LESSONS FROM THE MULTIJURISDICTIONAL PRACTICE COMMISSION: THE ART OF MAKING CHANGE

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I.

In 2000, I was appointed to the ABA Commission on Multijurisdictional Practice (MJP Commission). The commission had many meetings and heard much testimony on the subject of its charge.[1] The question before the commission was disarmingly simple: When should a lawyer from a United States or foreign jurisdiction be authorized to provide legal services in a United States jurisdiction in

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1. The charge was:

> **RESOLVED** that the American Bar Association establish the Commission on the Multijurisdictional Practice to research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law. The Commission shall analyze the impact of those rules on the practices of in-house counsel, transactional lawyers, litigators and arbitrators and on lawyers and law firms maintaining offices and practicing in multiple state and federal jurisdictions. The Commission shall make policy recommendations to govern the multijurisdictional practice of law that serve the public interest and take any other action as may be necessary to carry out its jurisdictional mandate. The Commission shall also review international issues related to multijurisdictional practice in the United States.

AM. BAR ASS'N, MISSION STATEMENT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE OF LAW, *available at* http://www.abanet.org/cpr/mjp-home.html (last visited August 21, 2002). The Commission's web site contains all of the written and oral testimony and various documents issued by the Commission, including its Interim Report, which was issued in November 2001 and the Final Report as adopted by the ABA House of Delegates on August 12, 2002. AM. BAR ASS'N, COMMISSION ON MULTIJURISDICTIONAL PRACTICE, *at* http://www.abanet.org/cpr/mjp-home.html (last visited August 21, 2002). The views expressed here are the author's and do not necessarily reflect the views of any commissioner or the American Bar Association.

which the lawyer is not admitted to practice?[2] A wise answer to this question must reconcile competing policies. On one hand, the states have traditionally determined both the definition of the practice of law and who may practice law within their borders.[3] A state may test for competence as a condition of bar admission.[4] Applicants may also undergo a review of their character to screen out (or delay admission of) those who will not act honestly and lawfully.[5] While states have on occasion been challenged or criticized for how they implement these inquiries,[6] the notion that a state has an interest in protecting its residents and its justice system from incompetent or unscrupulous lawyers is not challenged. At the same time, lawyers admitted in one state may be called upon to travel to another state for a client with cross-border problems.[7] If these lawyers are not admitted in the other state, their work there may be the unauthorized practice of law (UPL).[8] In favor of rules authorizing cross-border practice are the interests of clients, the increasing uniformity or accessibility of the law of all states,[9] and technological developments that permit lawyers to practice "virtually" anywhere without leaving their home jurisdiction.[10]

How to reconcile our traditional lawyer licensing system with changes in the national and international economy and in the nature of law practice has been part of professional discussion for some time.[11] But the need to move beyond discussion and toward clear answers was underscored in 1998 with the *Birbrower* decision of the

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2. The jurisdiction in which the lawyer is admitted is generally called the "home jurisdiction." Other jurisdictions are "host jurisdictions." I will use the word "state" to include American jurisdictions that are not states.

3. AM. BAR. ASS'N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *available at* http://www.abanet.org/legaled/baradmissions/bar.html (published yearly). Traditionally, the judiciary has determined what constitutes the practice of law. *In re* First Escrow, Inc., 840 S.W.2d 839, 842 (Mo. 1992). Courts sometimes share power with state legislatures. State *ex. rel.* Friedrich v. Circuit Court for Dane County, 531 N.W.2d 32 (Wis. 1995).

4. Giannini v. Real, 911 F.2d 354 (9th Cir. 1990).

5. *In re* Mustafa, 631 A.2d 45 (D.C. 1993).

6. Jones v. Bd. of Comm'rs of Ala. State Bar, 737 F.2d 996 (11th Cir. 1984) (rejecting a challenge to the administration of the Alabama State Bar Examination as racially discriminatory or otherwise in violation of the Constitution). For a general criticism of the character inquiry, see Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985).

7. William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501 (2001); Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665 (1995).

8. *In re* Schrader, 523 S.E.2d 327 (Ga. 1999) (suspending from Georgia practice for one year a Georgia lawyer because, while living in New York, the lawyer probated a will in Surrogates Court and was convicted of unauthorized practice, a misdemeanor).

9. Lexis and Westlaw offer lawyers case law, statutory law, and administrative regulations of every American jurisdiction on their desktop computer.

10. Among these developments, I include e-mail, facsimile transmission, and satellite conferencing. Although not of the same caliber, overnight mail delivery has also made it easier for lawyers to participate in a matter in a jurisdiction without physically entering that jurisdiction.

11. *See, e.g.*, Samuel J. Brakel & Wallace D. Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699 (1975) (an important early article).

California Supreme Court.[12] *Birbrower* held that New York lawyers who made three trips to California of a few days each, while working on an impending arbitration for a California client, engaged in the "extensive" practice of law in California.[13] As a result, the lawyers could not enforce their fee agreement as written.[14] This decision was surprising because the California court had, in other contexts, been pleasingly enlightened about the nature of modern law practice.[15] It was doubly surprising because, in a footnote, the court gratuitously wrote that the lawyers would not have been saved even had they associated with California counsel on the matter (they had not).[16] And it was most surprising, indeed startling, because in an aside not strictly necessary to its holding, the court emphasized, though briefly, that a lawyer may be guilty of unauthorized law practice "in" California by practicing virtually in California via e-mail, fax, phone or satellite from the lawyer's home jurisdiction, depending on the degree of virtual presence.[17] The court's references to virtual presence were not necessary to its opinion because the court did not know the amount, if any, of the firm's virtual presence. It consigned that inquiry to the lower courts on remand.[18]

We might pause here to reflect on the idea of virtual presence. How in fact does it differ from slower forms of communication that a lawyer might use to exchange information with clients in a different state? Consider e-mail, facsimile, telephone, express mail, and regular mail. Speed is one big difference among them. The first three mediums are quick, the second takes a day, and the third can take several days. But what of it? A lawyer can provide legal services to a client in another jurisdiction through each of these mediums. If virtual presence can place a lawyer

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12. Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998).

13. *Id.* at 7.

14. *Id.*

15. *See, e.g.*, General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994) (upholding employed lawyer's retaliatory discharge claim in recognition of economic dependency on employer); Howard v. Babcock, 863 P.2d 150 (Cal. 1993) (permitting law firms to impose reasonable restrictions on competition by lawyers who depart).

16. *Birbrower*, 949 P.2d at 4 n.3 ("Contrary to the trial court's implied assumption, no statutory exception to [the unauthorized practice statute] allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar.").

17. *Id.* at 5–6.

> For example, one may practice law in the state in violation of section 6125 [the unauthorized practice statute] although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person *automatically* practices law 'in California' whenever that person practices California law anywhere, or 'virtually' enters the state by telephone, fax, e-mail, or satellite.

Id. (emphasis in original).

18. *Id.* at 13. Nonetheless, the excursion can be justified on the ground that the lower courts would need guidance on the effect of virtual presence. The problem, however, is that the court's discussion offered almost no guidance at all.

"in" a host jurisdiction for purposes of that jurisdiction's prohibition of unauthorized law practice, why can't traditional mail do so as well? In either situation, the lawyer does something at home that results in the delivery of a document or information in the host jurisdiction. And on which side of the divide do we put express mail, which is not instant but faster than traditional mail? Indeed, why had we failed to grapple with the challenge of virtual presence in the century of the telephone, not to say the telegraph? What changed?

Analytically, the speed of the medium a lawyer uses to do legal work for a distant client should not matter. But perhaps, practically, it does. Speed coupled with capacity for moving great volumes of information make it feasible for a lawyer to achieve the functional equivalent of physical presence in a jurisdiction, certainly more effectively than the telephone and traditional mail allow. The telephone moves information quickly but in limited quantity. Traditional mail moves information slowly, though it can transmit large quantities. By combining speed and quantity, the new technology increased the capacity for virtual presence, and therefore a substantial practice, in a jurisdiction. Lawyer marketing, including via the Internet, enhances these opportunities.[19]

The *Birbrower* opinion was a conceptual torpedo. Launched, it caused a great deal of disruption, not only because of its apparent hostility to cross-border practice (despite weak protestations of realism[20]), but because it offered no help on how to rebuild from the confusion it spawned.[21] Maybe it's just too hard for judges to know these things ahead of time, but then how is a lawyer, whose fee and license may be at risk, supposed to know?

The court compounded the uncertainty because it emphasized three ways in which the law firm's work was connected to California—in addition to the lawyers'

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19. The Illinois State Bar Association is one of the few authorities that has addressed interstate solicitation of legal work. Ill. Adv. Op. 94-02 (1994) (concluding that a lawyer who is not a member of the Illinois Bar and who has sent targeted solicitations to Illinois residents "known to have been victims of torts," engages in "constitutionally protected" activity under *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988)). Despite its conclusion, the advisory opinion also states:

> By strong inference, however, [a lawyer's] letters advise the recipients that they may well have a legally enforceable claim for compensation, and tenders services related to the prosecution of that claim. The sender offers to assume responsibility for selecting the forum and the form of action, and to make the numerous other tactical decisions involved in the presentation and prosecution of such a claim. In short, the letter constitutes at least a tentative offer to provide legal services within Illinois for an Illinois resident. We believe that its transmission into the state constitutes the practice of law within this state.

Id.

20. *Birbrower*, 949 P.2d at 2 ("Although we are aware of the interstate nature of modern law practice and mindful of the reality that large firms often conduct activities and serve clients in several states, we do not believe these facts excuse law firms from complying with [the unauthorized practice statute].").

21. *Id.* (the court "decline[d] to provide" any guidance that would help lawyers figure out when their contacts with the state did and did not put them in violation of its unauthorized practice law).

trips there—but it then failed to identify the importance that each California connection had for its holding. The three connections were that one of two clients that had hired the firm for the impending arbitration was a California corporation;[22] the arbitration was going to be held in California;[23] and its subject was a contract governed by California law.[24]

How important were these California connections? If any of them were absent—if the client were incorporated in Delaware, if the arbitration were scheduled for Nevada, if the contract to be arbitrated were governed by New York or Illinois law—would the result have changed—assuming the lawyers' physical and virtual presence in California remained the same? We do not know the answers to these questions because the court told us nothing about the importance of each California nexus to its holding. For all we know, the lawyers' physical and virtual presence in the state was sufficient to make their practice unauthorized even if the facts presented no other California connection.[25]

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22. The client before the California Supreme Court was ESQ Business Services, Inc., a California corporation whose principal shareholder was an officer of a New York corporation of the same name and with common ownership. The Birbrower firm also represented the New York corporation. Its fee agreement was with both clients. The California corporation later sued the law firm for malpractice and the law firm counterclaimed for its fee. It was this counterclaim that the California Supreme Court adjudicated. The New York corporation did not initially join in the malpractice action, but was later added as a plaintiff, possibly to defeat diversity jurisdiction after the case was briefly removed to federal court. *Id.* at 14 (Kennard, J., dissenting). The dissenting judge, with some authority, concluded that representation in an arbitration was not the practice of law so the law firm's contacts were irrelevant. *Id.* The majority opinion focused solely on the rights of the California corporation, perhaps because only it challenged the fee agreement. A reader of the majority opinion would not know about the New York client.

23. *Id.* at 3.

24. *Id.* In addition, the court and the dissent alluded to a fourth California connection. The fee agreement between the parties, originally executed in New York, was later modified in California. *Id.* at 14 (Kennard, J., dissenting). It had to satisfy California requirements for fee contracts. *Id.* at 13. The very first paragraph of the majority's opinion emphasized that the "fee agreement stipulate[d] that California law would govern all matters in the representation." *Id.* at 2. Although the court mentioned this fact, it would be a mistake to conclude that the result would have differed had the parties stipulated that New York law would govern their fee agreement. The language of the opinion purports to enforce California public policy, not a mere contract term between the parties.

25. The court simply described the California contacts without assigning particular weight to any of them.

> [I]n 1992 and 1993, Birbrower attorneys traveled to California to discuss with ESQ and others various matters pertaining to the dispute between ESQ and Tandem. Hobbs and Condon [two Birbrower lawyers] discussed strategy for resolving the dispute and advised ESQ on this strategy. Furthermore, during California meetings with Tandem representatives in August 1992, Hobbs demanded Tandem pay $15 million, and Condon told Tandem he believed damages in the matter would exceed that amount if the parties proceeded to litigation. Also in California, Hobbs met with ESQ for the stated purpose of helping to reach a settlement agreement and to discuss the agreement that was eventually proposed. Birbrower attorneys also traveled to California to initiate arbitration proceedings before the matter

Birbrower highlighted another fact about the unauthorized practice of law by lawyers, which neatly conveys the strangeness of a doctrine that might have worked well for the United States in 1950, but that has become increasingly less coherent in the ensuing half century and is today sorely in need of an overhaul. The court held that the fee agreement might be divisible and could be enforced to the extent the work for which the lawyers sought compensation was performed while they were physically in New York and not virtually in California.[26] The case was remanded for this determination.

Now understand the import of this conclusion. The lawyers' fee was not at risk simply because their work required them to construe California law. If they had done the very same work while physically in New York and not virtually in California, they could get paid for it. The fee was lost only for work they did physically or (perhaps) virtually in California. Paraphrasing the reasoning in another case that denied a lawyer a fee of more than four million dollars on UPL grounds, it's where you practice law, not the law you practice, that determines whether the work is authorized.[27] So a New York lawyer, if competent, can advise a client from anywhere on the law of any jurisdiction (Korea, Uzbekistan, New Jersey) so long as she does it when both lawyer and client are in New York. But let that lawyer advise a California client on the law of California (or for all we know, the law of New York) while both are physically (or the lawyer is virtually) in California, then she may transgress the UPL rules, depending of course on whether her presence in California is sufficiently prolonged to constitute being "in" California within the meaning of its UPL rules.

I could go on poking holes in *Birbrower* and in the governing doctrine by which the court considered itself restrained, but I will not for two reasons. First, that will not help us emerge from the disorder the opinion caused, a task my commission tried to (and the profession must) address, and which I hope to advance here. And second, frankly, because after having thought about these issues for a long time, and especially during the commission's life, I have a new respect for their difficulty and,

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> was settled. As the Court of Appeal concluded, "the Birbrower firm's in-state activities clearly constituted the unauthorized practice of law" *in California.*

Id. at 7 (emphasis in original). All in all, one Birbrower attorney, Hobbs, made three trips to California; another, Condon, made two; and a third unnamed attorney made one. *Id.* at 3. The first trip lasted two days and the two other trips were also brief. *Id.* at 14 (Kennard, J., dissenting). The court characterized these physical contacts in conjunction with the fact that California was the anticipated location of the arbitration, that one of the corporate clients was a California corporation, and that California law governed the arbitration, as amounting to "extensive practice in this state." *Id.* at 7.

26. *Id.* at 12–13.

27. Servidone Constr. Corp. v. St. Paul Fire & Marine Ins. Co., 911 F. Supp. 560, 567 (N.D.N.Y. 1995). The *Servidone* court rejected Mr. Goddard's argument that

> he was not engaged in the unauthorized practice of law because none of his work for Servidone involved New York law, as the issues . . . were grounded in federal contract law. . . . St. Paul counters that this argument misdirects the court's inquiry because the critical question is *where* one is practicing law, *not what* jurisdiction's law is being practiced.

Id. at 567, 576. Note, however, that in *Servidone*, a lawyer had an office in New York, where he was not admitted. *Id.*

therefore, for the challenges that faced the *Birbrower* court. I do not think that the court dealt with those challenges as well as it should have, and therein missed an excellent opportunity to lead the profession into the next century. But even a mistake has pedagogical value. It is only a small exaggeration to say that if the California court was going to err, we should be grateful that it erred as transparently as it did because its decision has forced the rest of us to think hard about the problems it failed to solve. Paradoxically, perhaps, had the court upheld the fee agreement by concluding, for example, that the lawyers' presence in the state (and other contacts it identified) were not extensive enough to trigger the UPL rules, the opinion would not have been the burr it is, there might never have been a MJP commission, and I might be writing about something else entirely. Indeed, if the exact same decision had come from a court lacking the California Supreme Court's prominence, academic authors might have ignored it (or joked about it) as an example of the kind of provincialism to which America's "important" courts would not succumb, and which presented, therefore, no threat to our vision of what passed for progress.[28]

Against this recent history, the MJP commission began its work in the fall of 2000. The challenge was apparent. As anyone who has ever renovated a home knows too well, demolition is usually a lot easier and faster than construction. Similarly, as critics know, deconstructing a text or a performance is rarely as demanding as creating one. Solutions are elusive in the best of circumstances. These are not the best of circumstances. We who wish to address the lawyer UPL issues are not working under pure laboratory conditions, nor are we creating a proposal for a body of rules where none currently exists. However problematic they may be, there are now rules and laws that purport to guide the over 900,000 American lawyers and judges[29] in fifty-plus United States jurisdictions (different though these rules may be from place to place). There are also untold numbers of lawyers in the United States and abroad whose clients may have matters that bring them to foreign shores. There are now rules for these lawyers, which also vary from place to place.[30]

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28. Indeed, a dozen years before *Birbrower*, the North Dakota Supreme Court denied a Minnesota lawyer compensation for the time he spent while physically in North Dakota counseling his North Dakota client on *federal* tax law, but allowed the lawyer to receive compensation for such advice while the lawyer was physically in Minnesota. Ranta v. McCarney, 391 N.W.2d 161 (N.D. 1986). The court, however, did not deal with the issue of "virtual" presence. Although *Ranta* has been a useful pedagogical tool for highlighting the clash between modern practice and unauthorized practice laws, it has not been viewed as a threat to what some may view as progress. This is so, perhaps, because the court deciding it did not have the caché and influence of the California Supreme Court and because the contacts of the Minnesota lawyer with North Dakota were far more extensive and over a longer period of time than was true in *Birbrower*.

29. UNITED STATES CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2001 380 (926,000 employed lawyers and judges and 881,000 employed lawyers in 2000).

30. The international cross-border issues seriously complicate the quest for a solution. *See* Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001), *amended by* Corrections to Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 35 VAND. J. TRANSNAT'L L. 1387 (2002). The discussion here is limited to domestic cross-border practice.

I do not recall that any witness before the commission testified that things were just fine as they are. And the witnesses varied greatly, from all regions of the country and from many varieties of practice. The need for change was a consistent theme. I was warned to expect that those who believe no change is warranted generally keep silent until change is proposed, at which time they may mobilize to derail or dilute any proposal. (As it turned out, that did not happen.) But even when that does not happen, the near unanimity in a call for change may mask serious division over what that change should be. And so, ironically, the fact that everyone wants change, but not the same change, may sometimes lead to no change at all. This will happen if, of the lawyers or judges in the relevant rulemaking body, whether at the ABA or in United States jurisdictions, no majority favors the same change and no change at all is a majority's second choice. Second choices can win when no majority coalesces around any of the first choices.

That prospect counsels pragmatism, whatever the area of reform. Just as politics is the art of the possible, so too is success in changing the rules governing American lawyers an art of the possible. The question must be not what is the best set of rules in an ideal world, or even what rules we would propose in our world if, at the moment, there were no rules on the topic. Rather, the question must be what progress can we make right now in the world we have with all of the interests and operating assumptions that world encompasses. A critic might say that this perspective defers to the least progressive segments of the bar, regardless of their motives, but that is not true. The least progressive segments of the bar are not a majority and will not control the outcome. At best (or is it worst?), they can be courted by others seeking alliances.

Some might argue that the job of the commission was to recommend what its members believe is the right resolution of the issues regardless of what is possible. That argument fails to recognize that the twelve members of the commission did not think identically—and were no doubt chosen with their differences in mind. If everyone voted what he or she thought was the right resolution of the issues regardless of what was possible, we might have produced at least four, perhaps five or six, reports. That would have been a recipe for paralysis. A fractured commission would have encouraged a fractured debate in the ABA House of Delegates and merited little weight in American jurisdictions. Any commission will do the best job if its members compromise. This is not to say that in the interest of consensus anyone should subscribe to a proposal that he or she finds wholly wrongheaded, but only that our commission dealt not with religion, morality, or child-rearing practices, where differences of opinion may be intense and informed at least partly by faith. It dealt only with cross-border practice by lawyers, where the dominant if not the only consideration should be utilitarian (*i.e.*, what rules promise to produce the greatest benefits most efficiently with the least risk of harm?).[31]

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31. My view of the commission's responsibility is inconsistent with the statement of one ardent advocate of more generous cross-border authority, Anthony E. Davis. He said that "[i]t wouldn't be the worst thing in the world . . . if the right proposal was put to the ABA and lost. . . . It's much better to get it right and be voted down and be proved right in two or three years" than to take a compromise position. Am. Bar Ass'n/Bureau of Nat'l Affairs (ABA/BNA), *Conference Report, ABA Midyear Meeting, Regulation of the Bar, Interim Recommendations Need Changes, Speakers Urge at MJP Commission Hearing*, LAWS. MAN. ON PROF. CONDUCT, Feb. 13, 2002, at 104, 106. While persons not on the commission are free

Admittedly, this approach to problem solving is counterintuitive for an academic lawyer. Ideas, not pragmatism, are our metier. Largely sheltered from the vicissitudes of the economy, having no need to attract clients let alone please them, without a rent bill to pay or a payroll to meet, we can sit in our warm offices and spin out Utopian cross-border practice rules. As long as those rules make sense in the logic of our minds and the society we envision, we may dismiss pragmatism. If our rules do not work in the society we actually have, so what? Sooner or later, we may figure, society will catch up and meanwhile we can move on to the next problem and the next article.

II.

What set of rules will produce the greatest benefit most efficiently while minimizing risks to clients? We must remember that this is not meant to be a theoretical question, but an effort to produce a politically acceptable and coherent proposal. The word "politically" is not pejorative. It is a shorthand way of saying that not even small changes can be dictated—unless by judicial fiat—but must find consensus in the various committees and tribunals responsible for generating the profession's rules. Here, state courts are unlikely to impose changes that lack significant bar support. And although we have had experience in the last half century in which state regulations of the legal profession have been held unconstitutional,[32] we are not soon likely to see federal court interference with a state's judicial and legislative rules governing who may practice law within its borders.[33] The certiorari petition in *Birbrower* was denied.[34]

In Part II, I want to rehearse the considerations favoring change and those favoring caution. In Part III, I will discuss various proposals that might respond to these considerations. Part IV will describe the recommendations of the Commission and the action of the ABA House of Delegates.

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to, and perhaps should, stake out such views, I believe that the commission's responsibility is to identify a thoughtful consensus position that has a good chance of ABA adoption.

32. *See, e.g.*, Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985) (invalidating state law requiring residency in the state as a condition of admission to its bar); Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (invalidating state law restricting lawyer advertisements); Goldfarb v. Va. State Bar, 421 U.S. 773 (1975) (invalidating minimum fee schedules under federal antitrust law); United Transp. Union v. State Bar of Mich., 401 U.S. 576 (1971) (First Amendment protects "collective activity undertaken to obtain meaningful access to the courts" and "that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation," including by employing or securing "a commitment" from lawyers "that the maximum fee charged would not exceed twenty-five percent of the recovery" in FELA cases).

33. Leis v. Flynt, 439 U.S. 438 (1979) (upholding Ohio's refusal to admit out-of-state lawyers *pro hac vice* to try state court criminal case); Scariano v. Justices of the Supreme Court of Ind., 38 F.3d 920 (7th Cir. 1994) (upholding Indiana restrictions on right to gain admission on motion to state bar).

34. Birbrower, Montalbano, Condon & Frank, P.C. v. ESQ Bus. Servs., Inc., 525 U.S. 920 (1998).

A. Reasons to Change the Rules Governing Cross-border Practice

My list is in no particular order. Readers can create their own priority, if any. Some of these reasons can be merged and many overlap. Also, allocation between this list and the subsequent reasons for caution is somewhat arbitrary. A few of these reasons, if rephrased, can appear as well in the subsequent discussion.

1. We Should Respect Client Choice

If a client wants to hire an out-of-state lawyer, and certainly if the client knows where the lawyer is and is not admitted, the state should respect the client's choice absent evidence of probable harm. Clients who go to out-of-state lawyers are especially likely to be sophisticated in choice of counsel. Post-*Birbrower* legislation in California,[35] which the state supreme court thereafter echoed in professional conduct rules,[36] now recognizes this interest. It enables lawyers to enter the state to participate in most arbitration in the state or incident to arbitration elsewhere.

2. The Growth of Specialization Favors Relaxed Rules

Specialization in an area of law or an industry (or both) creates limited markets of sophisticated suppliers whose population may not be dispersed evenly throughout American jurisdictions. So the particular tax, trade, or environmental law expert that a company in Fargo or Little Rock desires may practice in Seattle or Atlanta. As stated above, that client is likely to be highly sophisticated and may even "buy" its legal counsel with the advice of local or employed counsel.

3. Looser Cross-Border Practice Rules Will Reduce Costs

Freer cross-border practice will permit a client to seek advice of an out-of-state lawyer without having to pay the duplicative costs of local counsel, whose employment the out-of-state specialist might otherwise require in order to avoid UPL risks. Alternatively, freer rules will make it easier for the out-of-state lawyer to enter the client's state for meetings and advice rather than require the client or the client's officers to travel to the lawyer's state.

4. The Homogeneity of Law Reduces the Risk of Mistake

Federal law is the same nationwide. Law that is nominally state law may be virtually the same in each state. For example, an expert on Articles 2 or 9 of the Uniform Commercial Code will likely be an expert on these Articles everywhere the UCC is adopted despite local variations. So insofar as we worry about peculiarities in a jurisdiction's local law, local law will often be irrelevant to the service, or there will be no peculiarities or none so obscure that we need worry about an out-of-state lawyer's ability to comprehend them.[37]

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35. CAL. CIV. PROC. CODE § 1282.4 (West 2002) (sunsetting on Jan. 1, 2006).

36. CAL. CT. R. 983.4 (sunsetting on Jan. 1, 2006).

37. Speakers at this symposium were surely better qualified than most lawyers to address issues arising under the professional conduct rules of any American jurisdiction.

5. The Easy Accessibility of All Law Favors Eased Rules

"You could look it up," has never been truer. On Lexis and Westlaw, for example, the law of every American and some foreign jurisdictions are readily accessible via desktop computers. And the law here includes cases and legislation, state agency rules and decisions, local laws and regulations, and numerous secondary sources.

6. The Rules Should Reflect Actual Practice

We have no scientific surveys, but do we even need one to know that lawyers will not hesitate to enter other jurisdictions temporarily—physically and especially virtually (e.g., by picking up the phone)—to handle an attractive matter? It will hardly occur to lawyers that such temporary presence will be deemed unauthorized law practice. Indeed, it would probably amaze the great majority of State A lawyers (pick any state) that they may be violating State B's UPL rules, and therefore their own state's ethics rules, simply by talking on the phone too long and sending a few too many long e-mails and faxes to out-of-state clients. Certainly, lawyers will refrain from establishing a physical presence in a host state from which they hold themselves out as being available to clients. And experience supports an instinct that this is the place to draw the line. Aside from loss of fees (discussed next), when lawyers are sanctioned for UPL it is generally for boorish conduct far more intrusive than temporary presence in another jurisdiction.[38] The fact that we do not punish transient presence is not alone a reason to enact rules allowing it if we also believe that this conduct poses unacceptable dangers. But the fact that we routinely tolerate the conduct, extensive though we must know it to be, suggests that we do not believe it carries such dangers.

7. Fee Forfeiture Under Current Rules Is Unfair

In *Birbrower*, what the firm lost was the enforceability of its fee agreement for its work, although the court did say that the agreement was divisible and that work the firm's lawyers did while physically in New York and not virtually in California (regardless of the law the work entailed) might be compensated under the agreement.[39] In fact, when transient presence in another jurisdiction leads to a sanction, that sanction is loss of the lawyer's fee for the work performed while in the other place.[40] This happens even though the client may have been fully aware of the lawyer's jurisdictional limitations, even though the work is good, and even though the lawyer was competent to perform the work, perhaps because the work construed

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38. For my casebook, I collect authority on lawyer unauthorized practice. STEPHEN GILLERS, REGULATION OF LAWYERS, 733–35 (6th ed. 2002). The common thread running through cases that sanction lawyers reveals that before courts impose discipline, an unauthorized court appearance, prolonged presence, or holding out in the host state is required. *Id.* These cases are sparse. *Id.*

39. Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 12–13 (Cal. 1998).

40. *See, e.g., id.*; Ranta v. McCarney, 391 N.W.2d 161 (N.D. 1986); Spivak v. Sachs, 211 N.E.2d 329 (N.Y. 1965).

federal law in an area of the lawyer's speciality.[41] Fee forfeiture is a remedy courts impose because letting the lawyer get paid for his or her work in the jurisdiction is deemed to offend public policy.[42] It is troubling that the sanction for unauthorized transient presence in a jurisdiction is *not* prosecution or discipline by the state but the grant of free legal services to a client who may choose to take advantage of this argument despite its knowledge of the lawyer's place of admission and even though the work is excellent. The client may have sought the lawyer out in the first place because of his or her reputation in a specialized field of practice.[43]

8. The Current Rules Are Ambiguous

Putting aside pro hac vice admission, discussed further below,[44] the current rules defining lawyer UPL lack clarity. No court has said that an out-of-state lawyer's professional presence within its borders, physically or virtually, will constitute UPL regardless of degree. A little is acceptable or at least tolerated, too much is not.[45] This uncertain state of affairs most burdens transactional lawyers, who have no recourse to formal temporary admission, but it also hurts lawyers in dispute resolution in several circumstances—when the forum in which they expect to appear lacks power to admit them temporarily;[46] for work they do before an action is filed and pro hac vice first becomes available; and for work in one jurisdiction ancillary to an action pending or impending elsewhere. This is not so much an argument for expanding the rules as for clarifying them, but it may be that expansion of the rules is the best way to improve clarity.

9. The Current Rules Favor Large Firms with Multiple Offices

No law firm will have an office in all American jurisdictions, but large ones can have a presence in a half dozen or more, each staffed by at least one member of the local bar. That anchor is all a firm may need to provide legal services "in" the

41. The Birbrower lawyers argued unsuccessfully that the client's knowledge of their jurisdictional limitations should operate as a defense. *Birbrower*, 949 P.2d at 11. In *Ranta*, the lawyer gave advice on federal tax law, where he was competent, and there was no challenge to the quality of his work. *Ranta*, 391 N.W.2d 161.

42. The *Birbrower* court characterized the fee agreement as "an illegal contract" that could not be enforced to the extent that the firm sought payment for services rendered "in California." 949 P.2d at 11.

43. *See Birbrower*, 949 P.2d at 14 (Kennard, J., dissenting) (California company hires the law firm because its New York corporate counterpart used that firm's services in New York); *Spivak*, 211 N.E.2d 329 (California lawyer, expert in matrimonial matters, who is asked to come to New York to advise client and does so, is denied a fee).

44. *See infra* text accompanying notes 85, 98–100.

45. *Compare Spivak*, 211 N.E.2d 329 (unauthorized practice of law when California lawyer spent fourteen days in New York counseling New York client on matrimonial matters), *with* El Gemayel v. Seaman, 533 N.E.2d 245 (N.Y. 1988) (single trip to New York does not constitute unauthorized practice).

46. The arbitrator in *Birbrower* lacked such power prior to the adoption of ameliorating legislation. *Birbrower*, 949 P.2d at 9.

particular jurisdiction without fear of sanction, including loss of fee.[47] If the firm in *Birbrower* had had a California office with a member of the California bar, it is highly unlikely that the client's defense to the fee claim would have succeeded. Then the New York lawyers could have done their work at home or, if they had to travel to California or appear virtually there, they could organize their work to bring it under the supervision of the California lawyer. This is not the same as associating with local counsel, a stratagem that the *Birbrower* court told us would not have brought protection.[48] A lawyer from State A, though not a lawyer in State B, can work for a State B lawyer, just as paralegals and law graduates awaiting admission may do.[49] If the California office of the New York firm were big enough, no New York lawyers would have had to travel and their virtual presence could have been kept to a minimum. The point is that strict rules against extrajudicial practice work a greater constraint on law firms that do not have branch offices in other jurisdictions.

10. Remedies for an Out-of-State Lawyer's Errors Are Available Through a Civil Action in the Client's Home State

If an out-of-state lawyer is guilty of malpractice or other actionable conduct in connection with work that brought him physically or virtually into a jurisdiction, the lawyer can be sued in that jurisdiction. Depending on the facts, long arm statutes can reach the lawyer who enters a jurisdiction to represent a client.[50] This is so

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47. Ethics rules allow law firms to practice under a single name even though the lawyers who lend their names to the firm are not authorized in a particular jurisdiction and may not even be alive. *See generally* MODEL RULES OF PROF'L CONDUCT R. 7.5(b) (1998) [hereinafter MODEL RULES]. Critics of looser rules may argue that looser rules would favor large firms over small ones, but for the reasons offered here, I think this is wrong.

48. *See supra* text accompanying note 16.

49. Dietrich Corp. v. King Res. Co., 596 F.2d 422, 426 (10th Cir. 1979); Shapiro v. Steinberg, 440 N.W.2d 9, 11 (Mich. Ct. App. 1989). For example, the New Jersey Supreme Court delayed the applicant's admission to the bar because he had an established office in the state for seven years without having been admitted to practice there. *In re* Jackman, 761 A.2d 1103 (N.J. 2000). Jackman was not

> functioning as a law clerk, preparing legal research and documents for review and action by another responsible attorney licensed in New Jersey. Jackman had taken on all the duties of a lawyer rendering legal services to clients. He interviewed and counseled clients, prepared and signed documents to or on behalf of clients, and negotiated with lawyers on the merger and acquisition matters he handled. This was not a law clerk situation.

Id. at 1107; *see also* N.Y. County Op. 682 (1990).

50. For example, Colorado had personal jurisdiction over a New York law firm that represented a Colorado resident in a New York action, corresponded with the Colorado resident or her local attorney, and allegedly allowed a default judgment to be entered against the Colorado resident in New York, which was converted into a Colorado judgment. Keefe v. Kirschenbaum & Kirschenbaum, P.C., 40 P.3d 1267 (Colo. 2002). In another example, a Rhode Island attorney counseled a Rhode Island citizen in Rhode Island in connection with injuries suffered by the client while on a trip to New York. Liberatore v. Calvino, 742 N.Y.S.2d 291 (App. Div. 1st Dept. 2002). The lawyer made numerous telephone calls into New York and sent correspondence into New York in an effort to negotiate a settlement. *Id.* The court upheld personal jurisdiction in New York over the Rhode Island attorney. *Id.* Although "[t]elephone

whether the lawyer's conduct is the basis for a claim brought by the client or by a third person under any of a number of evolving theories of third party liability.[51]

11. The Out-of-State Lawyer Can be Disciplined in a Jurisdiction in Which the Lawyer Is Not Admitted

Long arm discipline is recognized. Minimal contacts with a forum can support disciplinary jurisdiction; a lawyer can be deemed to submit to such jurisdiction by virtue of the performance of (or offer to perform) legal services in the host jurisdiction.[52] True, the out-of-state lawyer cannot be suspended or disbarred from practice in a jurisdiction in which she is not admitted, but we tolerate this asymmetry now with pro hac vice admission. The lawyer who is admitted pro hac vice and is guilty of a disciplinary infraction can have her pro hac vice status revoked[53] (assuming the matter is still pending). She can also be denied future pro hac vice admissions in the courts of the host jurisdiction.[54] The same prospective remedy is available against the out-of-state transactional lawyer who commits a disciplinary violation. She can be denied the right to enjoy the host jurisdiction's permissive cross-border practice rules. Furthermore, the host state's disciplinary process can censure the out-of-state lawyer and can declare what further sanction that state's disciplinary machinery would impose if the lawyer were a member of its bar. The lawyer can be required to report this discipline to her home state authority.[55]

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calls and written communications" were generally insufficient to provide a basis for personal jurisdiction, they will suffice when "used by the defendant to actively participate in business transactions in New York." *Id.* at 293. The court continued: "Despite being unlicensed in New York, [Calvino] projected himself into the State to perform services by contracting with plaintiff to legally represent her here for purposes of obtaining a favorable settlement of her New York personal injury claim from New York tortfeasors in accordance with New York Law." *Id.* On the other hand, in an Eighth Circuit case, a Connecticut law firm defeated personal jurisdiction in Missouri. Porter v. Berall, 293 F.3d 1073 (8th Cir. 2002). The law firm had been hired in Connecticut, by Connecticut residents, to advise the clients on Connecticut law in connection with certain trusts registered in Missouri. *Id.* The court held that contacts between Connecticut and Missouri by mail and phone were "insufficient to justify exercise of personal jurisdiction under the due process clause." *Id.* at 1076. "The defendants were not licensed in Missouri, they did not maintain offices in Missouri, and they did not solicit business in Missouri. They provided advice on Connecticut law from their offices in Connecticut." *Id.* at 1077.

51. For these theories of liability, see GILLERS, *supra* note 38, at 822–33.

52. *In re* Coale, 775 N.E.2d 1079 (Ind. 2002) (Indiana disciplinary authority had jurisdiction over attorney not licensed in Indiana who allegedly sent Indiana residents targeted solicitations that violated Indiana rules); *In re* Murgatroyd, 747 N.E.2d 719, 721 (Ind. 2001) (sending solicitations for legal business to Indiana residents from outside the state "constituted professional legal activity in this state subject to our regulatory authority"). The lawyers in *Coale* were suspended from any law practice in Indiana, including through pro hac vice admission, until further order of the Court. The lawyers in *Murgatroyd* agreed to a judgment that did not include suspension from practice. *See also* S.C. CT. R. 418 (disciplinary authority over lawyers who mail offending advertisements or solicitations into South Carolina).

53. Filppula-McArthur *ex rel.*, Angus v. Halloin, 622 N.W.2d 436 (Wis. 2001).

54. *See, e.g.*, United States v. Ries, 100 F.3d 1469 (9th Cir. 1996).

55. *See, e.g.*, CAL. BUS. & PROF. CODE § 6068(o)(6) (West 2002) (requiring attorneys to report to the agency charged with attorney discipline the "imposition of discipline

12. Absent the Usual Exceptions to Full Faith and Credit, Facts Found in Host State Disciplinary Proceedings Can Be Preclusive When the Lawyer's Home State Reviews the Lawyer's Conduct and There Can Be a Strong Presumption in Favor of the Recommended Sanction

These devices can close the circle and virtually eliminate the traveling lawyer's ability to plan a retreat to his home state, free of the fear of a disciplinary sanction that can harm his practice.[56]

Before moving to the reasons that counsel caution in loosening the rules governing cross-border practice, I want to add a few words about a possible assumption behind the last three reasons in favor of liberalization. They may be seen to operate from the premise that lawyers who would cross borders to represent clients pose greater dangers than home state lawyers pose. This does not have to be the premise, of course. The benign concern may be that border crossing lawyers are no worse and no better than a state's own lawyers, but that the jurisdiction has less control over them and is therefore less able to deter misconduct or afford a remedy if misconduct occurs. The prior three paragraphs respond to the latter concern, which is valid and explored further below.[57] Invalid, however, is a position that would drive policy on the assumption that out-of-state lawyers are less able, less honest, or less willing to limit their work to matters within their competence. This is a position for which there is no empirical support and which should not be recognized as a valid basis for stringent rules that interfere with otherwise legitimate client choices and the usual deference to private ordering.

B. Reasons to Exercise Caution in Changing Cross-border Practice Rules

I now turn to the reasons for caution in formally changing the rules governing cross-border practice. I say "caution." I do not believe these reasons are a basis to reject all change. The virtual unanimity among commission witnesses in favor of some change also argues against rejection of change. Although I offer fewer reasons for caution than the dozen reasons for change, the issue should not, of course, be resolved by counting reasons divorced from their strength. Further, as stated, several of the first twelve reasons could be rephrased to fit here.

The reasons for caution center around two broad concerns: protection of third persons and unsophisticated clients; and protection of the local profession. The first concern is understandable, although testimony varied on the nature of the risks it posed and on how to reduce them. The second concern is more controversial and to many (but not me) may seem entirely misguided. I'll start with the easier one.

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against the attorney by any professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.").

56. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 22(D) (proposing something approaching full faith and credit, which it calls "reciprocal discipline.") On the issue of sanction, however, this rule contains a number of exceptions, including where "the misconduct warrants substantially different discipline in this state." *Id.* It may be that the willingness of states to broaden their rules for cross-border practice will be encouraged if home states promise to give greater respect to the host state's recommended sanction against a visiting lawyer from the home state.

57. *See infra* text accompanying notes 58–65.

1. Protecting Clients and Third Persons

To recapitulate: Clients or third persons who are harmed by a lawyer's misconduct now have two main options that they can employ in tandem. They can bring a civil claim against the lawyer and his firm and they can file a disciplinary complaint.[58] As discussed above, the first option will be no different whether the lawyer or firm is local or out-of-state. The cross-border activity that brought the lawyer into the state will also support personal jurisdiction for a civil claim.[59] The same is true for what I have called long arm disciplinary jurisdiction,[60] an idea that may be new in implementation but doctrinally unremarkable. Finally, a home state's full faith and credit for a host jurisdiction's disciplinary fact finding and, at least, a strong presumption in favor of its recommended sanction should quell the apprehension (which some may find unrealistic and perhaps uncharitable) that out-of-state lawyers will misbehave with impunity while traveling because they can then retreat to their home jurisdiction where no serious discipline will befall them. If you travel to another state, the lesson will be, you must expect to be treated like that state's lawyers in discipline.

But this disciplinary solution—long arm jurisdiction plus home state respect for the results—creates a problem of its own. Suddenly, disciplinary authorities will be responsible for policing the alleged misconduct of a larger pool of lawyers—namely all those lawyers who may now choose to enter the jurisdiction under the loosened rules but would not have done so previously. In theory, that number could include any lawyer nationwide. How will local disciplinarians manage? Who will pay the added cost of doing this job—local lawyers and taxpayers? Is the "solution" of long arm discipline plus home state respect for the result a mirage if local authorities lack the wherewithal to investigate and punish the miscreants?

Of course, we do not know whether, if the rules are changed, there will be more transient lawyers or, if there are, whether there will be more misconduct to investigate or added strain on local resources. We might anticipate more of all three. But how much more? We cannot know. That alone may cause some observers to say that this danger is conjectural. Conjectural or not, others may search for a way to make the added cost fall on those whose conduct creates it. That sounds fair, but how? One solution is to require lawyers found guilty of a rules violation to pay the cost of the investigation and hearing.[61] If the same cost-shifting rule applies to in-state lawyers, it cannot be criticized as discriminatory. This will capture some of the cost, but not all of it. It will not capture the added cost of investigation that does not lead to a finding adverse to the lawyer. But that cannot be a valid argument against looser rules. We cannot forbid out-of-state lawyers to enter a jurisdiction because their conduct may lead to an investigation that finds them blameless. Of course, the investigation may not find them blameless, but not sufficiently blameworthy to

58. If clients, they can also, as in *Birbrower*, refuse to pay the fee.

59. *See supra* text accompanying notes 50–51.

60. *See supra* text accompanying notes 52–56. *See generally* Charles W. Wolfram, *Expanding State Jurisdiction to Regulate Out-of-State Lawyers*, 30 HOFSTRA L. REV. 1015 (2002).

61. *See, e.g.*, Ky. Bar Ass'n v. Greene, 63 S.W.3d 182 (Ky. 2002); *In re* Olaiya, 635 N.W.2d 283 (Wisc. 2001).

warrant prosecution as a matter of discretion. Those investigations are not, however, likely to impose a great cost. Further, we can identify another income stream that should compensate for any added cost to the disciplinary system. We can require lawyers who plan occasionally and temporarily to enter a jurisdiction to register and pay an annual fee, just as home state lawyers now pay bar dues.[62] It can all be done by mail or Internet with a one-page form and a check or credit card number. The fee must fairly reflect the incremental costs associated with policing compliance with the more generous rules. True, lawyers may not always be able to anticipate a need to enter another jurisdiction, and therefore cannot always register in advance of their need to do so, but in those cases the lawyer can be required to register concurrently or soon after the cross-border work begins.

This source of money can also be used to meet another concern. Many states now have client protection funds, which will reimburse clients whose lawyers cheat them for some or all of their loss.[63] Contributors to those funds are the state's lawyers. What if a host state client is cheated by an out-of-state lawyer engaged in cross-border practice?[64]

We have to make some choices when an out-of-state lawyer cheats a host state resident. We can say that the host state client has no recourse to the host state's client protection fund. We can authorize any fund in the lawyer's home state to compensate the client. We can authorize the host state fund to compensate the client even though only in-state lawyers contribute to it. If so, we can also require out-of-state lawyers to contribute to the fund as a condition of cross-border practice. If we are going to create a contribution scheme to cover the added potential cost of disciplining lawyers who utilize more generous cross-border practice rules, then we can build into that tariff an appropriate additional amount to safeguard the jurisdiction's client protection fund. After all, if a lawyer is going to represent a client in a host state, it is equitable to ask him or her to contribute to a fund that protects the lawyer's clients in the host state.

Creation of this funding device will lead to more questions, an additional layer of bureaucracy, and need for more record keeping. How much will out-of-state lawyers be expected to contribute? Will the amount reflect each lawyer's degree of cross-border practice or will the amount be the same for all? Who will keep the records? These are challenges, to be sure. But they are not arguments against the use of this method to cushion a jurisdiction against expenses associated with greater cross-border practice. If those who protest looser rules cite the anticipated added cost of discipline and client protection—a prediction we are accepting as possible though unproved and perhaps unprovable—they must be amenable to a proposal to meet those added costs. They cannot say that a proposal has a particular problem—added

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62. The Nevada Supreme Court has recently imposed such a fee. NEV. SUP. CT. R. 42(2)(a)(i) & (8) ($350 application fee and $350 annually).

63. *See, e.g.*, N.Y. STATE FIN. LAW § 97-t (McKinney 2002) (establishing a fund for client protection).

64. I am envisioning an in-state client, not a client in the lawyer's home state on whose behalf the lawyer enters a host jurisdiction. If a *home* state client is cheated by his or her lawyer, the client will have recourse to the fund in the client's own state, if it has one. This is not a matter of equal concern to the host jurisdiction, whose solicitude is primarily for clients who are its own residents.

expense—and then refuse to help solve the problem, unless they are prepared to show that the burden of the solution is greater than any benefit that can be derived from the reform. That would not be a plausible claim. Governments collect fees all the time, under schemes that use more complex formulas and from populations that are larger, more diverse, and less compliant than lawyers. We might worry that some lawyers will ignore the new registration and fee system and enter the jurisdiction with impunity, but lawyers who will do that will do it whether the UPL rules permit them to do so or not. Appropriate sanctions can discourage this behavior.

The administration of this fee and registration system should be eased significantly if the states appointed a clearinghouse to receive registration forms, assess fees, and send the information and payments to the relevant state. The Internet would make managing the business extraordinarily easy, as simple as signing up for the ABA annual meeting. The ABA might offer to run the clearinghouse at cost plus a modest overhead.

2. Protecting Local Lawyers

The second concern if cross-border practice rules are formally eased is entirely different. Whereas the first concern focused on protection of in-state clients and third persons, the focus of the second concern is protection of the host state's legal profession. A free-market view may maintain that protection of a local industry or business is precisely the sort of goal we should not respect in making rules for interstate commerce. Indeed, the Constitution will often forbid it.[65]

If that were all, we would move on to the next section, but it is not all. The legal profession is not an industry or business, at least not in the same way as an oil company or a retail chain. The business or profession debate comes up most often in connection with legal advertising.[66] Those debates are irrelevant to my point. Nor do I

65. *See, e.g.*, Hicklin v. Orbeck, 437 U.S. 518 (1978). In *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), the Court held that the Privileges and Immunities Clause of the United States Constitution prohibited New Hampshire from denying bar admission to a Vermont resident who had passed the New Hampshire bar examination, but lived 400 yards from the New Hampshire border. *Piper* establishes that the practice of law is a "privilege," protected by the Constitution, and that Piper's status as a non-resident was not a valid reason to deny her admission to the New Hampshire bar. *Id.* However, Piper had passed the New Hampshire bar examination. The question remains whether a lawyer who has not passed a state's bar examination has a "privilege" to practice temporarily in the state. The Court held in *Piper* that the "Clause does not preclude discrimination against non-residents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against the non-resident bears a close or substantial relationship to the State's objective." *Id.* at 284 (internal citation omitted).

66. Justice O'Connor has been an eloquent skeptic, viewing the Supreme Court's advertising and solicitation decisions as giving insufficient weight to a state's interest in emphasizing the noncommercial aspects of law practice. *See, e.g.*, Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 490 (1988) (O'Connor, J., dissenting) ("Restrictions on advertising and solicitation by lawyers . . . act as a concrete day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other."); *see also* Goldfarb v. Va. State Bar, 421 U.S. 773 (1975) (addressing the business or profession question in the context of a challenge to minimum fee schedules under federal antitrust law).

mean to embrace that part of the "professionalism" campaign that is little more than institutional self-promotion.[67] My claim is that there is reason to accept the proposition that the legal profession is a different kind of business because its members have historically played a role in the governance of their communities. Sometimes this role is formalized, as when state law compels membership in the state's bar association and assigns it governmental duties.[68] Sometimes the role is informal, as when lawyers work pro bono or volunteer to work on court committees or as members of government commissions.

The question must be asked—Will easy cross-border practice result in the exodus of desirable work as clients, perhaps solicited, gravitate toward lawyers in adjacent states or even more distant places, thereby weakening the economic base of the local bar and depleting the time and personnel available to do pro bono and volunteer work for individuals, government, non-profit groups, and the justice system? Elsewhere, I analogized this to the effect Wal-Mart has on local retail stores.[69] This danger has been referenced in two disparate places—a Supreme Court dissent and testimony of the Akron Bar Association before the MJP Commission.

Supreme Court of New Hampshire v. Piper[70] held that the Privileges and Immunities Clause of the Constitution prevented New Hampshire from denying bar membership to an otherwise qualified applicant who had passed its bar examination but did not live in New Hampshire. Justice Rehnquist, alone in dissent, offered a valid state interest for the New Hampshire rule.[71] (It happens not to be one that the state chose to argue.[72]) Justice Rehnquist suggested that if non-residents were free to join its bar, the state could fear client flight, at least for the most desirable work, as lawyers in neighboring Boston gained admission to the New Hampshire bar and, without residing there, bid for that work. That would weaken the New Hampshire bar economically and, eventually, the availability of lawyers to participate in the civic life of the state. Justice Rehnquist wrote:

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67. *See, e.g.*, Nancy J. Moore, *Professionalism Reconsidered*, 1987 AM. B. FOUND. RES. J. 773; Ronald D. Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOY. U. CHI. L.J. 1149 (1987).

68. *See, e.g.*, CAL. CONST. art. VI, § 9 ("Every person admitted and licensed to practice law in this State is and shall be a member of the State Bar . . ."); Emslie v. State Bar of Cal., 520 P.2d 991, 998, (1974) ("The State Bar is a public corporation created by the Legislature as an administrative arm of this court for the purpose of assisting in matters of admission and discipline of attorneys."); *see also* CAL. BUS. & PROF. CODE § 6076.5 (West 2002) (giving the State Bar the power to initiate proposals for changes in the rules of professional conduct).

69. Am. Bar Ass'n/Bureau of Nat'l Affairs (ABA/BNA), *Conference Report, 27th National Conference on Professional Responsibility, Admissions, Speakers Review, Seek Reform of Rules that Inhibit Multijurisdictional Law Practice*, LAWS. MAN. PROF. CONDUCT, June 6, 2001, at 351. Also, we might anticipate that a weakening of geographical ties may weaken a lawyer's identification with his or her community as the lawyer redirects a practice outside of it.

70. 470 U.S. 274 (1985).

71. *Id.* at 290 (Rehnquist, J., dissenting).

72. *Id.* at 287 n.23 ("[T]he dissent's justification for the residency requirement was not raised by appellant or addressed by the courts below.").

> Put simply, the State has a substantial interest in creating its own set of laws responsive to its own local interests, and it is reasonable for a State to decide that those people who have been trained to analyze law and policy are better equipped to write those state laws and adjudicate cases arising under them. The State therefore may decide that it has an interest in maximizing the number of resident lawyers, so as to increase the quality of the pool from which its lawmakers can be drawn. A residency law such as the one at issue is the obvious way to accomplish these goals. Since at any given time within a State there is only enough legal work to support a certain number of lawyers, each out-of-state lawyer who is allowed to practice necessarily takes legal work that could support an in-state lawyer, who would otherwise be available to perform various functions that a State has an interest in promoting.
>
> Nor does the State's interest end with enlarging the pool of qualified lawmakers. A State similarly might determine that because lawyers play an important role in the formulation of state policy through their adversary representation, they should be intimately conversant with the local concerns that should inform such policies. And the State likewise might conclude that those citizens trained in the law are likely to bring their useful expertise to other important functions that benefit from such expertise and are of interest to state governments—such as trusteeships, or directorships of corporations or charitable organizations, or school board positions, or merely the role of the interested citizen at a town meeting. Thus, although the Court suggests that state bars can require out-of-state members to "represent indigents and perhaps to participate in formal legal-aid work," the Court ignores a host of other important functions that a State could find would likely be performed only by in-state bar members. States may find a substantial interest in members of their bar being residents, and this insular interest . . . itself has its genesis in the language and structure of the Constitution.[73]

This risk will confront smaller states adjoining large cities in other states—New Jersey is a second example—but it could also arise where a rural or semi-urban area of one state abuts a large city of another state. Even absent this geography, however, enterprising law firms may seek to build a national practice in a specialty by using modern technology to establish a virtual presence elsewhere or to solicit clients in distant places to a degree that can make the lawyer's presence in the host jurisdiction the functional equivalent of physical presence.[74] To paraphrase Ross

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73. *Id.* at 293 n.3 (Rehnquist, J., dissenting). In a footnote, Justice Rehnquist wrote:

> In New Hampshire's case, lawyers living 40 miles from the state border in Boston could easily devote part of their practice to New Hampshire clients. If this occurred a significant amount of New Hampshire legal work might wind up in Boston, along with lawyers who might otherwise reside in New Hampshire.

Id.

74. An example I offer as a problem in my casebook involves dispute resolution services, but one can also construct the problem around transactional services:

Perot, local lawyers may expect to hear a "giant sucking sound" as their most lucrative work disappears.[75] Lawyers who have no expectation of attracting out-of-state business, and an infrequent need to cross state lines for the clients they do have, may worry over that prospect, and the courts and lawmakers who depend on a vibrant, engaged local bar, willing to donate free time to the commonweal, may sympathize with this constituency.[76]

One could reply that, as it happens, Justice Rehnquist's prediction has not come to pass. It was a hypothetically interesting notion, but that's all. It does not appear that Boston lawyers have peeled off the best work of the New Hampshire bar leading that bar to cease or reduce its civic engagement. But there are also responses to this reply. First, the prospect of large numbers of hungry Boston lawyers choosing to sit for the New Hampshire bar, then competing with New Hampshire lawyers for

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> A law firm in St. Louis has developed an expertise in various forms of employment discrimination on behalf of workers. These claims are controlled by federal or state law or both. The firm has 36 lawyers, all members of the Missouri bar only. It does not want to open branch offices in other states, but it does want to attract out-of-state business. (Right now, about 10 percent of its clients are out-of-state, referred by lawyers or other clients.) The firm sets up a web site and also advertises tastefully in traditional ways. Its goal is to build a national practice. Whenever possible, its lawyers will do their work at the firm's St. Louis office, communicating with clients, potential clients who reply to firm marketing, and adversaries by e-mail, fax, and phone. When necessary, lawyers will travel briefly to other states.
>
> Many claims can be resolved solely through negotiation, without litigation or administrative complaints. If these are necessary, though, the firm will seek pro hac vice admission as required. Except for its web site and advertising, the firm will never physically or virtually enter another state until it is contacted by a potential client in that other state in response to its marketing or through a reference. In this way, it figures, it can come as close as possible to practicing nationwide without having any office outside Missouri or lawyers admitted to the bar of any other jurisdiction.

GILLERS, *supra* note 38.

75. Ross Perot, as the presidential candidate in 1992, used this image repeatedly. For example, in the third presidential debate, held October 19, 1992, he referred to the North American Free Trade Agreement by saying: "You implement that NAFTA . . . and you're going to hear a giant sucking sound of jobs being pulled out of this country right at a time when we need the tax base to pay the debt and pay down the interest on the debt and get our house back in order." *Campaign '92: Transcript of the Third Presidential Debate*, WASH. POST, Oct. 20, 1992, at A22, *available at* 1992 WL 2160870.

76. Depending on the jurisdiction, any change in the rules regarding cross-border practice may require amending unauthorized practice of law statutes, or ethics rules for lawyers, or both. The legislatures and the courts in a particular jurisdiction may both have authority over this issue. Indeed, it was California's unauthorized practice law upon which the *Birbrower* court relied for its analysis. Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998). The case begins with a citation to the state statute governing the practice of law and then describes the court's job as follows: "We must decide whether an out-of-state law firm, not licensed to practice law in this state, violated [the UPL statute] when it performed legal services in California for a California-based client under a fee agreement stipulating that California law would govern all matters in the representation." *Id.*

the business of New Hampshire clients, was remote when Justice Rehnquist described it in 1985. By contrast, the prospect of lawyers anywhere, in an Internet age, targeting out-of-state clients anywhere under relaxed unauthorized practice rules is much more real. It is certainly easier to do. Some business plans will work, some will not, but the entry barriers are not high (no bar exam to take) and the possible rewards are enticing. But we need not quantify the risks. It is enough to recognize that they are not illusory. If you are a member of a bar that confronts these risks, or of a court that governs that bar, you might well decide that they are not worth running. It's fine for academics or lawyers with an interstate practice to advocate the free movement of lawyers among states, but for them there is only an upside—ideological clarity and more money, respectively. And if the charge is leveled that the local bar's recalcitrance is economically motivated, a local bar can respond that the urge to make market penetration less risky for competitors is economically motivated as well. In fact, one local bar responded just that way in testimony to the commission. The Akron Bar Association, while acknowledging that it was time to ease cross-border practice rules, cautioned against doing so in a way that threatened the cohesion and strength of local bars and that thereby weakened their quasi-governmental and civic roles in their communities. Its testimony reads in part:

> Another point we would like to make is the importance of presence in and commitment to a community and to local law. We are all aware of some of the negative effects that wide deregulation has had on businesses and services. These are effects that would be devastating to the public service nature of the practice of law. We read a cautionary tale of national concerns coming in to a community. Using practices that are not illegal but that can be somewhat predatory, they offer services and product at lower prices or with high customer service. They can afford to do so by spreading the profits and losses out over a wide network, rather than relying upon the profitability of the single unit. However, once the local competing businesses have been driven out, quality decreases, prices increase, service diminishes, and any semblance of responding to and serving the local community's interests becomes at best vague. Not only are the economic resources of the community now drained out of the community itself, but the interests of that community are no longer paramount or of concern to the national business. The lack of commitment to the community results in a lack of service to that community, its economic infrastructure, and its people. The Akron Bar cautions strongly against adopting a position on MJP that will allow similar results. We also note that driving out local practitioners, or draining the lucrative clients away from those practitioners, may result in less availability of low cost legal services, services that many lawyers offer in their local communities because they are members of and committed to those communities and their well-being. We should not trade short-term economic benefits for long-term losses to both economic and other interests.[77]

77. *See* AKRON BAR ASS'N, INITIAL TESTIMONY, *available at* http://www.abanet.org/cpr/mjp-written_comments.html (last visited Aug. 21, 2002); AKRON

An objection might be that the economic condition of the local bar is not a proper policy concern. If Akron's bar is weakened with looser cross-border practice rules, then the market, in the form of client choice, will have spoken. Wal-Mart succeeds because people shop there. If out-of-state lawyers are able to lure the most lucrative local work or enough of the ordinary work to cause economic pain to the local bar, then it is right and efficient, this argument goes, because it happened and that is all we need to know.

That's one view. But I have tried to show that a state may see a strong local bar as more valuable to its community, government, and justice system than survival of the locally owned stores that close following Wal-Mart's arrival. Either you accept that interest or you do not. I do accept it, although I doubt that even fairly generous cross-border practice rules pose a serious threat to local bars as a matter of fact. In any event, when we come to what the rules might actually say in the next Part, we see that there are ways to write them to minimize (though not eliminate) what I believe are the legitimate concerns expressed in the Akron Bar Association's testimony and in Justice Rehnquist's *Piper* dissent while responding to the arguments in favor of easing the rules.

The upshot of the analysis so far is this: Concern for client protection can be met through civil liability of lawyers to clients and third parties, a remedy that is equally available wherever the lawyer is admitted; and through discipline and recourse to client protection funds, with the incremental cost of employing the latter remedies paid by transient lawyers themselves. Concern for the effects of looser rules on the local bar is less easily addressed, in part because the seriousness of this danger is hard to measure in advance and in part because it will always be hard to identify whether and to what extent changes in local practice over time can be attributed to more permissive cross-border practice rules or something else. Because isolating causes and measuring consequences are difficult tasks, modulating rule changes to get just the right balance between the benefits of easier cross-border practice on the one hand, and preservation of a vibrant local bar on the other hand, is impossible. But of course, we do not need just the right balance.

III.

We come now to something of a paradox. Despite the theories for and against a greater or lesser expansion of the rules, and despite the difficulty of assessing risks and fashioning remedies, once we begin to think about the situation "on the ground," we discover a great deal of agreement and a debate that shrinks to a few narrow issues. In my experience on the MJP Commission and discussion generally, I found strong consensus to allow several categories of cross-border work and only limited areas of significant disagreement. I will focus on these, generally, rather than on the precise language that an ethics rule or UPL statute might adopt.

BAR ASS'N, SUPPLEMENTAL TESTIMONY, *available at* http://www.abanet.org/cpr/mjp-written_comments.html (last visited Aug. 21, 2002).

A. Categories of Permanent Presence

1. In-House Lawyers

Lawyers employed by organizations, including business entities and government, may be asked to relocate several times in their careers and obviously do not relish having to gain regular admission to the bar of each jurisdiction to which they are assigned. So long as they remain employees of their clients and work only for their clients (or their client's agents on client business) wherever they are stationed, sensible policy favors a special practice rule authorizing their work (except for appearances before tribunals where pro hac vice admission is available), even though they are stationed in a jurisdiction for an indefinite period. These lawyers can be required to register, to pay bar dues, to abide by the jurisdiction's ethics rules, to comply with other obligations of locally admitted lawyers like mandatory CLE and pro bono work, and to submit to the state's disciplinary system. In fact, many American jurisdictions have rules creating this special admission category, though the rules vary.[78]

2. Foreign Legal Consultants

Although I am limiting this discussion to domestic cross-border practice issues, it bears mention that some American jurisdictions permit special admission for foreign lawyers to advise solely on limited matters, essentially the law of their home country. They too can be required to register, comply with the jurisdiction's ethics rules, and submit to discipline, among other obligations.[79]

B. Temporary Presence

The prior two categories envision lawyers with offices in a jurisdiction. We now move to a series of categories where a lawyer's presence in a state is temporary and for a particular matter. The word "temporary" cannot be defined precisely. It may be described by what it is not. It is not having an office in the jurisdiction from which a lawyer holds himself or herself out to the public as available to practice law. It is not the systematic and continuous physical presence in a state even if the lawyer's office is elsewhere, perhaps just across the state border in an adjacent city. It is also not systematic and continuous *virtual* presence in a state. This last point is important.

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78. *See, e.g.*, AM. CORPORATE COUNSEL ASS'N, STATES' CORPORATE ADMISSION RULES, *at* http://www.acca.com/admissionRules/index.php (last visited November 1, 2002) (providing examples of special admissions rules).

79. *See, e.g.*, N.Y. JUD. CT. ACTS § 53(6) (McKinney 2001). In New York, the foreign legal consultant cannot

> render professional legal advice on the law of this State or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise), except on the basis of advice from a person duly qualified and entitled (other than by virtue of having been licensed [as a foreign legal consultant]) to render professional legal advice in this State on such law.

N.Y. Ct. R. § 521.3(e) (2002); *see generally* Carol A. Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 FORDHAM INT'L L.J. 1126 (1998).

It means to recognize that the kind of "permanent" presence that requires formal bar admission includes not only physical presence in a state but also systematically targeting the residents of that state virtually. Given modern technology and transportation, it is not hard to imagine, for example, that lawyers in a border city in State A would be able to do nearly everything required to have a law practice "in" State B while entering State B only rarely. If face to face meetings are needed, the client, not the lawyer, can drive across the border. If a state may require a lawyer to gain admission to its bar if the lawyer physically relocates to the state, and if a lawyer can establish nearly the same level of practice virtually from outside the state, then the state may consider that it has a valid interest in requiring the lawyer to gain admission to its bar. That, indeed, was the assumption underlying *Birbrower's* focus on virtual presence[80] and it may present the greatest challenge to those who want to modernize the rules governing cross-border practice. To complicate matters further, the resolution of this issue will affect transactional lawyers especially because pro hac vice admission rules, with a little expansion, should largely protect lawyers engaged in dispute resolution, whether their presence in the host state is physical or virtual.[81]

I turn now to those categories of temporary presence that should not draw significant disagreement. Doors provide a useful metaphor. How wide should we open the door to out-of-state lawyers who want to provide legal services in a host jurisdiction? Rules for in-house lawyers and foreign legal consultants open the door fairly wide. Yet the rules for each differ. In-house lawyers may advise on any law but only for their employer or its commonly owned companies.[82] Foreign legal consultants may advise anyone but only in a restricted area of law. As a practical matter, that will be the law of the country in which they are admitted.[83] When we move to the categories that permit temporary presence in a jurisdiction, the opening will be less generous. By definition, jurisdictional presence must be temporary, not permanent.[84] Beyond that requirement, several issues emerge. They are best divided between the interests of lawyers engaged in dispute resolution and lawyers whose work is transactional, a term I'll use to refer to matters that are not pending or impending before a court, agency, alternate dispute resolution forum or other tribunal.

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80. "The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations." *Birbrower*, 949 P.2d at 5. The court then went on to say that "[p]hysical presence here is one factor we may consider" in making this determination, "but it is by no means exclusive." *Id.*

81. *See infra* text accompanying note 85. Further, as my casebook hypothetical illustrates, we are not talking only about adjoining states. *See supra* note 74. Using technology, a lawyer can establish a virtual presence across the country. *Id.*

82. *See supra* note 78.

83. *See supra* note 79.

84. An example of a rule that focuses solely on temporary presence for a specific matter is found in Section 600.916 of Michigan Statutes, which exempts from the state's UPL prohibition an out-of-state lawyer "while temporarily in this state and engaged in a particular matter." Mich. Comp. Laws § 600.916(1) (2002); *see also infra* text accompanying notes 91–95.

1. Lawyers Engaged in Dispute Resolution

While pro hac vice admission is generally available for lawyers who are not permanent members of a tribunal's bar,[85] and while this avenue gives lawyers engaged in dispute resolution ("litigators") an advantage that transactional lawyers do not enjoy, nevertheless it has several gaps. First, a litigator may enter a jurisdiction to do work on a dispute before he or she has a chance to gain pro hac vice admission and indeed (if the lawyer's client is the potential claimant) even before a matter has been filed. In fact, the matter may never be filed. So a rule addressing this problem must consider whether to protect the litigator who has a reasonable expectation that he or she will gain pro hac vice admission if and when requested. Second, the matter that brings the lawyer into the jurisdiction may be pending or impending elsewhere, which means a jurisdiction must decide whether to allow the local work even though the dispute will not be adjudicated locally. Third, lawyers affiliated with the lawyer who has gained or expects to gain pro hac vice status, but who themselves will not seek that status though eligible to do so, need protection. An example are associates of a trial lawyer who will interview witnesses in the jurisdiction in connection with a matter in which the trial lawyer has been or reasonably expects to be admitted pro hac vice. The associates will not be trying the case or even in the courtroom, not because they would be denied pro hac vice admission but because they are not needed there. A final gap in the current regime, and it is sizeable, is the one in *Birbrower* itself. Not all dispute resolution is in court. Much of it is in alternate forums or in agencies. Should these tribunals be empowered to allow the pro hac vice appearance of out-of-state lawyers and to allow those lawyers the same latitude to work in a jurisdiction in anticipation of applying for admission?

2. Transactional Lawyers

Pro hac vice admission, if expanded to fill these gaps, should fully protect lawyers engaged in dispute resolution. Remaining are the great majority of United States lawyers whose work is transactional. It is only a small exaggeration to say that the focus and challenge of the current discussion is to figure out (and describe) the right protection for this group. Pro hac vice admission, as traditionally understood, will not work because by definition there is no tribunal available to grant it and therefore no tribunal to supervise the out-of-state lawyer. Should this concern us? Expansion of the rights of litigators envisions that they would be allowed to enter a host state in anticipation of a claim that may never be filed. So they, too, could be working without court supervision. Why can't transactional lawyers do the same?

One view would hold that transactional lawyers should be able to do the same so long as, like litigators, they temporarily enter the jurisdiction for a particular matter.[86] In this view, there is no restriction on the kind of matter that might bring the

85. Barker, *supra* note 7.

86. AM. CORP. COUNSEL ASS'N ET AL., A COMMON SENSE PROPOSAL FOR MULTIJURISDICTIONAL PRACTICE, *available at* http://www.acca.com/advocacy/mjp/commonsenseproposal.html (last visited Aug. 22, 2002) (sponsored by a consortium of organizations). Under this "Common Sense Proposal," as it was labeled by its sponsors, even a lawyer admitted only in a non-United States jurisdiction would be permitted to represent a

lawyer into the jurisdiction. Another view holds that a temporal limit is insufficient, that the door should not be so widely opened, and that there must be additional conditions, which can be presented in the alternative. According to this view, without an additional condition, a lawyer from State A could enter State B and handle a residential house closing or a separation agreement for a State B resident. These are areas where knowledge of local law is said to be especially critical and therefore the risk of incompetence high enough to forbid the activity, at least where the client is a host state client, whose protection is of particular concern to local regulators. The conditions in the following four paragraphs are examples of additional conditions, at least one of which we might insist be satisfied before the transactional lawyer could enter the host state, even temporarily.

a. Affiliation with Locally Admitted Lawyers

The *Birbrower* court told us that affiliation with a local lawyer would not have inoculated the out-of-state lawyers against a UPL charge, and it would seem to follow that any affiliation would have subjected the local lawyer to a charge of assisting the other lawyer's UPL.[87] But there may be general agreement that affiliation should be adequate to meet local concerns so long as the local lawyer actively participates in the representation and is not mere window dressing. The local lawyer, like the out-of-state lawyer, will be responsible for his or her own negligence. In some circumstances, the local lawyer will have disciplinary responsibility for the misconduct of the other lawyer.[88]

b. Work for a Home State Client

This category focuses on the client that the out-of-state lawyer is serving. If the client is in the lawyer's home state, not in the host state, then the host state has a reduced interest in protecting that client, though it retains an interest in protecting third parties in the host state against the lawyer's misconduct. Regulation of the out-of-state lawyer's relationship to a home state client can be seen as primarily a subject of concern for the home state's licensing and disciplinary authorities. That leaves this question: What makes a client a home state client? If the client is a person and resides in the lawyer's home state, that should suffice. But what if it is a business entity or a person who resides in a third state? One answer is to require the business entity to have an office in the home state. As for a person residing in, or a company whose office is in, a third state, one view would allow that representation because the host

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client "on a temporary basis" in a United States jurisdiction on any matter regardless of the source of law. *Id.*

87. CAL. RULES OF PROF'L CONDUCT R. 1-300(A) (1995) ("A member shall not aid any person or entity in the unauthorized practice of law."); *see also* Office of Disciplinary Counsel v. Pavlik, 732 N.E.2d 985 (Ohio 2000) (disciplining an Ohio lawyer who aided an out-of-state lawyer in unauthorized practice of law in Ohio).

88. MODEL RULES, *supra* note 47, at R. 8.4 (1998) states that it is "professional misconduct" for a lawyer to "knowingly assist" another in violation of the Rules of Professional Conduct. In addition, Model Rule 5 makes one lawyer responsible for another lawyer's violation of the professional conduct rules if the first lawyer has "knowledge of the specific conduct" by the second lawyer and "ratifies the conduct." MODEL RULES, *supra* note 47, at R.5.1(c)(1).

state is most concerned with protecting its own residents. This category might even extend to work a lawyer does for a former home state client who has moved to another state if the new work is related to the work the lawyer performed when the client resided in the lawyer's state. For example, a lawyer in Iowa who did successive estate plans for an Iowa business owner who has since retired to Arizona would be permitted to update the client's will even after she has relocated.

c. The Locus of the Matter

In addition to looking at the geographical nexus of the client, another condition would look at the location of the matter. Do the services in the host state arise out of, or have a reasonable relationship to, a matter in the lawyer's home state, wherever the client is situated? So, for example, if a lawyer were representing a person in the purchase of property in the lawyer's home state or in an application for regulatory approval in that state, and the work required the lawyer to perform related legal services in the host state, the work would be protected. The client's residence would be irrelevant under this provision. One ambiguity here is in the meaning of the phrase "substantial connection." The implication is that the main event is in the lawyer's home state and the lawyer's presence in the host state is incidental to that work. Efficiency then argues in favor of letting the lawyer do it all. But the language of this provision is not and cannot be precise.

d. The Source of the Governing Law

A final category might look not at the identity of the client, nor the locus of the matter, but the law governing the lawyer's work. If that law is not host state law, risk of error may be seen to be reduced. Easiest is the situation where the governing law is the law of the lawyer's home state. That is the law on which she has been tested. But other law may also present low risk. For example, federal law, international law, and the law of a foreign nation are the same in the lawyer's home state as in the host state. While it may be unusual for a State A lawyer to be an expert on a particular aspect of State B law, it will be common for a State A lawyer to be an expert on an aspect of State A law or federal, international, or foreign law. This distinction between State A law and State B law is harder to maintain for state law that is nearly uniform nationally.

IV.

The Commission's report contained nine recommendations, all of which were approved by the House of Delegates. The full text can be found on the Commission's web site.[89] Here I will discuss three of them.[90] The first contains the

89. AM. BAR ASS'N, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE (2002), *available at* http://www.abanet.org/cpr/mjp-home.html (last visited Oct. 15, 2002).

90. In addition to the three recommendations discussed here, the Commission recommended, and the House of Delegates approved, resolutions supporting "the principle of state judicial regulation of the practice of law"; encouraging the use of "the national lawyer regulatory data bank to promote interstate disciplinary enforcement mechanisms"; proposing a Model Rule on Pro Hac Vice Admission; proposing a Model Rule on Admission by Motion;

amendments to Rule 5.5, the centerpiece of the Commission's work. The second contains amendments to Rule 8.5 addressing disciplinary jurisdiction and choice of rule. The third is an amendment to Rule 22 of the Model Rules of Lawyer Disciplinary Enforcement, whose subject is reciprocal discipline.

With one exception, the first two paragraphs of Rule 5.5 are unremarkable. Rule 5.5(a) continues to forbid a lawyer to engage in the unauthorized practice of law or to assist another person in doing so.[91] Rule 5.5(b) forbids lawyers to hold out to the public or otherwise that they are admitted to practice in a jurisdiction if they are not.[92] Rule 5.5(b) also forbids lawyers to "establish an office or other systematic and continuous presence" in a jurisdiction in which they are not admitted "except as authorized by these Rules or other law."[93] Systematic and continuous presence can occur even if a lawyer does not physically enter the jurisdiction. For example, a lawyer may target the residents of a jurisdiction through solicitations prepared and sent from outside it. The comment states that systematic and continuous presence can occur without physical presence,[94] supporting *Birbrower*'s conclusion that virtual as well as physical presence implicates unauthorized practice policies.[95]

Rule 5.5(c) and (d) are at the heart of the Commission's innovations. Rule 5.5(c) describes the circumstances under which a lawyer in one jurisdiction may engage in practice in a host jurisdiction. For the lawyer's presence to be permitted, it must be "temporary."[96] "Temporary" is not a precise term. In this context, precision is impossible. "Temporary" denotes a standard whose meaning the courts will develop over time. But not even "temporary" presence is permitted unless one of four other criteria is satisfied. The first of these is where the work is undertaken in association with a locally admitted lawyer who "actively participates in the matter."[97] The key word is "actively." The local lawyer cannot be window dressing. The presence of the local lawyer gives comfort to the host jurisdiction that its residents and its justice system will be protected.

A second category addresses the lawyer engaged in dispute resolution in court.[98] Although that lawyer can seek pro hac vice admission, this provision recognizes that the lawyer may need authority to provide legal services in a jurisdiction even earlier, as when the lawyer enters the jurisdiction to investigate whether to file an action or appear in a pending one. The lawyer may also need to provide legal services in a jurisdiction incident to a matter that is pending or impending in another jurisdiction in which the lawyer is or expects to be admitted.

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encouraging jurisdictions to adopt the American Bar Association's Model Rule for the Licensing of Legal Consultants; and proposing a Model Rule for Temporary Practice by Foreign Lawyers. *Id.* at 6–7.

91. MODEL RULES, *supra* note 47, at R. 5.5(a).

92. *Id.* at R. 5.5(b)(2).

93. *Id.* at R. 5.5(b)(1).

94. *Id.* at R. 5.5 cmt. 4 ("Presence may be systematic and continuous even if the lawyer is not physically present here.").

95. See *supra* text accompanying notes 17–18.

96. MODEL RULES, *supra* note 47, at R. 5.5(c).

97. *Id.* at R. 5.5(c)(1).

98. *Id.* at R. 5.5(c)(2).

A third category protects lawyers engaged in dispute resolution before tribunals that do not have the power to admit them pro hac vice.[99] It grants lawyers the authority to appear in these tribunals (generally arbitration or other form of alternate dispute resolution) and to provide legal services incident to a pending or impending proceeding. The lawyer's work must "arise out of or [be] reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[100] This additional nexus, not present in the prior provision, is meant to recognize that whereas pro hac vice admission is administered by a judicial officer, the "neutral" who sits in an ADR proceeding does not have the same interest as a judge in controlling the degree to which out-of-state lawyers enter a host jurisdiction.

The final category responds to the interests of transactional lawyers.[101] Pro hac vice is unavailable to them. The rule allows transactional lawyers temporarily to provide legal services in a jurisdiction. But once again the services must be "reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[102] The precise nature of that relationship can vary significantly from matter to matter. The comment gives these examples of an acceptable relationship.

> [The matter] may have a significant connection with [the lawyer's home] jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions. . . . In addition, these services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign or international law.[103]

Rule 5.5(d) creates two exceptions to the prohibition in Rule 5.5(b) against establishing an office or other systematic and continuous presence in a jurisdiction in which a lawyer is not admitted. The most prominent is the exception for lawyers who are employed by an organization, usually a corporation.[104] The exception will allow the lawyer to provide legal services to his or her employer "or its organizational affiliates," but not services that require pro hac vice admission.[105] This provision recognizes the plight of employed lawyers who may be moved from place to place, for a few years at a time, and may not relish the prospect of becoming members of the bar of every jurisdiction in which they reside. Their work under this provision is limited to services for their employer or its organizational affiliates, which the comment defines to be "entities that control, are controlled by, or are under common control with the employer."[106] Personal legal services to other employees of the

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99. *Id.* at R. 5.5(c)(3).
100. *Id.*
101. *Id.* at R. 5.5(c)(4).
102. *Id.*
103. *Id.* at R. 5.5 cmt. 14.
104. *Id.* at R. 5.5(d)(1).
105. *Id.*
106. *Id.* at R. 5.5 cmt. 16.

employer are excluded.[107] The rule is broad enough to apply to government lawyers.[108] The comment recognizes that a state may impose additional obligations on these lawyers, such as registration, contribution to client protection funds, and mandatory continuing legal education.[109] Finally, Rule 5.5(d)(2) creates an exception to the prohibition against establishing a presence in a jurisdiction in which a lawyer is not admitted when the lawyer is authorized to do so "by federal law or other law of this jurisdiction."[110]

It is worth saying a further word about Rule 5.5(c). This is where the greatest innovations appear and where much of the debate centered. The goal is to define a space that appropriately recognizes the interests of clients and state regulators in a natural economy. The concept of temporary presence coupled with one of the four additional requirements defines that space. However, the definition must necessarily be fluid. Courts, ethics committees, and lawyers called upon to discern the boundaries in the context of a particular matter will have to engage in the very balancing process that occupied the Commission. Respect for the notion of "temporariness" is key. At the same time, "temporary" is not a "one size fits all" concept. Sometimes a single matter will require extended presence and will still be temporary. Sometimes multiple appearances in a jurisdiction in a series of matters, though each may be brief, will exceed the temporal boundaries. Lawyers must recognize that they are guests in the host jurisdiction (to extend the metaphor) and must not abuse their invitation.

The expanded authority that Rule 5.5 confers comes at a price. A lawyer who wishes, even on a temporary basis, to provide legal services in the jurisdiction must recognize the jurisdiction's interest in disciplining him or her for misconduct in connection with those services. The amendments to Rule 8.5 respond to this interest. They provide, first, that a "lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction."[111] This creates what we might call long-arm disciplinary jurisdiction.[112] Separately, the rule contains a "choice of law" provision—standards for determining which jurisdiction's rules of professional conduct will govern in any such proceeding. Unchanged is the rule that if the conduct is in connection with a matter pending before a tribunal, the rules of the tribunal govern.[113] Otherwise, "the rules of the jurisdiction in which the lawyer's conduct occurred" govern unless "the predominant effect of the conduct is in a different jurisdiction," in which case "the rules of that jurisdiction shall be applied to the conduct."[114] Sometimes, however, it will not be clear to the lawyer, at the time the lawyer acts, whose rules will govern. Consequently, Rule 8.5 also provides that a "lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules

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107. *Id.*
108. *Id.* The Rule would also apply to other employed lawyers. *Id.*
109. *Id.* at R. 5.5 cmt. 17.
110. *Id.* at R. 5.5(d)(2).
111. *Id.* at R. 8.5(a).
112. See *supra* text accompanying notes 52–55.
113. MODEL RULES, *supra* note 47, at R. 8.5(b)(1).
114. *Id.* at R. 8.5(b)(2).

of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur."[115]

The ABA Model Rules of Lawyer Disciplinary Enforcement provides for reciprocal discipline in Rule 22. The rule envisions that when a lawyer is disciplined in one jurisdiction, another jurisdiction in which the lawyer is also admitted will accept the factual conclusions of the first jurisdiction and impose the same discipline absent one of the exceptions in the rule. One of the previous exceptions excused the second jurisdiction from imposing the same discipline if the "misconduct established warrants substantially different discipline in this state."[116] The Commission deleted this exception, finding it too broad. Host jurisdictions are more likely to permit out-of-state lawyers to provide legal services if they have confidence that the lawyers' home jurisdictions will respect their recommended discipline. An exception that relieves the home jurisdiction of granting this respect if the conduct "warrants substantially different discipline" in the home jurisdiction was deemed unacceptable. Instead, the Commission opted for language that relieves the home jurisdiction of the duty of imposing reciprocal discipline if that discipline "would result in grave injustice; *or be offensive to the public policy of the jurisdiction.*"[117] The Commission added the italicized language.[118]

V. CONCLUSION

The work of the Commission on Multijurisdictional Practice is but a first step. The ABA recommends. The states enact and enforce. The task now is to persuade state rule makers, be they courts or legislatures, to adopt the ABA's recommendations. The chances of doing so are increased because the Commission's work emerged from a process that was entirely open, because the members of the Commission approached their task with open minds, and because the dozen Commission members reached consensus despite their different practice situations and perspectives. In a way, the process, though invisible in the text of the final documents, is an essential part of the product. This experience of finding the right balance between historically local control of the bar and the needs of clients in a national and international economy offers us a small case study on how to make changes in the governance of the profession.

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115. *Id.* at R. 8.5(b)(2). *Id.* R. 1.0(i) defines "reasonably believes" to denote "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." Consequently, the term has both an objective and a subjective component.

116. MODEL RULES OF LAWYER DISCIPLINARY ENFORCEMENT R. 22 (D)(4) (1993).

117. *Id.* R. 22(D)(3) (emphasis added).

118. *See* REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE, *supra* note 89, at 34.