

CALIFORNIA SUPREME COURT ADVISORY TASK FORCE  
ON MULTIJURISDICTIONAL PRACTICE

FINAL REPORT AND RECOMMENDATIONS

January 7, 2002

## CONTENTS

I. Introduction and Summary of the Report .....	5
II. Form of the Report .....	8
III. Process for Developing the Report of the Task Force.....	8
A. Statement of Charge.....	8
B. Members of the Task Force.....	9
C. Meetings of the Task Force.....	10
D. Public Commentary.....	11
IV. Current Restrictions on Practicing Law in California.....	12
A. Requirements for Admission to the California State Bar.....	12
B. Restrictions on the Practice of Law in California by Out-of-State Lawyers.....	14
V. Possibilities for Reform.....	17
A. Purposes Served by the Restrictions on Multijurisdictional Practice.....	17
B. Concerns about the Current Restrictions on Multijurisdictional Practice.....	18
C. General Considerations in Assessing the Possibilities for Reform.....	18
D. Particular Problems with the Current Restrictions.....	20
E. Possible Mechanisms for Reform: Advantages and Disadvantages.....	22
VI. Recommendations for Reform.....	26
A. Focusing on Particular Categories of Practice.....	26
B. In-house Counsel Residing in California.....	27
C. Public Interest Attorneys Relocating to California.....	30

D.	Non-Litigating Lawyers Temporarily in California To Provide Legal Services .....	32
E.	Lawyers Temporarily in California as Part of Litigation. ....	37
F.	Experienced Attorneys Moving to California from Another State. ....	39
G.	Government Attorneys Located in California. ....	39
VII.	Conclusion. ....	40
VIII.	Recommended Actions by the Judiciary or Legislature. ....	41
IX.	Resources. ....	41

## Acknowledgments

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A special expression of gratitude goes to the reporter and principal author of this report, Professor Joshua Paul Davis, Associate Professor, University of San Francisco Law School. His work in condensing the task force members' discussion, compiling their comments, and translating them into recommendations for this report has been invaluable.

The task force also gratefully acknowledges the assistance of Judicial Council of California/Administrative Office of the Courts staff: Susan R. Goins, task force counsel, whose efforts in synthesizing materials on multijurisdictional practice and in summarizing the public comments eased the task force's work; and Camilla Kieliger, administrative coordinator, who arranged all task force meetings, distributed the report, and collected public comments.

## I. Introduction and Summary of the Report

The California Supreme Court Advisory Task Force on Multijurisdictional Practice (“task force”) was formed in January 2001. Its charge is to assess whether and under what circumstances attorneys licensed to practice law in jurisdictions in the United States other than California should be permitted to practice law in California. This issue, often called “multijurisdictional practice,” is the subject of great debate.<sup>1</sup> Multijurisdictional practice is a significant issue for the California Supreme Court, which has responsibility for regulation and discipline of attorneys who practice law in California.

Requiring admission to the State Bar to practice law in California serves important purposes. Chief among them is the protection of the public, particularly of consumers of legal services. To this end, the State Bar, acting under the auspices of the California Supreme Court, administers an examination designed to ensure minimum attorney competence, monitors compliance with mandatory continuing legal education, and assists in the regulation of attorney conduct and the discipline of attorneys. More generally, the State Bar helps to maintain the integrity of the legal system and to achieve the efficient and just resolution of legal disputes. Expanding the ability of out-of-state<sup>2</sup> lawyers to practice law in California could run counter to these purposes.

Nevertheless, many voices call for change. Today’s reality is that the needs of many clients do not stop at state lines, and neither does the legal practice of the attorneys who represent them. The market for legal services has changed. Geographic boundaries do not have the same significance as they did when individual states were first charged with regulating the conduct of the lawyers who practice within their borders. Moreover, it appears that allowing out-of-state lawyers to provide legal services in California in some circumstances would not harm the public. One such circumstance would involve an attorney who is serving a sophisticated client, and is working in concert with lawyers admitted to practice law in California or is subject to regulation and discipline by California authorities.

California could address the issues surrounding multijurisdictional practice in several ways. At one end of the continuum would be participation in a national bar. However, many incremental steps would have to precede creation of a national bar, and neither California nor any other jurisdiction could impose a national bar unilaterally, because each state determines who may practice law within its borders. A similarly expansive approach would allow all attorneys licensed to practice law in other states to practice law in California. Doing so, however, would mean that the requirements for admission to practice law in California would in effect be the lowest standard adopted in any other state, and that lawyers would lose substantial connection to

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<sup>1</sup>For example, the American Bar Association (ABA) held a forum at Fordham University in the spring of 2000 on multijurisdictional practice and has formed a commission to consider the topic. Similarly, the State Bar of California (State Bar) and other state, local, and specialty bars have established committees, task forces, and advisory groups to study the issue.

<sup>2</sup>For the purposes of this report, “out-of-state” lawyers refers to lawyers who are members of the bar of a state, territory, or an insular possession of the United States but are not members of the State Bar of California.

the geographic community in which they practice. Such a change could make it difficult to protect consumers of legal services and could degrade professionalism by attorneys. At the other end of the continuum is preserving the status quo. This, too, seems unsatisfactory. The task force believes that current restrictions on practicing law in California should be relaxed where doing so will benefit consumers of legal services without creating any significant risk of harm to the public or the profession.

The task force considered various options. None was ideal, and each had its benefits and problems. Ultimately, the task force determined that retaining the status quo was insufficient. Instead, it chose to recommend changes. These should alleviate many of the most troublesome problems with the current system and provide an opportunity to assess in the future whether additional changes are in order. The changes made as a result of this report should be assessed to determine how they perform in the real world. This will allow for a more informed determination of whether the proposals in this report are desirable and whether additional changes should be made. For this reason, as discussed below, the task force recommends a review of any changes to the current system within five years after their implementation.

With these considerations in mind, the task force focused on particular kinds of practice in which the restrictions on multijurisdictional practice might be eased without threat to the public or to the integrity of the legal system. The aim was to ensure the highest level of professionalism; to permit proper oversight; and to benefit all consumers of legal services, from individuals with limited financial means and small businesses to large multinational corporations.

The task force concluded that two categories of out-of-state lawyers should be allowed to practice law in California through a system of registration:

1. In-house counsel providing out-of-court legal services exclusively for a single, full-time business entity employer (e.g., a corporation or partnership)<sup>3</sup> that does not provide legal services to third parties; and
2. Public-interest lawyers providing legal services to indigent clients on an interim basis before taking the California bar examination, under the supervision of an experienced member of the State Bar, at an agency meeting the definition of a qualified legal services project under Business and Professions Code section 6214 et seq.

In addition, provided the range of permissible activities can be defined clearly and narrowly so as to protect California consumers of legal services, the task force concluded that the following two categories of out-of-state lawyers should be allowed to practice law in California through a change in the definition of “the unauthorized practice of law”:

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<sup>3</sup> The task force recommends that an implementation committee consider whether a workable definition of “business entities” in this context could include public-interest organizations, unions, foundations, and other entities that might employ full-time attorneys to serve their legal needs.

1. Transactional and other nonlitigating lawyers providing legal services in California on a temporary and occasional basis; and
2. Litigating lawyers providing legal services in California in anticipation of filing a lawsuit in California or as part of litigation pending in another jurisdiction.

The task force also reached consensus on how California should define the circumstances in which out-of-state lawyers should be permitted to provide legal services in California. The task force recommends two basic approaches:

1. Registration. Registration would involve a process similar to admission to the State Bar of California, but without requiring an attorney to pass the California bar examination. It would permit an attorney licensed and in good standing in another jurisdiction in the United States to practice law in California on an ongoing basis without becoming a member of the State Bar. The task force recommends this approach for in-house counsel residing in California and employed by business entities. This would also be the appropriate approach for lawyers who have not yet taken the bar examination and who are working in California at an agency meeting the definition of a qualified legal services project under Business and Professions Code section 6214 et seq.
2. Change in the Definition of “the Unauthorized Practice of Law”: Changing the definition of “the unauthorized practice of law” would allow out-of-state attorneys to undertake specified tasks without violating California law. This approach—often called a “safe harbor”—would apply when an attorney’s involvement in California is too brief or infrequent to warrant the time and expense that would be required for registration. The task force recommends this approach for transactional and other nonlitigating lawyers who provide legal services in California on a temporary or an occasional basis, as well as for litigating lawyers who are preparing to file a lawsuit in California or who are performing litigation tasks in California arising out of a case pending in another jurisdiction. The task force’s consensus on creating a safe harbor in these circumstances was contingent on crafting narrow and clearly defined exceptions to the general proscription on out-of-state attorneys practicing law in California.

If the California Supreme Court were to adopt the task force’s recommendations, additional work would remain to be done. The task force did not undertake to draft the language that would give effect to each of its recommendations. Moreover, in some instances the task force reached consensus on a general approach but did not resolve issues and considerations necessary to its implementation. This report is the first step in the process of any reform.

The task force recommends that the court appoint a committee to work through the many

outstanding issues related to implementation of the recommendations in this report.

Finally, the task force recommends that any changes made pursuant to this report be subject to review within five years after their implementation. Further, mechanisms should be put in place to monitor and assess how the changes are working— for example, whether in-house counsel and public-interest attorneys are abiding by the restrictions on the scope of their conduct and whether the changes have ameliorated the problems they were designed to address. This effort could provide a firmer empirical basis for any future revisions to the restrictions on multijurisdictional practice.

## II. Form of the Report

This report addresses the process that the task force used to develop the report and its recommendations (Part III), the current requirements for admission to the State Bar of California and restrictions on out-of-state lawyers' practice of law in California (Part IV), the considerations taken into account in developing the report (Part V), and the specific recommendations for reform (Part VI). Part VII concludes the report. Part VIII provides recommendations for the judiciary or Legislature to act upon based on this report in light of public commentary. Part IX is a list of resources.

## III. Process for Developing the Report of the Task Force

### A. Statement of Charge

The task force was assembled by the California Supreme Court, at the request of the Legislature. The charge of the task force is to:

Study and make recommendations regarding whether and under what circumstances attorneys who are licensed to practice law in other states, and who have not passed the California State Bar examination, may be permitted to practice law in California. The task force study should consider all of the following factors:

- (a) Years of practice in other states.
- (b) Admission to practice law in another state.
- (c) Specialization of an attorney's practice in another state.
- (d) The attorney's intended scope of practice in California.
- (e) The admission requirements in the state or states in which the attorney has been licensed to practice law.

- (f) Reciprocity with and comity with other states.
- (g) Moral character requirements.
- (h) Disciplinary implications.
- (i) Consumer protection.<sup>4</sup>

## B. Members of the Task Force

The members of the task force represent various perspectives on the law. They include civil and criminal litigators, private and public attorneys, lawyers and laypersons, and transactional and trial counsel, to name but a few of their distinguishing characteristics. This diversity of perspectives has assisted the task force in considering the interests of all people who might be affected by any change in the rules governing the multijurisdictional practice of law. The participants in the task force are:

**Chair:** Raymond Marshall, McCutchen, Doyle, Brown & Enersen, LLP

Cristina Arguedas, Cooper, Arguedas & Cassman

Ophelia Basgal, Executive Director, Housing Authority of the County of Alameda

Jerome Braun, Senior Executive, Admissions, State Bar of California

Joanne M. Garvey, Heller, Ehrman, White & McAuliffe, LLP

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Rex S. Heinke, Greines, Martin, Stein & Richland, LLP

Beth J. Jay, Principal Attorney to the Chief Justice, Supreme Court of California

Drew Liebert, Chief Counsel, Assembly Committee on the Judiciary

Hon. Elwood Lui (Ret.), Jones, Day, Reavis & Pogue

Steven Nissen, Director, Governor's Office of Planning and Research

Hon. Dennis M. Perluss, Associate Justice, California Court of Appeal, Second Appellate District

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<sup>4</sup> Sen. Bill 1782; 1999–2000, § 1.

Mike Petersen, Policy Consultant, Senate Republican Caucus

Alan I. Rothenberg, Latham & Watkins

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Gene Wong, Chief Counsel, Senate Committee on the Judiciary

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### C. Meetings of the Task Force

The task force met as a whole on six occasions to prepare this report. It met four times to prepare a Preliminary Report and Recommendations and twice more after public commentary to address the ideas and concerns that the public expressed. The time for circulation of the report and public commentary was from July 31, 2001, to September 28, 2001, although the task force considered all comments whether or not they were submitted by September 28, 2001.

On March 1, at the outset of the first task force meeting, the Chief Justice of California, the Honorable Ronald M. George, explained to the members of the task force that they were not selected to represent any constituency but rather to bring to the discussion a range of perspectives and experiences, all of which were to contribute to formulating recommendations that would serve the public good. The task force's discussions over the ensuing months honored this instruction.

The task force began by considering whether California should expand the ability of out-of-state attorneys to practice law in California, paying attention to particular problems that result from the existing system. After extended discussion, the task force concluded that some change was appropriate, but that California should not, at present, adopt the broadest approaches to change—comity or reciprocity—given the many uncertainties about the effect such changes would have on the practice of law and on consumer protection. The task force then focused on specific

mechanisms that could be used to ease the current restrictions on the multijurisdictional practice of law and considered how each mechanism could be applied to ensure that any change would be practical and consistent with protection of the public from unscrupulous and incompetent attorneys. On each topic, the task force worked from the general to the particular, beginning with an open discussion of each member's views and then developing as refined a consensus as possible. Between meetings, the chair, the reporter, and representatives of the staff of the Office of the General Counsel and the California Supreme Court met to memorialize the conclusions of the task force in writing and to circulate that writing for commentary by members of the task force. Finally, the task force met to discuss the public's response to the Preliminary Report and Recommendations. This report is the result of the task force's efforts.

#### D. Public Commentary

The task force received 50 responses to its Preliminary Report and Recommendations ranging from the general to the specific. Commentators were equally divided between those who believed that the recommended changes went too far and those who believed they did not go far enough. A substantial number of respondents approved the changes recommended in the Preliminary Report. The task force benefited greatly in its deliberations from the many thoughtful comments from members of the public and is appreciative of the time and energy people invested in this effort.

Following review of the public comments, the task force met and discussed possible changes to the Preliminary Report and Recommendations. The members revisited the issue of reciprocity. The task force reaffirmed its decision not to recommend that lawyers licensed to practice law in other states be permitted to practice law in California, provided those states confer a similar right on California lawyers. The task force was concerned that this form of reciprocity might create significant difficulties, not the least of which is the problem of how to treat states that would extend reciprocity to only those California lawyers who graduated from law schools accredited by the ABA. The task force members concluded, however, that the possibility of reciprocity in the future should not be foreclosed, and some members felt that the changes recommended in this report might provide an incremental step in that direction.

The task force also declined to make its recommended changes contingent on other states offering equivalent opportunities for California lawyers, as some commentators suggested. The primary aims of the recommended changes are to reflect the realities of modern practice, provide for oversight, and promote the interests of consumers of legal services. The task force members concluded that these goals could be achieved along the lines set out in this report without significant risk to the public or the legal system. The task force felt strongly that delaying change until other states adopt similar provisions would pose an unnecessary obstacle to progress.

The task force considered two similar comments concerning treating certain categories of lawyers as "second-class citizens." One was that in-house counsel might be placed at a disadvantage by a registration system, which would prevent them from retaining their right to practice law in California if they ceased to work for their employers. Some commentators felt

that in-house counsel therefore might be placed in a vulnerable position: they would be required to move to California, but would not have the ability to practice outside the corporate environment. On the whole, however, the commentators who might be subject to the proposal were in favor of the change. Moreover, such attorneys would be free to work for other entities as in-house counsel and could take the California bar examination and acquire the right to engage in all forms of the practice of law in California.

A similar concern raised was that the proposed registration system for public-interest attorneys might suggest that indigent people are not entitled to the same quality of legal services as others. The task force concluded, however, that the proposed protections included in the registration system would address this problem. The task force was motivated by the reality that many people of limited means cannot secure legal counsel at all. Registering public-interest attorneys might to some small extent ameliorate the situation. For these reasons, after considering these points, the task force ultimately decided not to alter its recommendations regarding in-house counsel and public-interest attorneys.

Beyond these general points, the task force concluded that several issues raised by the public commentary would best be addressed by the body charged with implementing the changes recommended in this report. These issues include, for example, the proper methods of prosecuting and disciplining violations of the rules recommended in this report; the proper definition of the entity for whom in-house counsel may practice by registration, including not only a corporation, but possibly also its affiliates, subsidiaries, and other related organizations; and the rules necessary to ensure that public-interest attorneys practicing by registration have adequate supervision.

Finally, the task force revised portions of this report in response to comments. To the people who provided these comments—and, again, to all of the commentators—the task force is grateful.

#### IV. Current Restrictions on Practicing Law in California

##### A. Requirements for Admission to the California State Bar

To be eligible for certification to practice law in California, applicants must meet the following requirements:

- (1) Be of the age of at least 18 years;
- (2) Be of good moral character;
- (3) Complete the general education requirements before commencing the study of law;
- (4) Register as a general applicant or attorney applicant;

- (5) Complete the legal education requirements;
- (6) Qualify for and pass or establish exemption from the First-Year Law Students' Examination;
- (7) Pass the California Bar Examination and the required examination in professional responsibility or legal ethics; and
- (8) Be in compliance with California court-ordered child or family support obligations.<sup>5</sup>

The bar admissions process begins with an applicant at least 18 years of age who has completed the general education requirement. To meet this requirement, before beginning the study of law, all general applicants must complete at least two years of college work or attain in apparent intellectual ability the equivalent of at least two years of college, determined by taking any examinations in such subject matters and achieving the scores thereon as are prescribed by the Committee of Bar Examiners.<sup>6</sup>

The applicant also must complete the legal education requirement and register with the Committee of Bar Examiners.<sup>7</sup> To meet the legal education requirement, the student must graduate from a law school accredited by the Committee of Bar Examiners or approved by the American Bar Association or study law diligently for at least four years in another forum (law office, judge's chambers, or unaccredited or correspondence law school).<sup>8</sup> Furthermore, the applicant must either take and pass the First-Year Law Students' Examination or establish an exemption either by passing the bar examination of another jurisdiction or by satisfactorily completing the first-year course of study at an approved or accredited law school.<sup>9</sup>

The applicant must also prove to be of good moral character, as established by an application to and positive determination by the Committee of Bar Examiners.<sup>10</sup> Next, the applicant must apply to take, take, and pass both the Multistate Professional Responsibility Examination and the

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<sup>5</sup>Rules Regulating Admission to Practice Law, rule II [as of Jan. 1, 1997], at <http://www.calbar.org/shared/2admrule.htm> (all further note references to rules are to this source).

<sup>6</sup> Rule VII.

<sup>7</sup> Rules V and VII.

<sup>8</sup> *Ibid.*

<sup>9</sup> Rule VIII.

<sup>10</sup> Rule X.

California bar examination.<sup>11</sup> An attorney applicant who has been admitted to practice law in another jurisdiction and has been an active member in good standing of that bar for at least four years immediately before applying to the California bar may elect to take the Attorneys' Examination rather than the entire California bar examination.<sup>12</sup>

Finally, the applicant must be in compliance with California court-ordered child or family support obligations pursuant to California Welfare and Institutions Code section 11350.6.<sup>13</sup> An applicant who meets all of these requirements and pays all appropriate fees is eligible to be admitted to the practice of law in the State of California.

## B. Restrictions on the Practice of Law in California by Out-of-State Lawyers

Section 6125 of the California Business and Professions Code states: "No person shall practice law in California unless the person is an active member of the State Bar." (Bus. & Prof. Code, § 6125.) There are various exceptions to this broad prohibition against the practice of law in California by out-of-state attorneys. Five of them are: (1) by consent of a trial judge, (2) as counsel *pro hac vice*, (3) as a legal representative in arbitration proceedings, (4) as a foreign legal consultant, and (5) as military counsel.

### 1. What Constitutes "the Practice of Law" in California?

Section 6125 proscribes the unauthorized practice of law in California. It does not, however, define "the practice of law" or "in California." (Bus. & Prof. Code, § 6125.)

The California Supreme Court has defined "the practice of law" to mean "doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure." (*Birbrower v. Superior Court* (1998) 17 Cal.4th 119, 128 (quoting *People v. Merchants Protective Corp.* (1922) 189 Cal. 531, 535).) The practice of law includes "legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation." (*Ibid.*) The California Supreme Court has held that the practice of law occurs "in California" when "the unlicensed lawyer [has] engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties or obligations." (*Ibid.*)

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<sup>11</sup> Rule VIII.

<sup>12</sup> Rule IV. A modification to this rule, effective Jan. 1, 2002, will permit attorneys to qualify for the Attorneys' Examination if they have been active members in good standing of a bar in another jurisdiction for four years immediately before the administration of the California bar examination, rather than for four years immediately before applying for admission to practice law in California.

<sup>13</sup> Rule II.

The court’s definitions do not rely on the attorney’s physical presence in the state. (*Birbrower supra*, 17 Cal.4th at 128.) Furthermore, the court rejected the notion that a person automatically practices law in California by practicing California law or by “virtually” entering the state through technological means. (*Id.* at p. 129.) The court ruled that practicing law in California requires “sufficient contact with the State” and that “each case must be decided on its individual facts.” (*Ibid.*) The court stated: “This interpretation acknowledges the tension that exists between interjurisdictional practice and the need to have a state-regulated bar.”<sup>14</sup> (*Ibid.*)

## 2. Exceptions to Section 6125

Notwithstanding the broad prohibition in section 6125, California courts allow out-of-state attorneys to practice law in California for limited purposes. These exceptions to the rule are “narrowly drawn and strictly interpreted.” (*Birbrower supra*, 17 Cal.4th at p. 130.) The exceptions include the following:

### a. By Consent of the Trial Judge

An out-of-state attorney may be permitted to participate in an action pending in California by consent of a trial judge. (*In re McCue* (1930) 211 Cal. 57, 67; 1 Witkin, Cal. Procedure (4th ed. 1996) Attorneys, § 402, pp. 493–494).

### b. Rule 983–Counsel *pro hac vice*

Rule 983 of the California Rules of Court provides for the appearance of an out-of-state attorney *pro hac vice* (“for this occasion”). This rule requires that the attorney must be a member in good standing of and eligible to practice before the bar of any United States court or of the highest court in any state, territory, or insular possession of the United States. In addition, a counsel *pro hac vice* may not be a resident of California, regularly employed in California, or “regularly engage[d] in substantial business, professional, or other activities” in California. (Cal. Rules of Court, rule 983.) To be admitted *pro hac vice*, the out-of-state attorney must (1) make a written application, (2) be associated with an active member of the California bar who serves as attorney of record, and (3) pay a reasonable fee not exceeding \$50. (*Ibid.*)

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<sup>14</sup>The Court of Appeal in *Estate of Condon* (1998) 65 Cal.App.4th 1138, upon remand from the Supreme Court to decide the case in light of *Birbrower*, noted the *Birbrower* court’s use of the term “California client” and ruled that section 6125 does not apply to legal services provided in California by out-of-state counsel to non-California residents.

c. Rule 988–Foreign Legal Consultants

Rule 988 of the California Rules of Court authorizes the State Bar to “establish and administer a program for registering foreign attorneys or counselors at law.” Pursuant to this authority, the State Bar has adopted Registered Foreign Legal Consultants Rules and Regulations. To qualify for registration as a foreign legal consultant, an individual must be admitted to practice and be in good standing as an attorney in a foreign country for at least four of the six years immediately preceding the application, present satisfactory proof that he or she possesses the good moral character required for a person to be licensed as a member of the California State Bar, and must agree to a number of conditions on practice, such as being subject to disciplinary jurisdiction in California. (Cal. Rules of Court, rule 988(c).) Upon registration, a foreign legal consultant may offer advice on the law of the foreign jurisdiction to which he or she is admitted to practice. (Cal. Rules of Court, rule 988(d).) The scope of representation that a foreign legal consultant can provide is narrowly circumscribed by rule 988(d), which does not permit the consultant to appear as an attorney in any court or render any legal advice on California law.

d. Rule 983.4 – Out-of-State Attorney Arbitration Counsel

In *Birbrower supra*, 17 Cal.4th at p. 133, the court declined to establish an exception to section 6125 of the Business and Professions Code with respect to “work incidental to private arbitration or other alternative dispute resolution proceedings.” As the court explained, “Any exception is best left to the Legislature.” (*Ibid.*) After the decision, the California Legislature enacted such legislation. Pursuant to California Code of Civil Procedure section 1282.4, rule 983.4 of the California Rules of Court authorizes attorneys admitted to the bar of any state other than California, or any territory or insular possession of the United States to (1) represent parties in arbitrations in California and (2) provide legal services in California with respect to an arbitration occurring in another state or a territory or an insular possession. In addition, a party to an arbitration arising from a collective bargaining agreement can be represented by any person, even if he or she is not licensed to practice law in California. (1 Witkin, Cal. Procedure (2001 Supp.) Attorneys, § 402, pp. 76–77.)

e. Rule 983.1 – Military Counsel

Rule 983.1 of the California Rules of Court authorizes the appearance of a judge advocate not licensed to practice law in California to represent an

individual in military service. California courts allow such representation if (1) the judge advocate is a member in good standing of a United States court or the highest court of any state, territory, or insular possession of the United States and (2) retention of civilian counsel would cause substantial hardship. (Cal. Rules of Court, rule 983.1.)

The changes this report recommends are not intended to alter the scope of these or other exceptions to the restrictions on the unauthorized practice of law.

## V. Possibilities for Reform

### A. Purposes Served by the Restrictions on Multijurisdictional Practice

California's restrictions on legal practice are designed to require lawyers to become members of the State Bar if they are to practice law in California. In turn, this requirement allows the State Bar, under the auspices of the California Supreme Court, to regulate the conduct of attorneys and thereby protect the public and maintain the integrity of the legal system.

The State Bar plays two roles in regulating how lawyers behave. First, the State Bar administers the admission process for the practice of law in California. The bar provides a screening mechanism when attorneys first seek admission: the bar examination determines whether an applicant has demonstrated a minimum standard of attorney competence, and the inquiry into good moral character and the Multistate Professional Responsibility Examination (MPRE) determine whether an applicant has demonstrated adherence to standards of ethical conduct and knowledge of the general principles of professional responsibility. The California bar examination is considered particularly rigorous. This rigor is intended to protect California consumers of legal services and may be explained in part because, unlike other states, California permits candidates for admission to sit for the examination even when they have not graduated from law schools accredited by the ABA.

The State Bar, under the aegis of the California Supreme Court, also regulates the conduct of attorneys once they are admitted to law practice in California. This the bar does by various means. Ongoing regulation includes continuing legal education requirements. Disciplinary actions sanction and deter undesirable behavior by attorneys practicing law in California and may provide redress to injured clients and protection for other clients in the future.

## B. Concerns About the Current Restrictions on Multijurisdictional Practice

Various concerns have been expressed about the current restrictions on the practice of law by out-of-state lawyers in California. These include the costs of restrictions on free trade, the harm caused by denying clients the lawyers of their choice, the inefficiency of paying for the services of local counsel, the economic loss when corporations with large staffs decide consequently not to move to California, the difficulty of enforcing the current rules, the cost of other states not admitting California lawyers, and the conflict between the rules and the realities of legal practice today.

## C. General Considerations in Assessing Possibilities for Reform

### 1. Protection of Consumers

The primary concern in the deliberations of the task force was that consumers (particularly unsophisticated consumers), the public at large, and the courts should be protected from incompetent and unscrupulous attorneys who are not subject to discipline by the California State Bar. For this reason, the exceptions to the definition of “the unauthorized practice of law” that this report recommends should be drawn narrowly to ensure that they do not compromise the ability of the State Bar to protect consumers of legal services in California.

### 2. Equal Treatment for Attorneys

The task force considered whether California’s approach to multijurisdictional practice should distinguish between various categories of lawyers, including litigators and transactional lawyers, in-house counsel and lawyers at law firms, public-interest lawyers and lawyers working for profit, and lawyers who graduated from ABA-accredited law schools and those who did not.

### 3. Statutory, Constitutional, and Financial Constraints on Disciplining Out-of-State Lawyers

California’s ethical rules currently apply to the activities of out-of-state attorneys when they practice law in California (Rules Prof. Conduct, rule 1-100 (D)(2)), but it is unclear whether the State Bar’s disciplinary apparatus has the power or resources to impose discipline on out-of-state attorneys. The ability of the State Bar to regulate out-of-state attorneys depends, in part, on the current scope of the State Bar’s jurisdiction and the proper method for extending that jurisdiction. Some states have interpreted the statutes that empower their state bars to discipline lawyers as applying only to members of the particular state’s bar (e.g., West Virginia.) Even if California law governing professional discipline were to be interpreted similarly, an out-of-state lawyer might be subject to a criminal

prosecution or to a civil action over fees. In addition, an important practical issue is whether California has the resources to prosecute and impose discipline on out-of-state lawyers.

#### 4. Affected Interests

##### a. Clients

The primary concern is to protect consumers of legal services. Countervailing concerns are to give clients a choice in selecting the counsel they wish to represent them and not to require clients to pay for additional lawyers licensed in California. It may be possible to assess the permissible conduct of out-of-state lawyers based on their clients' sophistication about legal matters.

##### b. The Public

It is in the public's interest to have attorneys act in an ethical and competent manner, maintain the integrity of the legal system, ensure that lawyers' services are available at competitive prices, provide freedom of choice to consumers of legal services, and make lawyers' services accessible to people who need them. Moreover, the public may ultimately pay a premium for goods and services from corporations and businesses that pay higher attorney fees than they would in a less restrictive system.

##### c. California Courts and the Legal System

The California courts and legal system protect the public. Lawyers, as officers of the court, are integral to the administration of the legal system. The courts have an interest in maintaining competent, effective, and accountable representation to permit the efficient and just resolution of legal disputes. They have the ultimate responsibility to regulate attorney conduct so as to maintain the integrity of the legal system. Clarifying the rules for multijurisdictional practice will assist courts in fulfilling their supervisory role.

##### d. Law Schools

Law schools have an interest in training lawyers to practice in various jurisdictions. An expansion of the rights of California lawyers to practice in other states that extends only to those bar members who attended law schools approved by the ABA could have an adverse effect on law schools that the ABA has not approved. Distinguishing between these categories of law schools, however, would not be unprecedented. Nearly all states

currently require that students graduate from law schools approved by the ABA in order to sit for their bar examinations.

e. Individual Attorneys

Although the task force's focus was on the interests of consumers of legal services and the public, at times members and commentators cited concerns about the consistent treatment of lawyers. These included the question whether California lawyers would be permitted to practice law in other jurisdictions in the way lawyers from those jurisdictions would be permitted to practice law in California. Another concern was whether all members of the California bar would be treated equally by other states.

f. The Legal Profession

The perception of a loss of professionalism in the practice of law, a rise in incivility among legal practitioners, and the possible decrease in attorneys' willingness to perform public service have been topics of extensive discussion and analysis. The task force was concerned that a commitment by attorneys to act ethically and to work for the public good may depend, in part, on their connection to a particular geographic community. Expanding the ability of out-of-state attorneys to practice law in California may further attenuate the relationship between lawyers and the communities they serve and, therefore, may have an adverse affect on legal professionalism and on the commitment of lawyers to promote the public interest by, for example, providing pro bono assistance. On the other hand, the task force recognized that many communities of legal practitioners cross geographic boundaries and that many members of these legal communities maintain high professional standards and are committed to working for the good of society.

D. Particular Problems With the Current Restrictions

Many of the problems that arise from restrictions on multijurisdictional practice vary with the kind of practice at issue, as do the risks from easing those restrictions. After substantial discussion, the task force decided to focus on particular circumstances in which the current restrictions are likely to impose an unnecessary obstacle to clients hiring the attorneys of their choice. The task force identified the following categories as warranting particular attention:

1. In-house Counsel – Working in California

Various problems arise from the requirement that in-house counsel become members of the State Bar of California to practice law on behalf of their business employers in California. Corporations, business entities, and other sophisticated

consumers of legal services may be hindered in having in-house counsel move to California, or even travel on a regular basis to California, to serve their legal needs. Businesses thus may not be able to choose the right lawyer for a particular task. In addition, the requirement may increase businesses' costs, which ultimately may be borne by the consumers of their products or services. The requirement also may discourage businesses from relocating operations to California. This would be unfortunate because many businesses are sophisticated consumers of legal services and are likely to be able to screen the attorneys they hire without the assistance of the California bar examination, thereby protecting themselves from the harm caused by incompetent and unethical attorneys. Moreover, to the extent an in-house attorney works exclusively for a single employer, he or she will be under the constant scrutiny of the employer, and so no member of the general public is at risk of being poorly served as a client.

## 2. Public-Interest Lawyers – A Temporary Right to Practice Law in California Without Formal Admission

There is great need to increase indigent Californians' access to legal counsel. Easing the requirements for able out-of-state lawyers to come to California and provide legal services to the indigent may help somewhat to alleviate this need. This change would provide one small step toward improving access to justice in California's legal system, and would have to be carefully crafted to protect the indigent from incompetent and unscrupulous lawyers.

## 3. Transient Transactional and Other Nonlitigating Lawyers– Nonlitigating Lawyers Temporarily in California

In a number of circumstances, the limitations on the practice of law in California by out-of-state attorneys may cause difficulties when the services of transactional or other nonlitigating lawyers are needed by clients, especially by sophisticated business entities. Clients may desire to have their out-of-state attorneys perform limited tasks in California. Hiring additional counsel licensed in California may be inefficient. So may be educating new counsel licensed in California, who in any case may not be an adequate substitute when the client has a longstanding relationship with an out-of-state attorney. In addition, clients located in California may wish to hire out-of-state counsel for their special expertise. These useful roles out-of-state attorneys could play if permitted to practice law in California must be balanced against the attendant risks for consumer protection. Greater guidance to out-of-state lawyers would be useful. California law does not currently make clear when the practice of law occurs "in California," the scope of permissible activities by an out-of-state lawyer in California, or the circumstances in which associating California counsel will make it permissible for an out-of-state lawyer to practice law in California.

#### 4. Transient Litigators – Litigators Temporarily in California

Out-of-state attorneys often need to undertake litigation tasks in California. The current rules regarding admission *pro hac vice* reflect the legitimate role out-of-state lawyers may play in pursuing litigation in California. The *pro hac vice* rules work well for litigation pending in California, in part because a tribunal is available to decide whether attorneys will be permitted to practice law and, if they are, to police their behavior. Those rules may not suffice in all circumstances, however, because they pertain to litigation that has already commenced. Often litigators have to begin their work in California before a case has been filed. Moreover, the reality of today's practice frequently requires lawyers to undertake depositions, document reviews, negotiations, and other litigation tasks in several states. California law does not make clear the tasks an out-of-state attorney may undertake in California for litigation pending in another jurisdiction. The benefits of allowing out-of-state lawyers greater freedom to perform litigation-related tasks in California must be considered in light of the risks that may be created for consumers of legal services.

#### 5. Experienced Lawyers Seeking Permanent Admission to the California State Bar

Experienced out-of-state lawyers often express an interest in becoming members of the State Bar of California without taking the California bar examination. The key issue is whether easing the requirements for admission to the State Bar for experienced attorneys would solve any particular problems in the current system.

#### 6. Government Lawyers Seeking to Practice Law in California

An exemption from some of the requirements for out-of-state lawyers to practice law in California could have some salutary effect on the ability of the government to attract capable attorneys.

### E. Possible Mechanisms for Reform: Advantages and Disadvantages

#### 1. Comity/Reciprocity

Two possible mechanisms for allowing out-of-state lawyers to become members of the State Bar of California without taking the California bar examination are comity and reciprocity. If the State Bar of California extended comity, an out-of-state lawyer could become a member of the State Bar whether or not California lawyers have a similar opportunity in the state in which the lawyer is licensed. Through reciprocity, an out-of-state lawyer could become a member of the California State Bar without taking the California bar examination only if the lawyer is licensed by a state that provides an equivalent opportunity to California

lawyers. Under either mechanism, the other requirements for admission to the bar would typically apply. A condition for a lawyer to use either mechanism may be a certain number of years of practice. Comity or reciprocity could be achieved by permitting admission to practice law in California by motion.

Considerations. Either mechanism would greatly expand access to the practice of law in California. Both may provide the benefits of a free market but also may compromise the ability of California to regulate the competence of its attorneys. In addition, these approaches might encourage undesirable behavior, e.g., lawyers who are unable to pass the California bar examination could begin their careers in jurisdictions with more lenient admissions standards and then relocate to California.

Both comity and reciprocity pose problems. Comity would allow lawyers from other jurisdictions in the United States to practice law in California without ensuring that attorneys licensed to practice law in California have a reciprocal right to practice in those jurisdictions. Reciprocity would be difficult to pursue because California admits members to its State Bar who would not be eligible for admission to practice in other jurisdictions. In furtherance of a policy in favor of access to the legal profession, California allows a candidate to qualify to sit for the bar examination by various means, including by studying law in a law office or a judge's chambers or at an unaccredited or correspondence law school. In contrast, many other jurisdictions require graduation from a law school approved by the ABA as a prerequisite to admission to practice. These jurisdictions may refuse reciprocity to all California bar members. Alternatively, the jurisdictions may agree to admit only those members of the California bar who graduated from law schools accredited by the ABA. One possible obstacle to reciprocity, then, is that other jurisdictions will not admit attorneys to practice law based on membership in the California State Bar. Another possible obstacle is that California could refuse reciprocal treatment to other jurisdictions if they will admit some, but not all, members of the State Bar of California.

## 2. Registration

Out-of-state attorneys could be permitted to register to engage in a limited form of practice in California. Permissible registration could be determined by the kind of attorney or conduct at issue, or some combination of the two, and could extend to:

- In-house counsel employed by business entities in California;
- Lawyers undertaking litigation tasks in California for cases that have not yet been filed or that are pending in another jurisdiction; and

- Lawyers providing a defined counseling role in California to a corporation or business entity in regard to a transaction.

Considerations. Registration would have administrative costs, which could be paid through fees imposed on registering lawyers. Registration might be most practical when an attorney intends to practice law in California for an extended period of time, because it would then not be too burdensome compared to the benefits that registration would confer on the attorney, his or her clients, and the administration of justice. An advantage to registration is that it could require out-of-state attorneys to consent to jurisdiction and discipline in California. This could enhance the ability of California’s bar to regulate their behavior. Moreover, a registration fee would provide the resources to pay for the expanded regulation required. Registration also could be applied to attorneys who wish to serve particular clients in California for a defined purpose or to engage in various tasks in California related to litigation pending in another jurisdiction.

### 3. Exempting Specified Conduct From the Definition of “the Unauthorized Practice of Law”

Out-of-state attorneys could be permitted to undertake specified activities in California without being members of the State Bar of California. This change would require redefinition of when the practice of law is “unauthorized.” (*Birbrower, supra*, 17 Cal.4th at pp. 127–131 (discussing the definition of “the unauthorized practice of law”).) Examples of activities that the task force considered include:

- Interviewing potential witnesses and taking depositions in pending or anticipated litigation to occur in a jurisdiction other than California;
- Serving as in-house counsel for a corporation or other business entity in California that itself does not provide legal services to others; and
- Providing counsel or legal services in California to a business entity in regard to a discrete transaction.

Considerations. This approach is often called the creation of a “safe harbor.” Perhaps the greatest challenge it poses is the need to ensure that the exemptions are clearly defined. Otherwise, out-of-state attorneys may be able to engage in an ongoing and sustained legal practice in California, thereby circumventing the requirement of State Bar membership.

Defining the scope of the safe harbor is not easy. It is difficult to anticipate all of the tasks that should be permitted and to include them in a list. Moreover, a definition of a “safe harbor” that relies on examples or on a general description of

permissible conduct will be subject to interpretation and may not impose meaningful constraints on the conduct of out-of-state attorneys.

Consideration must also be given to the regulation and discipline of out-of-state lawyers practicing law in California. As a practical matter, when and how will out-of-state attorneys be held accountable if they violate ethical rules in California? One approach to exempting conduct from the definition of “the unauthorized practice of law” can be found in the ABA proposed amendments to the Model Rules of Professional Conduct, rules 5.5 and 8.5, which create “safe harbors” and provide for disciplinary procedures for multijurisdictional practice, respectively. The task force considered these definitions but did not choose to adopt them.

#### 4. Defining “the Practice of Law” to Exclude Specified Conduct, or Defining Specified Acts as Not Constituting the Practice of Law

A more precise definition could be given to “the practice of law.” (*Birbrower supra*, 17 Cal.4th at pp. 127–131 (discussing the definition of “the practice of law”).) The definition could exclude specified conduct by out-of-state attorneys. Alternatively, the existing definition could be retained, but specified conduct could be defined as not falling within the practice of law.

Considerations. This task would be very difficult. Courts have preferred a flexible definition of “the practice of law.” An effort to define “the practice of law” to allow attorneys greater freedom across jurisdictional boundaries may have the unintended consequence of permitting non-lawyers to engage in conduct that otherwise is limited to lawyers.

#### 5. Exemptions by Category of Attorney

Certain lawyers might be exempted by category from having to become a member of the California State Bar to practice law in California. Possible categories include:

- In-house counsel working in California for a corporation or other business entity that does not provide legal services to others; and
- Lawyers working for public-interest organizations, including legal services organizations.

Considerations. Exemptions that apply to categories of lawyers, rather than to categories of conduct, may not adequately protect California clients, the public, or the court system. The State Bar may not have effective means by which to regulate the conduct of a lawyer exempted by category from the admission

requirement. Issues to be resolved include whether the exempt lawyer would be required to take continuing legal education courses and how the full range of sanctions for unethical conduct would be imposed (e.g., California cannot disbar a non-member of the California State Bar.)

#### 6. Consortium of State Bars

The State Bar could participate in a consortium with other state bars to create common standards for admission or perhaps an expanded geographic area in which attorneys could practice and within which they would be subject to common regulation and discipline. Idaho, Oregon, and Washington are going forward with an approach along these lines.

Considerations. A significant issue is whether California would agree to accept the standards for admission to the bar established in other states. Joining a regional consortium of states that creates some form of reciprocity for licensing attorneys would not address restrictions on attorneys practicing law in California who are licensed by states outside the consortium.

### VI. Recommendations for Reform

#### A. Focusing on Particular Categories of Practice

The task force decided not to adopt comity or reciprocity as a means for expanding the ability of out-of-state lawyers to practice law in California. After lengthy discussion, the task force concluded that such sweeping measures are not appropriate at this time. By focusing on particular difficulties that arise under the current system, the recommendations in the report should provide solutions for the most pressing problems faced by out-of-state lawyers and their clients. Further, a more limited relaxation of the restrictions on practicing law poses less threat to the protection of consumers of legal services in California and is less likely to undermine legal professionalism by attenuating the ties between attorneys and the geographic communities that they serve. Moreover, the measures recommended in this report, if adopted, should provide valuable experience for assessing whether to adopt reciprocity or comity in the future. Finally, comity would not secure for members of the California State Bar the same rights it would afford out-of-state attorneys in California, and reciprocity raises difficult issues about the treatment of members of the California State Bar who did not graduate from a law school approved by the ABA.

## B. In-house Counsel Residing in California

### 1. Points of Consensus

The task force reached consensus that the requirements for in-house counsel who reside in California and who wish to provide legal services to a single, business-entity employer in California should be changed. Provided such in-house counsel are active members in good standing of the bar of another state, or a territory, or an insular possession of the United States, meet the criteria set forth below, and register with the State Bar of California, they should be permitted to provide legal services to their employers without having to become full members of the State Bar. The following restrictions would help to maintain the standards for the practice of law in California:

- a. Registration would not permit in-house counsel to make court appearances in California state courts.
- b. Registered attorneys would be permitted to provide legal services only to their business-entity employers.
- c. An attorney would not be eligible to register if his or her employer provides legal services to others.
- d. Attorneys would be required to register with the State Bar, pay registration fees, abide by the rules that govern the members of the State Bar, and submit to discipline by the State Bar.
- e. Registration would last only as long as the attorney is in the exclusive employment of the same qualifying entity. A change in employer would require a new registration.
- f. Attorneys would have to renew their registrations annually.
- g. Registered attorneys would have to satisfy the requirements to become and remain a member of the State Bar, other than the requirement of passing the California bar examination. These requirements would include participating in mandatory continuing legal education and acting in a manner consistent with a good moral character. (The task force did not reach a consensus on whether registering attorneys should have to achieve the score required by the California State Bar on the Multistate Professional Responsibility Examination.)

- h. Business-entity employers would have to confirm that they employ the attorney seeking to practice law in California by registration.

The task force also reached consensus that registered attorneys would be limited members of the State Bar and that all attorneys permitted to practice in California by registration, whether as an employee of a business entity or on any other basis, should be subject to all ongoing professional responsibility requirements in California and should have to participate in all programs designed to protect clients and the public, including making appropriate contributions to the client security fund.

## 2. Reasons for Change

Particularly with the advent of the Internet and other technological innovations, the work of business entities often crosses state lines, and so, naturally, do the efforts of their in-house counsel. In particular, a lawyer employed by a business entity may have special expertise that will benefit his or her employer in transactions occurring in various jurisdictions. The task force recognized that out-of-state lawyers serving as in-house counsel for a business entity could be permitted to practice law in California without posing any significant risk of harm to the public or the legal system. Business entities that use in-house counsel typically are capable of assessing attorneys on their own. As a result, they have less need for the California bar examination to serve as a screening mechanism than other consumers of legal services. Registration would require in-house counsel to meet the other requirements for gaining admission to the bar and for remaining a member in good standing. The State Bar could regulate the conduct of in-house counsel much as it regulates the conduct of its members.

The task force concluded that this change reasonably would meet the needs of some consumers in today's economy and the resulting realities of modern legal practice. Currently, some in-house corporate lawyers appear to engage in the unauthorized practice of law. The requirements for practice in California should be altered so that lawyers can serve their clients' legitimate needs, in ways that do not threaten the public or the legal system, and at the same time comply with the law. This reform is particularly appropriate because, to the extent an in-house attorney works exclusively for a single corporate employer, he or she will be under the constant scrutiny of his or her employer, and no member of the general public is at risk of being poorly served as a client. Some members of the task force also believe that permitting in-house counsel to practice by registration may help attract businesses to California.

In reaching consensus the task force considered, among other things, the following issues:

- a. As a practical matter, lawyers currently face little risk of discipline if they practice law in California for a business-entity employer without becoming members of the State Bar of California.
- b. The requirements to qualify for registration will have to be crafted carefully to prevent out-of-state lawyers from using registration in situations where attorneys might take advantage of vulnerable consumers.
- c. Creating general rules for multijurisdictional practice, rather than addressing the issue in a piecemeal fashion, may have benefits, but experience with gradual change may provide valuable experience for any broader changes in the future.

After reviewing costs and benefits, the task force concluded that a change was appropriate.

### 3. Related Issues

Task force members identified various unresolved issues. These include:

- a. The Entities That Qualify for Registration

Task force members recognized that some business entities are not sophisticated consumers of legal services. As a result, care must be taken to define those entities that should qualify to employ attorneys admitted to practice by registration. Further, sophisticated consumers of legal services other than businesses might qualify for registration as well. How should the “sophistication” about legal services be assessed to decide which entities qualify? Which entities other than corporations – perhaps public-interest organizations or labor unions – might qualify? The task force recommends that an implementation committee consider whether a workable definition of “business entities” in this context could include public-interest organizations, unions, foundations, and other entities that might employ full-time attorneys to serve their legal needs.

- b. The Scope of Permissible Practice

In-house counsel would be permitted to provide legal services only to their employers. Defining the scope of this practice can be difficult. In-house counsel may be asked to give legal advice to agents of the qualifying employer to assist them in carrying out their duties for the qualifying employer. Guidance will be necessary regarding when

providing such advice is permissible. The task force recommends that in-house counsel practicing in these circumstances be permitted to provide advice not only to a corporate employer but also to its affiliates, subsidiaries and other related entities, but cautions that care will have to be taken in describing the “entity” to which in-house counsel may provide legal services. Finally, members discussed the possibility of in-house counsel’s participation in litigation, but no consensus was reached regarding whether it would be limited to oversight of other attorneys or could extend to performing specified litigation tasks outside of court, perhaps including appearance at depositions.<sup>15</sup>

c. The Obligations of the Employer

The employing institution would have some responsibility as part of the registration process. The employer would be required to inform the State Bar about all lawyers it employs who reside in California and who are not members of the State Bar. In addition, the employer could be required to provide a statement (perhaps under penalty of perjury) that registering lawyers are in fact its employees, to agree to inform the State Bar if and when those lawyers are no longer in its employ, and to confirm that it has made the informed decision to hire an attorney to practice law in California who is not a member of the State Bar. The possibility was also raised that the employer might have some exposure for liability incurred by its employees registered to practice law in California if those employees engage in the unauthorized practice of law in California, but the task force made no specific recommendation concerning this issue.

C. Public-Interest Attorneys Relocating to California

1. Points of Consensus

The task force concluded that out-of-state attorneys relocating to California should be allowed to practice public-interest law in California before becoming members of the State Bar of California. This exemption would be of limited duration. It would apply only to lawyers working at organizations serving the needs of indigent clients. Qualifying organizations would have to provide supervision to such attorneys to ensure that they are familiar with relevant sources of California law. Initially, these organizations should be limited to those meeting

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<sup>15</sup>These issues are not resolved by the law permitting admission *pro hac vice* because such admission is not available to an attorney who is a resident of California or who regularly engages in substantial business, professional, or other activities in California. See *supra*, at IV.B.2.b.

the definition of “qualified legal services projects” as set forth in Business and Professions Code section 6214 et seq. Qualifying attorneys would have to meet all of the requirements for practicing law in California other than passing the California bar examination. They also would have to be active members in good standing of the bar of a state other than California or a territory or an insular possession of the United States.

## 2. Reasons for Change

There is a pressing need to make the legal system more accessible to indigent people, in part through increased availability of public-interest lawyers. At the same time, the task force acknowledges the limited role that it can play in satisfying that need. Any change in the rules regarding multijurisdictional practice is likely to have, at best, only a slight effect on the willingness of attorneys to work at public-interest organizations. More fundamental problems include the low salaries of public-interest legal jobs and the high cost of living in many parts of California. The task force emphasizes that people with limited economic resources should not receive less protection from incompetent and unscrupulous attorneys than other members of society. Nevertheless, providing a temporary opportunity to practice law in California may make public-interest legal practice more attractive to some able out-of-state attorneys. Requiring those attorneys to work under supervision and to satisfy all of the requirements for admission to the California State Bar, other than passing the bar examination, should protect consumers of legal services. The task force recognizes that other steps should be taken to increase the availability of legal counsel to indigent people in California.

## 3. Related Issues

Additional issues relevant to temporary public-interest practice in California include:

### a. The Mechanism for Permitting Public-Interest Lawyers to Practice Law in California

The task force identified registration as the appropriate method for permitting out-of-state attorneys to undertake a public-interest legal practice in California. The requirements would be similar to those that apply to out-of-state attorneys working in California as in-house counsel for business entities.

b. The Definition of “Public-Interest Legal Practice”

Defining “public-interest legal practice” is difficult. The task force did not undertake this task because it concluded that the scope of permissible public-interest practice should be narrow, at least initially. Lawyers should be permitted to practice only for agencies that fall within the definition of “qualified legal services projects” pursuant to Business and Professions Code section 6214 et seq. and that have the capacity to supervise and will supervise attorneys licensed to practice in other jurisdictions. In the future, a broader definition of “public-interest legal practice” may be appropriate.

c. Duration of Permissible Legal Practice

The task force did not come to a firm conclusion concerning the appropriate number of years an out-of-state lawyer might practice law in the public interest in California before joining the State Bar. A period of up to three years may be appropriate.

d. Restrictions on Supervision

The task force concluded that qualifying institutions would have to provide meaningful supervision by an attorney with a minimum number of years of experience in California practice. The task force did not decide the method for ensuring appropriate supervision or set the minimum number of years of experience that the supervising attorney should have.

D. Nonlitigating Lawyers Temporarily in California to Provide Legal Services

1. Points of Consensus

The task force reached consensus that nonlitigating out-of-state lawyers should be allowed to practice law on a temporary basis in California, provided that any exceptions to the general proscription on such legal practice are clearly and narrowly defined so as to protect consumers of legal services. The general preference was to effect this change by creating a so-called safe harbor – exemption from the prohibition on the unauthorized practice of law for specified activities performed on a temporary basis in California by lawyers who are licensed to practice law in other U.S. jurisdictions. The majority of task force members were reluctant to require these out-of-state lawyers to register. Given the temporary nature of their time in California, the inconvenience and cost of registration may be prohibitive. The safe harbor would extend only to lawyers

who provide legal services in California temporarily or on occasion. Restrictions would therefore apply to the duration and frequency with which out-of-state lawyers could practice law in California. To be eligible for the safe harbor, lawyers would have to maintain an office in another jurisdiction and not be resident in an office in California.

There are certain illustrative situations where an out-of-state nonlitigating lawyer would be permitted to practice law in California. The difficulty lies in determining how far beyond these examples to extend the permissible practice of law in California. Examples where the safe harbor could apply include (a) an attorney representing a sophisticated out-of-state client, as part of an ongoing relationship, in a transaction occurring in part in California; (b) a specialist in an area of federal law (examples include U.S. constitutional law and federal income taxation) providing advice to lawyers in California to assist them in representing their clients; and (c) in-house counsel licensed to practice law in a U.S. jurisdiction other than California and traveling to an office or plant in California to undertake discrete legal tasks for his or her corporate employer.

In these and similar clearly defined situations, the practice of law in California would be allowed. An out-of-state attorney practicing law in California under the safe harbor provision would thereby consent to discipline in California.

## 2. Reasons for Change

The task force recognized that clients often request an out-of-state transactional or other nonlitigating lawyer to come temporarily to California to provide legal services on a discrete matter. In many circumstances, such conduct poses no significant threat to the public or the legal system, particularly where the attorney is representing a client located in another state, has a longstanding relationship with the client, is an expert in the particular field of practice, or is working in conjunction with members of the State Bar. Permitting lawyers to undertake temporary nonlitigation work in California reflects the modern realities of legitimate legal practice. Existing restrictions on the practice of law in California at times may unduly burden attorneys who are seeking to provide useful services for their clients, in situations where hiring counsel licensed in California may not be practical. Transactional attorneys and other nonlitigating lawyers entering California on a temporary basis need better guidance on what they may and may not do. The limitations on the practice of law in California should be changed so that out-of-state lawyers can serve their clients' legitimate needs and at the same time comply with California law. Task force members noted that admission *pro hac vice* by a California court provides a means to engage in legal work for litigators. A similar opportunity to practice law temporarily in California should be afforded to nonlitigating lawyers.

In reaching consensus the task force recognized, among other things, the following issues:

- a. As a practical matter, out-of-state lawyers currently face little risk of disciplinary action if they undertake nonlitigation tasks on a temporary basis in California.
- b. Creating a limited safe harbor presents substantial difficulties. Unless care is taken, out-of-state lawyers could engage in the ongoing and sustained practice of law in California and circumvent the requirements for admission to the State Bar of California.
- c. Admission *pro hac vice* works because a court can both accept applications to practice temporarily in California and monitor the behavior of out-of-state lawyers practicing in California. No similar institution is ordinarily able to play these roles for nonlitigating lawyers. It is true that, pursuant to California Code of Civil Procedure section 1282.4 and rule 983.4 of the California Rules of Court, the State Bar certifies out-of-state attorneys who wish to participate in arbitration in California, and the arbitrator can then respond appropriately to any unethical behavior in the arbitration. However, the State Bar might have difficulty certifying *all* nonlitigating lawyers who wish to practice law in California, and no institution comparable to a court or an arbitrator would be available to monitor the behavior of most nonlitigating lawyers.

After reviewing costs and benefits, the task force concluded that a change was appropriate, if one could be carefully crafted.

### 3. Related Issues

The task force identified various issues that it did not resolve. Resolving some of the open issues would be essential to any effort to create a safe harbor. The issues include:

- a. Restrictions on the Duration, Frequency, and Nature of Activities

The task force's consensus on the creation of a safer harbor for nonlitigating lawyers was contingent on a clear and narrow definition of "permissible conduct." The activities that out-of-state lawyers would be allowed to perform in California might be limited by duration, frequency, and type.

i. Duration of Permissible Practice

Some limitation would be placed on the period of time over which an out-of-state lawyer could provide legal services in California. For example, an out-of-state lawyer might be limited to a set number of consecutive days or a certain number of days per year. Otherwise, out-of-state lawyers could gain the benefits of membership in the State Bar without meeting the requirements for admission.

ii. Frequency of Permissible Practice

A similar concern applies to the frequency—either in terms of number of visits or number of clients served—with which an out-of-state lawyer would practice in California. Some limitation would be necessary to prevent circumvention of State Bar requirements.

iii. Permissible Activities

The task force reached no consensus on the type of permissible nonlitigation activities that out-of-state lawyers might perform, although the consensus of the task force to recommend change in this category of conduct was contingent on adoption of a clear and narrow definition of any exception to the current prohibition on the unauthorized practice of law in California. One possibility would be to allow any activity reasonably related to the practice of a lawyer in another jurisdiction where the lawyer is a member of its bar. This approach would have the benefit of simplicity. However, such a broad definition could be extended to virtually any activity. An alternative would be to attempt to list the categories of activities that are permissible, although the list might be extended by analogy. Categories of activities might be listed by area of substantive law (federal taxation law, free speech issues arising under the U.S. Constitution, commercial transactions), type of task (consulting on taxation issues, compliance with environmental regulations), type of client (government agency, large corporation, legal services office), or some combination of the three. Alternatively, it may be possible to create a list of *impermissible* activities. One approach to this issue can be found in the ABA's proposed amendments to the Model Rules of Professional Conduct, rule

5.5. The task force did not choose to adopt this approach, because some members thought it seemed too broad to provide the necessary guidance. The task force concluded that further examination of this issue is necessary.

b. Consumer Protection, the Internet, and Advertising

Several members expressed particular concern over advertisements by out-of-state lawyers that reach consumers in California, particularly over the Internet. This raises some questions: Should California require advertising lawyers to identify themselves and to disclose that they are not members of the State Bar of California? Would the state be able to enforce these requirements? If these requirements are practical, they may help consumers make an informed decision about whether to hire the lawyers. They also may assist the California State Bar and government entities to enforce California's disciplinary rules and its restrictions on the practice of law in California by out-of-state lawyers.

c. Applicable Rules of Conduct

The California Rules of Professional Conduct should apply to out-of-state lawyers providing legal services on a temporary basis in California. Some provision should be made to resolve conflicts between those rules and the rules of professional conduct in the other state or states in which the attorney is admitted to practice. One approach to this issue can be found in the ABA proposed amendments to the Model Rules of Professional Conduct, rule 8.5. Further analysis of this issue is appropriate.

d. Discipline

Out-of-state attorneys performing nonlitigation tasks in California should be subject to discipline by California authorities for the violation of applicable laws and rules of professional responsibility. A change in the laws defining the jurisdiction of the State Bar may be needed to bring out-of-state lawyers who are not members of the bar within its jurisdiction. Concern was expressed that without some registration process and attendant fees, the State Bar's attorney disciplinary system may lack adequate funds to handle its increased burden.

e. Limitations on the Clients Out-of-State Lawyers May Serve

The suggestion was made that the safe harbor should not extend to work for certain categories of clients. The task force was concerned in particular that out-of-state lawyers could take advantage of California residents. Identifying and disciplining such lawyers may be difficult for California authorities. One possible way to address this concern would be to limit the safe harbor to services provided to a preexisting client or to a client with whom the lawyer has some other prior relationship. Another possibility would be to place restrictions on out-of-state lawyers representing California clients in particular. Different ways to fashion this possible limitation include prohibiting provision of legal services to any client located in California, to nonbusiness entities in California, or to California clients with whom the out-of-state lawyer has no prior relationship, or some combination of these prohibitions.

f. Association With Lawyers Licensed to Practice Law in California

At present, association by out-of-state lawyers with attorneys licensed to practice law in California is not a guarantee of conformance with the law. Even if California attorneys are actively involved in the representation, the out-of-state lawyer may be engaging in the unauthorized practice of law. (*Birbrower supra*, 17 Cal.4th at 126, n.3 (noting that out-of-state attorneys who associate with counsel licensed to practice law in California may nevertheless be engaging in the unauthorized practice of law).) Indeed, the California attorneys may be violating restrictions on aiding the unauthorized practice of law. (See Rules of Prof. Conduct, rule 1-300(A) (providing that a member of the State Bar “shall not aid any person or entity in the unauthorized practice of law”).) Guidelines should be provided to protect both out-of-state and California attorneys when they collaborate on behalf of a California client.

E. Lawyers Temporarily in California as Part of Litigation

1. Points of Consensus

The task force concluded that a change should be made to allow out-of-state lawyers to perform litigation tasks in California under specified circumstances, provided the permissible conduct is clearly and narrowly defined. First, attorneys who are preparing to participate in litigation in California would be permitted to provide legal services until the case is filed and they are able to seek admission

*pro hac vice*. Second, out-of-state attorneys would be able to undertake specified tasks in California related to litigation pending in another jurisdiction.

## 2. Reasons for Change

Today, legal disputes often cross state lines, and so does litigation. Attorneys should be able to follow the trail of litigation on behalf of their clients. In many circumstances, admission *pro hac vice* solves this problem by allowing attorneys to litigate in jurisdictions where they are not admitted to practice law. An attorney cannot seek admission *pro hac vice*, however, unless and until a lawsuit is filed in California. The task force recognized that in any situation where litigation is already pending before a court, a judge is available to monitor and discipline any inappropriate actions by counsel.

## 3. Related Issues

### a. Specifying Permissible Tasks or Circumstances

Attorneys could abuse the privilege of providing legal services in California in anticipation of litigation or of performing tasks related to litigation pending in another jurisdiction. If these exemptions from the unauthorized practice of law are not defined with care, attorneys may be able to circumvent the requirements for membership in the California State Bar. Possible approaches to the definition could include specifying the permissible tasks or limiting the circumstances under which an out-of-state attorney may provide legal services in California.

### b. Protecting California Lawyers Practicing in Other States

A change in the rules governing the “transient” practice of law in California may not protect California lawyers undertaking litigation tasks in other jurisdictions. (Cf. Bus. & Prof. Code, § 6049.1(b)(2).) One way to encourage other jurisdictions to adopt a similar safe harbor for California lawyers would be to allow a lawyer to undertake litigation tasks in California only to the extent that the state where the lawyer is licensed affords California lawyers the same opportunity.

## F. Experienced Attorneys Moving to California From Other States

### 1. Points of Consensus

A majority of the task force concluded that no change should be made to the scope of permissible legal practice by experienced attorneys in the state of California.

### 2. Reasons Against Change

The task force considered permitting experienced out-of-state attorneys who move to California to become members of the State Bar without taking the California bar examination. The task force concluded, however, that its other recommendations for change would provide an appropriate first step in assisting clients to meet their needs for legal services in California. The focus of the task force was on the needs of the public. The task force concluded that the public interest would not be served by entirely eliminating the role played by the California bar examination in screening experienced practitioners for admission to the State Bar. If and when the recommendations by this task force are implemented, California will be in a better position to assess whether the changes have been successful and whether additional changes are warranted. Until then, experienced attorneys should be required to meet the rigors of the California bar examination. Any relaxation of this requirement in the future would require attention to the issue of reciprocity and, in particular, to how other states treat members of the California State Bar who have not graduated from ABA-accredited law schools.

## G. Government Attorneys Located in California

### 1. Points of Consensus

The task force concluded that no change should be made to the scope of permissible legal practice by government lawyers in California.

### 2. Reasons Against Change

Few general statements can be made about government lawyers as a whole, in light of the many variations in the tasks they perform and the roles they play. For this reason, special rules for the permissible practice of law by out-of-state lawyers working for the government in California would be difficult to craft. Moreover, many government lawyers serve and communicate directly with the public at large. The reliance of a great variety of citizens on government attorneys militates against adopting a general rule that would relax the requirements for them to practice law in California.

## VII. Conclusion

The task force's recommendations are aimed at easing and clarifying the current restrictions on the practice of law in California by attorneys who are not members of the California State Bar. The recommendations are designed to address some problems that arise from the current system while avoiding any significant risk of harm to consumers of legal services in California.

The task force concluded that, at present, California should not adopt a system of comity or reciprocity that would license out-of-state attorneys in general to practice law in California without passing the California bar examination. Rather, expanding the ability of out-of-state lawyers to practice law in a targeted way, focusing on particular problems that arise from the present system, will address the most pressing issues and will allow California to gain experience through incremental steps, without exposing consumers—particularly unsophisticated consumers—to harm from incompetent or unethical attorneys. California should take the opportunity to assess whether more sweeping change is appropriate.

The task force concluded that California should expand the ability of out-of-state attorneys to practice law in California in specific ways. Reforms should include allowing in-house counsel to provide legal services in California for a single business-entity employer and permitting public-interest lawyers to work on an interim basis for public-interest institutions that provide legal counsel to indigent Californians. These changes should be effected by allowing out-of-state lawyers to register with the State Bar of California to engage in these forms of legal practice.

In addition, California's rules should be adjusted to meet the specific needs of transactional and other nonlitigating lawyers who are in California to practice law on a temporary basis, as well as of attorneys who wish to perform litigation tasks in California for cases that they intend to file in California or that they have already filed and that are pending in another jurisdiction within the United States. These changes should be implemented by altering the definition of "the unauthorized practice of law" for lawyers who are licensed in a state other than California or a territory, or an insular possession of the United States and who undertake legal practice in California.

## VIII. Recommended Actions by the Judiciary or Legislature

In light of the Supreme Court's role in attorney admission and discipline, the task force concluded that further action initially should be taken by the court. The task force also recommends that the court present this report to the Legislature and continue its close cooperation with the Legislature in taking further action.

The task force recommends that the California Supreme Court:

1. Adopt the proposals outlined in this report;
2. Appoint a committee to address issues related to the implementation of any of the task force's proposals that the Supreme Court adopts;
3. Instruct the implementation committee to institute a plan to monitor and assess the effects of any changes made to the rules governing the multijurisdictional practice of law;
4. Instruct the implementation committee to include in the plan an assessment to be undertaken within five years after the implementation of any of the proposals in this report; and
5. Appoint a task force to consider the assessment of any changes that have been made, and prepare a report addressing any additional changes that may be appropriate.

## IX. Resources

The task force reviewed articles, proposals, draft rules, and comments relating to the multijurisdictional practice of law from many sources. Listed below are resources that the task force found most germane and educational.

1. ABA Commission on Multijurisdictional Practice of Law, *Multijurisdictional Practice of Law Bibliography*, at <<http://www.abanet.org/cpr/mjp-bibliography.html>> (as of Jan. 3, 2001). This bibliography lists more than 30 articles on issues related to multijurisdictional practice.
2. *Symposium on the Multijurisdictional Practice of Law* (Mar. 10-11, 2000), at <<http://www.abanet.org/cpr/mjp-symposium.html>> (as of Jan. 3, 2002). This source includes articles presented at the symposium, as well as transcripts of public hearings and written comments and position papers submitted to the American Bar Association Commission on Multijurisdictional Practice of Law.

3. ABA Section of Legal Education and Admission to the Bar and National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements* (2000).
4. Crossing the Bar.Com, *Information and Commentary on the Multijurisdictional Practice of Law*, at <<http://www.crossingthebar.com>> (as of Jan. 3, 2002). This Web site is a discussion forum on the multijurisdictional practice of law.
5. *Symposium on Ethics and the Multijurisdictional Practice of Law* (1995) 36 S. Texas L. Rev. 657.
6. Peter R. Jarvis, *Where You Stand Depends on Where You Sit: One Litigator's View of Multijurisdictional Practice Issues and Related Policy Questions*, at <<http://www.abanet.org/cpr/mjp-pjarvis.html>> (as of Jan. 3, 2002).
7. Williams, *A National Bar—Carpe Diem*, 5-WTR Kansas Journal of Law & Public Policy 201.
8. Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers* (1995) 36 South Texas Law Review 665.