitive will change anything.

Moreover, since the public and judges may file an ethics complaint at any time, barring lawyers from filing an ethics complaint before "any underlying litigation or dispute is completed or resolved" will not forestall the use of such complaints as a litigation tactic. In fact, placing such restrictions on filing may be read by the public as attempts to prevent enforcement for the protection of lawyers.

For these reasons, the NJSBA continues its opposition to the addition of a new RPC regarding civility and professionalism and, in particular, the language proposed by the Special Committee.

18. NEW RULE PROVIDING “SAFE HARBOR” FOR LAWYERS WHO PRESENT ISSUES OF ETHICAL CONDUCT IN GOOD FAITH TO FIRM ETHICS COUNSEL OR INDEPENDENT COUNSEL, AND WHO, IN GOOD FAITH, FOLLOW THE ADVICE RECEIVED IN RESPONSE – RPC 5.2

The NJSBA supports this proposal. We note that the Special Committee has revised its proposal consistent with the NJSBA’s previous comments. As such, we believe the proposed rule is an improvement and a necessary clarification for the reasons outlined by the Special Committee.

19. CHOICE OF LAW – RPC 8.5

The NJSBA continues to support the Special Committee’s recommendation to adopt the proposed amendment.

20. REVISION OF RPC 5.5 TO INCLUDE LAWYERS LICENSED IN JURISDICTIONS OUTSIDE THE U.S. AS MULTIJURISDICTIONAL PRACTITIONERS

The NJSBA continues its support of the Special Committee’s recommendation to adopt the proposed additions to RPC 5.5 relating to the practice of law by foreign lawyers. The NJSBA believes that permitting lawyers licensed in jurisdictions outside the U.S. as multijurisdictional practitioners is a natural extension of its support of in-house practice and *pro hac vice* admission of foreign lawyers. The NJSBA notes, however, that the Special Committee recommended subsection (b)(3)(v) of RPC 5.5 not be applicable to foreign lawyers because it permits a more far-ranging practice in New Jersey; the NJSBA believes, on the contrary, that foreign lawyers should be permitted to benefit from all parts of RPC 5.5

21. COMMENTS TO ANY OR ALL OF NEW JERSEY’S RPCs

The NJSBA reiterates its opposition to this recommendation. As the NJSBA previously noted, New Jersey was one of the earliest adopters of the RPCs in 1984. Reference to the official comments as a resource, without formal force of regulatory effect through adoption, has worked since that time. Moreover, the NJSBA believes that any attempt to adopt comments selectively would be a massive undertaking with little additional value. Accordingly, absent a compelling reason to do so, the NJSBA does not support the proposal.

22. ADDITIONAL RECOMMENDATION

The NJSBA urges the Court to consider an additional amendment to the current language of RPC 8.4(g) to include prohibiting discrimination based on gender identity or expression. This amendment would bring the RPCs in line with and make the language consistent with the New Jersey Law Against Discrimination. It is recommended that the Rule be amended to read as follows:

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, gender identity or expression, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

Once again, the NJSBA compliments the Special Committee for its thoughtful, comprehensive review of the proposed model rules and comments. I also thank you for the opportunity to allow the Association to review the Special Committee's report and recommendations, and for the Court's willingness to consider the above comments. Please do not hesitate to contact me with any additional questions or comments on the above.

Very truly yours,



Miles S. Winder, III
President

/sab

cc: Thomas Hoff Prol, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director