

AMERICAN BAR ASSOCIATION

**REPORT OF THE COMMISSION
ON MULTIJURISDICTIONAL PRACTICE**

AUGUST 2002

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Introduction and Overview

On behalf of the Commission on Multijurisdictional Practice, I respectfully submit to the House of Delegates our Report and recommendations. I am proud of the Commission and its outstanding effort to produce this Report in a timely manner. The predicate for this national study undertaken by the American Bar Association was the dynamic change and evolution in nature and scope of legal practice during the past century, facilitated by a transformation in communications, transportation and technology.

In the early twentieth century, states adopted "unauthorized practice of law" (UPL) provisions that apply equally to lawyers licensed in other states and to nonlawyers. These laws prohibit lawyers from engaging in the practice of law except in states in which they are licensed or otherwise authorized to practice law. UPL restrictions have long been qualified by *pro hac vice* provisions, which allow courts or administrative agencies to authorize an out-of-state lawyer to represent a client in a particular case before the tribunal.¹ In recent years, some jurisdictions have adopted provisions authorizing out-of-state lawyers to perform other legal work in the jurisdiction.²

Jurisdictional restrictions on law practice were not historically a matter of concern, because most clients' legal matters were confined to a single state and a lawyer's familiarity with that state's law was a qualification of particular importance. However, the wisdom of the application of UPL laws to licensed lawyers has been questioned repeatedly since the 1960s in light of the changing nature of clients' legal needs and the changing nature of law practice. Both the law and the transactions in which lawyers assist clients have increased in complexity, requiring a growing number of lawyers to concentrate in particular areas of practice rather than being generalists in state law. Often, the most significant qualification to render assistance in a legal matter is not knowledge of any given state's law, but knowledge of federal or international law or familiarity with a particular type of business or personal transaction or legal proceeding. Additionally, modern transportation and communications technology have enabled clients to travel easily and transact business throughout the country, and even internationally. Because of this globalization of business and finance, clients sometimes now need lawyers to assist them in transactions in multiple jurisdictions (state and national) or to advise them about multiple jurisdictions' laws.

Although client needs and legal practices have evolved, lawyer regulation has not yet responded effectively to that evolution. As the work of lawyers has become more varied, specialized and national in scope, it has become increasingly uncertain when a lawyer's work (other than as a trial lawyer in court) implicates the UPL law of a jurisdiction in which the lawyer is not licensed. Lawyers recognize that the geographic scope of a lawyer's practice must be adequate to enable the lawyer to serve the legal needs of clients in a national and global economy. They have expressed concern that if UPL restrictions are applied literally to United

¹For a collection of different jurisdictions' *pro hac vice* provisions, see http://www.crossingthebar.com/pro_hac_vice.htm.

²See notes 17 – 20 and accompanying text, *infra*.

States lawyers who perform any legal work outside the jurisdictions in which they are admitted to practice, the laws will impede lawyers' ability to meet their clients' multi-state and interstate legal needs efficiently and effectively.

This concern was sharpened by the California Supreme Court decision, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*, 949 P.2d 1 (Cal. 1998), which held that lawyers not licensed to practice law in California violated California's misdemeanor UPL provision when they assisted a California corporate client in connection with an impending California arbitration under California law, and were therefore barred from recovering fees under a written fee agreement for services the lawyers rendered while they were physically or "virtually" in California. Although the state law was subsequently and temporarily amended to allow out-of-state lawyers to obtain permission to participate in certain California arbitrations, concerns have persisted.

In response to professional concerns about the regulation of multijurisdictional law practice, ABA President Martha Barnett appointed this Commission in July 2000 to undertake the following responsibilities:

(1) "Research, study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law;" (2) "analyze the impact of those rules on the practice of in-house counsel, transactional lawyers, litigators and arbitrators and on lawyers and law firms maintaining offices and practicing in multiple state and federal jurisdictions;" (3) "make policy recommendations to govern the multijurisdictional practice of law that serve the public interest and take any other actions as may be necessary to carry out its jurisdictional mandate;" and (4) "review international issues related to multijurisdictional practice in the United States."

From the outset, the MJP Commission recognized the importance of engaging in an objective and comprehensive inquiry and of encouraging as many others as possible to lend assistance. To stimulate discussion, the Commission began by issuing a series of background papers that identified examples of multijurisdictional practice, described relevant regulatory interests, and listed some of the enhancements and reforms that others had proposed. The Commission invited testimony and written submissions by state and local bar associations, ABA entities, and other representative organizations of the legal profession and the public, and solicited the views and experiences of law firms, government and in-house corporate law offices, and individuals. The Commission conducted public hearings in Atlanta, Chicago, Dallas, Kansas City, Miami, New York, and San Diego, and individual Commissioners spoke at bar association meetings and other programs throughout the country. The Commission drew liberally on the experience of individuals appointed to serve as liaisons and on the resources of the various organizations they represented, as well as on the resources of the Center for Professional Responsibility. It collected and reviewed the relevant legal literature.³ Of particular importance, it gave close study to the relevant proposals of the ABA Commission on Evaluation of the Rules

³For a selected bibliography on the multijurisdictional practice of law, see <http://www.abanet.org/cpr/mjp-bibliography.html>.

of Professional Conduct ("Ethics 2000 Commission") and the relevant provisions of the ALI Restatement (Third) of the Law Governing Lawyers.

In November 2001, the Commission issued an Interim Report describing its preliminary recommendations. By that time, the Commission had received more than 50 written submissions and heard testimony from individuals from around the nation and the world who recognized the importance and timeliness of its inquiry.⁴ Some submissions, such as those of the California, Missouri, New Jersey and Washington state bar associations, were the product of a committee appointed for the specific purpose of formulating a position on the issues before the Commission. To encourage additional participation and interaction, the Commission established a website containing relevant writings, including transcripts of hearing testimony and written submissions,⁵ and established an extensive listserv on which relevant information was posted.⁶

The Commission made clear that the purpose of its Interim Report was to elicit feedback. From the start, the Commission had been committed to undertaking an objective and comprehensive study of the issues relating to multijurisdictional practice, and it intended to continue in that spirit until its work was completed. Thus, it was crucial to this initiative for the Commission to receive responses and perspectives from the widest possible range of individuals and organizations.

In response to its Interim Report, the Commission received many additional submissions, some of which supported the preliminary recommendations but many of which proposed changes and improvements.⁷ Additionally, the Commission conducted hearings in Philadelphia and New York at which it received testimony concerning its proposals. Based on the comments it received, the Commission revised its preliminary recommendations.

The Commission expresses its gratitude to all the individuals and organizations who assisted it in identifying the legitimate needs of clients for lawyers to engage in multijurisdictional practice, the regulatory concerns that this practice presents, and the possibilities for reform. The recommendations presented in this report draw extensively on the written submissions and testimony presented to the Commission over the course of nearly two years and could not have taken shape without the generous assistance provided by many to the Commission.

⁴Lists of those who made written submissions to the Commission and who offered oral testimony are available on the Commission's website. *See* note 5, *infra*.

⁵The website is <http://www.abanet.org/cpr/mjp-home.html>.

⁶The listserv is MJP-GENERAL@MAIL.ABANET.ORG.

⁷Written responses to the Commission's Interim Report are available on the website at http://www.abanet.org/cpr/mjp/comm_summ2.html.

Summary of Recommendations

"Multijurisdictional practice" ("MJP") describes the legal work of a lawyer in a jurisdiction in which the lawyer is not admitted to practice law. As this report discusses, a wide variety of practices falling within this rubric have been called to the attention of the MJP Commission. The guiding principle that informs the Commission's recommendations is simple to state: we searched for the proper balance between the interests of a state in protecting its residents and justice system, on the one hand; and the interests of clients in a national and international economy in the ability to employ or retain counsel of choice efficiently and economically. A key word here is "balance." Our challenges did not lend themselves to mathematical solutions. Rather, accommodating our state-based system of bar admission, which we fully support, with the realities of modern life and our tradition of respect for client choice required the exercise of informed judgment. Our judgment was informed not only by the diverse experience and perspectives of the members of the Commission and its liaisons, but also by the wealth of testimony, written and spoken, of which we have been the most fortunate beneficiary.

The Commission's recommendations are, in summary, as follows:

1. The ABA affirm its support for the principle of state judicial regulation of the practice of law.
2. The ABA re-title Rule 5.5 of the Model Rules of Professional Conduct as "Unauthorized Practice of Law; Multijurisdictional Practice of Law".

The ABA amend Rule 5.5(a) of the ABA *Model Rules of Professional Conduct* to provide that a lawyer may not practice law in a jurisdiction, or assist another in doing so, in violation of the regulations of the legal profession in that jurisdiction.

The ABA adopt proposed Rule 5.5(b) to prohibit a lawyer from establishing an office or other systematic and continuous presence in a jurisdiction, unless permitted to do so by law, or another provision of Rule 5.5; or holding out to the public or otherwise representing that the lawyer is admitted to practice law in a jurisdiction in which the lawyer is not admitted.

The ABA adopt proposed Rule 5.5(c) to identify circumstances in which a lawyer who is admitted in a United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may practice law on a temporary basis in another jurisdiction. These would include:

- Work on a temporary basis in association with a lawyer admitted to practice law in the jurisdiction, who actively participates in the representation;
- Services ancillary to pending or prospective litigation or administrative agency proceedings in a state where the lawyer is admitted or expects to be admitted *pro hac vice* or is otherwise authorized to appear;
- Representation of clients in, or ancillary to, an alternative dispute resolution ("ADR") setting, such as arbitration or mediation; and
- Non-litigation work that arises out of or is reasonably related to the lawyer's practice

in a jurisdiction in which the lawyer is admitted to practice.

The ABA adopt proposed Rule 5.5(d) to identify multijurisdictional practice standards relating to (i) legal services by a lawyer who is an employee of a client and (ii) legal services that the lawyer is authorized by federal or other law to render in a jurisdiction in which the lawyer is not licensed to practice law.

3. The ABA amend Rule 8.5 of the ABA *Model Rules of Professional Conduct* in order to clarify the authority of a jurisdiction to discipline lawyers licensed in another jurisdiction who practice law within their jurisdiction pursuant to the provisions of Rule 5.5 or other law.

4. The ABA amend Rules 6 and 22 of the ABA *Model Rules for Lawyer Disciplinary Enforcement* to promote effective disciplinary enforcement with respect to lawyers who engage in the multijurisdictional practice of law and to renew efforts to encourage states to adopt Rule 22, which provides for reciprocal discipline.

5. The ABA should encourage the use of the National Lawyer Regulatory Data Bank to promote interstate disciplinary enforcement mechanisms and urge jurisdictions to adopt the International Standard Lawyer Numbering System®. The ABA should also urge jurisdictions to require lawyers to report to the lawyer regulatory agency in the jurisdiction in which they are licensed, all other jurisdictions in which they are licensed and any status changes in those other jurisdictions.

6. The ABA adopt the proposed *Model Rule on Pro Hac Vice Admission* to govern the admission of lawyers to practice law before courts and administrative agencies *pro hac vice* in jurisdictions in which the lawyer is not admitted to practice.

7. With regard to the establishment of a law practice on a permanent basis in a jurisdiction in which a lawyer is not admitted to practice, the ABA adopt the proposed *Model Rule on Admission by Motion* to facilitate the licensing of the lawyer, if the lawyer is admitted to practice in another United States jurisdiction, has been engaged in the active practice of law for a significant period of time and is in good standing in all jurisdictions where admitted.

8. With regard to lawyers admitted to practice only in non-United States jurisdictions, the ABA encourage United States jurisdictions to adopt the ABA *Model Rule for the Licensing of Legal Consultants* or to conform their already existing rule to the Model Rule.

9. With regard to lawyers who seek to provide legal services in the United States and are admitted to practice law only in non-United States jurisdictions, the ABA adopt the proposed *Model Rule on Temporary Practice by Foreign Lawyers* to identify circumstances where it is not the unauthorized practice of law for a lawyer admitted in a non-United States jurisdiction to provide legal services on a temporary basis for a client in a United States jurisdiction.

The Basis for Change

Background: state licensing and jurisdictional restrictions

State admissions and regulation. Lawyers in the United States are not licensed to practice law on a national basis, but are licensed by a state judiciary⁸ to practice law within the particular state.⁹ In general, state admissions processes are intended to protect the public by ensuring that those who are licensed to practice law in the state have the requisite knowledge of that state's laws and the general fitness and character to practice law.

The state-based licensing process originated more than two centuries ago when the need for legal services was locally based and often involved the need for representation in court. Over time, the nature of law practice has expanded. Increasingly, lawyers counsel and assist clients outside the courthouse. Although understandings differ about the extent to which a law license gives lawyers exclusive authority to render legal services in addition to litigation, it is generally understood that a state license to practice law permits a lawyer to offer a range of services, including but not limited to courtroom advocacy, and that some of those services may not be rendered in the state either by nonlawyers or by lawyers who are licensed only in another jurisdiction.

The traditional route to bar admission includes graduating from an accredited law school, passing the admitting state's bar examination, and satisfying the state's bar examiners that the applicant possesses the requisite character to practice law. There is some state variation, however, in the process for licensing lawyers. For example, Wisconsin recognizes a "diploma privilege" whereby graduates of either of that state's law schools may be admitted to practice law without taking the state's bar examination.¹⁰ California and a few other states do not require, as most states do, that applicants to the bar be graduates of law schools that are accredited by the ABA.¹¹

⁸In virtually every state, the state's highest court oversees the licensing process. The exception is New York, where the four intermediate appellate courts are responsible for admission to practice law as well as lawyer discipline.

⁹For ease of reference, this report refers to "states" to include both states and the District of Columbia.

¹⁰Wisconsin SCR 40.03.

¹¹*See, e.g.*, California Rules Regulating Admission to Practice Law, Rule VII (as amended Dec. 8, 2001) (applicant may have studied four years in law school authorized by the state of California, in a law office under personal supervision of California state bar member or in a judge's chambers, or by instruction from a correspondence law school); Supreme Court of Georgia, Rules Governing Admission to the Practice of Law, Part B, Section 4(b)(2)(Oct. 12, 2000) (applicant must have JD or LLB from law school approved by the ABA or by the Georgia Board of Bar Examiners); Rules for Admission to the Practice of Law in West Virginia, Rule 3.0 (1992)(applicant may be graduate of non-ABA accredited law school if admitted in another state,

As a practical matter, a lawyer who seeks to engage in a national law practice cannot presently gain admission to the bar of every state. States generally require out-of-state lawyers to pass the state's bar examination to be licensed. Bar examinations generally differ from state to state, although the degree of difference has narrowed over the years, as states have come to rely increasingly on a standardized examination.¹² Being a member in good standing of another state's bar generally does not qualify a lawyer for "reciprocal" admission, although many states do allow lawyers to be admitted on motion upon a showing of good standing and a demonstrated record of active law practice elsewhere for a specific period.¹³

Under the jurisdiction of the judicial branch of government, states establish rules to govern the professional conduct of lawyers. Lawyers are required to represent clients competently and to refrain from undertaking work that they are not qualified to handle. State courts oversee disciplinary agencies that enforce the rules of professional conduct through disciplinary proceedings. Lawyers may be reprimanded, suspended, disbarred or otherwise sanctioned for misconduct. Disciplinary mechanisms are designed to encourage proper conduct, discourage misconduct and provide for appropriate sanctions when misconduct occurs. Enforcement of professional norms is also promoted through various indirect means, including civil lawsuits for legal malpractice.

Over the years, many states have supplemented and improved their regulatory processes. For example, to promote professional competence and familiarity with state ethics rules, many states now require ongoing continuing legal education. Many require their lawyers to contribute

graduate of a reputable law school determined by Board of Law Examiners to be equivalent to ABA-accredited law school, or graduate of law school of a foreign country where basis of jurisprudence is common law of England and applicant has studied 30 credit hours in basic courses at an ABA-accredited law school).

¹²Standardized examinations are produced by the National Conference of Bar Examinations (NCBE). At present, 52 jurisdictions employ the Multistate Professional Responsibility Examination (MPRE); 53 jurisdictions employ the Multistate Bar Examination (MBE), a standardized multiple-choice examination that covers six core subjects; 15 jurisdictions employ the Multistate Essay Examination (MEE), a standardized essay examination that covers ten subjects; and 27 jurisdictions employ the Multistate Performance Test (MPT), a standardized lawyer-skills examination. Five jurisdictions-Nebraska, North Dakota, South Dakota, Washington, D.C., and West Virginia-use only NCBE examinations; all others include some multiple choice or essay questions of their own. (Jurisdictions include the fifty states, the District of Columbia, and the following territories: Guam, Northern Mariana Islands, the Republic of Palau and the Virgin Islands.)

¹³Recently, three states-Idaho, Oregon and Washington-entered into a reciprocity agreement providing that a lawyer admitted in any one of those states may be admitted to practice law in the other states without having to pass their bar examinations. *See, e.g.,* Rules for Admission of Attorneys in Oregon, Rule 15 (effective Jan. 1, 2002).

to a client protection fund for the benefit of clients in the state who suffer financial loss because of a lawyer's dishonesty. One state, Oregon, mandates malpractice insurance for bar members.¹⁴

Nationally, disciplinary enforcement has been improved and refined with assistance from the Conference of Chief Justices, the American Bar Association and the National Organization of Bar Counsel. There has been improved coordination among disciplinary authorities of different states as called for in the 1992 ABA report, *Lawyer Regulation for a New Century* (McKay Report).¹⁵

States sanction members of their own bar for misconduct occurring outside the jurisdiction, and some states also bring disciplinary proceedings predicated on misconduct committed in the state by a lawyer who is licensed elsewhere. Consistent with ABA policy, *ABA Model Rules for Lawyer Disciplinary Enforcement* Rule 22, most states give reciprocity to disciplinary decisions of other jurisdictions. To assist them in doing so, the ABA operates the National Lawyer Regulatory Data Bank, which collects and disseminates information about lawyer discipline.

Geographical boundaries. In general, a lawyer may not represent clients before a state tribunal or otherwise practice law within a particular state unless the lawyer is licensed by the state or is otherwise authorized to do so. Jurisdictional restrictions promote a variety of state regulatory interests. Most obviously, by limiting law practice in the state to those whom the state judiciary, through its admissions process, has deemed to be qualified to practice law in the state, they promote the state interest in ensuring that those who represent clients in the state are competent to do so. Jurisdictional restrictions also promote the state interest in ensuring that lawyers practicing law within the state do so ethically and professionally. Lawyers licensed by the state are thought to be more conversant than out-of-state lawyers with state disciplinary provisions as well as with unwritten but understood expectations about how members of the local bar should behave, and lawyers in the state may be disciplined more easily and effectively than out-of-state lawyers when they engage in professional improprieties. By strengthening lawyers' ties to the particular communities in which they maintain their offices, jurisdictional restrictions may also help maintain an active and vibrant local bar, which in many communities serves a crucial public role, because lawyers serve voluntarily on court committees, in public office, and on boards of not-for-profit institutions in the community.

States give effect to jurisdictional restrictions through UPL statutes and proscriptions in the rules of professional conduct such as those based on ABA Model Rule 5.5. Although UPL provisions are most often applied to nonlawyers, they have also been applied to lawyers. They subject lawyers to the risk of sanction (in some states, criminal sanction) for practicing law within a state where they are not licensed. Besides being enforced directly, these provisions may be invoked in disciplinary proceedings based on disciplinary rules that prohibit lawyers from engaging in, or assisting others in, the unauthorized practice of law, in fee forfeiture actions or

¹⁴Or. Rev. Stat. sec. 9.080, subsection 2.

¹⁵See Recommendations 20 (National Discipline Data Bank) and 21 (Coordinating Interstate Identification).

other civil actions by clients against their lawyers or by opposing parties in the context of disqualification motions.¹⁶

Today, no state categorically excludes out-of-state lawyers and there is general agreement that, as a practical matter, lawyers cannot serve clients effectively unless accommodations are made for multijurisdictional law practice, at least on a temporary or occasional basis. For example, every jurisdiction permits *pro hac vice* admission of out-of-state lawyers appearing before a tribunal, although the processes and standards for *pro hac vice* admission differ.

For transactional and counseling practices, and other work outside court or agency proceedings, there is no counterpart to *pro hac vice* admission, but, as discussed below, multijurisdictional law practice is common for certain types of practitioners. The laws of two states, Michigan and Virginia, specifically authorize occasional or incidental practice by out-of-state lawyers. Michigan's UPL statute provides that it does not apply to an out-of-state lawyer who is "temporarily in [Michigan] and engaged in a particular matter."¹⁷ The Virginia rules permit an out-of-state lawyer occasionally to provide legal advice or services in Virginia "incidental to representation of a client whom the attorney represents elsewhere."¹⁸ As noted earlier, California now specifically authorizes out-of-state lawyers to represent clients in arbitrations.¹⁹ Some state courts have identified similar exceptions in judicial decisions.²⁰

Some states also accommodate certain out-of-state lawyers who seek to establish a law office in the state or to practice law in the state on a regular basis. For example, states have adopted provisions permitting in-house corporate lawyers, or lawyers employed generally by organizational clients, to provide legal services on behalf of the organization from an office located in a state where the lawyer is not licensed. Typically, the lawyer is required to register and to submit to the state's regulatory authority.²¹

¹⁶See note 22, *infra*.

¹⁷Mich. Comp. Law Ann. sec. 600.916.

¹⁸Va. State Bar Rule, Pt. 6, sec. 1(C).

¹⁹Rule 983.4, California Rules of Court. Among the California "safe harbors" is an additional one authorizing a judge advocate who is admitted in another United States jurisdiction to appear on behalf of an individual in military service.

²⁰See, e.g., *In the Matter of Opinion 33 of the Committee on the Unauthorized Practice of Law*, 733 A.2d 478 (N.J. 1999)(authorizing work by out-of-state bond lawyers).

²¹See, e.g., Fla. Ct. R. ch 17 (counsel exclusively employed by a business organization may relocate to Florida, without taking bar exam, upon annual registration with The Florida Bar, including annual fee, and sworn statement submitting to the Supreme Court of Florida for disciplinary purposes); Idaho Bar Commission Rule 220 (house counsel license available for lawyers licensed in other jurisdictions who "limit their professional activities to internal counseling and practice limited to the business of his or her employer," subject to \$640 fee, submission to Idaho disciplinary rules, and annual renewal); Kan. Sup. Ct. R. 706 (special

With respect to foreign lawyers, approximately half of the states, beginning with New York in 1974, have adopted "foreign legal consultant" provisions, which allow members of the legal professions of foreign jurisdictions to be licensed without examination to engage in the practice of law in the state on a restricted basis. In 1993, the ABA adopted a resolution recommending that all states adopt such a provision and approved a *Model Rule for the Licensing of Legal Consultants*.

The increasing prevalence of multijurisdictional practice

temporary permit granted to out-of-state lawyer receiving entire compensation from employer upon verified petition including written certification from employer); Ky. Ct. R. 2.11 (limited certificate of admission for counsel performing legal services solely for employer, subject to all obligations of admitted members of Kentucky Bar Association, upon signed statement by employer, application fee of \$1000 plus current annual dues or fees of the Kentucky Bar Association); Mich. Bd. of L. Examiners R. 5 (special certificate available for institutional lawyer licensed for 3 of 5 years preceding application; character report and payment of fees required); Minn. Ct. Admission to Bar R. 9 (temporary license limited to 12 months for in-house counsel employed solely by a single organization, available upon employer affidavit, character and fitness investigation, and fee); Mo. Sup. Ct. R. 8.105 (limited license valid for five years available for employed lawyer upon application with affidavit from employer, character and fitness report, and application fee); Ohio Gov. Bar R. VI section 4 (lawyer employed full-time by a nongovernmental Ohio employer may be granted "corporate status" upon filing a Certificate of Registration and paying fee; may be renewed biennially as long as attorney is so employed); Okla. State Bar Rule Article 2, Section 5 (special temporary permit without examination for lawyer who becomes a resident of Oklahoma in order to accept or continue full-time employment; application must include various certificates, including from employer); Oregon Admission Rule 16.05 (effective Nov. 1, 2001) (lawyer employed by business entity may apply for admission as house counsel upon application, including affidavit signed by applicant and business entity, application fees, annual and other fees required of active members of the Oregon State Bar, investigation of applicant, passing of the Professional Responsibility Examination, and submission to Oregon rules governing admitted attorneys); S.C. App. Ct. Rule 405 (limited certificate of admission to practice available for lawyer who "performs most of his duties for the business employer in South Carolina and has his principal office in South Carolina" upon application accompanied by \$100 fee and statement signed by employer; lawyer is subject to all duties and obligations of active member of the South Carolina Bar); Washington Court Rules APR 8(f) (limited license for in-house counsel available if lawyer is employed in Washington, exclusively for business entity, upon application with affidavit of employer, application fees, and current year's annual membership fee; lawyer must pass the Professional Responsibility exam, and be subject to rules governing lawyers.)

For a canvass of corporate admission rule status in all states, *see* <http://www.acca.com/v1/barad/chart.html>.

Testimony before the Commission was unanimous in recognizing that lawyers commonly engage in cross-border legal practice. Further, there was general consensus that such practice is on the increase and that this trend is not only inevitable, but necessary. The explosion of technology and the increasing complexity of legal practice have resulted in the need for lawyers to cross state borders to afford clients competent representation.

In connection with litigation, it is not uncommon for parties to retain lawyers in whom they have particular confidence, or with whom they have a prior relationship, to represent them in lawsuits in jurisdictions in which the lawyers are not licensed, and for these lawyers to be admitted *pro hac vice* to appear on behalf of the client. However, lawyers also perform work outside their home states for which they cannot obtain *pro hac vice* admission, which is not available prior to the filing of a lawsuit or to authorize work that is not related to a judicial proceeding in the particular state. For example, litigators commonly go to states other than those in which they are authorized to practice law in order to review documents, interview witnesses, enter into negotiations, and conduct other activities that are either ancillary to a lawsuit pending in a state in which they are authorized to practice or that are performed before a lawsuit is filed.

In ADR proceedings as well, it is common for lawyers to render services outside the particular states in which they are licensed. Sometimes, the parties choose to conduct the ADR proceeding in a state that has no relation to the parties or the dispute, because they prefer a neutral site. Because particular knowledge of state law and procedure is not necessary, the parties often select lawyers based on other considerations, such as the lawyers' prior knowledge of the relevant facts or a preexisting client-lawyer relationship.

Lawyers who provide legal advice or assistance in transactions also commonly provide services in states in which they are not licensed. Like litigators, transactional lawyers who are representing clients in the state in which they are licensed travel outside the state in order to conduct negotiations, gather information, provide advice, or perform other tasks relating to the representation. Lawyers also travel outside their home states in order to provide assistance to clients who are in special need of their expertise. For example, lawyers who concentrate their practice in federal law--such as securities, antitrust, labor, or intellectual property law--are often retained by clients outside their home states because of the clients' regard for their particular expertise. The same is true of foreign lawyers whose expertise in foreign law is sought, as well as of other lawyers, such as bond lawyers or mergers-and-acquisition lawyers, who practice in specialized areas.

For some lawyers, multijurisdictional practice grows out of an ongoing relationship with a client. Sometimes, the work is for a client who resides in the lawyer's home state but who has business dealings outside the state. Other times, the work is for a client who has moved out of state. A lawyer who drafts a will for a client in one state may be asked by that client to draft a codicil to the will after the client has moved to another state. For in-house lawyers in particular, ongoing work for a corporate employer commonly involves travel to the different states where the corporation has offices or business interests.

The impact of jurisdictional restrictions on legal practice

Lawyers have general understandings about how jurisdictional restrictions apply to their work in states where they are not licensed. These understandings are shaped less by the wording of the UPL provisions or by decisional law, which is sparse,²² than by conventional wisdom or by what the U.S. Supreme Court has called "the lore of the profession."²³ On one hand, lawyers understand that they may not open a permanent office in a state where they are not licensed and also that they may not appear in the court of a state where they are not licensed without judicial authorization. On the other hand, lawyers recognize that they may give advice in their own states concerning the law of other jurisdictions, that they may represent out-of-state clients in connection with transactions and litigation that take place where the lawyer is licensed, and that they may travel to other jurisdictions in connection with legal work on behalf of clients who reside in and have matters in the state where the lawyer is licensed.

Lawyers' general understandings are, to some extent, reinforced by the sporadic enforcement of state UPL laws. Regulatory actions are rarely brought against lawyers who assist clients on a temporary basis in connection with multi-state or interstate matters. This might

²²Recent decisions applying UPL restrictions include: *Z.A. v. San Bruno Park School Dist.*, 165 F.3d 1273 (9th Cir. 1998) (California UPL law held to forbid out-of-state lawyer from providing legal assistance, as distinguished from lay advice, in connection with state administrative proceeding); *In re: Desilets*, 247 B.R. 660 (Bankr., W.D. Mich. 2000) (finding that Texas attorney engaged in UPL by attempting to operate a bankruptcy practice in Michigan based on his *pro hac vice* admission to the federal courts); *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Ca. 1998) (denying portion of fee to New York law firm that represented New York and California clients in connection with California arbitration); *Koscove v. Bolte*, 30 P.3d 784 (Colo. Ct. App. 2001) (finding that Wisconsin lawyer engaged in UPL in Colorado by investigating and pursuing client's claim for royalty payments and assisting in contemplated lawsuit, prior to being admitted *pro hac vice*); *Torrey v. Leesburg Regional Medical Center*, 769 So. 2d 1040 (Fla. 2000) (finding that Michigan lawyer engaged in UPL by filing civil complaint in Florida, where other members of his firm were licensed but he was not); *Attorney Grievance Commission of Maryland v. Harris-Smith*, 737 A.2d 567 (Md. 1999) (finding that attorney admitted in three other states engaged in UPL in Maryland by practicing for three years in Maryland law firm, where she screened cases for her federal bankruptcy court practice); *In re Jackman*, 761 A.2d 1103 (N.J. 2000) (finding that lawyer admitted in Massachusetts engaged in UPL for seven years by serving as an associate in a New Jersey law firm and, in that role, working on transactional matters in which he interviewed and counseled clients, prepared and signed documents, and negotiated with other lawyers); *Office of Disciplinary Counsel v. Pavlik*, 732 N.E.2d 985 (Ohio 2000) (sanctioning Ohio lawyer for aiding and abetting UPL by Illinois lawyer whom he hired to assist his law firm's corporate clients as a business broker and financial consultant).

For a review of decisions on the application of UPL provisions to out-of-state lawyers, see William T. Barker, *Extrajudicial Practice by Lawyers*, 56 BUS. LAW. 1501 (August, 2001).

²³*In re Snyder*, 472 U.S. 634, 645 (1985).

fairly suggest that there is a profession-wide understanding that the UPL laws, however broadly they may be written and however they may be interpreted in theory, will be interpreted by courts and enforcement agencies to accommodate reasonable and conventional professional practices. Further, one might assume that, because of the sporadic nature of proceedings to enforce jurisdictional restrictions, lawyers may comfortably rely on their professional understandings and that, therefore, there is no need to reform existing laws, however inconsistent or non-specific they may be. These assumptions would be mistaken, however.

The existing system of lawyer regulation is and should be a matter of serious concern for many lawyers. Even in contexts where jurisdictional restrictions clearly apply, as in state-court proceedings, problems are caused by the lack of uniformity among the *pro hac vice* provisions of different states, unpredictability about how some of the provisions will be applied by the courts in individual cases, and, in some cases, the provisions' excessive restrictiveness. Of even greater concern, however, is that, outside the context of litigation, the reach of the jurisdictional restrictions is vastly uncertain as well as, potentially, far too restrictive. Lawyers may recognize that UPL enforcement proceedings are infrequent, and that when UPL laws are invoked, courts have the ability to interpret them realistically to accommodate the interests of clients with interstate or multi-state legal problems. Nevertheless, some lawyers will turn down clients or take other steps to avoid or reduce the risk of having to defend against UPL charges or of appearing to violate rules of professional conduct.

The existing system of lawyer regulation has costs for clients. For example, out of concern for jurisdictional restrictions, lawyers may decline to provide services that they are able to render skillfully and ethically. In doing so, they may deprive the client of a preferred lawyer including, at times, a lawyer who can serve the client more efficiently and economically than other available lawyers by drawing on knowledge gained in the course of prior work for the particular client or by drawing on expertise in the particular subject area. For example, the same considerations that may lead a corporation to prefer the services of an in-house lawyer, irrespective of where that lawyer is licensed, might lead a corporation to prefer the services of a lawyer or law firm with which it has a sustained relationship. Cautious lawyers may deny both institutional and individual clients the benefit of an ongoing client-lawyer relationship. Alternatively, lawyers may insist that the client engage local counsel or co-counsel in situations where doing so adds unnecessarily to the expense of the representation, because the out-of-state lawyer possesses all the necessary knowledge and expertise and would represent the client competently and ethically.

These costs are real, not merely hypothetical, for the clients of both transactional lawyers and litigators. Irrespective of the low risk of enforcement, lawyers and law firms take jurisdictional restrictions seriously. Further, even if lawyers felt free to ignore UPL laws in areas where there is a professional consensus that the laws are outmoded and there appears to be a tacit understanding that they will not be enforced, it is undesirable to retain the laws as written, rather than amending them to accord with contemporary understandings and practices that serve clients well. Keeping antiquated laws on the books breeds public disrespect for the law, and this is especially so where the laws relate to the conduct of lawyers, for whom there is a professional imperative to uphold the law.

Conclusion

This Report contains recommendations to amend existing rules and to adopt new rules regulating the multijurisdictional practice of law, including rules relating to lawyers' professional conduct, bar admission, lawyer discipline, *pro hac vice* admission and foreign legal consultants. Effective implementation of the new and amended rules will require coordination among various ABA entities, the judiciary and state and local bar associations. These proposals will enable lawyers to meet the emerging needs of clients consistent with the state regulatory interest in protecting clients and the public through an effective and efficient enforcement mechanism.

The American Bar Association should place the highest priority on encouraging the adoption of its policies governing the multijurisdictional practice of law. The protection of the public and the interests of the profession would be most effectively served by an affirmative effort by the Association to assist the judicial branch of government, its regulatory agencies and the organized bar in the consideration, adoption and implementation of consistent policies on multijurisdictional practice of law throughout the United States. Through the Center for Professional Responsibility and its constituent entities, the Association should evaluate the implementation and impact of its policies relating to multijurisdictional practice, coordinate the continued study of multijurisdictional practice and monitor developments in the United States and in international practice, and make such additional recommendations as appropriate to govern the multijurisdictional practice of law that serve the public interest.

On behalf of the Commission, I would like to take this opportunity to thank ABA Presidents Martha W. Barnett and Robert E. Hirshon for their leadership in providing us the opportunity to address these complicated issues; our Reporter Bruce A. Green for his steadfast commitment to the many drafts and redrafts inherent in this process; Commission Counsel John A. Holtaway for his thorough commitment and good counsel throughout; Dean Burnele V. Powell and Jeanne P. Gray of the ABA Center for Professional Responsibility for their support; and to the many ABA Staff who assisted us with their dedicated efforts.

Nearly two years ago, we embarked on a mission to study and report on the myriad issues concerning the multijurisdictional practice of law. We fully appreciated the inherent difficulty of attempting to reconcile the common threads and values of our various jurisdictions which have developed over two hundred and twenty-five years of history, with the sea of changes brought to our society and profession in a world of continually evolving technological change. Our process was always open. From the outset, we sought the contributions and comments from all segments of our profession, held hearings and open roundtable discussions over a period of sixteen months both before and after the issuance of our November 2001 Interim Report, and participated in many programs, teleconferences, and other communications on our study. As a result, over seventy entities provided testimony to us, ranging from city and state bar associations to ABA sections, ABA affiliated organizations, foreign bar associations and other concerned entities.

We asked for the broadest possible range of input. We are gratified to have received it. In response to the many comments and additional testimony we received following the issuance of our Interim Report, we incorporated a variety of substantive changes into our final Report and recommendations.

We came as Commissioners and Liaisons from different substantive areas and styles of practices—from solo practices, small, medium and large firms, law schools, corporate law departments, and the Supreme Court of Indiana; and from different and diversified bar experiences, with many Commissioners having significant involvement with state bar associations, ABA sections and committees, and various affiliated organizations such as the American Corporate Counsel Association, the National Organization of Bar Counsel, and the Association of Professional Responsibility Lawyers. The debates were vigorous, the viewpoints varied. From the cauldron of debate was ultimately forged a broad consensus and respect for each other, for the process we had engaged in, and for the Report and recommendations we have proposed. It has been said that life is a series of compromises. In this sense, it was more a thoroughly considered evolution of ideas being shaped with due regard to tradition, the interests of the public, our clients, our system of justice, the divergences in legal practice, and the realities of modern life, all of which form the dynamic environment in which our profession must exist.

As lawyers, it is essential that our ethical and professional rules and guidelines reflect the core values of our profession and the system of justice, and that they serve the public interest as it exists today. Our work was accomplished with a genuine spirit of collegiality, respect for the views and practical problems of the practitioners in areas other than our own; unfailing commitment to the public interest and the common good, and always with an eye to preserving the core values of our great system of justice. It has been an honor to serve with my colleagues, all of whom devoted countless hours of hard work, good will, commitment, and levity to our work. It is my sincere hope that our work will be of benefit to the legal profession, the American public, and our system of justice, and will serve as a guiding beacon as we move forward into the realities of a century of dynamic change.

Respectfully submitted,

Wayne J. Positan, Chair
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