

**Report 201A**

**AMERICAN BAR ASSOCIATION  
COMMISSION ON MULTIJURISDICTIONAL PRACTICE  
REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

- 1 RESOLVED, that the American Bar Association affirms its support for the principle of state
- 2 judicial regulation of the practice of law.

## REPORT

The most fundamental question for this Commission, and for the legal profession, is whether jurisdictional restrictions on the practice of law have continued validity and should be retained in the United States. The Commission believes that the principle of the regulation of the practice of law by the state judicial branch of government, which includes jurisdictional limits on legal practice, should be preserved, and therefore recommends that the ABA affirm its support for this fundamental principle.

A number of organizations and individuals have noted that, in the European Union, a lawyer in one member state may establish a law practice in another member state with relative ease,<sup>1</sup> and have proposed that jurisdictional restrictions similarly be relaxed in the United States. These proposals have come in several forms.

Some advocate that United States lawyers be permitted to practice law nationally without restriction on the nature and extent of the work that they may perform in jurisdictions in which they are not licensed. This would include being able to establish a law practice in any state, subject to whatever disciplinary rules and regulatory requirements apply in that state, and being able to practice law regularly and/or occasionally in other states in which the lawyer has not established a law practice.

Proponents of a national scheme have suggested various ways in which the concept of law practice without jurisdictional limitations might be implemented. One suggestion is that all jurisdictions enact laws providing that any United States lawyer may practice law in any

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<sup>1</sup>See generally, Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 INT'L LAW 307 (Spring 2000); See also, Ronald A. Brand, *Uni-State Lawyers And Multinational Practice: Dealing With International, Transnational, And Foreign Law*, 34 VAND. J. TRANSNAT'L L. 1135 (2001); Wayne J. Carroll, *Innocents Abroad: Opportunities and Challenges for the International Legal Advisor*, 34 VAND. J. TRANSNAT'L L. 1097 (2001); Julian Lonbay, *Lawyer Ethics in the Twenty-first Century: The Global Practice Reconciling Regulatory and Deontological Differences - The European Experience*, 34 VAND. J. TRANSNAT'L L. 907 (2001); Steven Mark, *Harmonization Or Homogenization? The Globalization Of Law And Legal Ethics--An Australian Viewpoint*, 34 VAND. J. TRANSNAT'L L. 1173 (2001); 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); The Law Society of (England and Wales, Comment to the ABA Commission on Multijurisdictional Practice (submitted March 19, 2002), [www.abanet.org/cpr/mjp/comm2\\_lsew.pdf](http://www.abanet.org/cpr/mjp/comm2_lsew.pdf); Union Internationale des Avocats, Memorandum to the ABA Commission on Multijurisdictional Practice (March 13, 2002) [www.abanet.org/cpr/mjp/comm2\\_uida.html](http://www.abanet.org/cpr/mjp/comm2_uida.html).; cf. Laurel Terry, Memorandum (May 2001), [http://www.abanet.org/cpr/mjp-comm\\_terry.doc](http://www.abanet.org/cpr/mjp-comm_terry.doc) (for Terry charts analyzing various global MJP schemes, click on [http://www.abanet.org/cpr/mjp-written\\_comments.html](http://www.abanet.org/cpr/mjp-written_comments.html)); The Law Society of Alberta, *Should We Build Walls or Gates?* (February 2001), [http://www.abanet.org/cpr/mjp-comm\\_lsa.html](http://www.abanet.org/cpr/mjp-comm_lsa.html) (offers Canada's reciprocal protocol as a model for achieving greater inter-jurisdictional mobility).

jurisdiction, permanently or on a temporary basis, without a requirement of additional admission.<sup>2</sup> Another plan contemplates a national compact, whereby states would permit other states' lawyers to provide legal services in the state on a temporary basis, and whereby a lawyer from one state could move to another state and become a member of the bar in that state without having to take another bar exam, provided the lawyer establishes that he or she is a member in good standing of a state bar, is of good character and pays all relevant fees.<sup>3</sup> A third proposal for comprehensive reform, the so-called "driver's license" model, envisions a uniform registration system that would enable a lawyer licensed in one jurisdiction to establish an office or otherwise engage in a systematic and continuous presence in another jurisdiction for the practice of law.<sup>4</sup> Under all of these proposals, lawyers who are unqualified to undertake legal work could be subject to disciplinary proceedings and legal malpractice actions, but jurisdictional restrictions would not play any role in protecting clients from unqualified lawyers.

Those in favor of permitting national law practice have advanced various arguments to support their position. First and foremost, they have suggested that eliminating geographic limits will promote client interests, and that regulatory interests that are said to justify these limits can be adequately served without them. In general, consistent with the duty of competence, they argue that out-of-state lawyers will undertake legal work only if they are qualified to perform that work, as is ordinarily true of lawyers practicing within their own states. The ethical

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<sup>2</sup>Association of Professional Responsibility Lawyers ("APRL"), Proposal to the ABA Commission on Multijurisdictional Practice (February 2001) (first tier of proposal suggests decriminalizing the purely temporary presence of out-of-state lawyers); The Association of the Bar of the City of New York, Statement of Evan A. Davis, President, before the ABA Commission on Multijurisdictional Practice (March 30, 2001), [http://www.abanet.org/cpr/mjp-comm\\_bacny.html](http://www.abanet.org/cpr/mjp-comm_bacny.html).

<sup>3</sup>See American Corporate Counsel Association ("ACCA"), Memorandum dated February 16, 2001 to ABA Commission on Multijurisdictional Practice, [http://www.abanet.org/cpr/mjp-mcguckin\\_witness.html](http://www.abanet.org/cpr/mjp-mcguckin_witness.html). Under this proposed arrangement, states would retain control over lawyer admission, discipline, and other practice requirements such as those relating to CLE, *pro bono* work, participation in Interest on Lawyers' Trust Accounts (IOLTA) programs and professional liability insurance.

<sup>4</sup>See the Association of Professional Responsibility Lawyers ("APRL"), Proposal to the ABA Commission on Multijurisdictional Practice (February 2001), [http://www.abanet.org/cpr/mjp-comm\\_aprl.html](http://www.abanet.org/cpr/mjp-comm_aprl.html). This proposed model would include various requirements: Three years prior admission to a U.S. jurisdiction; a certificate of good standing from the home jurisdiction; statements of two sponsors affirming the applicant's character and fitness; certification that the lawyer has read the state's ethics rules; a registration fee of \$500 or more, as well as annual fees; annual certification that the lawyer remains in good standing in other jurisdictions where admitted; appearance with local co-counsel in court unless permitted otherwise under existing *pro hac vice* rules. In this model, registered lawyers would be subject to the jurisdiction of the host state's disciplinary agency and the state's character and fitness authority would have the right to review and object to any applicant.

obligation will be reinforced by the risk of civil liability or disciplinary sanction, as well as the risk to their professional reputation, if lawyers perform negligently.

In addressing the professional misconduct engaged in by a few incompetent or unethical lawyers, proponents of national law practice posit that geographic restrictions of any kind are overly exclusive, in that they deny clients access to many out-of-state lawyers who would represent them competently and ethically. They suggest that state regulatory interests might be served equally well in other ways: first, by providing increased resources to disciplinary authorities to enable them to bring actions against lawyers who perform incompetently or unethically or who undertake work for which they are not qualified; second, by encouraging greater coordination among disciplinary authorities across the country; third, by providing additional financing to client protection funds to enable these funds to better compensate clients who are harmed by lawyers' dishonesty; and, fourth, by requiring all lawyers to maintain professional liability insurance in order to better compensate clients who are financially harmed by lawyers' negligence.

Many of those from whom the Commission heard did not advocate the elimination of jurisdictional restrictions on a wholesale basis, but advocated loosening restrictions on a limited basis. A coalition of several national organizations proposed amending Model Rule 5.5 (and changing state UPL laws where necessary) to authorize lawyers to practice on a temporary basis in a state in which they are not licensed as long as they do not establish an office in that state and so long as they are in good standing in their states of admission.<sup>5</sup>

Some groups affirmatively opposed or specifically declined to endorse national practice,<sup>6</sup> because they believe that regulatory interests served by jurisdictional restrictions cannot

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<sup>5</sup>See Joint Proposal of the American Corporate Counsel Association (ACCA), the Association of Professional Responsibility Lawyers (APRL), the National Organization of Bar Counsel (NOBC), and others, *A Common Sense Proposal for Multijurisdictional Practice*. The proposal, which has gone through a series of revisions, is available at: <http://www.acca.com/advocacy/mjp/commonsenseproposal.html> and <http://www.acca.com/commonsenseproposal.html>.

<sup>6</sup>See, e.g., Akron Bar Association, Written Testimony On Behalf of the Akron Bar Association Re: Multijurisdictional Practice (Feb. 5, 2001), [http://www.abanet.org/cpr/mjp-comm\\_akronba.html](http://www.abanet.org/cpr/mjp-comm_akronba.html); Camden County Bar Association ad hoc Committee on Multi-jurisdictional Practice, (letter dated April 14, 2001), [http://www.abanet.org/cpr/mjp-comm\\_ccba.html](http://www.abanet.org/cpr/mjp-comm_ccba.html); Delaware State Bar Association, Report of the Multijurisdictional Practice Special Committee, (April 23, 2001); Louisiana State Bar Association, Special Committee on Multi-jurisdictional Practice, Preliminary Report, [http://www.abanet.org/cpr/mjp-comm\\_lsba.html](http://www.abanet.org/cpr/mjp-comm_lsba.html); Nebraska State Bar Association Memorandum to the ABA Commission on Multijurisdictional Practice (May 11, 2001), [http://www.abanet.org/cpr/mjp-comm\\_nsba.doc](http://www.abanet.org/cpr/mjp-comm_nsba.doc); Nevada State Bar Commission on MJP Memorandum to ABA Commission on Multijurisdictional Practice (June 21, 2001), [http://www.abanet.org/cpr/mjp-comm\\_nsba.html](http://www.abanet.org/cpr/mjp-comm_nsba.html); New Jersey State Bar Association, Committee on Multijurisdictional Practice, Preliminary Report and Recommendations (June 25, 2001), [http://www.abanet.org/cpr/mjp-comm\\_njsba.html](http://www.abanet.org/cpr/mjp-comm_njsba.html).

otherwise be served adequately in some contexts, such as when unsophisticated state residents retain out-of-state counsel to render services concerning matters in the state that are governed by state law.<sup>7</sup> Traditionally, it has been assumed that the lawyer licensed in the state will, on average, be better qualified to perform this work. That lawyer will be more likely to have studied state law, both prior to admission and afterwards, and to have gained experience in state law matters by virtue of having established a practice in the state and having worked with other in-state lawyers who serve either as supervisors or as mentors. In general, states have greater confidence in their own admissions processes than in that of sister states. Likewise, states believe that lawyers practicing in the states in which they are licensed are more likely than out-of-state lawyers to comply with state disciplinary obligations and are more readily and directly subject to sanction when they fail to do so. Further, states may believe that fostering the development of the local bar through jurisdictional restrictions serves the public interest.

Consistent with these beliefs, those who oppose eliminating jurisdictional restrictions raised a variety of concerns about harms that may result from eliminating jurisdictional restrictions entirely, including: unscrupulous lawyers may provide services that they are unqualified to render; well-intentioned lawyers may misjudge their ability to render competent advice in a foreign jurisdiction; overworked disciplinary agencies may not be able to regulate out-of-state lawyers effectively; lawyers may "race to the bottom" by gaining admission in states that are perceived to have lower admissions criteria and then practicing law in states that are perceived to have more stringent criteria; and national practice may erode the commitment of the bar to objectives such as undertaking *pro bono* representation, working to improve the law, maintaining client protection funds, and promoting continuing legal education programs.<sup>8</sup>

This debate is difficult to resolve, in large part, because of the absence of empirical evidence about how the elimination of jurisdictional restrictions would affect law practice in the United States, and the inability to obtain such evidence without authorizing national practice. Although there is no evidence that current common multijurisdictional practices pose a significant disciplinary threat or result in the provision of incompetent representation, one cannot necessarily conclude from this that eliminating geographical restrictions in their entirety will be harmless. Many believe that common wisdom suggests otherwise. Nor is there evidence that clients will be better served by permitting national law practice, rather than by authorizing multijurisdictional practice by the judicial branch of government on a more limited basis. Thus, the question is how to proceed in an area of uncertainty.

The Commission believes that, at the present juncture, and given the present state of knowledge, the ABA should not recommend the wholesale elimination of jurisdictional limits on

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<sup>7</sup>See, e.g., *Matter of Stambulis*, No. 022701294 (Ill. Sup. Ct. 2001) (Illinois lawyer suspended for, *inter alia*, engaging in UPL by assisting at least 100 clients in more than a half dozen different states in the preparation of trust documents, at least some of which were not properly prepared in accordance with the law of the client's state).

<sup>8</sup>See, e.g., New Jersey State Bar Association, Report and Recommendations on Multijurisdictional Practice (March 2002), [www.abanet.org/cpr/mjp/comm2\\_njsba.html](http://www.abanet.org/cpr/mjp/comm2_njsba.html).

law practice, whether for established practice, regular practice, or temporary and occasional practice. Given the principle of state-based judicial regulation of the legal profession, the assumptions underlying that principle, and the support of a large segment of the bar for preserving it, the Commission believes that a stronger case would have to be made that national law practice is essential and that a more measured approach will not suffice to facilitate law practice and to promote the public interest. While that case may be made over time as lesser changes are adopted and as law practice continues to evolve, the Commission does not believe it has been made yet. The Commission's conclusion is that, for the present, the judicial branch of government in each state should identify those particular interstate practices, comparable to *pro hac vice* representation, that should explicitly be authorized, because client choice and other interests in favor of multijurisdictional law practice outweigh the countervailing regulatory interests, and identify other reforms to facilitate and effectively regulate appropriate interstate and multi-state law practice. The Commission believes that allowing such practices will not only serve the public interest, but also improve obedience to and enforcement of the applicable rules.<sup>9</sup>

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<sup>9</sup>Many entities offering comments to the Commission have urged liberalizing restrictions. *See, e.g.*, ABA Section of Antitrust Law, Memorandum to ABA Commission on Multijurisdictional Practice (March 13, 2002), [http://www.abanet.org/cpr/mjp/comm2\\_al.html](http://www.abanet.org/cpr/mjp/comm2_al.html); ABA Section of Business Law, Memorandum to the ABA Commission on Multijurisdictional Practice (March 13, 2002), [http://www.abanet.org/cpr/mjp/comm2\\_bl2.pdf](http://www.abanet.org/cpr/mjp/comm2_bl2.pdf); Council of the Bars and Law Societies of the European Union, Memorandum to the ABA Commission on Multijurisdictional Practice (March 12, 2002), [www.abanet.org/cpr/mjp/comm2\\_ccbe.pdf](http://www.abanet.org/cpr/mjp/comm2_ccbe.pdf); Federal Communications Bar Association (FCBA), Statement at the Philadelphia Hearing of the ABA Commission on Multijurisdictional Practice (Feb. 1, 2002), [http://www.abanet.org/cpr/mjp-comm\\_fcba.html](http://www.abanet.org/cpr/mjp-comm_fcba.html); ABA Law Student Division, Resolution (Aug. 3, 2001), [http://www.abanet.org/cpr/mjp-comm\\_lsd.doc](http://www.abanet.org/cpr/mjp-comm_lsd.doc); American College of Real Estate Lawyers (ACREL), Comments on the Interim

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Report of the ABA Commission on Multijurisdictional Practice (March 2002), [http://www.abanet.org/cpr/mjp/comm2\\_acrel2.html](http://www.abanet.org/cpr/mjp/comm2_acrel2.html); ABA Section of Real Property, Probate and Trust Law, Comments on Multi-jurisdictional Practice (Jan. 23, 2001), [http://www.abanet.org/cpr/mjp-comm\\_srpt.html](http://www.abanet.org/cpr/mjp-comm_srpt.html) & Supplemental Comments on Multijurisdictional Practice (June 29, 2001), [http://www.abanet.org/cpr/mjp-comm\\_srpt2.html](http://www.abanet.org/cpr/mjp-comm_srpt2.html); ABA Senior Lawyers Division, Resolution (April 21, 2001), [http://www.abanet.org/cpr/mjp-comm\\_sld.html](http://www.abanet.org/cpr/mjp-comm_sld.html); ABA Standing Committee on Solo and Small Firm Practitioners, Memorandum to the ABA Commission on Multijurisdictional Practice (Aug. 16, 2001) [http://www.abanet.org/cpr/mjp-comm\\_solo.doc](http://www.abanet.org/cpr/mjp-comm_solo.doc).

