Lawyers in the United States and Canada are generally licensed to practice by political subdivisions ("jurisdictions"), generally states or provinces. Such licensure furthers the ability of the highest court in a jurisdiction to exercise control over, and administer, the practice of within that jurisdiction. One justification for this local regulation is that it ensures that lawyers practicing in a particular jurisdiction are familiar with the laws of that jurisdiction. Regrettably, many clients and legal matters tend not to respect jurisdictional boundaries. Multi-state or multi-national business dealings or litigation dealing with issues in one or more jurisdiction. Further, the idea that lawyers licensed in a jurisdiction maintain competence in all aspects of the jurisdiction’s jurisprudence is an anachronistic concept dating back to the time when a lawyer might be called upon to handle anything from a capital criminal defense to a complex business transaction. Most lawyers now tend to limit their practice to more focused areas of law so that business lawyer is likely to be more familiar with the business law of Delaware than the workers compensation laws of her or his home jurisdiction.

Practice of law by a lawyer licensed in one jurisdiction (the "home jurisdiction") in another jurisdiction (the "host jurisdiction") in which the lawyer is not licensed ("multijurisdictional practice" or "MJP") may constitute unauthorized practice of law under the rules of the host jurisdiction and violation of home jurisdiction’s equivalent of...
Model Rule 5.5. (Unauthorized Practice of Law; Multijurisdictional Practice of Law). These strictures in some respects are intended to protect clients but may have the effect, if not the intent, to protect host state lawyers from competition.

Over the past two decades, in the United States both the Model Rules of Professional Conduct and state rules governing unauthorized practice of law have been reviewed and relaxed to take into account several circumstances in which a home state lawyer is practicing in a host state including, in-house (or single-client) representation, pro hac vice practice, licensing of foreign legal consultants, military lawyers and their spouses, temporary practice, pro bono practice in the host state by home state lawyers, practice while awaiting admission on motion, practicing in non and others. In each of these cases, the states have needed to develop rules either admitting the home state lawyers to practice, declaring particular activities not to be the unauthorized practice of law, or providing special limited licenses to practice under certain conditions. Attendant to these rules, states have had to consider the application of rules such requirements with respect to continuing legal education, location for maintenance of trust accounts, participation in pro bono activities.

In Canada, on October 17, 2013 the law societies of the provinces other than the three remote northern territories entered into a National Mobility Agreement adopted authorizing temporary practice in host provinces by lawyers in good standing in their home provinces. Temporary practice generally entails practice for up to 100 days per year. Under some circumstances the temporary practice may be extended.

This panel will discuss the history of the legal and ethical restraints on multijurisdictional practice of law across state and provincial boundaries and across
national borders, the current treatment of MJP in the United States and Canada – including some of the current issues in balancing the interests of the host jurisdictions and those of the lawyer and client, and some speculation as to how MJP may develop in the future, based upon current anecdotal experiences. It will focus on some of the issues applicable to temporary practice and “in-house” or “single-client” practice and will consider other special rules and temporary practice.

Materials

Model Rule 5.5 and Comment.
Model Rule 8.5 and Comment.
House of Delegates Resolution 103 February 8, 2016 including current Rule 5.5, Model Registration of In-House Counsel, and The Regulation of Foreign Lawyers, and in Particular, Foreign In-House Counsel, in the U.S.: Proposals for a Better and More Comprehensive Framework
The National Mobility Agreement of 2013
RESOLVED, That the American Bar Association amends the black letter of Rule 5.5 of the ABA Model Rules of Professional Conduct as follows:

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign
jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d),

(i) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority, or,

(ii) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

FURTHER RESOLVED, That the American Bar Association amends the ABA Model Rule for Registration of In-House Counsel and the Commentary, dated February 2016.

Model Rule for Registration of In-House Counsel

GENERAL PROVISIONS:
A. A lawyer who is admitted to the practice of law in another United States jurisdiction or is a foreign lawyer, who is employed as a lawyer and has a continuous presence in this jurisdiction by an organization, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services, and who has a systematic and continuous presence in this jurisdiction as permitted pursuant to Rule 5.5(d)(1) of the Model Rules of Professional Conduct, shall register as in-house counsel within [180 days] of the commencement of employment as a lawyer or if currently so employed then within [180 days] of the effective date of this Rule, by submitting to the [registration authority] the following:

1) A completed application in the form prescribed by the [registration authority];
2) A fee in the amount determined by the [registration authority];
3) Documents proving admission to practice law and current good standing in all jurisdictions, U.S. and foreign, in which the lawyer is admitted to practice law.
4) If the jurisdiction is foreign and the documents are not in English, the
lawyer shall submit an English translation and satisfactory proof of the accuracy of the translation; and

5) An affidavit from an officer, director, or general counsel of the employing entity attesting to the lawyer’s employment by the entity and the capacity in which the lawyer is so employed, and stating that the employment conforms to the requirements of this Rule.

For purposes of this Rule, a “foreign lawyer” is a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority. For purposes of this Rule, the [state’s highest court of appellate jurisdiction] may, in its discretion, allow a lawyer lawfully practicing as in-house counsel in a foreign jurisdiction who does not meet the above requirements to register as an in-house counsel after consideration of other criteria, including the lawyer’s legal education, references, and experience.

SCOPE OF AUTHORITY OF REGISTERED LAWYER:

B. A lawyer registered under this Rule shall have the rights and privileges otherwise applicable to members of the bar of this jurisdiction with the following restrictions:

1. The registered lawyer is authorized to provide legal services to the entity client or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer, and for employees, officers and directors of such entities, but only on matters directly related to their work for the entity and only to the extent consistent with Rule 1.7 of the Model Rules of Professional Conduct [or jurisdictional equivalent];

2. The registered lawyer shall not:
   a. Except as otherwise permitted by the rules of this jurisdiction, appear before a court or any other tribunal as defined in Rule 1.0(m) of the Model Rules of Professional Conduct [or jurisdictional equivalent]; or
   b. Offer or provide legal services or advice to any person other than as described in paragraph B.1., or hold himself or herself out as being authorized to practice law in this jurisdiction other than as described in paragraph B.1; and
   c. If a foreign lawyer, provide advice on the law of this or another jurisdiction of the United States except on the basis of advice from a lawyer who is duly licensed and authorized to provide such advice.

PRO BONO PRACTICE:

C. Notwithstanding the provisions of paragraph B above, a lawyer registered under this Rule is authorized to provide pro bono legal services through an established not-for-profit bar association, pro bono program or legal services program or through such 60 organization(s) specifically authorized in this jurisdiction.
OBLIGATIONS:

D. A lawyer registered under this Rule shall:
   1. Pay an annual fee in the amount of $_____________; 
   2. Pay any annual client protection fund assessment;
   3. Fulfill the continuing legal education requirements that are required of active members of the bar in this jurisdiction;
   4. Report within [___] days to the jurisdiction the following:
      a. Termination of the lawyer’s employment as described in paragraph A.5)4.;
      b. Whether or not public, any change in the lawyer’s license status in another jurisdiction, whether U.S. or foreign, including by the lawyer's resignation;
      c. Whether or not public, any disciplinary charge, finding, or sanction concerning the lawyer by any disciplinary authority, court, or other tribunal in any jurisdiction, U.S. or foreign.

LOCAL DISCIPLINE:

E. A registered lawyer under this Rule shall be subject to the [jurisdiction’s Rules of Professional Conduct], [jurisdiction’s Rules of Lawyer Disciplinary Enforcement], and all other laws and rules governing lawyers admitted to the active practice of law in this jurisdiction. The [jurisdiction’s disciplinary counsel] has and shall retain jurisdiction over the registered lawyer with respect to the conduct of the lawyer in this or another jurisdiction to the same extent as it has over lawyers generally admitted in this jurisdiction.

AUTOMATIC TERMINATION:

F. A registered lawyer’s rights and privileges under this Rule automatically terminate when:
   1. The lawyer’s employment terminates;
   2. The lawyer is suspended or disbarred or the equivalent thereof in any jurisdiction or any court or agency before which the lawyer is admitted, U.S. or foreign; or
   3. The lawyer fails to maintain active status in at least one jurisdiction, U.S. or foreign.

REINSTATEMENT:

G. A registered lawyer whose registration is terminated under paragraph F.1. above, may be reinstated within [___] months of termination upon submission to the [registration authority] of the following:
   1. An application for reinstatement in a form prescribed by the [registration authority];
   2. A reinstatement fee in the amount of $_____________; 
   3. An affidavit from the current employing entity as prescribed in paragraph A.5)4.
SANCTIONS:

H. A lawyer under this Rule who fails to register shall be:
   1. Subject to professional discipline in this jurisdiction;
   2. Ineligible for admission on motion in this jurisdiction;
   3. Referred by the [registration authority] to this [jurisdiction’s bar admissions authority]; and
   4. Referred by the [registration authority] to the disciplinary authority or to any duly constituted organization overseeing the lawyer’s profession, or that granted authority to practice law in the jurisdictions of licensure, U.S. and/or foreign.

Comment

[1] Paragraph A of this Rule provides that the [state’s highest court of appellate jurisdiction] may, in its discretion, allow someone who does not meet the Rule’s other definitional requirements of a foreign lawyer, but who is lawfully practicing as in-house counsel in their home foreign jurisdiction, to register. The exercise of such discretion by the court may be necessary, because some foreign jurisdictions may not permit otherwise qualified in-house counsel to be members of or admitted to the bar. Lawyers in such foreign jurisdictions who are employed as in-house counsel may be required to relinquish any bar membership or admission while so employed or they may never have obtained such admission or membership status.

[2] Paragraph F of this Rule sets forth three circumstances that result in automatic termination of in-house counsel’s registrations status. In situations where a court has exercised its discretion pursuant to Paragraph A of this Rule, a registered foreign in-house counsel lacking bar admission or licensure in that individual’s home country cannot “fail to maintain active status” as set forth in Paragraph F(3). There is no active status in existence. Absent the circumstances set forth in Paragraph F(2), the triggering event to terminate registration status of such foreign in-house counsel would be the termination of employment of that individual by the employer as set forth in Paragraph F(1).
REPORT

The Regulation of Foreign Lawyers, and in Particular Foreign In-House Counsel, in the U.S.: Proposals for a Better and More Comprehensive Framework

I. Introduction

Several ABA Model Rules address the licensing of or authorization for practice by foreign lawyers in the U.S. These ABA policies are conditioned on those lawyers being able to certify that they are a “member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.” As such, the ABA policies dealing with foreign in-house counsel de facto exclude over 70% of foreign lawyers, particularly lawyers from civil law jurisdictions, who are either not required or not even legally allowed to be members of the bar when practicing as in-house counsel. For example, a lawyer admitted to the practice of law in France, upon going in-house, has to surrender her bar admission status, and consequently, does not fall under the current ABA definition of foreign lawyer. As a result, U.S. corporations are constrained in their hiring of legal talent from the majority of countries around the world, and foreign-based companies are equally constrained from seconding foreign lawyers from such countries to work in the U.S. Because these in-house lawyers do not meet the requirements for being authorized to practice as and being registered as foreign in-house lawyers in the U.S., the state supreme courts cannot effectively regulate them and U.S. client employers cannot rely on the protection of the attorney-client privilege for the legal advice they receive from these employed lawyers.

II. Abstract

The ABA has had a long-standing practice of recognizing the importance and value associated with the practice of foreign law and allowing foreign legal practitioners to engage in practice, on a limited basis, in the U.S. Indeed, as early as 1993, the ABA House of Delegates approved the adoption of the Model Rule for the Licensing of Legal Consultants (currently the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants) to support the work of foreign lawyers in this country. As of October 6, 2015, 32 states and the District of Columbia had adopted a rule authorizing and regulating the practice of foreign legal consultants.\(^1\)

\(^1\) The ABA Model Rule for Temporary Practice by Foreign Lawyers, Rule 5.5(d) of the ABA Model Rules of Professional Conduct, the ABA Model Rule for Registration of In-House Counsel, the ABA Model Rule on Pro Hac Vice Admission, and the ABA Model Rule for the Licensing and Practice of Foreign Legal Consultants can be viewed at \url{http://www.americanbar.org/groups/professional_responsibility/policy.html}.

\(^2\) \textit{Id.}
Between August 2012 and February 2013, following a three and one-half year study of how globalization and technology are transforming the practice of law and how the regulation of lawyers, including foreign lawyers, should be updated in light of those developments, the ABA Commission on Ethics 20/20 submitted ten Resolutions for adoption by the House of Delegates.

Specifically regarding foreign lawyers, the Commission examined the practice authority of foreign-trained lawyers in the U.S. who are asked to advise clients on foreign or international law issues. As the Commission noted in its report, "one important practical effect of globalization is that clients regularly expect lawyers in firms of all sizes to handle matters that involve multiple jurisdictions, domestic and international." The Commission further recognized that "clients are encountering an increasing number of legal issues and problems that implicate foreign or international law and for which the assistance of foreign lawyers can be valuable."

The Commission went on to propose three related Resolutions that, with appropriate client protections, would allow clients to utilize the expertise of foreign counsel. One Resolution proposed to add foreign lawyers to the ABA Model Rule on Pro Hac Vice Admission so as to provide authorization for them to appear pro hac vice (subject to a number of limitations). A second Resolution sought to add authorization for foreign lawyers to serve as in-house counsel from a continuous and systematic presence in the U.S. via amendments to Model Rule of Professional Conduct 5.5, and a third Resolution sought companion amendments to the ABA Model Rule for the Registration of In-House Counsel. The House of Delegates adopted all of these Resolutions, which were developed with the goal of responding to the increasing number of foreign companies with substantial operations and offices in the U.S., as well as U.S. companies with substantial operations abroad, which often find that the foreign legal advice they want of lawyers from non-U.S. jurisdictions can be offered more efficiently and effectively if those lawyers relocate to a corporate office in the U.S.

In urging adoption of these Resolutions, the Ethics 20/20 Commission noted that foreign lawyers (including foreign legal consultants) are already engaged as in-house counsel within the U.S., but are subject to little oversight. Accordingly, the Commission concluded that adding foreign lawyers to both Model Rule 5.5 (to authorize foreign lawyers to serve as in-house counsel from a continuous and systematic presence in the U.S.) and the Model Rule for the Registration of In-House Counsel would achieve the benefit of ensuring that those lawyers are identifiable, subject to monitoring, and accountable for their conduct. These Resolutions were also aimed at ensuring that the foreign lawyers are subject to the professional conduct rules of the jurisdiction where they are employed, contribute to the client protection fund, are subject to sanctions if they

---

4 ABA Commission on Ethics 20/20 Introduction and Overview in Report to ABA House of Delegates, February 2013, p.5.
fail to register or do not comply with the professional conduct rules, and comply with continuing legal education requirements.

All these Resolutions have one element in common: they utilize the definition of foreign lawyer as used in longstanding ABA policy, including the ABA Model Rule for the Licensing and Practice by Foreign Legal Consultants, which a number of state supreme courts have adopted. Under such definition, a foreign lawyer is "a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority." However, this definition does not account for the unique way in which foreign lawyers are permitted to practice in-house in most foreign countries. Thus, the goal of regulating these foreign lawyers as authorized U.S. in-house lawyers is not being maximized because in many of these in-house foreign lawyers do not meet the criteria under the current rules. A recent informal survey conducted by the Litigation Committee of the ABA Section of International Law of 70 jurisdictions across the world, from Europe to Asia to Africa and the Americas, shows that, in many countries, in-house counsel are not admitted to practice (or admitted to the bar) as we traditionally view practice licensure in the U.S., and therefore they are not subject to regulation and discipline by a professional body or a public authority in the way that their U.S. counterparts are. At the same time, many of these jurisdictions impose comparable, if not more stringent, educational requirements than those required in the U.S. for lawyers to be authorized to practice, whether in-house or in private practice. As a result, there is a need to address, in the current versions of Model Rule 5.5 and the Model Rule for Registration of In-House Counsel, this discreet but very real issue that is unique to foreign in-house counsel and their clients.

Model Rule 5.5 (d) is where the limited practice authority for in-house counsel (foreign and domestic) who have a systematic and continuous presence in the U.S. office of their employer is provided. As noted in Comment [17] to Model Rule 5.5, such in-house counsel may also be subject to registration requirements. Not all jurisdictions that have adopted the provisions of Model Rule 5.5(d), however, require registration as provided for in the Model Rule for Registration of In-House Counsel. Further, the registration requirements set forth in the Model Rule for Registration of In-House Counsel are intended to apply to those situations where in-house counsel is practicing via a systematic and continuous presence in the jurisdiction, not a temporary (fly-in-fly-out) presence.

---

5 See: http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201h.authcheckdam.pdf. That same definition is adopted for the licensing of Foreign Legal Consultants in New York. In support of his application as a foreign lawyer, the candidate must, under both the ABA Rule and the NY State Rule, produce certain evidence of his or her status as a foreign lawyer, in the form of "a certificate from the professional body or public authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as such attorney or counselor at law or the equivalent." See: https://www.law.northwestern.edu/career/llm/documents/NY_FLC_rules.pdf.

This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered. These courts possess the inherent authority to regulate the practice of law and the legal profession, as long recognized by the ABA, and such an exercise of discretion would be within their purview. The proposed amendments would not only bring these foreign lawyers under the regulatory umbrella, but they also would offer better protection for the advice provided by these foreign lawyers to U.S.-based clients and, thus, to clients relying on such advice. One of the cornerstones is the protection afforded to their communications by the attorney-client privilege. This protection is engrained in the status of an attorney, whether such attorney practices in private practice or in-house, or whether such attorney has obtained all licensing requirements. This privilege belongs to the client and protects his communications with his attorneys in connection with the giving of legal advice. It is important to allow these foreign lawyers to become authorized U.S. lawyers so that there is no question that the privilege applies.

III. The Intrinsic Limitations of the ABA Definition of Foreign Lawyer With Regard to Foreign In-House Counsel

A. In-House Counsel and the Fluctuating Concept of "Admission to Practice"

As noted above, the definition of a foreign lawyer provides that the individual must be:

"a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority".7

In a number of foreign countries, unlike the U.S. model, the legal profession is not unified. Different professions of the law cohabitate and there is not a one-way path to becoming a lawyer. A number of countries do not allow members of the bar to practice in-house and remain members of the bar during that time, while a large majority of in-house legal practitioners started their career in-house and never took a bar exam or engaged in law firm practice. As such, they never went through the process of a formal admission after taking a bar exam, the way it is typically done in the U.S., and yet they are all considered lawyers in these foreign jurisdictions. These lawyers derive their authority to practice law as lawyers not from bar admission, or bar membership, but from the law directly. The survey that was compiled in support of this Resolution shows that the requirement that a foreign lawyer be admitted as such to practice, and produce a certificate of good standing in the bar from his country of origin as a condition to being eligible to practice and be registered as a foreign in-house lawyer in the U.S., would de facto exclude approximately 70% of foreign lawyers, mostly from civil law jurisdictions, from the benefit of such protection and regulation.

7 Supra note 1.
B. Regulation and Discipline of Foreign In-House Lawyers

Under the ABA definition, a foreign lawyer must also be subject to effective regulation and discipline by a duly constituted professional body or a public authority.

Because in many foreign countries in-house lawyers are not members of the bar in the same way they are in the U.S., they are not subject to regulation and discipline in the same way either. In countries where the profession of lawyer is unified, such as the UK and most common law jurisdictions, all lawyers, whether employed in private practice or in-house, are members of a single body and subject to regulation and discipline. In others, such as France, Italy or Sweden, only lawyers in private practice are members of the bar. Lawyers employed in-house would typically be members of a national association of in-house lawyers, such as AFJE in France, or another foreign equivalent, which has restrictive conditions for admitting members and recognizing the legal status of an in-house legal practitioner, as well as a code of ethics by which lawyers must abide. They often do not, however, have the authority to regulate or discipline these lawyers. Neither does the national bar organization, if such organization, as in France, does not have the statutory authority to regulate lawyers other than those employed in private practice. And yet, the legal status of all these lawyers, whether they work in private practice or in-house, is recognized by the law of the foreign country, and so is their ability to give legal advice and draft legal documents.

In its current drafting, the ABA definition of foreign lawyer, which links the status of a lawyer to his or her regulation or discipline by a duly constituted professional body, as is the case in the U.S., is again too restrictive with regard to the unique position of foreign in-house counsel, and fails to account for the fact that the vast majority of foreign in-house practitioners are not regulated or disciplined as such by a duly established organization such as the bar, even though they are subject to a number of duties and laws, such as the duty to maintain confidentiality, by virtue of their status as lawyers. If these lawyers, who cannot be members of the bar, were to breach those duties, they could be subject to prosecution and sanctions. These sanctions, however, would be imposed by the courts, not a bar, and come directly from the law, not from a duly established professional body. The strict interpretation of the ABA definition would exclude de facto all lawyers who are currently employed as in-house attorneys in most foreign countries, who are most likely to apply for authorization to practice as foreign in-house lawyers in the U.S.

C. The Proposed Amendments to Model Rule of Professional Conduct 5.5 and to the Model Rule for Registration of In-House Counsel

For the reasons set forth above, the Section of International Law recommends that Model Rule 5.5 and the Model Rule for Registration of In-House Counsel be amended as follows:

Model Rule 5.5(e):
For purposes of paragraph (d) only, the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and the foreign lawyer or foreign in-house counsel must be subject to effective regulation and discipline by a duly constituted professional body or a public authority, or, in its discretion, are otherwise authorized by [this highest court of appellate jurisdiction] to practice in this jurisdiction as an in-house counsel.

Model Rule For the Registration of In-House Counsel (at the end of Paragraph A):

For purposes of this Rule, a “foreign lawyer” is a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority. For purposes of this Rule only, the [state’s highest court of appellate jurisdiction] may, in its discretion, allow a lawyer lawfully practicing as in-house counsel in a foreign jurisdiction who does not meet the above requirements to register as an in-house counsel after consideration of other criteria, including the lawyer’s legal education, references, and experience.

In particular, where the lawyer is not, in the foreign jurisdiction, allowed to be or remain (as applicable) a member of the bar while practicing in-house, the court, in looking to the legal education, references and experiences of the applicant for registration status, may consider the following criteria in determining whether to grant the request:

(a) The legal education (i.e. foreign equivalent of a U.S. JD degree) of the individual;
(b) The professional experience of the individual, including the number of years that the individual has worked as in-house counsel;
(c) The individual’s passing of the foreign jurisdiction's bar examination;
(d) The individual's prior admission to the foreign bar, or other duly constituted authority;
(e) The individual’s disciplinary record (including prosecution or sanctions as described above), if any, while admitted to the foreign bar or during the course of the individual’s employment as in-house counsel;
(f) The individual’s eligibility to join or rejoin the foreign bar upon ceasing to be employed in-house; and
(g) The individual's understanding of the Model Rules of Professional Conduct.

To further explain why the language regarding the courts’ discretion is being added to enhance clarity for those seeking practice authorization under the Registration Rule or for those seeking to enforce it, the Section proposes a new Comment [1]. That new Comment states:
[1] Paragraph A of this Rule provides that the [state’s highest court of appellate jurisdiction] may, in its discretion, allow someone who does not meet the Rule’s other definitional requirements of a foreign lawyer, but who is lawfully practicing as in-house counsel in their home foreign jurisdiction, to register. The exercise of such discretion by the court may be necessary, because some foreign jurisdictions may not permit otherwise qualified in-house counsel to be members of or admitted to the bar. Lawyers in such foreign jurisdictions who are employed as in-house counsel may be required to relinquish any bar membership or admission while so employed or they may never have obtained such admission or membership status.

In addition, the Section proposes amending Section F of the Model Rule for Registration of In-House Counsel that addresses when registration status automatically terminates. The Section proposes that paragraph F(2) read as follows to ensure consistency with Model Rule 5.5(d):

F. The registered lawyer’s rights and privileges under this Rule automatically terminate when:
   1. The lawyer’s employment terminates;
   2. The lawyer is suspended or disbarred or the equivalent thereof in any jurisdiction; or
   3. The lawyer fails to maintain active status in at least one jurisdiction, U.S. or foreign.

To further clarify when the registration status would automatically terminate for in-house counsel granted registration status pursuant to the court’s discretion, the Section proposes new Comment [2], which states:

[2] Paragraph F of this Rule sets forth three circumstances that result in automatic termination of in-house counsel’s registrations status. In situations where a court has exercised its discretion pursuant to Paragraph A of this Rule, a registered foreign in-house counsel lacking bar admission or licensure in that individual’s home country cannot “fail to maintain active status” as set forth in Paragraph F(3). There is no active status in existence. Absent the circumstances set forth in Paragraph F(2), the triggering event to terminate registration status of such foreign in-house counsel would be the termination of employment of that individual by the employer as set forth in Paragraph F(1).

D. The Proposed Amendments Also Afford Better Protection of the Attorney-Client Privilege

Amending the current model rules on the authorization and registration of foreign in-house lawyers in the U.S. also would offer better protection to the advice provided by these foreign lawyers to their U.S.-based clients.
One of the cornerstones of the licensing of lawyers in the U.S. is the protection afforded to their communications by the attorney-client privilege. This protection is engrained in the status of an attorney, whether such attorney practices in private practice or in-house. Such privilege equally should extend to the advice given by foreign in-house lawyers in the U.S. so that U.S.-based clients relying on such advice can confidently seek out such advice without fear of their communications with those foreign lawyers being subject to disclosure.8

Such a privilege, with some variations in the scope and degree of protection, also attaches to the communication of foreign lawyers with their clients in their home jurisdiction. However, longstanding case law, in Europe in particular, has questioned such privilege attaching to legal advice given by in-house lawyers, the argument being advanced by the European Court of Justice being that in-house counsel, by virtue of their employment relationship and exclusive affiliation to one client only, i.e. their employer, lacks the independence that would otherwise be expected of lawyers giving advice to a number of clients on a non-exclusive basis. There are a number of political calls at the national and EU level to put an end to this situation, which severely undermines both the authority of in-house counsel and the protection of clients relying on such advice in Europe. This also poses a number of very practical risks for U.S. lawyers, particularly U.S.-based in-house counsel involved in communications with EU-based in-house counsel, including the risk U.S. lawyers take that their communications will be subject to an order of disclosure by a court of law in the EU, without the ability of these lawyers to successfully claim the protection of the attorney-client privilege before such court. Likewise, a U.S. in-house counsel who provides legal advice to an EU-based client or in-house colleague, knowing that such legal advice may not be subject to the attorney-client privilege in the EU, may not be able to claim the protection of the U.S. attorney-client privilege.

The issue of the lack of privilege for in-house counsel communications in the EU is not an issue that is linked to the lawyer’s regulated status in countries where in-house lawyers are also members of a bar. It is an issue that is linked to their employment status. Therefore, when foreign in-house lawyers come to the U.S. to practice and start giving legal advice to U.S-based clients, it may very well be argued in case of an EU dispute that these foreign lawyers’ legal advice may not be subject to the attorney-client privilege in the EU, and may be ordered to be disclosed.

---

8 This is not to suggest that in every jurisdiction a lawyer must be licensed in order for the privilege to apply. The Standard Rule of the Federal Rule of Evidence defines a “lawyer” as a person licensed to practice law in any state or nation. Moreover the privilege extends not only to lawyers but to confidential communications with persons reasonably believed by the client to be authorized to practice law in any state or nation. Standard 503(a)(2). Many states, including Florida, California, Arkansas, Oregon, Idaho, Delaware, and Texas have adopted this rule. For instance, Florida Statute (“Fla. Stat.”) 90.502 expressly regulates the lawyer-client privilege: “(1) For purposes of this section:

(a) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.

(…) This subsection does not affect the qualification and admission of lawyers to practice in Florida, which is regulated and administered by the Florida Bar.” Notably, the adoption of this rule is not universal across the U.S. Thus, it is suggested that the Model Rules be amended to broaden the categories of foreign lawyers who may serve as in-house counsel so that there is no issue that the lawyer participating in the communication is a lawyer for purposes of determining the application of the privilege.
Conversely, if some of the obligations those lawyers derive from being licensed and registered as in-house lawyers in the U.S. are that they: are subject to the professional conduct rules of the jurisdiction where they are employed, contribute to the client protection fund, are subject to sanctions if they fail to register or do not comply with the professional conduct rules, and comply with continuing legal education requirements, one could also argue that one of the key benefits a registered and properly licensed foreign in-house lawyer would gain from such status is the ability for their client to claim the benefit afforded to their foreign in-house lawyer's legal advice by the U.S. rules on the attorney-client privilege.

IV. Conclusion

For the reasons highlighted in this Report, it is recommended that Model Rule 5.5 and the ABA Model Rule for the Registration of In-House Counsel be amended to include the discretion of a court of highest appellate jurisdiction to license to practice in the U.S. a foreign in-house lawyer, who otherwise, due to his or her country’s rules, would not fall under the current definition of foreign lawyer. Allowing such discretion will ensure not only that such competent and trained foreign in-house lawyers are legally able and, as a result, encouraged to seek registration in the U.S., but also that U.S.-based clients would effectively receive the full benefit of these regulations and the freedom to choose the foreign in-house lawyer who best fits their needs, including better protection of the attorney-client privilege.

Respectfully Submitted,

Lisa J. Savitt
Chair, ABA Section of International Law

February 2016
1. **Summary of Resolution(s).**
Under Model Rule 5.5 (d), a foreign lawyer is "a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority." However, this definition does not account for the unique way in which foreign lawyers are permitted to practice in-house in most foreign countries. This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered. These courts possess the inherent authority to regulate the practice of law and the legal profession, as long recognized by the ABA, and such an exercise of discretion would be within their purview. The proposed amendments would not only bring these foreign lawyers under the regulatory umbrella, but they also would offer better protection for the advice provided by these foreign lawyers to U.S.-based clients and, thus, to clients relying on such advice. One of the cornerstones is the protection afforded to their communications by the attorney-client privilege.

2. **Approval by Submitting Entity.**
The Council of the Section of International Law approved this recommendation and resolution at its Meeting on October 20, 2015.

3. **Has this or a similar resolution been submitted to the House or Board previously?**
No.

4. **What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?**
Several ABA Model Rules address the licensing of or authorization for practice by foreign lawyers in the U.S. These ABA policies are conditioned on those lawyers being able to certify that they are a “member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.” As such, the ABA policies dealing with foreign in-house counsel de facto exclude over 70% of foreign lawyers, particularly lawyers from civil law jurisdictions, who are either not required or not even legally allowed to be members of the bar when practicing as in-house counsel. In particular, this Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its
discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered. The court, looking to the legal education, references and experiences of the applicant for registration status, may consider the several criteria in determining whether to grant the request. Thus, the Section proposes to add a new Comment specifying that grant of discretion to the courts is necessary because some foreign jurisdictions may not permit otherwise qualified in-house counsel to be members of or admitted to the bar. In addition, the Section proposes amending Section F of the Model Rule for Registration of In-House Counsel that addresses when registration status automatically terminates. To further clarify when the registration status would automatically terminate for in-house counsel granted registration status pursuant to the court’s discretion, the Section proposes new Comment setting forth three circumstances that result in automatic termination of in-house counsel’s registrations status. Amending the current model rules on the authorization and registration of foreign in-house lawyers in the U.S. also would offer better protection to the advice provided by these foreign lawyers to their U.S.-based clients.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?
N/A.

6. Status of Legislation. (If applicable)
N/A.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.
If this recommendation and resolution are approved by the House of Delegates, Model Rule 5.5 and the ABA Model Rule for the Registration of In-House Counsel will include the discretion of a court of highest appellate jurisdiction to license to practice in the U.S. a foreign in-house lawyer, who otherwise, due to his or her country’s rules, would not fall under the current definition of foreign lawyer. Allowing such discretion will ensure not only that such competent and trained foreign in-house lawyers are legally able and, as a result, encouraged to seek registration in the U.S., but also that U.S.-based clients would effectively receive the full benefit of these regulations and the freedom to choose the foreign in-house lawyer who best fits their needs, including better protection of the attorney-client privilege.

8. Cost to the Association. (Both direct and indirect costs)
N/A.

9. Disclosure of Interest. (If applicable)
N/A.
10. **Referrals.**

This Resolution and Report was developed by a joint working group comprised of representatives from the following entities: Task Force on International Trade in Legal Services (ITILS); Standing Committee on Professional Discipline; Standing Committee on Ethics and Professional Responsibility; Business Law Section; Litigation Section; National Organization of Bar Counsel; Tort Trial and Insurance Practice Section, Judicial Division; and the Section of Legal Education and Admissions to the Bar. The Standing Committee on Professional Discipline, the Standing Committee on Ethics and Professional Responsibility, and ITILS agreed to co-sponsor in time for the filing deadline.

Further referrals are being undertaken to the following entities: Litigation Section, Business Law Section, National Organization of Bar Counsel, Tort Trial and Insurance Practice Section, Judicial Division, Section of Legal Education and Admissions to the Bar.

11. **Contact Name and Address Information.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Steven M. Richman  
CLARK HILL PLC  
502 Carnegie Center Suite 103  
Princeton, NJ 08540  
609.785.2900 (main)  
609.785.2911 (direct)  
E-mail: SRichman@clarkhill.com

Glenn P. Hendrix  
Arnall Golden Gregory LLP  
Suite 2100  
171 17th Street, N.W.  
Atlanta, GA 30363  
Phone: 404/873-8692  
E-Mail: glenn.hendrix@agg.com

12. **Contact Name and Address Information.** (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

Steven M. Richman  
CLARK HILL PLC  
502 Carnegie Center Suite 103  
Princeton, NJ 08540  
609.785.2900 (main)  
609.785.2911 (direct)  
E-mail: SRichman@clarkhill.com
EXECUTIVE SUMMARY

1. **Summary of the Resolution**
   This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered.

2. **Summary of the Issue that the Resolution Addresses**
   Under Model Rule 5.5 (d), a foreign lawyer is "a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority." However, this definition does not account for the unique way in which foreign lawyers are permitted to practice in-house in most foreign countries. This Report supports amending ABA Model Rule 5.5 and the ABA Model Rule for Registration of In-House Counsel to include language specifying that the court of highest appellate jurisdiction may, in its discretion, allow foreign in-house lawyers who do not meet the ABA definition of foreign lawyer because they cannot be “members of the bar” to be able to practice as in-house counsel in the U.S. and to be so registered. These courts possess the inherent authority to regulate the practice of law and the legal profession, as long recognized by the ABA, and such an exercise of discretion would be within their purview. The proposed amendments would not only bring these foreign lawyers under the regulatory umbrella, but they also would offer better protection for the advice provided by these foreign lawyers to U.S.-based clients and, thus, to clients relying on such advice. One of the cornerstones is the protection afforded to their communications by the attorney-client privilege.

3. **Please Explain How the Proposed Policy Position will address the issue**
   With the proposed resolution, Model Rule 5.5 and the ABA Model Rule for the Registration of In-House Counsel will include the discretion of a court of highest appellate jurisdiction to license to practice in the U.S. a foreign in-house lawyer, who otherwise, due to his or her country’s rules, would not fall under the current definition of foreign lawyer. Allowing such discretion will ensure not only that such competent and trained foreign in-house lawyers are legally able and, as a result, encouraged to seek registration in the U.S., but also that U.S.-based clients would effectively receive the full benefit of these regulations and the freedom to choose the foreign in-house lawyer who best fits their needs, including better protection of the attorney-client privilege.

4. **Summary of Minority Views**
   None.
# Comparison of ABA Model Rule for Registration of In-House Counsel with State Versions

**American Bar Association Center for Professional Responsibility Policy Implementation Committee**

<table>
<thead>
<tr>
<th>ABA Model Rule</th>
<th>Continuous Presence/Residency Requirement</th>
<th>Registration: (a) with State Authority (b) within a certain time</th>
<th>(a) Application Fee (b) Annual Fee</th>
<th>Foreign Lawyer Register as In-House Counsel</th>
<th>Appearances Before Tribunals Allowed</th>
<th>Pro Bono Legal Services Allowed</th>
<th>Host State CLE Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>Yes</td>
<td>(a) Yes (b) 180 days</td>
<td>(a) Yes (b) Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>N/A ¹</td>
</tr>
<tr>
<td></td>
<td>Exclusively employed by a business located in the State of Alabama.</td>
<td>(a) Bar (b) 180 days</td>
<td>(a) Yes - $725 (b) Yes - $300</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>AK</td>
<td>No rule.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>AZ</td>
<td>Yes: employed within the State; not intended to apply to temporary or sporadic presence.</td>
<td>(a) Bar (b) 90 days</td>
<td>(a) Yes-75% of bar dues (b) Yes-75% of bar dues</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Completion of course on Arizona law; compliance with home state CLE or if none, AZ CLE.</td>
</tr>
</tbody>
</table>

¹ N/A means not addressed in the rule.
<table>
<thead>
<tr>
<th>State</th>
<th>Continuous Presence/Residency Requirement</th>
<th>Registration: (a) with State Authority (b) within a certain time</th>
<th>(a) Application Fee (b) Annual Fee</th>
<th>Foreign Lawyer Register as In-House Counsel</th>
<th>Appearances Before Tribunals Allowed</th>
<th>Pro Bono Legal Services Allowed</th>
<th>Host State CLE Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>AR</td>
<td>No rule: but see Rule 5.5(d)(1)</td>
<td></td>
<td></td>
<td></td>
<td>No</td>
<td>No</td>
<td>Registered legal services attorney.</td>
</tr>
<tr>
<td>CA</td>
<td>Residency required.</td>
<td>(a) Bar (b) 180 days</td>
<td>(a) Yes: $550 to apply, $363 moral character check; 25 hrs. CLE (b) Yes: $390</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>CO</td>
<td>Yes</td>
<td>(a) Yes (b) N/A</td>
<td>(a) $100 (b) Yes</td>
<td>Yes, Lawyer may act on behalf of single client as if licensed.</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>CT</td>
<td>No specific provision, but termination occurs after 180 consecutive days of relocation of House Counsel outside of Connecticut</td>
<td>(a)Yes (b)Within 3 months before or after employment</td>
<td>(a) $1000 (b) Yes</td>
<td>Yes, as of January 1, 2009</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>DE</td>
<td>N/A</td>
<td>(a) Yes (b) Within 1 year</td>
<td>(a) $80 (b) No</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>DC</td>
<td>No registration requirement but allows. Rule 49(c)(6) of the Rules of the District of Columbia Court of Appeals</td>
<td>N/A</td>
<td>N/A</td>
<td>Yes</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>State</td>
<td>Continuous Presence/Residency Requirement</td>
<td>Registration: (a) with State Authority (b) within a certain time</td>
<td>(a) Application Fee (b) Annual Fee</td>
<td>Foreign Lawyer Register as In-House Counsel</td>
<td>Appearances Before Tribunals Allowed</td>
<td>Pro Bono Legal Services Allowed</td>
<td>Host State CLE Required</td>
</tr>
<tr>
<td>-------</td>
<td>------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>-----------------------------------</td>
<td>------------------------------------------</td>
<td>-----------------------------------</td>
<td>-------------------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>FL</td>
<td>Yes. Must be residing or relocating to Florida within 6 months of application.</td>
<td>(a) Bar (b) within 6 months of employment</td>
<td>(a) $1600 (b) $265</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>GA</td>
<td>No Rule, But see Rule 5.5 (d) and (e).</td>
<td>N/A</td>
<td>N/A</td>
<td>Yes. No registration</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>HI</td>
<td>No Rule</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ID</td>
<td>Must maintain his/her office for the practice of law as house counsel within the state on behalf of corporate employer.</td>
<td>(a) Bar (b) 60 days prior to assuming duties as in-house counsel</td>
<td>(a) $800 (b) $255, 1-3 years practice $340, over 3 years</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>Yes</td>
</tr>
<tr>
<td>IL</td>
<td>N/A. Exclusive employment by Illinois entity required.</td>
<td>(a) Yes (b) 120 days</td>
<td>(a) $1250 (b) $105, 1-3 years practice; $289, 3 or more years</td>
<td>Yes</td>
<td>No</td>
<td>Yes if US licensed, with statement to Administrator and proof of sponsoring organization</td>
<td>Yes</td>
</tr>
<tr>
<td>IN</td>
<td>Yes</td>
<td>(a) Yes (b) N/A</td>
<td>(a) $850 (b) No, $50 renewal fee, maximum 5 yrs. renewal</td>
<td>Yes (eff. 1/1/13)</td>
<td>N/A</td>
<td>N/A</td>
<td>Must attend law update Forum within 12 months</td>
</tr>
<tr>
<td>State</td>
<td>Continuous Presence/Residency Requirement</td>
<td>Registration: (a) with State Authority (b) within a certain time</td>
<td>(a) Application Fee (b) Annual Fee</td>
<td>Foreign Lawyer Register as In-House Counsel</td>
<td>Appearances Before Tribunals Allowed</td>
<td>Pro Bono Legal Services Allowed</td>
<td>Host State CLE Required</td>
</tr>
<tr>
<td>-------</td>
<td>------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>-----------------------------------</td>
<td>------------------------------------------</td>
<td>----------------------------------</td>
<td>-------------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>IA</td>
<td>Maintains an office or systematic and continuous presence</td>
<td>(a) Yes (b) 90 days</td>
<td>(a) $500 and $200 to Client Security Commission (b) $50 Annual Assessment to Client Security</td>
<td>Yes</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>KS</td>
<td>Full-time limited to the business of the Kansas employer</td>
<td>(a) Yes (b) Within 90 days of beginning employment</td>
<td>(a) $1250 (b) $100</td>
<td>Yes. Under Rule 5.5(d) (1) “legal services” for employer’s business</td>
<td>N/A</td>
<td>Yes</td>
<td>N/A</td>
</tr>
<tr>
<td>KY</td>
<td>Will perform legal services solely for employer</td>
<td>(a) Yes (b) N/A</td>
<td>(a) $1500 (b) $171, under 5 years; $221, over 5 years</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>N/A</td>
</tr>
<tr>
<td>LA</td>
<td>Employed exclusively as lawyer for employer</td>
<td>(a) Yes (b) N/A</td>
<td>(a) $300 plus annual discipline &amp; registration fees (b) After 2009, $235 plus Annual Discipline fee as set by LSBA</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>Yes</td>
</tr>
<tr>
<td>ME</td>
<td>No Rule. But see Rule 5.5 (d) (1).</td>
<td>N/A</td>
<td>N/A</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>MD</td>
<td>N/A</td>
<td>(a) No (b) N/A</td>
<td>(a) N/A (b) N/A</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>N/A</td>
</tr>
<tr>
<td>MA</td>
<td>N/A</td>
<td>(a) Yes (b) N/A</td>
<td>(a) N/A (b) Yes (as established by the Court from time to time)</td>
<td>Yes. Under Rule 5.5(d) (1)</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>State</td>
<td>Continuous Presence/Residency Requirement</td>
<td>Registration: (a) with State Authority (b) within a certain time</td>
<td>(a) Application Fee (b) Annual Fee</td>
<td>Foreign Lawyer Register as In-House Counsel</td>
<td>Appearances Before Tribunals Allowed</td>
<td>Pro Bono Legal Services Allowed</td>
<td>Host State CLE Required</td>
</tr>
<tr>
<td>-------</td>
<td>------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>---------------------------------</td>
<td>----------------------------------------</td>
<td>---------------------------------</td>
<td>---------------------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td>MI</td>
<td>Must intend in good faith to establish an office in Michigan</td>
<td>(a) Yes (b) N/A</td>
<td>(a) $600 (b) N/A</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>MN</td>
<td>Employed in Minnesota for a single entity</td>
<td>(a) Yes (b) N/A</td>
<td>(a) $625 (b) N/A</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>MS</td>
<td>No Rule</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MO</td>
<td>Employed exclusively for an entity</td>
<td>(a) Yes (b) N/A</td>
<td>(a) $1240 (b) $183</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>MT</td>
<td>No Rule but see RPC 5.5 (b)</td>
<td>N/A</td>
<td>N/A</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>NE</td>
<td>Continuous presence</td>
<td>(a) Yes (b) Within 90 days of beginning employment</td>
<td>(a) $700 (b) $345</td>
<td>No</td>
<td>N/A</td>
<td>Yes</td>
<td>N/A</td>
</tr>
<tr>
<td>NV</td>
<td>Employed exclusively for entity</td>
<td>(a) Yes (b) N/A</td>
<td>(a) $250 (b) Yes, equal to current rate for time in practice</td>
<td>No</td>
<td>No</td>
<td>Yes, with separate certification</td>
<td>Yes</td>
</tr>
<tr>
<td>NH</td>
<td>No Rule. But see Rule 5.5 (d) (1).</td>
<td>N/A</td>
<td>N/A</td>
<td>Yes</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>State</td>
<td>Continuous Presence/Residency Requirement</td>
<td>Registration: (a) with State Authority (b) within a certain time</td>
<td>(a) Application Fee (b) Annual Fee</td>
<td>Foreign Lawyer Register as In-House Counsel</td>
<td>Appearances Before Tribunals Allowed</td>
<td>Pro Bono Legal Services Allowed</td>
<td>Host State CLE Required</td>
</tr>
<tr>
<td>-------</td>
<td>------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>--------------------------------------</td>
<td>-------------------------------------------</td>
<td>----------------------------------------</td>
<td>-------------------------------</td>
<td>-------------------------</td>
</tr>
<tr>
<td>NJ</td>
<td>Applicant performs legal services solely for designated employer</td>
<td>(a) Yes (b) 60 Days</td>
<td>(a)$750 (b) Yes, Discipline, Client Protection Fund &amp; LAP</td>
<td>Yes</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>NM</td>
<td>No Rule See RPC 5.5 (d) (1)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NY</td>
<td>Provide legal services to the single employer entity or organizational affiliates.</td>
<td>(a) Yes (b) 30 days</td>
<td>(a) No (b) Comply with biennial registration req.</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>N/A</td>
</tr>
<tr>
<td>NC</td>
<td>No Rule. But see Rule 5.5 (d) (1).</td>
<td>N/A</td>
<td>N/A</td>
<td>Allowed under Rule 5.5(d)(1)</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>ND</td>
<td>Employed in North Dakota as in-house Counsel exclusively for corporation</td>
<td>(a) Yes (b) N/A</td>
<td>(a) $380 equivalent to ND lawyer who has practiced for 5 years (b) $380</td>
<td>Yes</td>
<td>No</td>
<td>N/A</td>
<td>Yes</td>
</tr>
<tr>
<td>OH</td>
<td>Employed full-time by Non-governmental by Ohio employer</td>
<td>(a) Yes (b) N/A</td>
<td>(a) $350 (b) $350</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>Yes</td>
</tr>
<tr>
<td>OK</td>
<td>Must establish residence</td>
<td>(a) Bar (b) N/A</td>
<td>(a) $750 (b) $175, but not in rule</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>OR</td>
<td>Employed by business entity authorized to do business in Oregon</td>
<td>(a) Yes (b) N/A</td>
<td>(a) $1050 (b) $416</td>
<td>Yes. (Allowed on a temporary basis under Rule 5.5(c))</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>State</td>
<td>Continuous Presence/Residency Requirement</td>
<td>Registration: (a) with State Authority (b) within a certain time</td>
<td>(a) Application Fee (b) Annual Fee</td>
<td>Foreign Lawyer Register as In-House Counsel</td>
<td>Appearances Before Tribunals Allowed</td>
<td>Pro Bono Legal Services Allowed</td>
<td>Host State CLE Required</td>
</tr>
<tr>
<td>-------</td>
<td>--------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>----------------------------------</td>
<td>-------------------------------------------</td>
<td>-------------------------------------</td>
<td>---------------------------------</td>
<td>----------------------</td>
</tr>
<tr>
<td>PA</td>
<td>Employed on more than a temporary basis or if maintains an office or other systematic or continuous presence</td>
<td>(a) Yes (b) 6 months</td>
<td>(a) $1250 (b) $175</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>RI</td>
<td>Employed by Corporation with office in RI</td>
<td>(a) Yes (b) N/A</td>
<td>(a) N/A (b) $200</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>Yes</td>
</tr>
<tr>
<td>SC</td>
<td>Provides legal services solely to employer</td>
<td>(a) Yes (b) N/A</td>
<td>(a) $400 (b) $100</td>
<td>No</td>
<td>Yes-state agency and magistrate in civil matters No-any other SC Court</td>
<td>Yes</td>
<td>N/A</td>
</tr>
<tr>
<td>SD</td>
<td>No Rule. But see Rule 5.5 (d) (1).</td>
<td>N/A</td>
<td>N/A</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>TN</td>
<td>Continuous presence.</td>
<td>(a) Yes (b) Within 180 days</td>
<td>(a) $750 (b) Annual fees payable by active member</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>TX</td>
<td>Rule XIV, Rules Governing Admission to the Bar of Texas, Foreign Legal Consultants, Section 1(b)(4). Admission not Required for In-House Counsel</td>
<td>Annual fees payable by active member</td>
<td>Yes</td>
<td>No</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>State</th>
<th>Continuous Presence/Residency Requirement</th>
<th>Registration: (a) with State Authority (b) within a certain time</th>
<th>(a) Application Fee (b) Annual Fee</th>
<th>Foreign Lawyer Register as In-House Counsel</th>
<th>Appearances Before Tribunals Allowed</th>
<th>Pro Bono Legal Services Allowed</th>
<th>Host State CLE Required</th>
</tr>
</thead>
<tbody>
<tr>
<td>UT</td>
<td>Must be bona fide resident of the state of Utah or maintain an office as employer’s house counsel in state</td>
<td>(a) Yes (b) Within 6 months</td>
<td>(a) $850 (b) $350</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>Must complete CLE of licensing state</td>
</tr>
<tr>
<td>VT</td>
<td>No Rule. But see Rule 5.5 (d) (1).</td>
<td>N/A</td>
<td>N/A</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>VA</td>
<td>Employed as lawyer exclusively for entity</td>
<td>(a) Yes (b) N/A</td>
<td>(a) $150 (b) $250</td>
<td>Yes: identified as a “Corporate Counsel Registrant”.</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>WA</td>
<td>Employed as lawyer exclusively for employer.</td>
<td>(a) Yes (b) N/A</td>
<td>(a) Yes (b) Yes</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>WV</td>
<td>No Rule. But see Rule 5.5 (d) (1).</td>
<td>N/A</td>
<td>N/A</td>
<td>Allowed under Rule 5.5(d)(1)</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>WI</td>
<td>Employed in Wisconsin on a continuing basis.</td>
<td>(a) Board of Bar Examiners (b) 60 days</td>
<td>(a) $250 (b) No</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>WY</td>
<td>No Rule. But see Rule 5.5 (d) (1).</td>
<td>N/A</td>
<td>N/A</td>
<td>No</td>
<td>No</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>U.S. Virgin Islands</td>
<td>Continuous Presence/Residency Requirement</td>
<td>Registration: (a) with State Authority (b) within a certain time</td>
<td>(a) Application Fee (b) Annual Fee</td>
<td>Foreign Lawyer Register as In-House Counsel</td>
<td>Appearances Before Tribunals Allowed</td>
<td>Pro Bono Legal Services Allowed</td>
<td>Host State CLE Required</td>
</tr>
<tr>
<td>-------------------</td>
<td>------------------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>-----------------------------------</td>
<td>------------------------------------------</td>
<td>------------------------------------</td>
<td>-------------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>Systematic or continuous presence.</td>
<td>(a) Director of Bar Admissions (b) 60 days</td>
<td>(a) $500 (b) $50 annual assessment and Bar dues</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
</tr>
</tbody>
</table>

Copyright © 2016 American Bar Association. All rights reserved. Nothing contained in this chart is to be considered the rendering of legal advice. The chart is intended for educational and informational purposes only. We make every attempt to keep the chart as accurate as possible. If you are aware of any inaccuracies in the chart, please send your corrections or additions and the source of that information to John Holtaway, (312) 988-5298, john.holtaway@americanbar.org
RESOLVED, That the American Bar Association adopts the Model Rule for Registration of In-House Counsel dated August 2008, for those jurisdictions that elect to impose registration requirements on lawyers practicing therein under Model Rule 5.5(d).

Model Rule for Registration of In-House Counsel

GENERAL PROVISIONS:
A. A lawyer admitted to the practice of law in another United States jurisdiction who has a continuous presence in this jurisdiction and is employed as a lawyer by an organization as permitted pursuant to Rule 5.5(d)(1) of the Model Rules of Professional Conduct, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services, shall register as in-house counsel within [180 days] of the commencement of employment as a lawyer or if currently so employed then within [180 days] of the effective date of this rule, by submitting to the [registration authority] the following:
   1) A completed application in the form prescribed by the [registration authority];
   2) A fee in the amount determined by the [registration authority];
   3) Documents proving admission to practice law and current good standing in all jurisdictions in which the lawyer is admitted to practice law; and
   4) An affidavit from an officer, director, or general counsel of the employing entity attesting to the lawyer’s employment by the entity and the capacity in which the lawyer is so employed, and stating that the employment conforms to the requirements of this rule.

SCOPE OF AUTHORITY OF REGISTERED LAWYER:
B. A lawyer registered under this section shall have the rights and privileges otherwise applicable to members of the bar of this jurisdiction with the following restrictions:
1. The registered lawyer is authorized to provide legal services to the entity client or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer, and for employees, officers and directors of such entities, but only on matters directly related to their work for the entity and only to the extent consistent with Rule 1.7 of the Model Rules of Professional Conduct [or equivalent provision in the jurisdiction]; and

2. The registered lawyer shall not:
   a. Except as otherwise permitted by the rules of this jurisdiction, appear before a court or any other tribunal as defined in Rule 1.0(m) of the Model Rules of Professional Conduct [or jurisdictional equivalent], or
   b. Offer or provide legal services or advice to any person other than as described in paragraph B.1., or hold himself or herself out as being authorized to practice law in this jurisdiction other than as described in paragraph B.1.

PRO BONO PRACTICE:
   C. Notwithstanding the provisions of paragraph B above, a lawyer registered under this section is authorized to provide pro bono legal services through an established not-for-profit bar association, pro bono program or legal services program or through such organization(s) specifically authorized in this jurisdiction.

OBLIGATIONS:
   D. A lawyer registered under this section shall:
      1. Pay an annual fee in the amount of $____________;
      2. Fulfill the continuing legal education requirements that are required of active members of the bar in this jurisdiction;
      3. Report within [___] days to the jurisdiction the following:
         a. Termination of the lawyer’s employment as described in paragraph A.4.;
         b. Whether or not public, any change in the lawyer’s license status in another jurisdiction, including by the lawyer's resignation;
         c. Whether or not public, any disciplinary charge, finding, or sanction concerning the lawyer by any disciplinary authority, court, or other tribunal in any jurisdiction.

LOCAL DISCIPLINE:
   E. A registered lawyer under this section shall be subject to the [jurisdiction’s Rules of Professional Conduct] and all other laws and rules governing lawyers admitted to the active practice of law in this jurisdiction. The [jurisdiction’s disciplinary counsel] has and shall retain jurisdiction over the registered lawyer with respect to the conduct of the lawyer in this or another jurisdiction to the same extent as it has over lawyers generally admitted in this jurisdiction.

AUTOMATIC TERMINATION:
F. A registered lawyer’s rights and privileges under this section automatically terminate when:
   1. The lawyer’s employment terminates;
   2. The lawyer is suspended or disbarred from practice in any jurisdiction or any court or agency before which the lawyer is admitted; or
   3. The lawyer fails to maintain active status in at least one jurisdiction.

REINSTATMENT:
G. A registered lawyer whose registration is terminated under paragraph F.1. above, may be reinstated within [xx] months of termination upon submission to the registration authority of the following:
   1. An application for reinstatement in a form prescribed by the registration authority;
   2. A reinstatement fee in the amount of $______________;
   3. An affidavit from the current employing entity as prescribed in paragraph A.4.

SANCTIONS:
H. A lawyer under this rule who fails to register shall be:
   1. Subject to professional discipline in this jurisdiction;
   2. Ineligible for admission on motion in this jurisdiction;
   3. Referred by the registration authority to the jurisdiction’s bar admission authority; and
   4. Referred by the registration authority to the disciplinary authority of the jurisdictions of licensure.
REPORT

The Council of the Section of Legal Education and Admissions to the Bar, at its meeting of December 1-2, 2006, approved the Model Rule for Registration of House Counsel (Registration Rule). The purpose of the Registration Rule is to create a regulatory model useful to states that might wish to follow the registration approach when adopting Rule 5.5(d) of the Model Rules of Professional Conduct.

Rule 5.5(d) now excludes from the definition of unauthorized practice of law the provision of legal services by in-house counsel admitted in one jurisdiction and practicing in another jurisdiction, when the lawyer is providing legal services solely to the lawyer’s employer. Rule 5.5(d) states:

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.

Rule 5.5(d) applies to lawyers who are employed to render legal services to the employer. The provision assumes that the in-house lawyer can establish an office or other “systematic presence” in the jurisdiction and forgo local licensure without unreasonable risk to the client or others because the employer is able to assess the lawyer’s qualifications and the quality of the lawyer’s work.

Model Rule 5.5, Comment [17], states that lawyers who establish an office or continuous presence in the state “may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.” In an effort to create a regulatory model useful to states that might wish to follow the registration approach, the Bar Admission Committee drafted, and the Council of the Section has approved for submission to the House, this Rule.

PURPOSE OF REGISTRATION RULE

The Council recognizes that in addition to client security fund assessments and continuing legal education requirements, registration would make an in-house counsel’s status known to the public. Local public records would be available to verify that such lawyers are licensed by another state and in good standing. Furthermore, a lawyer who practices pursuant to this rule is subject to the disciplinary authority of the local jurisdiction. (See Rules 5.5 and 8.5, ABA Model Rules of Professional Conduct.)

The Registration Rule would provide a mechanism for jurisdictions to identify and monitor in-house counsel who are practicing in the jurisdiction. The Rule also provides sanctions for those who fail to register.

TIMING OF REGISTRATION
Paragraph A of the Registration Rule anticipates that the adopting jurisdiction would designate a time within which the lawyer must register after he or she establishes the office or “continuous presence” in the jurisdiction. The Council recognizes that following the adoption of the Rule those already engaged in an in-house counsel practice would have to come into compliance with the registration system. Each adopting jurisdiction could select the number of days or months within which those lawyers subject to this provision would need to register.

SPECIFIC FILING REQUIREMENTS

The lawyer subject to the registration requirement would pay a fee in an amount determined by the jurisdiction and submit three types of essential documents:

- An application in a form prescribed by the jurisdiction, requesting information such as name, address, employer’s name and address, status of license in another state or states. No “character and fitness” questions would be asked because a background investigation is not part of the registration process. If there is some reason to doubt the authenticity or accuracy of the documentation, good standing or employment, the prospective registrant would have the burden of resolving all questions to the satisfaction of the registering authority.

- Proof of admission and proof of current good standing in all jurisdictions where licensed. An individual who is not in good standing in one or more jurisdictions would be required to disclose this issue whether the status is due to disbarment or because the lawyer is not current with annual registration fees or CLE requirements. Disclosure of the nature and extent of any license restrictions, regardless of how minor, would be required.

- A sworn statement of an authorized individual from the employing entity attesting that the registering lawyer is employed by the entity and the employment is consistent with the requirements of the rule. This provision requires a specific attestation that the lawyer is working exclusively for the employer, that the employer is engaged in a lawful enterprise, and that the employment takes place in the state of registration.

SCOPE OF AUTHORITY

Paragraph B describes what the registered lawyer would and would not be permitted to do under the authority of this registration. The registered lawyer could practice law in the state except that the lawyer could not represent anyone other than the employer and subsidiaries under common control. The lawyer could also represent employees, officers and directors of the employer or its subsidiaries on matters that arise from the work for these entities and so long as the representation complies with the jurisdiction’s conflict of interest rules. For example, if an employee has been subpoenaed by name to testify at an administrative hearing about matters within the scope of his or her employment, the lawyer could counsel the employee about the subpoena and testimony and, if consistent with the rules of the administrative agency, represent the
employee at the hearing. The lawyer could not appear before a court or other tribunal unless permitted by law or rule.

This provision prohibits registered lawyers from engaging in occasional representation of friends, relatives or employees of the employer and assures that the only permitted client is the employer. The provision also would prohibit the registered lawyer from appearing in court or other tribunal under the auspices of this registration, even if on behalf of the employer, unless they are admitted pro hac vice or by some other exception to the local licensure law.

PRO BONO PRACTICE

Paragraph C authorizes and encourages registered lawyers to participate in authorized pro bono programs and to provide legal services to clients of those programs. By limiting pro bono representation to clients of authorized programs, the Rule removes any impediment to full participation by in-house counsel in pro bono legal work while assuring that participation in such programs occurs with adequate oversight.

OBLIGATIONS

The Rule requires payment of an annual fee and completion of whatever continuing legal education requirement the jurisdiction would impose. In addition, the registered lawyer has three obligations:

• To report any change in the lawyer’s employment;
• To report any change in the lawyer’s licensing status in any other licensing jurisdiction; and
• To report any professional charge, finding or sanction arising in any jurisdiction.

The lawyer must inform the registering authority of any termination of the employment relationship upon which the registrant’s status rests. Because the registration status assumes that registered lawyers are in good standing in their state or states of licensure, they bear the burden of reporting any change in that status. By requiring the registered lawyer to report “any change in the lawyer’s licensing status,” the Rule requires that the lawyer must report any lapse in good standing in a law license for reasons other than professional discipline. Similarly, by stating that the lawyer must report “any professional charge, finding or sanction,” the lawyer must report the filing of a complaint, not just the final disposition of a professional discipline complaint.

LOCAL DISCIPLINE

In paragraph E, the Council intends that the Rule give the disciplinary counsel jurisdiction over registered lawyers’ professional conduct, whether the conduct arises from the in-house counsel practice or from any other aspect of practice. This authority exists concurrently with that of disciplinary counsel in other states of licensure.

AUTOMATIC TERMINATION

Paragraph F provides that three events can result in automatic termination of the registration and thus the lawyer’s right to practice as in-house counsel in the state. These are the loss of qualifying employment, whether voluntary or involuntary; suspension or
disbarment from any jurisdiction or from any federal court or agency before which the lawyer had been admitted to practice; and the failure to maintain active status in at least one jurisdiction.

REINSTATEMENT

By paragraph G’s reinstatement provision, the Council sought to permit the lawyer to move from one in-house counsel position to another without beginning the registration process anew. The “application for renewal” described in paragraph G.1-3 could be no more than a short submission identifying the new qualifying employer, assuring the payment of a fee, and providing for an affidavit from the new employer assuring compliance with the registration requirements. The jurisdiction could specify a reasonable period of time, perhaps 3 to 6 months, during which a registered lawyer could transfer the registration from one qualifying employer to another. Failure to transfer the registration within the stated period would result in the termination of the registration status, requiring the lawyer to begin the process anew.

SANCTIONS

The Committee concluded that a provision would be necessary so that a lawyer who is required to register under this provision but fails to do so would be subject to sanctions. The jurisdiction in which in-house counsel practices without registration could sanction such counsel by subjecting him or her to professional discipline. Although Model Rule 5.5 exempts in-house counsel from prosecution for unauthorized practice, the jurisdiction adopting a registration requirement would subject the in-house counsel who fails to comply with the registration rule to prosecution for unauthorized practice. The Rule would prohibit in-house counsel who fail to register from being admitted on motion without examination in the jurisdiction. In-house counsel who fail to register will be referred to the appropriate authorities in the jurisdictions of registration and licensure.

CONCLUSION

By this Rule, the Council proposes a straightforward registration process that neither creates a de facto licensing process nor places an undue burden on in-house counsel or on states’ bar regulatory systems. The Rule will encourage in-house counsel to come forward and register and that registration will inure to the benefit of the bar as well as to the benefit of the public.

The Council respectfully requests that the House of Delegates approve the Model Rule.

Respectfully submitted,

Ruth McGregor, Chairperson
August 2008
### In-House Corporate Counsel Registration Rules

<table>
<thead>
<tr>
<th>State</th>
<th>Rule/Source</th>
<th>Fee Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>State</td>
<td>Section</td>
<td>Description</td>
</tr>
<tr>
<td>-------</td>
<td>---------</td>
<td>-------------</td>
</tr>
<tr>
<td>CO</td>
<td>Chapter 18. Rules Governing Admission To The Bar, Rule 204.1, Single-Client Counsel Certification.</td>
<td>Registration requirement for in-house corporate counsel.</td>
</tr>
<tr>
<td>CT</td>
<td>Effective January 1, 2008.</td>
<td>Section 2-15A – Authorized House Counsel.</td>
</tr>
<tr>
<td>DE</td>
<td>Rule 55.1 Limited permission to Practice of In-House Counsel</td>
<td>Fee: $100. Applies to foreign lawyers.</td>
</tr>
<tr>
<td>DC</td>
<td>No registration rule but allowed under:</td>
<td></td>
</tr>
<tr>
<td>FL</td>
<td>Rule 17-1.3, Rules Regulating The Florida Bar</td>
<td>Registration requirement for in-house corporate counsel.</td>
</tr>
<tr>
<td>State</td>
<td>Rule Status</td>
<td>Details</td>
</tr>
<tr>
<td>-------</td>
<td>-------------</td>
<td>---------</td>
</tr>
<tr>
<td>GA</td>
<td>No Rule.</td>
<td>Have adopted Rule 5.5. Georgia Rule 5.5 allows domestic and foreign lawyers to practice as in-house counsel.</td>
</tr>
<tr>
<td>HI</td>
<td>No Rule.</td>
<td></td>
</tr>
</tbody>
</table>
| ID    | No Rule.    | Idaho Rules Governing Admission, Rule 220  
Registration requirement for in-house corporate counsel.  
Application Fee: $800  
Annual Dues: $230 (under 3 years); $315 (over 3 years) |
https://www.ilbaradmissions.org/appinfo.action?id=4  
Fee: $1250 |
| IN    | Rule 6, Indiana Supreme Court Rules for Admission to the Bar  
http://www.in.gov/judiciary/rules/ad_dis/  
Admission by Motion available.  
Rule 6, Indiana Supreme Court Rules for Admission to the Bar  
Fee: $850. Applies to foreign lawyers. |
| IA    | CHAPTER 31  
ADMISSION TO THE BAR  
Rule 31.16 Registration of house counsel.  
A lawyer may practice law in Iowa under this registration provision for a period of up to five years, then must move for admission by motion. (Does not apply to foreign lawyers).  
Foreign lawyers allowed.  
Fee: $700 and pay annual disciplinary fee |
<table>
<thead>
<tr>
<th>State</th>
<th>Rule Reference</th>
<th>Link</th>
<th>Requirement Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>KY</td>
<td>Kentucky Supreme Court Rule 2.111</td>
<td><a href="http://www.kybar.org/page/SCR">http://www.kybar.org/page/SCR</a></td>
<td>Registration requirement for in-house corporate counsel. Application Fee: $1500 Annual Fees: $171 (under 5 years); $221 (over 5 years)</td>
</tr>
</tbody>
</table>
| LA    | La. S. Ct. Rule XVII, Section 14  
Section 14. Limited Admission for In-House Counsel | [http://www.lasc.org/rules/supreme/RuleXVII.asp](http://www.lasc.org/rules/supreme/RuleXVII.asp) | Application Fee: $300 Annual Fees: Annual Disciplinary Assessment required of attorneys admitted to practice three years or more pursuant to La. S. Ct. Rule XIX, Section 8; and Louisiana State Bar Association annual dues pursuant to Article V of the Articles of Incorporation of the Louisiana State Bar Association during the period of the limited license. |
<p>| ME    | No Rule. | Have adopted Rule 5.5. |
| MD    | Maryland Code, Section 10-206(d), Business Occupations and Professions | <a href="http://law.justia.com/maryland/codes/gbo/10-206.html">http://law.justia.com/maryland/codes/gbo/10-206.html</a> |</p>
<table>
<thead>
<tr>
<th>State</th>
<th>Rule Reference</th>
<th>Description</th>
<th>Application Fee</th>
<th>Annual Dues</th>
</tr>
</thead>
<tbody>
<tr>
<td>MA</td>
<td>Rule 4:02, subsection (9)</td>
<td>Registration requirement for in-house corporate counsel.</td>
<td>$600</td>
<td>$260</td>
</tr>
<tr>
<td>MI</td>
<td>Michigan Board of Law Examiners Rule 5</td>
<td>Registration requirement for in-house corporate counsel.</td>
<td>$600</td>
<td>$260</td>
</tr>
<tr>
<td>MN</td>
<td>Minn. Sup. Ct. Admission Rule 9</td>
<td>Registration requirement for in-house corporate counsel.</td>
<td>$825</td>
<td>None</td>
</tr>
<tr>
<td>MS</td>
<td>No Rule.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MO</td>
<td>Missouri Supreme Court Rule 8.105</td>
<td>Registration requirement for in-house corporate counsel.</td>
<td>$750</td>
<td>$183</td>
</tr>
<tr>
<td>State</td>
<td>Requirement</td>
<td>Details</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-------</td>
<td>-------------</td>
<td>--------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>MT</td>
<td>No registration rule but allowed under:</td>
<td>Rule 5.5(b) of the Montana Rules of Professional Conduct. <a href="https://supremecourtdocket.mt.gov/view/AF%2009-0688%20Rule%20Change%20-%20Order?id=%7bE094024E-0000-C118-9AD0-255BFE8C0308%7d">https://supremecourtdocket.mt.gov/view/AF%2009-0688%20Rule%20Change%20-%20Order?id=%7bE094024E-0000-C118-9AD0-255BFE8C0308%7d</a> Applies to foreign lawyers.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NV</td>
<td>Nevada Supreme Court Rule 49.10</td>
<td><a href="http://www.leg.state.nv.us/CourtRules/scr.html">http://www.leg.state.nv.us/CourtRules/scr.html</a> Registration requirement for in-house corporate counsel. Fee: $250 plus annual fee for member of State Bar of Nevada</td>
<td></td>
<td></td>
</tr>
<tr>
<td>NM</td>
<td>No Rule but allowed under Rule 5.5(d)(1).</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Rules</td>
<td>Registration</td>
<td>Fee</td>
<td>Other Information</td>
</tr>
<tr>
<td>-------</td>
<td>-------</td>
<td>--------------</td>
<td>-----</td>
<td>-------------------</td>
</tr>
</tbody>
</table>
| NY    | Rules of the Court of Appeals, Part 522  
22 NYCRR, Part 522  
(Effective 12/30/2015)  
Registration of In-House Counsel  
Applies to foreign lawyers.  
Fee: Bar dues. | | | |
| NC    | No Rule.  
Have adopted Rule 5.5.  
See also, North Carolina General Statutes, Chapter 84-5(b).  
http://www.ncga.state.nc.us/gascripts/Statutes/StatutesTOC.pl?0084 | | | |
| ND    | North Dakota Supreme Court Rules: Rule 3, Admission to Practice Rules  
http://www.ndcourts.com/Court/Notices/20040256/AdmissionR3_Final.htm  
Fee: Annual fee equivalent to what a ND lawyer admitted five years would pay. 45 hours of CLE every three years. | | | |
| OH    | Ohio Supreme Court Rules for the Government of the Bar, Rule VI, Section 3.  
http://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf  
Registration requirement for in-house corporate counsel.  
Application Fee: $250  
Annual Dues: $250 (every two years) | | | |
| OK    | Okla. R. Gov. Adm. Law Practice, Art. 2, Sec. 5  
Registration requirement for in-house corporate counsel.  
Application Fee: $750  
Annual Dues: $175 | | | |
| OR  | Ore. Sup. Ct. Rule 16.05  
  | [https://www.osbar.org/rulesregs](https://www.osbar.org/rulesregs)  
  | Registration requirement for in-house corporate counsel.  
  | Application Fee: $1050  
  | Annual Dues: $416 |
|-----|---------------------------|
| PA  | Rule 302: Limited In-House Corporate Counsel License  
  | Fee: $1250 |
| RI  | Article II, Rule 9, Rules of the Rhode Island Supreme Court.  
  | [https://www.courts.ri.gov/Courts/SupremeCourt/Supreme%20Court%20Rules/Admissi onBar-ArticleII.pdf](https://www.courts.ri.gov/Courts/SupremeCourt/Supreme%20Court%20Rules/AdmissionBar-ArticleII.pdf)  
  | Fee: $200 |
| SC  | S.C. App. Ct. Rule 405  
  | [http://m.sccourts.org/courtReg/displayRule.cfm?ruleID=405.0&subRuleID=&ruleType =APP](http://m.sccourts.org/courtReg/displayRule.cfm?ruleID=405.0&subRuleID=&ruleType=APP)  
  | Registration requirement for in-house corporate counsel.  
  | Application Fee: $400  
  | Annual Dues: $225 |
| SD  | No Rule.  
  | Have adopted Rule 5.5. |
| TN  | Tenn. Sup. Ct. R. 7, Section 10.01.  
  | Registration of In-House Counsel  
<p>| Fee: $750 |</p>
<table>
<thead>
<tr>
<th>State</th>
<th>Requirements</th>
<th>Links</th>
</tr>
</thead>
<tbody>
<tr>
<td>TX</td>
<td>See, Rule XIV, Rules Governing Admission to the Bar of Texas, Foreign Legal Consultants, Section 1(b)(4). <a href="http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/14/14.911300.pdf">http://www.txcourts.gov/All_Archived_Documents/SupremeCourt/AdministrativeOrders/miscdocket/14/14.911300.pdf</a> See also, Texas Board of Bar Examiners Policy Statement on Lawful Practice. In-house counsel not required to be admitted.</td>
<td></td>
</tr>
<tr>
<td>WA</td>
<td>Wash. Admission to Practice Rule 8(f) <a href="http://www.courts.wa.gov/court_rules/?fa=court_rules.display&amp;group=ga&amp;set=APR&amp;ruleid=gaaapr08">http://www.courts.wa.gov/court_rules/?fa=court_rules.display&amp;group=ga&amp;set=APR&amp;ruleid=gaaapr08</a> Applies to foreign lawyers. Application Fee: $620 Annual Dues: $169 (under 4 years); $278 (under 6 years); $341 (over 6 years)</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Rules</td>
<td>Reciprocity Required</td>
</tr>
<tr>
<td>---------------</td>
<td>----------------------------------------------------------------------</td>
<td>----------------------</td>
</tr>
<tr>
<td>WV</td>
<td>Have adopted Rule 5.5.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Admission by Motion: reciprocity required.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Rules 4.0 to 4.5, West Virginia Supreme Court of Appeals Rules for Admission to the Practice of Law in West Virginia</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Foreign lawyers allowed to practice under RPC 5.5 (d).</td>
<td></td>
</tr>
<tr>
<td>WI</td>
<td>Supreme Court Rule 10.03(4)(f).</td>
<td>(Adopted July 30, 2008)</td>
</tr>
<tr>
<td></td>
<td>Fee: $250</td>
<td></td>
</tr>
<tr>
<td>WY</td>
<td>Have adopted Rule 5.5.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Allowed under Rule 5.5 of the Rules of Professional Conduct.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Admission by Motion: reciprocity required.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Wyoming Statute 33-5-110 and Rules 301 to 305 of the Wyoming Rules and Procedures Governing Admission to the Practice of Law.</td>
<td></td>
</tr>
<tr>
<td></td>
<td><a href="http://www.courts.state.wy.us/Supreme/CourtRule?CourtRuleCategoryID=27">http://www.courts.state.wy.us/Supreme/CourtRule?CourtRuleCategoryID=27</a></td>
<td></td>
</tr>
<tr>
<td>U.S. Virgin Islands</td>
<td>Supreme Court Rule 202.1. Limited permission to practice as in-house counsel.</td>
<td></td>
</tr>
</tbody>
</table>
National Mobility Agreement 2013

Signed October 17, 2013
The purpose of this agreement is to facilitate temporary and permanent mobility of lawyers between Canadian jurisdictions.

While the signatories participate in this agreement voluntarily, they intend that only lawyers who are members of signatories that have implemented reciprocal provisions in their jurisdictions will be able to take advantage of the provisions of this agreement.

The signatories recognize that

- they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practise law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,

- while differences exist in the legislation, policies and programs pertaining to the signatories, including those differences between common law and civil law jurisdictions in Canada, lawyers have a professional responsibility to ensure that they are competent with respect to any matter that they undertake, and

- it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

Most of the signatories subscribed to the Interjurisdictional Practice Protocol of 1994, in which they agreed to certain measures to facilitate the temporary and permanent inter-jurisdictional practice of law and the enforcement of appropriate standards on lawyers practising law in host jurisdictions.

Since December 2002, all provincial law societies, other than the Chambre des notaires du Quebec (“Chambre”), have signed the National Mobility Agreement (“NMA”) establishing a comprehensive mobility regime for Canadian lawyers.

In 2006 all law societies other than the Chambre, signed the Territorial Mobility Agreement. Under that agreement, provisions were mandated for reciprocal permanent mobility between the law societies of the territories and the provinces for five years. A further agreement made in November 2011 renewed the Territorial Mobility Agreement without a termination date.
In June 2008 Quebec enacted a “Regulation respecting the issuance of special permits of the Barreau du Quebec” (“Barreau”), which provided, inter alia, that a member in good standing of a bar of another Canadian province or territory could become a member of the Barreau known as a “Canadian legal advisor” (“CLA”). A CLA may provide legal services respecting the law of federal jurisdiction, the law of his or her home province and public international law.

In March 2010 all law societies, other than the Chambre, signed the Quebec Mobility Agreement (“QMA”). Under that agreement members of the Barreau are able to exercise mobility in the common law jurisdictions on a reciprocal basis as CLAs.

In June 2010 the Council of the Federation approved the Mobility Defalcation Compensation Agreement (“MDCA”) to bring more consistency, certainty and transparency to the process for compensating the public if funds are misappropriated by lawyers exercising their mobility rights under the NMA. Since then, all provincial law societies, other than the Barreau and the Chambre, have signed the MDCA.

In March 2012 all law societies, including the Chambre, signed an addendum to the Quebec Mobility Agreement extending to members of the Chambre the right to acquire CLA status in another province.

In January 2013, the Council of the Federation of Law Societies approved a report from the National Mobility Policy Committee. In that report, the Committee concluded and recommended that it would be in the public interest to implement mobility to and from the Barreau on the same terms as now apply to mobility between common law jurisdictions under the permanent mobility provisions of the NMA. The Committee also reported that the CLA provisions of the QMA and its Addendum should continue in place with respect to members of the Chambre, and the Chambre was in favour of that resolution. The Committee’s report and recommendations do not affect the current rules for temporary mobility between Quebec and other provinces and the territories.

As a result, the signatories hereby agree to adopt this new National Mobility Agreement, 2013 (“NMA 2013”), changing the original NMA to remove the distinction between members of the Barreau and members of law societies outside of Quebec for the purposes of transfer between governing bodies. The signatories also agree to incorporate into the NMA 2013 the provisions for members of the Chambre to be granted status as CLAs by law societies outside of Quebec and to rescind the QMA and its Addendum.
THE SIGNATORIES AGREE AS FOLLOWS:

Definitions

1. In this agreement, unless the context indicates otherwise:

   “Barreau” means le Barreau du Québec;
   “Chambre” means la Chambre des notaires du Québec;
   “day” means any calendar day or part of a calendar day in which a lawyer provides legal services;
   “discipline” includes a finding by a governing body of any of the following:
   (a) professional misconduct;
   (b) incompetence;
   (c) conduct unbecoming a lawyer;
   (d) lack of physical or mental capacity to engage in the practice of law;
   (e) any other breach of a lawyer’s professional responsibilities;
   “disciplinary record” includes any of the following, unless reversed on appeal or review:
   (a) any action taken by a governing body as a result of discipline;
   (b) disbarment;
   (c) a lawyer’s resignation or otherwise ceasing to be a member of a governing body as a result of disciplinary proceedings;
   (d) restrictions or limits on a lawyer’s entitlement to practise;
   (e) any interim suspension or restriction or limits on a lawyer’s entitlement to practise imposed pending the outcome of a disciplinary hearing.

   “entitled to practise law” means allowed, under all of the legislation and regulation of a home jurisdiction, to engage in the practice of law in the home jurisdiction;
   “governing body” means the Law Society or Barristers’ Society in a Canadian common law jurisdiction, the Barreau and the Chambre;
   “home governing body” means any or all of the governing bodies of the legal profession in Canada of which a lawyer is a member, and “home jurisdiction” has a corresponding meaning;
   “host governing body” means a governing body of the legal profession in Canada in whose jurisdiction a lawyer practises law without being a member, and “host jurisdiction” has a corresponding meaning;
“Inter-Jurisdictional Practice Protocol” means the 1994 Inter-Jurisdictional Practice Protocol of the Federation of Law Societies of Canada, as amended from time to time;

“lawyer” means a member of a signatory governing body, other than the Chambre;

“liability insurance” means compulsory professional liability errors and omissions insurance required by a governing body;

“mobility permit” means a permit issued by a host governing body on application to a lawyer allowing the lawyer to provide legal services in the host jurisdiction on a temporary basis;

“notary” means a member of the Chambre;

“practice of law” has the meaning with respect to each jurisdiction that applies in that jurisdiction;

“providing legal services” means engaging in the practice of law physically in a Canadian jurisdiction or with respect to the law of a Canadian jurisdiction;

“Registry” means the National Registry of Practising Lawyers established under clause 18 of this agreement;

“resident” has the meaning respecting a province or territory that it has with respect to Canada in the Income Tax Act (Canada).

General

2. The signatories agree to adopt this agreement as a replacement for the National Mobility Agreement of 2002, the Quebec Mobility Agreement of 2010 and the Addendum to the Quebec Mobility Agreement of 2012, all of which are revoked by consent.

3. The signatory governing bodies will
   (a) use their best efforts to obtain from the appropriate legislative or supervisory bodies amendments to their legislation or regulations necessary or advisable in order to implement the provisions of this agreement;
   (b) amend their own rules, by-laws, policies and programs to the extent they consider necessary or advisable in order to implement the provisions of this agreement;
   (c) comply with the spirit and intent of this agreement to facilitate mobility of Canadian lawyers in the public interest and strive to resolve any differences among them in that spirit and in favour of that intent; and
   (d) work cooperatively to resolve all current and future differences and ambiguities in legislation, policies and programs regarding inter-jurisdictional mobility.

....6
National Mobility Agreement 2013

4. Signatory governing bodies will subscribe to this agreement and be bound by it by means of the signature of an authorized person affixed to any copy of this agreement.

5. A signatory governing body will not, by reason of this agreement alone,
   (a) grant to a lawyer who is a member of another governing body greater rights to provide legal services than are permitted to the lawyer by his or her home governing body; or
   (b) relieve a lawyer of restrictions or limits on the lawyer’s right to practise, except under conditions that apply to all members of the signatory governing body.

6. Amendments made under clause 3(b) will take effect immediately on adoption with respect to members of signatory governing bodies that have adopted reciprocal provisions.

Temporary Mobility Among Common Law Jurisdictions

7. Clauses 8 to 32 apply to temporary mobility of lawyers of common law jurisdictions in other common law jurisdictions.

Mobility without permit

8. A host governing body will allow a lawyer from another jurisdiction to provide legal services in the host jurisdiction or with respect to the law of the host jurisdiction on a temporary basis, without a mobility permit or notice to the host governing body, for a total of not more than 100 days in a calendar year, provided the lawyer:
   (a) meets the criteria in clause 11; and
   (b) has not established an economic nexus with the host jurisdiction as described in clause 17.

9. The host governing body will have the discretion to extend the time limit for temporary mobility under clause 8 with respect to an individual lawyer.

10. It will be the responsibility of a lawyer to
    (a) record and verify the number of days in which he or she provides legal services in a host jurisdiction(s) or with respect to each jurisdiction; and
    (b) prove that he or she has complied with provisions implementing clause 8.
National Mobility Agreement 2013

11. To qualify to provide legal services on a temporary basis without a mobility permit or notice to the host governing body under clause 8, a lawyer will be required to do each of the following at all times:
   (a) be entitled to practise law in a home jurisdiction;
   (b) carry liability insurance that:
       (i) is reasonably comparable in coverage and amount to that required of lawyers of the host jurisdiction; and
       (ii) extends to the lawyer’s practice in the host jurisdiction;
   (c) have defalcation compensation coverage from a Canadian governing body that extends to the lawyer’s practice in the host jurisdiction;
   (d) not be subject to conditions of or restrictions on the lawyer’s practice or membership in the governing body in any jurisdiction;
   (e) not be the subject of criminal or disciplinary proceedings in any jurisdiction;
   (f) have no disciplinary record in any jurisdiction.

12. For the purposes of clause 8:
   (a) a lawyer practising law of federal jurisdiction in a host jurisdiction will be providing legal services in the host jurisdiction;
   (b) as an exception to subclause (a), when appearing before the following tribunals in a host jurisdiction a lawyer will not be providing legal services in a host jurisdiction:
       (i) the Supreme Court of Canada;
       (ii) the Federal Court of Canada;
       (iii) the Tax Court of Canada;
       (iv) a federal administrative tribunal.

13. A host jurisdiction will allow a lawyer to accept funds in trust on deposit, provided the funds are deposited to a trust account:
    (a) in the lawyer’s home jurisdiction; or
    (b) operated in the host jurisdiction by a member of the host governing body.
National Mobility Agreement 2013

Mobility Permit Required

14. If a lawyer does not meet the criteria in clause 11 to provide legal services in the host jurisdiction or with respect to the law of the host jurisdiction on a temporary basis, a host governing body will issue a mobility permit to the lawyer:

(a) on application;
(b) if, in the complete discretion of the host governing body, it is consistent with the public interest to do so;
(c) for a total of not more than 100 days in a calendar year; and
(d) subject to any conditions and restrictions that the host governing body considers appropriate.

Temporary Mobility Not Allowed

15. A host governing body will not allow a lawyer who has established an economic nexus with the host jurisdiction to provide legal services on a temporary basis under clause 8, but will require the lawyer to do one of the following:

(a) cease providing legal services in the host jurisdiction forthwith;
(b) apply for and obtain membership in the host governing body; or
(c) apply for and obtain a mobility permit under clause 14.

16. On application, the host governing body will have the discretion to allow a lawyer to continue to provide legal services in the host jurisdiction or with respect to the law of the host jurisdiction pending consideration of an application under clause 15(b) or (c).

17. In clause 15, an economic nexus is established by actions inconsistent with temporary mobility to the host jurisdiction, including but not limited to doing any of the following in the host jurisdiction:

(a) providing legal services beyond 100 days, or longer period allowed under clause 9;
(b) opening an office from which legal services are offered or provided to the public;
(c) becoming resident;
(d) opening or operating a trust account, or accepting trust funds, except as permitted under clause 13.

National Registry of Practising Lawyers

18. The signatory governing bodies will establish, maintain and operate a National Registry of Practising Lawyers containing the names of lawyers from each signatory governing body qualified under clause 11 to practise law interjurisdictionally without a mobility permit or notice to the host governing body.
19. Each signatory governing body will take all reasonable steps to ensure that all relevant information respecting its members is supplied to the Registry and is kept current and accurate.

Liability Insurance and Defalcation Compensation Funds

20. Each signatory governing body will ensure that the ongoing liability insurance in its jurisdiction
   (a) extends to its members for the provision of legal services on a temporary basis in or with respect to the law of host signatory jurisdictions; and
   (b) provides occurrence or claim limits of $1,000,000 and $2,000,000 annual per member aggregate.

21. In the event that a claim arises from a lawyer providing legal services on a temporary basis, and the closest and most real connection to the claim is with a host jurisdiction, the home governing body will provide at least the same scope of coverage as the liability insurance in the host jurisdiction. For clarity, all claims and potential claims reported under the policy will remain subject to the policy’s occurrence or claim limit of $1,000,000 and $2,000,000 annual per member aggregate.

22. Signatory governing bodies will notify one another in writing, as soon as practicable, of any changes to their liability insurance policies that affect the limits of liability or scope of coverage.

23. Signatory governing bodies that are also signatories to the MDCA will apply or continue to apply the provisions of the MDCA respecting defalcation compensation. Signatory governing bodies that are not signatories to the MDCA will apply or continue to apply the provisions of the Interjurisdictional Practice Protocol respecting defalcation compensation, specifically clause 10 of the Protocol and Appendix 6 to the Protocol.

24. Signatory governing bodies will notify one another in writing, as soon as practicable, of any changes to their defalcation compensation fund programs that affect the limits of compensation available or the criteria for payment.
Enforcement

25. A host governing body that has reasonable grounds to believe that a member of another governing body has provided legal services in the host jurisdiction will be entitled to require that lawyer to:
   (a) account for and verify the number of days spent providing legal services in the host jurisdiction; and
   (b) verify that he or she has not done anything inconsistent with the provision of legal services on a temporary basis.

26. If a lawyer fails or refuses to comply with the provisions of clause 25, a host governing body will be entitled to:
   (a) prohibit the lawyer from providing legal services in the jurisdiction for any period of time; or
   (b) require the lawyer to apply for membership in the host jurisdiction before providing further legal services in the jurisdiction.

27. When providing legal services in a host jurisdiction or with respect to the law of a host jurisdiction, all lawyers will be required to comply with the applicable legislation, regulations, rules and standards of professional conduct of the host jurisdiction.

28. In the event of alleged misconduct arising out of a lawyer providing legal services in a host jurisdiction, the lawyer’s home governing body will:
   (a) assume responsibility for the conduct of disciplinary proceedings against the lawyer unless the host and home governing bodies agree to the contrary; and
   (b) consult with the host governing body respecting the manner in which disciplinary proceedings will be taken against the lawyer.

29. If a signatory governing body investigates the conduct of or takes disciplinary proceedings against a lawyer, that lawyer’s home governing body or bodies, and each governing body in whose jurisdiction the lawyer has provided legal services on a temporary basis will provide all relevant information and documentation respecting the lawyer as is reasonable in the circumstances.

30. In determining the location of a hearing under clause 28, the primary considerations will be the public interest, convenience and cost.

31. A governing body that initiates disciplinary proceedings against a lawyer under clause 28 will assume full responsibility for conduct of the proceedings, including costs, subject to a contrary agreement between governing bodies.

32. In any proceeding of a signatory governing body, a duly certified copy of a disciplinary decision of another governing body concerning a lawyer found guilty of misconduct will be proof of that lawyer’s guilt.
Permanent Mobility of Lawyers

33. A signatory governing body will require no further qualifications for a member of another governing body to be eligible for membership than the following:
   (a) entitlement to practise law in the lawyer’s home jurisdiction;
   (b) good character and fitness to be a lawyer, on the standard ordinarily applied to applicants for membership; and
   (c) any other qualifications that ordinarily apply for lawyers to be entitled to practise law in its jurisdiction.

34. Before admitting as a member a lawyer qualified under clauses 33 to 40, a governing body will not require the lawyer to pass a transfer examination or other examination, but may require the lawyer to do all of the following:
   (a) provide certificates of standing from all Canadian and foreign governing bodies of which the lawyer is or has been a member;
   (b) disclose criminal and disciplinary records in any jurisdiction;
   (c) consent to access by the governing body to the lawyer’s regulatory files of all governing bodies of which the lawyer is a member, whether in Canada or elsewhere; and
   (d) certify that he or she has reviewed all of the materials reasonably required by the governing body.

35. Members of the Barreau whose legal training was obtained outside Canada and who have not had their credentials reviewed and accepted by the Barreau are not qualifying members of the Barreau for the purpose of clauses 33 to 40.

Public Information

36. A governing body will make available to the public information obtained under clause 34 in the same manner as similar records originating in its jurisdiction.

Liability Insurance

37. Subject to clause 40, a signatory governing body other than the Barreau will, on application, exempt a lawyer from liability insurance requirements if the lawyer does the following in another signatory jurisdiction:
   (a) is resident;
   (b) is a member of the governing body; and
   (c) maintains ongoing liability insurance required in that jurisdiction that provides occurrence or claim limits of $1,000,000 and $2,000,000 annual per member aggregate.
38. For the purposes of clause 37, a lawyer who is resident in Quebec and who is a member of more than one signatory governing body other than the Barreau will be deemed resident in one of the other jurisdictions in which the lawyer is a member, as determined in accordance with nationally consistent criteria to be included in the insurance programs of all signatory jurisdictions. In the event that nationally consistent criteria are not in place, the lawyer will be deemed resident in the jurisdiction of the signatory body in which the lawyer has been a member continuously for the longest period of time.

39. In the event that a claim arises from a lawyer providing legal services and the closest and most real connection to the claim is with a jurisdiction in which the lawyer has claimed an exemption under clause 37, the insurance program of the governing body in the jurisdiction where the lawyer is insured will provide at least the same scope of coverage as the liability insurance in the jurisdiction in which the lawyer is exempt. For clarity, all claims and potential claims reported under the policy will remain subject to the policy’s occurrence or claim limit of $1,000,000 and $2,000,000 annual per member aggregate.

40. A lawyer who is a member of the Barreau and one or more of the other signatory governing bodies must comply with the liability insurance requirements of the Barreau and at least one of the other signatory governing bodies of which the lawyer is a member. Insurance coverage is to be provided as follows:

(a) by the professional liability insurance program of the Barreau with respect to services provided by the lawyer as a member of the Barreau;
(b) by the professional liability insurance program of a signatory governing body other than the Barreau with respect to services provided by the lawyer as a member of a signatory governing body other than the Barreau.

Temporary Mobility between Quebec and Common Law Jurisdictions

41. The Barreau will permit lawyers entitled to practise law in a home jurisdiction, on application under regulations that apply to the Barreau, to provide legal services in Quebec or with respect to the law of Quebec on a specific case or for a specific client for a period of up to one year, which may be extended on application to the Barreau.

42. A signatory governing body, other than the Barreau, will permit members of the Barreau to provide legal services in its jurisdiction or with respect to the law of its jurisdiction on one of the following bases:

(a) as provided in clauses 8 to 32; or
(b) as permitted by the Barreau in respect of the members of the signatory governing body.
Permanent Mobility of Quebec Notaries

43. Signatory common law governing bodies will establish and maintain a program in order to grant Canadian Legal Advisor ("CLA") status to qualifying members of the Chambre.

44. Members of the Chambre whose legal training was obtained outside Canada and who have not had their credentials reviewed and accepted by the Chambre are not qualifying members of the Chambre for the purpose of clauses 43 to 50.

45. A member of the Chambre who is granted the status of CLA in any jurisdiction outside of Quebec may, in his or her capacity as a CLA:
   (a) give legal advice and consultations on legal matters involving the law of Quebec or involving matters under federal jurisdiction;
   (b) prepare and draw up a notice, motion, proceeding or similar document intended for use in a case before a judicial or quasi-judicial body in a matter under federal jurisdiction where expressly permitted by federal statute or regulations;
   (c) give legal advice and consultations on legal matters involving public international law; and
   (d) plead or act before a judicial or quasi-judicial body in a matter under federal jurisdiction where expressly permitted by federal statute or regulations.

46. A governing body will require no further qualifications for a notary to be eligible for status as a CLA beyond the following:
   (a) entitlement to practise the notarial profession in Quebec; and
   (b) good character and fitness to be a member of the legal profession, of the standard ordinarily applied to applicants for membership.

47. Before granting CLA status to a notary qualified under clauses 43 to 50, a governing body will not require the notary to pass a transfer examination or other examination, but may require the notary to do all of the following:
   (a) provide certificates of standing from all Canadian and foreign governing bodies of the legal profession of which the notary is or has been a member;
   (b) disclose criminal and disciplinary records in any jurisdiction; and
   (c) consent to access by the governing body to the notary’s regulatory files of all governing bodies of the legal profession of which the notary is a member, whether in Canada or elsewhere.

48. A governing body will make available to the public information obtained under clause 47 in the same manner as similar records originating in its jurisdiction.
National Mobility Agreement 2013

49. A governing body must require that a notary who is granted the status of a CLA continue to maintain his or her practising membership in the Chambre.

50. The Chambre will continue to make available to its members who are also CLAs in another jurisdiction ongoing liability insurance with minimum occurrence or claim limits for indemnity of $1,000,000 and $2,000,000 annual per member aggregate.

Inter-Jurisdictional Practice Protocol

51. The signatory governing bodies agree that the Inter-Jurisdictional Practice Protocol will continue in effect, to the extent that it is not replaced by or inconsistent with legislation, regulation and programs adopted and implemented to give effect to this agreement.

Transition Provisions

52. This agreement is a multi-lateral agreement, effective respecting the governing bodies that are signatories, and it does not require unanimous agreement of Canadian governing bodies.

53. Provisions governing temporary and permanent mobility in effect at the time that a governing body becomes a signatory to this agreement will continue in effect:
   (a) with respect to all Canadian lawyers until this agreement is implemented; and
   (b) with respect to members of Canadian law societies that are not signatories to this agreement.

Withdrawal

54. A signatory may cease to be bound by this agreement by giving each other signatory written notice of at least one clear calendar year.

55. A signatory that gives notice under clause 54 will:
   (a) immediately notify its members in writing of the effective date of withdrawal; and
   (b) require that its members who provide legal services in the jurisdiction of another signatory governing body ascertain from that governing body its requirements for inter-provincial mobility before providing legal services in that jurisdiction after the effective date of withdrawal.
National Mobility Agreement 2013

SIGNED on the 17th day of October, 2013

Law Society of British Columbia
Per: Authorized Signatory

Law Society of Alberta
Per: Authorized Signatory

Law Society of Saskatchewan
Per: Authorized Signatory

Law Society of Manitoba
Per: Authorized Signatory

Law Society of Upper Canada
Per: Authorized Signatory

Chambre des notaires du Québec
Per: Authorized Signatory

Barreau du Québec
Per: Authorized Signatory

Law Society of New Brunswick
Per: Authorized Signatory

Nova Scotia Barristers' Society
Per: Authorized Signatory

Law Society of Prince Edward Island
Per: Authorized Signatory

Law Society of Newfoundland and Labrador
Per: Authorized Signatory
Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, (sic) or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:
   (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
   (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
   (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
   (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
   (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
   (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:
   (1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
   (2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d):
   (1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as
lawyers or counselors at law or the equivalent, and subject to effective regulation and
discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws
of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise
of its discretion, [the highest court of this jurisdiction].

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to
practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be
authorized by court rule or order or by law to practice for a limited purpose or on a restricted
basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the
lawyer’s direct action or by the lawyer assisting another person. For example, a lawyer may not
assist a person in practicing law in violation of the rules governing professional conduct in that
person’s jurisdiction.

[2] The definition of the practice of law is established by law and varies from one
jurisdiction to another. Whatever the definition, limiting the practice of law to members of the
bar protects the public against rendition of legal services by unqualified persons. This Rule does
not prohibit a lawyer from employing the services of paraprofessionals and delegating functions
to them, so long as the lawyer supervises the delegated work and retains responsibility for their
work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose
employment requires knowledge of the law; for example, claims adjusters, employees of
financial or commercial institutions, social workers, accountants and persons employed in
government agencies. Lawyers also may assist independent nonlawyers, such as
paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-
related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice
generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other
systematic and continuous presence in this jurisdiction for the practice of law. Presence may be
systematic and continuous even if the lawyer is not physically present here. Such a lawyer must
not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this
jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States
jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal
services on a temporary basis in this jurisdiction under circumstances that do not create an
unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies
four such circumstances. The fact that conduct is not so identified does not imply that the
conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does
not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous
presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer’s services are provided on a
“temporary basis” in this jurisdiction, and may therefore be permissible under paragraph (c).
Services may be “temporary” even though the lawyer provides services in this jurisdiction on a
recurring basis, or for an extended period of time, as when the lawyer is representing a client in a
single lengthy negotiation or litigation.
Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word “admitted” in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the lawyer’s practice in the jurisdiction in which the lawyer is admitted is within the jurisdiction of that lawyer’s practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted but are not within
paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer’s client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer’s work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client’s activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law in behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. See also Model Rule on Temporary Practice by Foreign Lawyers. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer’s officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer’s ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer’s qualifications and the quality of the lawyer’s work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds.
and mandatory continuing legal education. See Model Rule for Registration of In-House Counsel.

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., Model Rule on Practice Pending Admission.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.
Rule 8.5: Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

Comment

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction’s disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer’s conduct may involve significant contacts with more than one jurisdiction.
Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

When a lawyer’s conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer’s conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer’s reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client’s informed consent confirmed in the agreement.

If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.
Reforming Lawyer Mobility—Protecting Turf or Serving Clients?

JAMES W. JONES,* ANTHONY E. DAVIS,t SIMON CHESTER,t AND CAROLINE HART§

ABSTRACT

In this Article, we describe in detail the current problems with the regulation of lawyer mobility in the United States and the compelling reasons that a fundamental change in the present approach is required. We contend that the current rules regarding multijurisdictional practice by licensed lawyers impede the ability of clients to achieve more efficient and cost effective legal services, are unnecessary to protect the interests of clients, and undermine the integrity of the overall regulatory structure by articulating requirements that as a practical matter cannot be complied with. Drawing on lessons from Australia and Canada, both common law countries with a long tradition of regulation of the legal profession at the state/provincial levels, we offer a proposal for the recognition of rights of practice of all American lawyers engaged in federal or interstate matters in all American jurisdictions. This proposal, if adopted, would enable clients to use counsel of their choice on a nationwide basis. Such a change is critical if American lawyers are to remain responsive to the legitimate expectations and demands of their clients and true to the highest standards of professionalism.

TABLE OF CONTENTS

INTRODUCTION .......................................... 128

I. A BRIEF HISTORY OF THE REGULATION OF LAWYERS IN THE UNITED STATES ..................................... 128

II. THE CURRENT PROBLEMS WITH THE REGULATION OF LAWYER MOBILITY IN THE UNITED STATES ............. 130

* James W. Jones is a Senior Fellow at the Center for the Study of the Legal Profession at the Georgetown University Law Center.
† Anthony E. Davis is a Partner at Hinshaw & Culbertson LLP.
‡ Simon Chester is Counsel at Gowling WLG (Canada) LLP.
§ Caroline Hart is a Senior Lecturer (Law) at the School of Law and Justice at the University of Southern Queensland and Director of the National Rural Law and Justice Alliance.

The authors wish to thank Michael G. Ruff, an associate attorney at Hinshaw & Culbertson LLP, for his contributions to this Article. © 2017, James W. Jones, Anthony E. Davis, Simon Chester, and Caroline Hart.
A. THE REVISED RULE 5.5 HAS NOT BEEN UNIFORMLY ADOPTED .................................................. 131
B. THE REVISED RULE 5.5 FAILS TO ADDRESS SOME KEY ISSUES ........................................... 133
C. THE PENALTIES IMPOSED FOR VIOLATIONS OF RULE 5.5 CAN BE SEVERE. ............................... 135
   1. Use of Criminal Penalties ................................. 135
   2. Civil Damages .................................................. 136
   3. Nullifying Acts of Unauthorized Practice .............. 137
   4. Professional Discipline in the Host State and Reciprocal Discipline in the Home State .................. 137
   5. Professional Discipline in the Home State ............ 138
   6. Denial of Legal Fees ........................................... 139
   7. Use by State Courts of Unauthorized Practice Rules as a Deterrent to Out-of-State Lawyers .......... 139

III. COMPELLING REASONS FOR REVISING THE U.S. APPROACH TO LAWYER MOBILITY ......................... 140
   A. THE CURRENT APPROACH IMPEDES THE RIGHT OF CLIENTS TO ACHIEVE INCREASED EFFICIENCY AND COST EFFECTIVENESS IN THE DELIVERY OF LEGAL SERVICES .................................................. 140
   B. THE CURRENT APPROACH IS UNNECESSARY TO PROTECT THE INTERESTS OF CLIENTS .................. 142
   C. THE CURRENT APPROACH CREATES RULES THAT ARE IMPOSSIBLE TO COMPLY WITH ...................... 143

IV. REFORM OF THE RULES ON LAWYER MOBILITY IN AUSTRALIA AND CANADA .................................. 145
   A. REGULATION OF LAWYER MOBILITY IN AUSTRALIA ................................................................. 146
      1. Regulation of the Legal Profession and Historic Restrictions on Lawyer Mobility ..................... 146
      2. Pressure for Change from Outside the Legal Profession ......................................................... 148
      3. The Legal Profession’s Move Toward Multijurisdictional Practice ......................................... 150
REFORMING LAWYER MOBILITY

4. EXPERIENCE SINCE MOBILITY REFORM
   a. Admission to Practice
   b. Professional Discipline

5. IMPROVED RELATIONSHIPS AMONG PROFESSIONAL AND REGULATORY BODIES

B. REGULATION OF LAWYER MOBILITY IN CANADA
   1. REGULATION OF THE LEGAL PROFESSION AND HISTORIC RESTRICTIONS ON LAWYER MOBILITY
   2. CONSTITUTIONAL PRESSURES FOR MOBILITY REFORM
   3. ANTITRUST PRESSURES FOR MOBILITY REFORM
   4. PRESSURES FROM TRADE LIBERALIZATION AGREEMENTS FOR MOBILITY REFORM
   5. THE LEGAL PROFESSION’S MOVE TOWARD MULTIJURISDICTIONAL PRACTICE
      a. The First Step to Reform: The Inter-jurisdictional Practice Protocol
      b. Adoption of the National Mobility Agreement
      c. Canada’s Remote Northern Territories and the National Mobility Agreement
      d. The Special Situation of Québec
   6. EXPERIENCE SINCE MOBILITY REFORM

V. LESSONS LEARNED FROM THE AUSTRALIAN AND CANADIAN REFORM PROCESSES

VI. REFORM OF LAWYER MOBILITY IN THE UNITED STATES: A PROPOSED WAY FORWARD

CONCLUSION
INTRODUCTION

It is the contention of this Article that the current rules restricting the ability of American lawyers to engage in the practice of law on a nationwide basis are no longer rational or workable, are contrary to the best interests of clients, and are unnecessary to protect the public from harm. Whatever the justifications of such a system at a time when the fastest means of communication was on the back of a horse and when almost all legal matters were “local” by nature and impact, they are no longer persuasive in a nationwide market where lawyers’ services routinely have impacts across state lines and where information moves at the speed of light.

In support of these conclusions, in the sections that follow we examine how the existing structure of lawyer regulation came about, and the problems that now arise in trying to conform the day-to-day practices of modern lawyers to the complex, overlapping, and inconsistent rules of the numerous states and other jurisdictions that comprise the United States. We proceed to describe why fundamental change is needed in the system, and review the objections that have traditionally been raised to liberalizing current rules. We then describe the positive experiences in Australia and Canada—both common law countries that, like the United States, regulate the practice of law primarily at the state or provincial level—in reforming the rules governing lawyer mobility and in implementing a more rational approach to the regulation of legal practice on a nationwide basis. Finally, we suggest a way forward for implementing similar changes in the United States.

We begin, however, with a brief look at the historical reasons that the American legal profession evolved as it did.

I. A BRIEF HISTORY OF THE REGULATION OF LAWYERS IN THE UNITED STATES

In his much-celebrated book Undaunted Courage, which recounts the history of the Lewis and Clark Expedition, Stephen Ambrose illuminates the cultural, political, and philosophical ideas that dominated American society when Thomas Jefferson became President in 1801. Those ideas were shaped and limited in important ways by certain fundamental facts that had existed for so long that most people regarded them as permanent and unchangeable. Not the least of these involved the inherent limitations on communications resulting from the vast distances encompassed by the North American continent. As Ambrose wrote:

A critical fact in the world of 1801 was that nothing moved faster than the speed of a horse. No human being, no manufactured item, no bushel of wheat, no side of beef (or any beef on the hoof, for that matter). No letter, no information, no idea, order, or instruction of any kind moved faster. Nothing
had ever moved faster, and, as far as Jefferson’s contemporaries were able to
tell, nothing ever would.

Since the birth of civilization, there had been almost no changes in
commerce or transportation . . . . The Americans of 1801 had more gadgets,
better weapons, a superior knowledge of geography, and other advantages over
the ancients, but they could not move goods or themselves or information by
land or water any faster than had the Greeks and Romans.¹

The reality of the limitations of geography and distance that Ambrose
described influenced almost all aspects of early American life, including the
development of American law. As Professor Lawrence Friedman noted in A
History of American Law, early efforts by the old established bars of the original
colonies to keep the legal profession small and elite through rigorous admissions
standards following the American Revolution largely collapsed, in no small part
because of the diverse legal needs of a vast and rapidly expanding country of
individual entrepreneurs.² As Professor Friedman put it:

Theories of Jacksonian democracy have been used to explain why the bar let
down its bars on admission. But basic social facts pushed the profession in the
same direction. Government control of occupations was, in general, weak and
diffuse. Geographical and social mobility was high. There were many
jurisdictions; no one of them could really define standards for itself; and the
weakness of one was the weakness of all . . . . Besides, a factotum profession,
within the grasp of ambitious men of all sorts, was socially useful. The prime
economic fact of American life . . . was mass ownership of land and (some bits
of) capital. It was a society where many people, not just the noble and the lucky
few, needed some rudiments of law, some forms or form-books, some
know-how about the mysterious ways of courts or governments. It was a
society, in short, that needed a large, amorphous, open-ended [legal] profession.³

As a consequence, control of the American legal profession remained highly
localized and dispersed through the first hundred years or so following the
Revolution.⁴ Although control of bar admission subsequently shifted to the state
level in all U.S. jurisdictions, the tradition of local control—and, equally
important, the absence of uniform national standards—remains the norm for the
regulation of American lawyers.⁵ We contend that such a balkanized approach to
the regulation of the legal profession, including particularly the restrictions

¹. Stephen E. Ambrose, Undaunted Courage: Meriwether Lewis, Thomas Jefferson, and the Opening
³. Id. at 317–18.
⁴. In many states, admission to the bar was originally determined at the county level, sometimes with the
proviso that admission to a single county bar entitled a lawyer to practice in all of the courts of the state. Id.
at 316.
imposed by individual states on the free movement of lawyers across the nation in the rendering of services to their clients, is no longer rational or workable.

II. THE CURRENT PROBLEMS WITH THE REGULATION OF LAWYER MOBILITY IN THE UNITED STATES

The problems with the current approach to the regulation of lawyer mobility in the United States were exemplified by the 1998 decision of the California Supreme Court in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court.* In that case, a New York law firm was engaged by a California company to assist it in a business dispute scheduled for arbitration in California. The record indicated that some of the preparatory work in the case was performed by Birbrower lawyers in New York, that the lawyers communicated regularly with their California client by telephone, and that the firm’s lawyers visited with their client several times in California and represented the client in negotiations in that state. After the dispute was settled prior to arbitration, the client refused to pay Birbrower for its services on grounds that the legal services had been performed in California and none of the firm’s lawyers were licensed to practice in that state.

To the consternation of both academic and practicing lawyers across the country, the California Supreme Court ruled that the Birbrower lawyers had engaged in the unauthorized practice of law in California and that, as a consequence, the client was excused from paying the portion of the firm’s legal fees related to services that had been rendered in that state. Significantly, the court held that, under the facts in the case before it, it would have made no difference if the New York lawyers had associated with local California counsel and that the Birbrower lawyers could be deemed to have been practicing in California even if they had never been physically present there.

In the wake of the *Birbrower* ruling, the American Bar Association (ABA) established a Commission on Multijurisdictional Practice that proposed, after extensive deliberations, substantial amendments to ABA Model Rule 5.5 to address the problem of lawyers practicing “temporarily” in jurisdictions where they were not otherwise admitted to practice. The amended Rule 5.5, as adopted by the ABA House of Delegates in August 2002, provides in relevant part as follows:

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

---

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice. . . .

The new Rule 5.5 was clearly designed to address explicitly some of the key issues arising from the Birbrower case, and it does represent a significant improvement from previously existing rules. However, serious issues remain.

A. THE REVISED RULE 5.5 HAS NOT BEEN UNIFORMLY ADOPTED

To be effective, the revised Rule 5.5 needed to be adopted, using essentially the same language, in virtually all of the states. Unfortunately, that has not happened. Although the revised rule has been adopted in some form by forty-three states, the adopted versions differ, sometimes in significant ways.

The most common variation is a requirement for a tighter nexus between the matter on which an out-of-state lawyer is working and his or her home state than

---

8. It might be noted that, within a year following the Birbrower decision, the California Legislature effectively overturned the ruling by amending the Code of Civil Procedure to permit out-of-state lawyers to participate in arbitrations in California if they file a certificate of good standing with an in-state arbitrator. See Cal. Civ. Proc. Code § 1282.4 (West 2015).

9. As of this writing, the seven states that have not adopted any version of Rule 5.5 include Hawaii, Kansas, Mississippi, Montana, Texas, West Virginia, and Wyoming. California has technically not adopted any form of Rule 5.5, but it has addressed the issue of lawyer mobility in its own rules. See, e.g., Cal. R. Ct. 9.47, 9.48.
is apparently required in the “reasonably related” language of Model Rule 5.5. In seven states—Connecticut, Kentucky, Maine, North Carolina, Tennessee, and Virginia—the matter must not only be “related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice,” but must also involve services being provided to an existing client of the lawyer, and in all of these states but Connecticut, the representation of the existing client must be in a jurisdiction in which the lawyer is licensed to practice. In addition, Connecticut has modified the “reasonably related” language of Rule 5.5 to be “substantially related.” California specifies that a “material aspect” of the matter has to occur in a jurisdiction other than California and in which the lawyer seeking protection of the rule is licensed to practice law. And Nevada provides that an out-of-state lawyer must be

acting with respect to a matter that is incident to work being performed in a jurisdiction in which the lawyer is admitted, provided that the lawyer is acting in ... [Nevada] on an occasional basis and not as a regular or repetitive course of business in ... [Nevada].

Most onerous is the requirement imposed by New Jersey that the matter being undertaken by an out-of-state lawyer must be

with respect to a matter where the practice activity arises directly out of the lawyer’s representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in ... [New Jersey] is occasional and is undertaken only when the lawyer’s disengagement would result in substantial inefficiency, impracticality or detriment to the client.

Other variations from Model Rule 5.5 include requirements in at least five states—Florida, New Jersey, Nevada, South Carolina, and South Da-
REFORMING LAWYER MOBILITY

kota— that out-of-state lawyers working temporarily in their jurisdictions complete some sort of notification or registration process, sometimes designating in-state agents for service of process or submitting to state tax regimes. In Virginia, out-of-state lawyers are required to make certain disclosures to in-state clients, and Arizona goes one step further by requiring that in-state clients provide “informed consent” to the out-of-state lawyer’s activities. In New Mexico, if a transactional matter involves any issues specific to the law of that jurisdiction, an out-of-state lawyer temporarily practicing in New Mexico must associate with a licensed in-state lawyer.

B. THE REVISED RULE 5.5 FAILS TO ADDRESS SOME KEY ISSUES

Apart from the lack of uniformity in the adoption of the revised Model Rule 5.5 by the several states, the revised rule addresses some but by no means all of the multijurisdictional practice issues confronting today’s practicing lawyers on a daily basis. Hence, even if the rule had been adopted in the same form by all of the states, significant issues would remain, as shown by the following examples:

• A lawyer who commutes to work across state lines and in the evenings and on weekends works remotely using technology from her home (in a state where she is not admitted) is presumably engaged in the unauthorized practice of law, even under the revised Rule 5.5, because her presence is not temporary (she has a “systematic and continuous presence”) even if none of her clients are located in the state where she lives. In other words, she is “practicing” in the state where she resides just because she is sitting there when she works remotely.

• A lawyer in State A is requested by a new client in State B to negotiate a business transaction in State C. Even assuming that State C has adopted the revised Rule 5.5, the lawyer remains at risk of engaging in unauthorized practice in State C because it could be argued that his activities in that state do not “arise out of or are reasonably related to” the lawyer’s practice in State A, because the new client is in State B. The risk would be even higher if State C were one of the seven states noted above that have limited the applicability of section (c) of Rule 5.5 to matters involving existing clients.

• A lawyer who advertises on the internet—perhaps using only social media like LinkedIn—could be found to be engaged in the unauthor-

25. See S.D. Rules of Prof’l Conduct R. 5.5(c)(5) (requiring out-of-state lawyers to obtain a South Dakota sales tax license and to pay South Dakota sales taxes).
ized practice of law in another state in which she is not licensed to practice. Many states, while taking care not to penalize the act of advertising on the internet itself, nonetheless expressly penalize lawyers who accept clients from their states who respond to internet advertising.

- A real estate developer client in State A asks its law firm in State B to handle all of the company’s commercial leases in states throughout the country, to include the negotiation, drafting, and final execution of all necessary documents. Even in states that have adopted the revised Rule 5.5, firm lawyers not admitted to practice in those states could be regarded as engaged in unauthorized practice because the activities might not be deemed to be “arising out of or . . . reasonably related to” the firm’s practice in State B.

Some of these “gaps” in coverage in Model Rule 5.5 are of course exacerbated by modifications in the language of the rule as adopted in various states (as described above). Also, all of the temporary practice “safe harbors” included in section (c) of Rule 5.5 remain subject to the general restriction set out in section (b) of the rule that an out-of-state lawyer (even one permitted to practice temporarily in the regulating state under section (c)) may not establish “systematic and continuous presence” in the regulating state for the practice of law. Comment 4 to the rule demonstrates the potential breadth of this latter restriction by noting that “[p]resence may be systematic and continuous even if the lawyer is not physically present here.” Needless to say, in a digital age when lawyers routinely practice “virtually” in many jurisdictions, the cautionary language of section (b) gives ample cause for both uncertainty and concern. Indeed, at least one state, Indiana, has added a comment to its version of Model Rule 5.5 warning out-of-state lawyers that “advertising in media specifically targeted to Indiana residents or initiating contact with Indiana residents for solicitation purposes could be viewed as ‘systematic and continuous presence’” in Indiana, thus vitiating the applicability of the temporary practice rule.

To date, only two states, Arizona and New Hampshire, have expressly recognized that it is not the unauthorized practice of law to practice law remotely—i.e., digitally—when sitting in the state but actually using technology

29. As noted below, the Comments to Rule 5.5 state that a lawyer’s presence in another state “may be systematic and continuous even if the lawyer is not physically present there.” MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 4 (2016) [hereinafter MODEL RULES].

30. See S.C. APP. CT. R. 418 (providing that out-of-state lawyers who advertise in South Carolina can face unauthorized practice sanctions, including needing to refund all legal fees obtained from clients as a result of the advertising).

31. As noted below, this is not merely a hypothetical possibility. This was, in fact, the result in New Jersey, a state that was one of the first to adopt a version of the revised Rule 5.5. See N.J. Comm. on the Unauthorized Practice of Law, Op. 49 (2012).

32. IND. RULES OF PROF'L CONDUCT R. 5.5 cmt. 4,
to practice in another jurisdiction where the lawyer is licensed and in good standing.\textsuperscript{33}

What these “gaps” and ambiguities of meaning reflect, of course, is the fact that the temporary practice provisions of Model Rule 5.5 are a compromise resulting from years of debate within the legal profession in general and the ABA in particular over the type of multijurisdictional practice (if any) that should be permitted in the United States. As one commentator has described it:

It is a compromise between lawyers and regulators who wanted multistate practice to be governed much in the manner of drivers’ licenses—a driver licensed in one state can drive in any state—and those who wanted to minimize, wherever possible, the amount of in-state legal work that an out-of-state lawyer could perform without seeking general or pro hac vice admission to the local bar. As a compromise between these extremes, Rule 5.5(c) bears some resemblance to the proverbial camel as a horse designed by a committee.\textsuperscript{34}

C. THE PENALTIES IMPOSED FOR VIOLATIONS OF RULE 5.5 CAN BE SEVERE

While one might have thought that the widespread adoption of the revised Model Rule 5.5 would have moderated aggressive enforcement against perceived unauthorized practice violations by lawyers from sister states, for many jurisdictions that has not proved to be true. While it is important to note that imposition of penalties has not been common—particularly considering the frequency with which the rule is violated—it remains the case that penalties for violation can be quite severe and that at least some states appear willing to impose them. Set out below are a variety of ways in which states have continued to penalize lawyers from other states for alleged unauthorized practice—using examples almost all of which post-date the adoption of the revised Model Rule 5.5.

1. USE OF CRIMINAL PENALTIES

The most draconian risks faced by lawyers accused of engaging in unauthorized practice involve the threat of criminal prosecution. For example, in March 2004, a district attorney in North Carolina filed misdemeanor charges for

\textsuperscript{33} See Ariz. Rules ER 5.5(d) (“A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction may provide legal services in Arizona that exclusively involve federal law, the law of another jurisdiction, or tribal law.”); Order (No. R-15-0018) (Ariz. Aug. 27, 2015) (amendment to ER 5.5 of the Arizona Rules of Professional Conduct); N.H. Rules of Prof’l Conduct R. 5.5(d) (“A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that: . . . (3) relate solely to the law of a jurisdiction in which the lawyer is admitted.”); Order (N.H. Oct. 17, 2016) (amendment to Rule 5.5 of the New Hampshire Rules of Professional Conduct).

\textsuperscript{34} 2 Hazard et al., supra note 5, § 46.8, at 46-21 (3d ed. 2010 Supp.).
unauthorized practice against two Georgia lawyers and their law firm because they had represented a North Carolina university in an internal investigation in 2002–2003. Although they were engaged precisely because of their expertise in the arcane area of college sports law, the Georgia lawyers were charged with violating section 84-4 of the North Carolina General Statutes, which prohibits (with limited exceptions) the practice of law by any person not licensed by the state bar of North Carolina. Curiously, this prosecution was brought despite the fact that North Carolina was one of the first states to adopt the revised Model Rule 5.5, permitting temporary practice in North Carolina by lawyers from other states, the state’s version of the rule having gone into effect on March 1, 2003.

North Carolina is not alone in prescribing criminal penalties for the unauthorized practice of law. In New York, for instance, a person who engages in unauthorized practice may be charged with a misdemeanor or, in certain cases, with a Class E felony. So, while criminal charges are not often brought against lawyers allegedly engaged in unauthorized practice, they are certainly not out of the question.

2. Civil Damages

In addition to criminal penalties for unauthorized practice, at least one state allows plaintiffs the opportunity to sue lawyers and law firms in private civil

36. The statute provides, in pertinent part, that:

[except as otherwise permitted . . . it shall be unlawful for any person or association of persons, except active members of the Bar of . . . North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body.

N.C. GEN. STAT. § 84-4 (2011). As is common among unauthorized practice statutes, exceptions are made for law students, certain not-for-profit in-house counsel, attorneys admitted pro hac vice, etc.
38. Unauthorized practice in New York occurs when one actually practices law, appears to practice law, or holds oneself out as licensed to practice law, through advertising or otherwise, “without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath.” N.Y. Jud. Law § 478 (McKinney 2013).
39. “[A]ny person violating section four hundred seventy-eight . . . of this article, shall be guilty of a misdemeanor.” N.Y. Jud. Law § 485. Recall supra note 38 that section 478 refers simply to the violation of statutorily defined unauthorized practice, irrespective of any damages resulting therefrom.
40. A person engaging in unauthorized practice is guilty of a felony rather than a misdemeanor where he or she:

(1) falsely holds himself or herself out as a person licensed to practice law in this state, a person otherwise admitted to practice law in this state, or a person who can provide services that only attorneys are authorized to provide; and
(2) causes another person to suffer monetary loss or damages exceeding one thousand dollars or other material damage resulting from impairment of a legal right to which he or she is entitled.

actions for the tort of engaging in unauthorized practice. In *Fogarty v. Parker, Poe, Adams & Bernstein LLP*, the Supreme Court of Alabama ruled that a lawyer and her law firm licensed to practice in another state may be sued by private individuals for engaging in unauthorized practice, notwithstanding any statutory carve-outs that limit causes of action for malpractice against in-state “legal service providers.”

3. **Nullifying Acts of Unauthorized Practice**

While the consequences of engaging in unauthorized practice are usually directed against the offending lawyers and their law firms, sometimes the clients of such lawyers also suffer. Some state unauthorized practice statutes provide safe harbors for both attorneys’ “preparatory efforts” while awaiting pro hac vice admission and for non-substantive services that non-lawyers may traditionally perform. However, when two out-of-state attorneys filed a motion for reconsideration on behalf of their corporate client in a workers’ compensation case, the North Dakota Supreme Court found that they had stepped over the line of the unauthorized practice safe harbor. The court held that the filing of the motion for reconsideration was more than a “purely mechanical service” that “could have been filed by a person who lacked the license to practice law.” As a result, the court voided the reviewing agency’s decision and reinstated the workers’ compensation award, thereby effectively nonsuiting the client of the out-of-state lawyers.

4. **Professional Discipline in the Host State and Reciprocal Discipline in the Home State**

Civil and criminal penalties are by no means the only negative consequences that may face attorneys found to have engaged in the unauthorized practice of law. While disbarment is traditionally a penalty reserved for an attorney disciplined by the state in which he is admitted, unauthorized practice in foreign state jurisdictions can also lead to disbarment.

Disbarment as a penalty is generally limited to those attorneys who have maintained a “systematic and continuous presence” in the state in which their practice is unauthorized. Such were the circumstances for a lawyer admitted in New York and Pennsylvania, who for years—as part of a business relationship with a Delaware accountant—practiced estate planning for Delaware clients from his office in Pennsylvania. In its decision in *In re Kingsley*, the Delaware Supreme Court disbarred the attorney, noting that of particular import was his

---

41. 961 So. 2d 784, 789 (Ala. 2007).
42. Carlson v. Workforce Safety & Ins., 765 N.W.2d 691, 704 (N.D. 2009).
43. *Id.* at 701 (internal quotation omitted); see also Blume Constr., Inc. v. State, 872 N.W.2d 312 (N.D. 2015).
knowledge that his activities were in violation of state law governing unauthorized practice. In particular, the attorney had received formal written notice of his unauthorized practice, yet had continued to serve his Delaware clients.\textsuperscript{45} By the time his activities in Delaware were terminated, he had prepared estates for some seventy-five Delaware clients over a two-year period.\textsuperscript{46}

Disbarment in a host state is, however, not the end of the matter. Most states require that lawyers report professional discipline imposed in other states,\textsuperscript{47} and reciprocal discipline is usually imposed almost automatically.\textsuperscript{48} Thus, a lawyer disbarred in a state where he had never been admitted will later face almost certain automatic disbarment in his actual state of admission.\textsuperscript{49}

5. PROFESSIONAL DISCIPLINE IN THE HOME STATE

Even absent a prosecution for engaging in unauthorized practice in another state, lawyers may still face discipline in their home states for engaging in such activities in another jurisdiction. In 2005, in \textit{In re Bolte}, the Wisconsin Supreme Court publicly reprimanded a member of its state bar for advising and assisting a client in recovering nearly two million dollars in previously unpaid royalties for mineral rights in Colorado.\textsuperscript{50} The case is remarkable for the fact that, as the court noted, the lawyer had explicitly advised the client that:

\begin{itemize}
\item \textsuperscript{45} Id. at *4, *9.
\item \textsuperscript{46} Id. at *2, *5, *9.
\item \textsuperscript{47} The requirements for reporting discipline imposed in other states are found, for example, in New York respectively at N.Y. Comp. Codes R. & Regs. tit. 22, § 603.3(d) (1st Dep’t) (repealed 2016); N.Y. Comp. Codes R. & Regs. tit. 22, § 691.3(e) (2d Dep’t) (repealed 2016); N.Y. Comp. Codes R. & Regs. tit. 22, § 806.19(b) (3d Dep’t) (repealed 2016); and in N.Y. Rules of Prof’l Conduct R. 8.3. Similar rules are in place in other states. See, e.g., Mass. Sup. Jud. Ct. R. 4:01 (2016) (§§ 16(1), 16(6)); Ill. Sup. Ct. R. 763; Ill. Rules of Prof’l Conduct R. 8.3; Va. Sup. Ct. R. 1A:4(7); Va. Rules R. 8.3.
\item \textsuperscript{48} The imposition of reciprocal discipline, and the reporting requirements, are generally set out in court rules. See, for example, N.Y. Comp. Codes R. & Regs. tit. 22, § 603.3(a) (repealed 2016), which sets out the rule subjecting attorneys to reciprocal discipline in the First Judicial Department in New York:
\begin{quote}
Any attorney to whom this Part shall apply, pursuant to section 603.1 of this Part who has been disciplined in a foreign jurisdiction, may be disciplined by this court because of the conduct which gave rise to the discipline imposed in the foreign jurisdiction. For purposes of this Part, foreign jurisdiction means another state, territory or district.
\end{quote}
The other Judicial Departments in New York have almost identical rules, see N.Y. Comp. Codes R. & Regs. tit. 22, § 691.3 (2d Dep’t) (repealed 2016); N.Y. Comp. Codes R. & Regs. tit. 22, § 806.19 (3d Dep’t) (repealed 2016); or a rule to similar effect, N.Y. Comp. Codes R. & Regs. tit. 22, § 1022.22 (4th Dep’t).
\item \textsuperscript{49} The normative rule for the imposition of reciprocal discipline is that it will be imposed as a matter of comity as between the states unless the lawyer in question can show a lack of due process in the original, underlying disciplinary proceeding, or that the discipline was with respect to conduct that is not disciplinable in the state seeking to impose reciprocal discipline. See, e.g., \textit{In re Green}, 308 A.D.2d 72, 75 (N.Y. App. Div. 1st Dep’t 2003) (citing \textit{In re Gifis}, 259 A.D.2d 105, 107 (N.Y. App. Div. 1st Dep’t 1999)); see also \textit{In re Feldman}, 140 A.D.2d 880, 880 (N.Y. App. Div. 3d Dep’t 1988) (disbarring attorney in New York after disbarment ordered by New Jersey court, under the theory that the ends of justice would best be served by imposing the same punishment in both jurisdictions).
\item \textsuperscript{50} 699 N.W.2d 914, 922 (Wis. 2005).
\end{itemize}
While he was a lawyer, he was not licensed to practice in Colorado. He explained that he could not appear in court and that she would have to hire a lawyer to pursue any legal redress. The referee stated: "[i]t is clear from the evidence that it was [the client] who pursued [the lawyer's] services and that [the lawyer] was initially reluctant to become involved." 51

Even though the client had not been harmed, the lawyer was nevertheless disciplined for his actions in representing the client in Colorado because he had not been admitted in that state. 52

6. DENIAL OF LEGAL FEES

Apart from the potential for criminal prosecution, civil liability, professional discipline, and causing actual harm to their clients, lawyers found to have engaged in unauthorized practice also risk not being able to collect their fees. This was, of course, the case in Birbrower, 53 but the most extraordinary example of the principle is the case of In re Ferrey. 54 In that matter (actually decided shortly before the adoption of the revised Rule 5.5), the Supreme Court of Rhode Island—in a case where a lawyer had been successful on behalf of his clients—granted attorney Ferrey’s application for statutory legal fees for the period during which he had been admitted pro hac vice, but denied fees for his admittedly extensive preparatory work on the same matter prior to his pro hac vice admission on the grounds that, until his admission, he had been engaging in unauthorized practice.

7. USE BY STATE COURTS OF UNAUTHORIZED PRACTICE RULES AS A DETERRENT TO OUT-OF-STATE LAWYERS

Unfortunately, despite the widespread adoption of the revised Rule 5.5, some state courts continue to use the rules against unauthorized practice as a deliberate deterrent to the ability of out-of-state lawyers to engage in reasonable multijurisdictional practice. A prime example is New Jersey.

Although New Jersey was among the first states to adopt the revised Rule 5.5 (albeit in a much narrower version than proposed by the ABA), in October 2012, the Committee on the Unauthorized Practice of Law appointed by the Supreme Court of New Jersey issued Opinion 49 on “Multijurisdictional or Crossborder Practice,” which addressed the unauthorized practice of law in the commercial real estate context. In the opinion, the Committee chose to define unauthorized practice as broadly as possible so as to prevent a client’s selected national counsel from performing in New Jersey the normal range of services provided by such

51. Id. at 916.
52. Id. at 922.
53. See Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 10 (Cal. 1998).
counsel in other states across the country. In particular, the Committee noted that, while it could not prevent out-of-state lawyers from advising their client regarding the leases for the client’s shopping malls located in New Jersey (so long as they did so from outside the state), it would constitute the unauthorized practice of law in New Jersey for such lawyers to draft the leases or even to come to New Jersey to supervise the execution of the leases. The opinion stands as a particularly egregious example of the deliberate use of unauthorized practice rules to protect the turf of in-state lawyers, even where clients are harmed by the unnecessary cost of engaging in-state lawyers and by deprivation of the advice and assistance of counsel of their choice.

* * *

From the foregoing cases and examples, it is clear that the rules governing lawyer mobility and multijurisdictional practice in the United States continue to be a serious problem. While the revised Model Rule 5.5 promulgated in 2002 has been helpful in addressing some of the issues, it has fallen well short of the optimistic predictions voiced at the time of its adoption. In the next section, we turn to the reasons that a more fundamental solution to the problems associated with the current regulation of lawyer mobility is required.

III. COMPPELLING REASONS FOR REVISING THE U.S. APPROACH TO LAWYER MOBILITY

It has now been sixteen years since the promulgation of the revised Model Rule 5.5. While the adoption of the rule in some form by a significant majority of the states has certainly been beneficial, it has not solved the problem of lawyer mobility in the United States. Indeed, as described above, serious problems remain and, with the continuing rapid evolution of the legal marketplace, they are likely to become more severe.

A. THE CURRENT APPROACH IMPEDES THE RIGHT OF CLIENTS TO ACHIEVE INCREASED EFFICIENCY AND COST EFFECTIVENESS IN THE DELIVERY OF LEGAL SERVICES

At least since 2008 (if not earlier), commercial clients in the U.S. legal market have been increasingly insistent that lawyers and law firms provide more value for the dollars they receive. By “value,” clients have generally meant that they expect their lawyers to deliver services more efficiently, more cost effectively, and more predictably than ever before.\(^{55}\) And, with the shifts in relative economic

power in the marketplace since 2008, clients are now clearly in the driver’s seat to reward those lawyers and law firms that are able to meet their expectations and to punish those that are not. As many observers have noted, the market for legal services in the United States has clearly shifted from a seller’s to a buyer’s market.\(^5\)

This shift in client expectations is plainly reflected in the mounting insistence of clients that the overall costs of legal services be reduced.\(^6\)

In this market climate, it is particularly anomalous that the prevailing rules of practice of the legal profession should maintain impediments to client desires to achieve such efficiencies and cost reductions. Not only do current practices make it more difficult for clients to use counsel of their choice across state borders, but in many instances clients are permitted to do so only by incurring the additional expense and administrative burden of retaining “local counsel” in matters where the addition of such local lawyers is both unnecessary and unwanted.

Perhaps the general requirement for use of local counsel could have been justified in an era when most legal matters were in fact “local,” when substantive law differed markedly from one state to another, when it was sometimes challenging to research out-of-state law and practice, and when transportation and communications technology were limited. Today, however, circumstances are dramatically different. As one leading commentator has described:

\[\text{[L]awyers—even solo practitioners in small towns far from state boundaries—increasingly have practices that require them to consider the law of other states, if not other countries . . . . To require clients to hire multiple lawyers in cross-border transactions, for example, or in litigation in which even a single witness lives in another state, would be prohibitively expensive and could further erode the public’s respect for the law and for lawyers.} \]

Similarly, many legal matters involve considerations of federal law, which is largely uniform throughout the country. Other matters involve substantially or entirely identical state statutes, such as the Uniform Commercial Code. Ethical standards for law practice have become more and more uniform as well, as the \textit{Model Rules of Professional Conduct} have been adopted in most jurisdictions: . . . .

Finally, although there are differences in the law from state to state and even from city to city, modern electronic research tools make it much easier for a lawyer to learn the laws and practices of other jurisdictions than it was in the prior print-based era . . . .\(^7\)

In a market climate of growing client insistence that lawyers perform their services more efficiently and cost effectively, it is increasingly difficult for the

\(^5\) See id.

\(^6\) In recent years, cost concerns have led clients across the market to disaggregate matters, retain more work in house, rely more heavily on non-traditional service providers, and move “down market” for many kinds of legal matters. See id.

\(^7\) 2 HAZARD ET AL., supra note 5, § 46.5, at 46-12 (3d ed. 2010 Supp.).
legal profession to defend artificially-imposed impediments that frustrate clients’ legitimate expectations, particularly where such restrictions can no longer be justified as necessary consumer protections.

B. THE CURRENT APPROACH IS UNNECESSARY TO PROTECT THE INTERESTS OF CLIENTS

In most U.S. jurisdictions, the temporary practice of an out-of-state lawyer without proper authorization is regarded as the “unauthorized practice of law” (UPL), just as if the activities of the out-of-state lawyer had been undertaken by a layperson without legal training or experience.\(^59\) While this result may make sense in a strictly literal way—since neither the out-of-state lawyer nor the unlicensed layperson has been “authorized” to practice law in the regulating state—it cannot be otherwise justified.

Even accepting that UPL rules may provide beneficial consumer protections where untrained laypersons are concerned,\(^60\) such a case is very hard to make where trained and licensed lawyers are involved, even if such lawyers are from out of state. As previously noted, much of U.S. law practice today involves issues of federal law or of substantially similar state law, where any substantive or procedural differences in the law of any particular jurisdiction can be easily and quickly discerned through modern computerized research tools. All lawyers admitted to practice in the United States today have basic research skills and experience that should enable them to find and apply the law in any other U.S. jurisdiction. Moreover, in an age of increasing lawyer specialization, it is clearly true that lawyers trained and experienced in particular substantive areas of the law are likely to be more competent to handle matters in their fields of specialization, even in states where they are not licensed, than are non-specialist lawyers physically located in such states. An experienced real estate lawyer from New York, for example, is more likely to be able competently to handle a complex real estate financing project in Chicago than a family law practitioner who happens to be licensed in Illinois.

In the United States today, forty-one states and the District of Columbia permit the admission of out-of-state lawyers to practice in their jurisdictions on motion and without the requirement that they pass the local bar examination under some circumstances.\(^61\) This fact in itself underscores the point that lawyers in all U.S. jurisdictions are competent professionals who need not demonstrate specialized knowledge about the substantive law or procedures of a particular state in order

\(^59\) Id. at 46-11 to -12.

\(^60\) It should be noted that the efficacy of UPL rules in achieving effective consumer protection objectives is not universally accepted. See Charles W. Wolfram, Modern Legal Ethics 828–34 (1986).

to practice there in a way that serves the best interests of their clients. The same point is confirmed in practices across the country relating to pro hac vice admission of out-of-state litigators.62

Unfortunately, it may be that the primary motivation for many of the restrictions on lawyer mobility has less to do with protections for clients than with protection for local lawyers from out-of-state competition. And as to that motivation, we heartily agree with the commentator who observed that “[i]f the UPL rules are intended to protect clients, clients should have some say as to how much protection they want. And if the rules are designed in part to protect lawyers from competition, then lawyers should not be allowed unilaterally to determine the extent of their own protection.”63

C. THE CURRENT APPROACH CREATES RULES THAT ARE IMPOSSIBLE TO COMPLY WITH

In his “Chair’s Introduction” to the published version of the Model Rules of Professional Conduct in 2002, Delaware Chief Justice Norman Veasey, speaking on behalf of the ABA’s Commission on Evaluation of the Rules of Professional Conduct, noted:

At the end of the day, our goal was to develop Rules that are comprehensible to the public and provide clear guidance to the practitioner. Our desire was to preserve all that is valuable and enduring about the existing Model Rules, while at the same time adapting them to the realities of modern law practice and the limits of professional discipline. We believe our product is a balanced blend of traditional precepts and forward-looking provisions that are responsive to modern developments . . . 64

Unfortunately, as regards the issue of lawyer mobility, the current rules fall well short of the laudatory goals articulated by the Chief Justice. We submit that the failure of the revised Rule 5.5 to address the kinds of issues that we previously identified65 (thus failing to provide the “clear guidance” that its drafters intended) makes it all but impossible for lawyers to conform their conduct to the Model Rules’ requirements in a number of very common circumstances. This raises problems not only for individual lawyers, but also for the firms in which they practice.

62. See Stephen Gillers, A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It, 63 HASTINGS L.J. 953, 993–94 (2012). As Professor Gillers notes, “[p]ro hac vice admission means we have long had a high comfort level with a lawyer’s cross-border practice in host-state forums and with non-home-state law.” Id. at 994.


65. See Part II.A.
Under Model Rule 5.1, partners and other lawyers exercising managerial authority in a law firm are required to “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” A lawyer is also made responsible for another’s violation of the Model Rules if

the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The unfortunate truth is that today most law firm leaders—and particularly law firm general counsel and others responsible for risk management—are fully aware that lawyers in their firms are probably in at least technical violation of the rules governing multijurisdictional practice in one or more states every single day. An extraordinary decision, which was handed down while this Article was already in the editing process, exemplifies both the universality of the practice of law across state lines, and at least one court’s absolute refusal to recognize the realities of law practice in the digital age. In the case of *In re Charges of Unprofessional Conduct in Panel File No. 39302,* a Colorado-admitted lawyer, without ever setting foot in Minnesota, exchanged approximately two dozen emails with a Minnesota lawyer in order to intercede on behalf of his parents-in-law against whom the Minnesota lawyer was trying to enforce a $2,368.13 judgment. The Minnesota Supreme Court upheld the professional discipline in Minnesota of the Colorado lawyer on these facts, holding that “engaging in e-mail communications with people in Minnesota may constitute the unauthorized practice of law in Minnesota, in violation of Minn. R. Prof. Conduct 5.5(a), even if the lawyer is not physically present in Minnesota.”

It is hard even to conjecture the tiny proportion of practicing lawyers in 2016 who do not send emails on behalf of clients to persons in other states on a daily, if not hourly basis. And yet, if someone complains—in the case cited above, the Minnesota lawyer who was trying to collect the judgment and with whom the Colorado lawyer had communicated—apparently such communication may be treated as the disciplinable unauthorized practice of law. And yet, as a practical matter, there is little that can be done to address the problem, given the inherent failure in the rules themselves. The result is an unhealthy situation in which large numbers of practitioners effectively ignore the rules while a few unlucky ones from time to time face disciplinary proceedings, denial of fees, or worse. Such a

66. *Model Rules R. 5.1(a).*
67. *Model Rules R. 5.1(c)(2).*
68. *See 884 N.W.2d 661 (Minn. 2016).*
69. *Id. at 664–65.*
70. *Id. at 663.*
result clearly undermines both the authority of the rules themselves and the respect that should be accorded to them across the profession.

In a detailed article on how technology and the rapidly changing marketplace for legal services call into question our traditional models for regulating the legal profession, Professor Stephen Gillers addressed this broader problem:

The question I ask is how the regulatory framework should be altered to accommodate the forces of change while protecting what is precious in the lawyers’ world, our core values and especially the assurance of our clients’ trust. My thesis is that these forces cannot be stopped, though they can be slowed and they can be pushed underground. Rules refusing to recognize the conduct these forces encourage may lead to sanctions against the occasional lawyer or nonlawyer who is snared in the high beam of a regulator’s patrol car. But many others will speed along on back roads undetected. That is not healthy for the law or the nation.\footnote{Gillers, \textit{supra} note 62, at 971.}

We agree with Professor Gillers’ conclusion and consequently believe that there is an urgent need to solve the problems of multijurisdictional practice in the United States once and for all. Before turning to our proposed solution, however, we think it is instructive to consider how the same issue has been addressed in two other countries—Australia and Canada—that are similar to the United States in terms of their legal traditions and their constitutional structures.

\section*{IV. Reform of the Rules on Lawyer Mobility in Australia and Canada}

Rules governing the rights of multijurisdictional practice by lawyers have changed significantly in many countries in recent years. The most dramatic change has probably been in Europe where lawyers located anywhere in the European Union (EU) now have broad rights of audience and practice in all other EU countries.\footnote{See Council Directive 77/249/EEC, art. 2, 1977 O.J. (L 78) 17 (EU); Council Directive 98/5, art. 1, 1998 O.J. (L 77) 36 (EC).} For our purposes, however, it is perhaps more relevant to focus on recent reforms in two countries—Australia and Canada—that are very much like the United States. Both Australia and Canada are predominantly common law jurisdictions,\footnote{The only exception is, of course, the Province of Québec in Canada.} and they are both structured on a federal constitutional model. Moreover, in both countries—as in the United States—the legal profession has historically been “self-regulating,” with the primary focus being at the state or provincial levels.
A. REGULATION OF LAWYER MOBILITY IN AUSTRALIA

Australia—although significantly smaller than the United States in terms of population (with about 23.5 million people)—has a number of commonalities with the United States that make it a relevant choice for comparison regarding lawyer mobility. Australia is a federal common law country; in Australia, the federation is a commonwealth consisting of six states and two territories, and the states are empowered to regulate the legal profession. The legal services sector includes over 100,000 lawyers and contributes more than ten billion dollars annually to the national economy. It is, however, fairly concentrated, with the legal services market in the states of New South Wales and Victoria encompassing seventy-two percent of Australia’s lawyers.

1. REGULATION OF THE LEGAL PROFESSION AND HISTORIC RESTRICTIONS ON LAWYER MOBILITY

As in the United States, the legal profession in Australia is regulated at the state and territorial levels and not by the federal government; indeed, the federal Parliament lacks the power to create laws to regulate lawyers. Reflecting its British heritage, the Australian legal profession is divided into solicitors and barristers. In New South Wales, Victoria, and Queensland, a lawyer is required to practice as either a solicitor or a barrister through application for a practicing certificate from either the state law society or bar association. In the remaining jurisdictions—South Australia, Tasmania, Western Australia, the Northern Territory, and the Australian Capital Territory—lawyers can be admitted as both solicitors and barristers.

The traditional restrictions on lawyer mobility arose from the inherent jurisdiction of the state and territorial courts to determine the professional

74. See Australian Constitution.
77. Reid Mortensen, Australia: The Twain (and Only the Twain) Meet—The Denise of the Legal Profession National Law, 16 LEGAL ETHICS 219, 219 (2013) [hereinafter Mortensen, Australia].
79. For example, see the Legal Profession Act 2007 (Qld), s 37. Section 37(2) provides that the local roll must include the roll of solicitors and the roll of barristers.
80. For example, in Western Australia, lawyers may practice as both barrister and solicitor, as noted in the Legal Profession Act 2008 (WA), s 3; under the definition of “admission to the legal profession,” this means admission by a Supreme Court as a barrister, or a solicitor, or a barrister and solicitor, or a solicitor and barrister under this Act. In other words, lawyers may practice as either a “solicitor” or a “barrister,” or as both a “solicitor and barrister.”
standards of their lawyers and to impose discipline for breaches of those standards as noted in case law. *Queensland Law Society Inc v Smith* notes the source of the inherent disciplinary jurisdiction of the Queensland Supreme Court: The Supreme Court’s powers are comprised of a number of sources including the Charter of Justice of 1823, as well as jurisdiction power and authority that is the same as the courts of common law and chancery in England.\(^{81}\) This jurisdiction also included the “inherent disciplinary jurisdiction over solicitors as being officers of the court.”\(^{82}\)

One important method for restricting lawyers from one jurisdiction from practicing in another was limiting the ability of lawyers not admitted in a particular jurisdiction from collecting fees for their work performed there; for example, section 38(1) of the Queensland Law Society Act 1952 states:

No solicitor shall on or after 1 July 1931, act or practice as a solicitor unless—

(a) The solicitor has obtained from the secretary in proper form a certificate which is then in force to the effect that the solicitor is on the roll of the court as a solicitor thereof and entitled to practice as a solicitor . . . .\(^{83}\)

Section 39(1) provides that persons practicing without a certificate shall be guilty of an offense and liable to summary conviction for contempt of court and the imposition of a monetary fine:

Every person who directly or indirectly acts or practises as a solicitor or conveyance—(a) without having at the time a certificate then in force issued to him by the secretary . . . shall be guilty of an offence, and shall be liable on summary conviction to a penalty not exceeding $500 and in addition thereto shall be guilty of a contempt of the Court and shall be liable to be punished accordingly.\(^{84}\)

Section 44 provides that, if a lawyer does participate in proceedings in any court without having previously obtained a practicing certificate, he or she will not be able to recover any fee, reward, or disbursement relating to such work.\(^{85}\) This latter restriction can also be found in section 209(2) of the Queensland Supreme Court Act 1995 that stipulates: “A person who is not a lawyer is not entitled to claim or recover or receive directly or indirectly a sum of money or other remuneration for appearing or acting on behalf of another person in the Supreme Court.”\(^{86}\)

---

82. *Id.*
85. *Queensland Law Society Act 1952* (Qld), s 44 (repealed 2007).
86. *Queensland Supreme Court Act 1995* (Qld), s 209(2) (repealed 2011).
Case law has also contributed to the limits placed upon those who may carry out the functions of a lawyer; the leading case on the exclusive role of legal practitioners to give legal advice is *Cornall v Nagle*.\(^{87}\) Phillips J, in that case, held that where the giving of legal advice was concerned, the public is to be protected from the untrained and the unqualified, with the result that the task will ordinarily be regarded as the exclusive province of professionals who are trained and duly qualified.\(^{88}\)

2. Pressure for Change from Outside the Legal Profession

Today, lawyers in Australia may practice freely across state and territorial borders without concern about the traditional restrictions on multijurisdictional practice.\(^{89}\) This change—implemented through legislation passed by each of the individual state and territorial parliaments across the country\(^{90}\)—came about as a result of a lengthy process beginning in the early 1990s, and was driven initially by pressure from outside the legal profession itself.\(^{91}\) As described below, however, it took until the mid-2000s to enact that legislation.

In October 1992, as part of a National Competition Policy Review, Australian Prime Minister Paul Keating appointed Professor Frederick G. Hilmer to chair a committee to review trade practices legislation and to make recommendations for the development of a new national competition policy.\(^{92}\) The result was a comprehensive report on national competition that was issued by Professor Hilmer’s committee in 1993.\(^{93}\) The terms of reference for the report included that it should give effect to the principle that Australia should “develop an open,

---


90. See *Legal Profession Act 2006* (ACT); *Legal Profession Act 2004* (NSW), superseded by *Legal Profession Uniform Law Application Act 2014* (NSW); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (Qld); *Legal Practitioners (Miscellaneous) Amendment Act 2013* (SA); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2004* (Vic), superseded by *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession Act 2008* (WA).

91. The pressures for change to the legal profession have been based upon external economic arguments put forward as part of the review of trade practices legislation and development of national competition policy by Professor Hilmer, who was commissioned by the Australian Government to prepare a report on his findings. See generally *FREDERICK G. HILMER, NAT’L COMPETITION POLICY REVIEW COMM., NATIONAL COMPETITION POLICY* (1993) [hereinafter HILMER REPORT].

92. See generally id.

93. Id.
integrated domestic market for goods and services by removing unnecessary barriers to trade and competition . . . "94

The Hilmer Report acknowledged that Australia was a single integrated market and that the economic significance of state and territorial boundaries had become less important with developments in transportation and communications that enabled even small firms to carry on trade and commerce throughout the country.95 The report also noted that, although trade policy reforms had had the effect of increasing international trade competitiveness, the professions had been protected from such competition, as well as from domestic competition.96 The report pointed out that the development of a new national competition policy provided an opportunity to extend reforms to achieve more national consistency and to bypass the costs associated with addressing industry-specific, local regulatory arrangements on a case-by-case basis.97

With respect to the legal profession, the Hilmer Report noted that some opportunities for increased competition had already resulted from reforms like the relaxation of restrictions on advertising and some lessening of the monopoly over conveyancing.98 At the same time, there had been general acceptance that the professions should not be regarded as coming within the meaning of “trade and commerce” as defined by the Australian Constitution, although there had been some variation among the states and territories regarding that characterization.99 That distinction, it might be noted, has been rejected in the United States.100

The Hilmer Report did note that, in its submission made to the Hilmer committee, the Australian Council of Professions did not object to national competition principles as reflected in existing legislation being applied to the professions, so long as professional associations retained the ability to determine and enforce entry requirements and practice standards.101 Such respect for individual professional associations became a key element in the reforms ultimately adopted.102

94. Id. at 361.
95. Id. at xvii.
96. Id. at xviii.
97. Id. at xvii–xiii.
98. Id. at 13 (citing LAW REFORM COMM’N OF VICT., NO. 47 ACCESS TO THE LAW: RESTRICTIONS ON LEGAL PRACTICE (May 1992); ATTORNEY-GEN.’S DEP’T, THE STRUCTURE & REGULATION OF THE LEGAL PROFESSION: ISSUES PAPER (1992)).
101. See HILMER REPORT, supra note 91, at 134.
102. See NAT’L LEGAL PROFESSION REFORM PROJECT, CONSULTATION REGULATION IMPACT STATEMENT 12 (2010).
3. THE LEGAL PROFESSION’S MOVE TOWARD MULTIJURISDICTIONAL PRACTICE

The move toward the adoption of multijurisdictional practice for Australian lawyers arose out of the drive for an expanded and more uniform national competition policy as described above. The process of change was reflected in three major reforms—the process of mutual recognition of occupations (including but not limited to the professions) that began in 1992, the Legal Profession Model Law Project that began in 2006, and the Legal Profession National Law Reform Project that was launched in 2009. Each of these is described below.103

a. Mutual Recognition

The first step toward reform of the rules governing lawyer mobility in Australia came through assent to mutual recognition of occupations, as reflected in legislation passed in each of the states and territories.104 The purpose of the legislation was to enable the states and territories to enter into a scheme for the mutual recognition of all regulatory standards for goods and occupations adopted in Australia.105 Such mutual recognition was an initiative arising out of a series of Special Premiers Conferences conducted over an eighteen-month period with the objective of achieving an historic reconstruction of intergovernmental relations.106 The “principal aim” was to “remove the needless artificial barriers to interstate trade in goods and the mobility of labor caused by regulatory differences among Australian states and territories.”107 Mutual recognition was “expected to greatly enhance the international competitiveness of the Australian

---

103. Increased lawyer mobility has been only one objective among many in efforts in Australia to move toward a more competitive legal profession, one that is better prepared to deal with the opportunities and challenges growing out of increased internationalization of the market for legal services. See generally Joe Catanzariti, President, Law Council of Austl., Speech at the Opening of Law Summer School 2013, Univ. of W. Austl., The Future of the National Legal Profession (Feb. 22, 2013), https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/TheFutureoftheNationalLegalProfession.pdf [https://perma.cc/U3K4-MDCX] [hereinafter Catanzariti Speech]; John Briton, Legal Servs. Comm’r (Queensl.), Speech at St. Vincents’ 48th Annual Queensland Law Society Symposium, National Legal Profession Reform and the Regulation of the Future (Mar. 27, 2010), https://www.lsc.qld.gov.au/__data/assets/pdf_file/0015/106080/national-legal-profession-reform-and-the-regulation-of-the-future.pdf [https://perma.cc/XP88-CVKE]. Such additional efforts include recognition of incorporated legal practices and multidisciplinary partnerships, as well as recognition of foreign lawyers entering into commercial association with local practitioners. Discussion of these topics is beyond the scope of this Article, but they provide the context for the broader considerations of national competitiveness within which the issue of lawyer mobility has arisen.

104. “Occupations” for these purposes included “professions.” See, e.g., Mutual Recognition Act 1992 (Qld) pt 1 div 4 sub-div 1.

105. See, e.g., id. s 3. Similar purpose provisions are provided in all state and territory legislation.


economy and to be a major step forward in the achievement of micro-economic reform.”

A major principle of mutual recognition was that:

If someone is assessed to be good enough to practice a profession or an occupation in one state or territory, then they should be able to do so anywhere in Australia. A person who is registered in one jurisdiction will only need to give notice, including evidence of their home registration to the relevant registration authority in another jurisdiction to be entitled immediately to commence practice in an equivalent occupation in that second state or territory. No additional assessment [would] be undertaken by the local registration or licensing body to assess the person’s capabilities or expertise. Local registration authorities [would] be required to accept the judgment of their interstate counterparts of a person’s educational qualifications, experience, character or fitness to practice . . . . [T]he occupations a person seeks to move between from one state to another have to be substantially equivalent and have to be subject to statutory registration arrangements . . . . [E]veryone would agree that in Australia the existing regulatory arrangements of each state or territory generally provide a satisfactory set of standards. Thus, on implementation of mutual recognition, [in] no jurisdiction will . . . there be an influx of inadequately qualified practitioners in registered occupations.

Mutual recognition thus meant that a legal practitioner in one state should be able to apply to have his or her practicing certificate recognized in another state. Unfortunately, however, there were operational differences that complicated lawyer mobility—for example, differences relating to professional indemnity insurance and classes of practicing certificates, the requirements in some states that government lawyers hold practicing certificates, and the provisions in some states that legal services such as conveyancing could be carried out by non-practitioners. These differences “fettered the free movement of legal practitioners,” notwithstanding the adoption of the mutual recognition principles.

b. The Legal Profession Model Law Project

Moves toward national uniformity of the legal profession in Australia continued in 1994 with the Law Council of Australia producing a paper entitled *Blueprint for the Structure of the Legal Profession: A National Market*

---

108. *Id.*
109. *Id.* at 641.
111. Catanzariti Speech, supra note 103, at 4.
112. The Law Council of Australia is the national body representing sixteen state and territorial legal professional bodies, as well as a large law firm group. The Executive, which is elected at the Law Council’s annual general meeting every year, consists of five representatives of the Law Council’s constituent bodies.
for Legal Services (Blueprint).\textsuperscript{113} In it the Council set out an agenda aimed at reforming the legal profession in Australia “with the objective of removing constraints on the development of a national market in legal services and developing other efficiency enhancing reforms.”\textsuperscript{114}

The Blueprint was prepared with the cooperation and support of each of the legal professional bodies in Australia (all of which were members of the Law Council).\textsuperscript{115} As a result, the document reflected broad agreement on the following general principles and objectives:

1. [N]ational competition policy principles apply to the legal profession;
2. [L]awyers admitted in any State or Territory of Australia are able to practise law throughout Australia;
3. [E]xisting constraints which prevent a lawyer’s right to practise without restriction throughout Australia are removed in order to facilitate the development of a national market in legal services;
4. [R]ecognition that the independence of the legal profession is dependent upon the profession’s right to self-regulation;
5. [T]he system of regulation of the legal profession is implemented by uniform state and territory legislation;
6. [T]he self-regulation of the legal profession is subject to an external and transparent process of accountability to ensure that the rules of the professional bodies are not inconsistent with national competition policy principles;
7. [T]he protection of consumers of legal services through comprehensive education and training of the legal profession and the development of a uniform standard of client care; and
8. [P]roper information is available for consumers of legal services as to quality and cost of legal services.\textsuperscript{116}

Of particular importance to the development of the Blueprint was the need to ensure that uniform requirements were established for practical legal training.

\textsuperscript{113} LAW COUNCIL OF AUSTL., BLUEPRINT FOR THE STRUCTURE OF THE LEGAL PROFESSION: A NATIONAL MARKET FOR LEGAL SERVICES (1994) [hereinafter BLUEPRINT].

\textsuperscript{114} Id. at 3.

\textsuperscript{115} Id. The Law Council of Australia includes the following members: Australian Capital Territory Law Society; Australian Capital Territory Bar Association; Law Society of New South Wales; New South Wales Bar Association; Law Society Northern Territory; Northern Territory Bar Association; Queensland Law Society; Bar Association of Queensland; Law Society of South Australia; South Australian Bar Association; Tasmanian Independent Bar; Law Society of Tasmania; Law Institute of Victoria; the Victorian Bar; Law Society of Western Australia; Western Australian Bar Association; and Law Firms Australia. See Constituent Bodies & Directors, LAW COUNCIL OF AUSTL., http://www.lawcouncil.asn.au/lawcouncil/index.php/about-the-law-council-of-australia?id=13 [https://perma.cc/LXP9-WE2J] (last visited Nov. 8, 2016).

\textsuperscript{116} BLUEPRINT, supra note 113, at 3–4.
reforming lawyer mobility. Such training—which includes institutional instruction, on-the-job training, or a combination of both—is designed to provide practitioners with an understanding of and competence in areas of legal ethics, professional responsibility, and trust accounting. The Blueprint also addressed Post Admission Supervised Work, requiring that a person admitted to practice law complete a period of two years of restricted practice.

Further, legal practitioners seeking an unrestricted right to practice were encouraged (where possible) to complete a practice management course including topics like the financial mechanics of legal practice; costing and pricing of legal services; technology for legal practice; management, including staff, time, and conflict management; practice evaluation, including assessing the feasibility of starting up a sole practice or entering into a partnership; trust and controlled money management; and professional standards, including risk management procedures. Finally, the Blueprint noted “that it is incumbent on all lawyers to remain current with issues of law and legal practice through informal and formal continuing legal education.” Insofar as practicable, professional associations were directed to facilitate access for all lawyers to effective and relevant education and training programs for their professional development.

In July 2001, the Standing Committee of Attorneys-General (SCAG), which includes federal, state, and territorial attorneys general from Australia as well as New Zealand, discussed the need for a more uniform approach to the regulation of the legal profession and agreed that their officers should develop proposals for a model law for consideration by government ministers. In developing the model law, three different types of provisions were designated:

1. Core Uniform (CU)—core provisions that are to be adopted in each State and Territory, using the same wording as far as practicable.
2. Core Non Uniform (CNU)—core provisions that are to be adopted in each State and Territory, but the wording of the model provisions need not be adopted.
3. Non-Core (NC)—States and Territories can choose the extent to which they will adopt these provisions.

---

117. See id. at 6–7. The Blueprint also required legal education in professional areas, including work and file management, legal writing and drafting, interviewing, negotiation and dispute resolution, legal analysis and research, and advocacy. Practical legal training also required coverage of practice areas, including criminal and civil litigation, wills and estate management, commercial and corporate practice, and property practice.
118. Id. at 8.
119. Id. at 12.
120. Id.
121. Id. at 13.
122. See generally Mortensen, Australia, supra note 77.
The purpose of the model law was to create the basis for “uniform” legislative approaches, rather than “identical legislation.” This approach was seen as having a better chance of achieving commonality across the Australian jurisdictions. More important than identical legislation to the Law Council of Australia was the motivation of encouraging competition for greater choice and benefits for consumers, enabling an integrated delivery of legal services nationally, streamlining state and territory regulations to allow lawyers to practice easily within Australia, and enabling Australian law firms to compete nationally and internationally.

This focus on achieving a uniform legislative approach rather than identical legislation resulted in some key differences that have diluted the degree of uniformity in the bills ultimately enacted across the country, for example, in the approach to disciplinary proceedings, which were considered “non-core.”

In 2004, SCAG released a draft Model Bill aimed at harmonizing the laws across jurisdictions. In August 2006, a revised version of the Model Bill was released.

As finalized, the Model Bill removed significant barriers to interstate legal practice to allow greater competition in the provision of legal services. As set out in the explanatory notes to the Queensland version of the statute, the benefits of the Model Bill were described as including:

- nationally consistent standards for admission to the legal profession;
- recognition of interstate practicing certificates;
- a strengthening of complaints and disciplinary processes;
- nationally consistent trust account requirements;
- nationally consistent costs disclosure requirements;
- nationally consistent criteria for the assessment of costs;
- nationally agreed inter-jurisdictional fidelity fund arrangements;
- new business structure options for legal practices, namely, incorporated legal practices and multidisciplinary practices;
- and nationally agreed regulatory arrangements for foreign lawyers.

The Model Bill provided for a system of lawyer mobility through its definitions of an “Australian lawyer,” a “local lawyer,” and an “interstate lawyer.”
Referring to the Model Bill, 

132. MODEL BILL, supra note 123, at ch 1 s 2 schs 1–2 (defining a “lawyer” simply as a person admitted into the Supreme Court of the jurisdiction in question).

133. See id. at ch 2 s 3 schs 3–4.

134. Id. at s 1.2.3.

135. Id.

136. Id.

137. Id. at s 1.2.5.

138. Id. at ch 1 s 2 sch 5.

139. Id. at ch 2 s 6 schs 4–16.

140. See Legal Profession Act 2007 (Qld) s 13 (Austl.).

141. See Legal Profession Act 2006 (ACT); Legal Profession Act 2004 (NSW), superseded by Legal Profession Uniform Law Application Act 2014 (NSW); Legal Profession Act 2006 (NT); Legal Profession Act 2007 (Qld); Legal Practitioners (Miscellaneous) Amendment Act 2013 (SA); Legal Profession Act 2007 (Tas); Legal Profession Act 2004 (Vic), superseded by Legal Profession Uniform Law Application Act 2014 (Vic); Legal Profession Act 2008 (WA).

142. The Council of Australian Governments was formed in 1992. Its members include the Prime Minister of Australia (who serves as Chair), the Premiers of the six states, the First Ministers of the two territories, and the President of the Australian Local Government Association. See generally COAG Members, COUNCIL OF AUSTRALIAN GOV’TS, https://www.coag.gov.au/coag-members [https://perma.cc/U7MT-7F7Q] (last visited Nov. 8, 2016).

143. Catanzariti Speech, supra note 103.
National Legal Reform Taskforce to make recommendations and propose draft legislation for further consideration.\textsuperscript{144} In particular, COAG saw the Taskforce as an opportunity to enhance the clarity and accessibility of consumer protection.\textsuperscript{145}

The Taskforce started its consultation process with the release of seven discussion papers in late 2009.\textsuperscript{146} The result was a proposed new framework for national regulation of the legal profession that was embodied in a draft national Uniform Law designed around the following concepts:

- The creation of a national legal profession regulatory framework;
- The establishment of an Australian legal profession;
- A reduction in the regulatory burden for Australian legal practitioners and law practices;
- Enhanced consumer protection; and
- Maintenance of the independence of the legal profession.\textsuperscript{147}

The Uniform Law was intended to provide for a national legal profession and a national legal services market through simplified uniform legislation and regulatory standards.\textsuperscript{148} It was meant to ensure that legal practitioners could move freely among Australian jurisdictions and that law practices could operate on a national basis, thus increasing the competitiveness of Australian law firms and facilitating the development of an international legal services market.\textsuperscript{149}

\textsuperscript{144} Legal Profession National Law 2011 (COAG) s 1.1.3 (AustL) (“The objectives of this Law are to promote the administration of justice and an efficient and effective Australian legal profession, by: (a) providing and promoting national consistency in the law applying to the Australian legal profession; and (b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and (c) enhancing the protection of clients of law practices and the protection of the public generally; and (d) empowering clients of law practices to make informed choices about the services they access and the costs involved; and (e) promoting regulation of the legal profession that is efficient, effective, targeted and proportionate; and (f) providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.”).

\textsuperscript{145} See id.


\textsuperscript{148} Catanzariti Speech, supra note 103, at 6–7.

The state of Victoria was chosen as the host jurisdiction for the proposed legislation and New South Wales was selected to host the two new regulatory bodies created under the Uniform Law—the Legal Services Council and the Commissioner for Uniform Legal Services Regulation (who was also to act as the Chief Executive Officer (CEO) of the Legal Services Council). Together, the two new parties were to set the policy framework for the new scheme and refine the way it operates by issuing guidelines and directions to local regulatory authorities to make sure the law operates consistently across jurisdictions, and by advising the attorneys-general of the need for any potential amendments.

The key problem with the proposed Uniform Law is that, to date, it has been adopted in only two states, New South Wales and Victoria. The model legislation was intended to bring about the creation of a national regulatory framework. Toward the end of the development of the model legislation, however, the remaining states and territories withdrew their support. A primary concern of the dissenting jurisdictions appeared to be the costs associated with the proposed scheme and the withdrawal of federal funding to support the project.

Notwithstanding the refusal of most states to participate, however, the Uniform Law has successfully created a legal services market across New South Wales and Victoria, an area that encompasses almost three-quarters of Australia’s lawyers. The Uniform Law now regulates the legal profession across these two jurisdictions, governing matters such as practicing certificate types and conditions, maintenance and auditing of trust accounts, continuing professional development requirements, complaint handling processes, billing arrangements, and professional discipline issues. Moreover, the pressures for a national regulatory scheme still exist, most notably through the lobbying efforts

150. Bilateral Agreement on Legal Profession Uniform Framework 2013 (NSW–Vic) ch 4 s 1 schs 2–3.
151. See id. ch 5 (Maintenance of consistency and amendment of the Framework).
157. Id. sch 1 ch 4 pt 4.2.
158. Id. ch 1 ch 3 pt 3.3 div 3. Refer in particular to section 52, which creates a statutory condition of holding a practicing certificate that includes “continuing professional development.”
159. Id. sch 1 ch 5 pt 5.2–5.3.
160. Id. sch 1 ch 4 pt 4.3, div 3–5, 7.
of a new organization, “Law Firms Australia.”\textsuperscript{162} That group has commented that they “are confident that once people begin to see the advantages of the uniform rules in [New South Wales] and Victoria we will be able to persuade them to get on board.”\textsuperscript{163} Continuing, they observed:

70 per cent of the lawyers in this country are now regulated by a uniform set of rules and laws, but we have some way to go to persuade the other states and territories that it is important for the profession to be regulated with some consistency across the country.\textsuperscript{164}

4. EXPERIENCE SINCE MOBILITY REFORM

Complete lawyer mobility across state and territorial borders now exists in Australia. It does not exist in a single national framework but rather through legislation passed by individual states and territories.\textsuperscript{165} Whether Australia will ultimately move toward a national model for the regulation of the legal profession remains to be seen, but substantial progress has obviously been made in assuring that Australian lawyers can now practice anywhere in their country without being constrained by arbitrary and antiquated rules. That said, there has been some commentary on the successes (and gaps) in the Model Law Program, focusing on topics such as admission to practice and professional discipline.

a. Admission to Practice

Some commentators have noted that it is important “that there should be a substantial commonality of approach in assessing eligibility for admission,”\textsuperscript{166} and that “impressions of widely varying treatment on admission depending on jurisdiction, apart from promoting forum shopping, are likely to be detrimental to the confidence the public can legitimately feel regarding ethical standards within the profession.”\textsuperscript{167} A more uniform approach to admission would avoid the starkly varied results in \textit{Law Society of Tasmania v Richardson}\textsuperscript{168} and \textit{Re AJG}.\textsuperscript{169}

\textsuperscript{162} Chris Merritt, \textit{Large Law Firm Group Changes Name to Law Firms Australia, Australian}, July 17, 2015.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} See Mortensen, \textit{Australia, supra} note 77; see also \textit{Legal Profession Act 2006 (ACT); Legal Profession Act 2004 (NSW), repealed by Legal Profession Uniform Law Act 2014 (NSW); Legal Profession Act 2006 (NT); Legal Profession Act 2007 (Qld); Legal Practitioners (Miscellaneous) Amendment Act 2013 (SA); Legal Profession Act 2007 (Tas); Legal Profession Act 2004 (Vic), repealed by Legal Profession Uniform Law Application Act 2014 (Vic); Legal Profession Act 2008 (WA)}.
\textsuperscript{166} Dal Pont, \textit{supra} note 89, at 189.
\textsuperscript{167} Id.
\textsuperscript{168} \textit{Law Soc’y of Tasmania v Richardson} [2003] TASSC 9.
\textsuperscript{169} \textit{In Re AJG} [2004] QCA 88.
In the former case, an applicant who made a conscious decision not to disclose a finding of academic misconduct and displayed no remorse for that omission received no disciplinary condemnation, whereas in the latter an applicant who disclosed a not dissimilar finding of academic misconduct while expressing contrition was denied admission for a time.\textsuperscript{170}

A similar inconsistent result was evident in the way two different jurisdictions handled the case of a single applicant for admission in \textit{Re Del Castillo},\textsuperscript{171} where the Australian Capital Territory Full Court was inclined to deny admission to an applicant who did not disclose an acquittal for murder and who had previously lied both to the police and his lawyer, and the New South Wales Court of Appeal’s disinclination to discipline the same applicant.\textsuperscript{172}

b. Professional Discipline

The Australian legal system is based on an adversarial model in both criminal and civil law. There is an exception, however, for supreme courts when exercising their inherent jurisdiction in the professional discipline of officers of the court.\textsuperscript{173} The purpose of such disciplinary proceedings is to protect the reputation of the legal profession, and also to uphold community confidence in the rule of law.\textsuperscript{174} One significant benefit of the Model Law Project has been the movement toward uniformity of definitions of “unsatisfactory professional conduct” and “professional misconduct” for disciplinary purposes in the various jurisdictions across Australia.\textsuperscript{175} Consistency among “jurisdictions as to conduct capable of generating a disciplinary consequence increases the likelihood of a consistent disciplinary response to equivalent forms of misconduct, and with it, public confidence in the maintenance of consistent professional standards.”\textsuperscript{176}

Unfortunately, however, the adoption of uniform rules of evidence in disciplinary proceedings was treated as a “non-core” provision in the Model Bill, with the result that outcomes can still vary from one jurisdiction to another.\textsuperscript{177} For example, facts that could be admissible in Queensland (where disciplinary proceedings are not bound by the rules of evidence) and lead to disciplinary sanctions may not be admissible in New South Wales or Victoria (where such

\begin{flushleft}
\begin{enumerate}
\item\textsuperscript{170} Dal Pont, \textit{supra} note 89, at 189.
\item\textsuperscript{171} See \textit{Re Del Castillo} [1998] ACTSC 131.
\item\textsuperscript{172} See \textit{Prothonotary v Del Castillo} [2001] NSWCA 75.
\item\textsuperscript{173} See McLean, \textit{supra} note 123, at 230.
\item\textsuperscript{174} Id. at 229.
\item\textsuperscript{175} See, e.g., \textit{Legal Profession Act 2007} (Tas) ss 420 (defining “unsatisfactory professional conduct”); \textit{id.} ss 421 (defining “professional misconduct”).
\item\textsuperscript{176} Dal Pont, \textit{supra} note 89, at 191.
\item\textsuperscript{177} See \textit{MODEL BILL, supra} note 123, at 1, in which the use of the abbreviations is applied throughout the Bill.
\end{enumerate}
\end{flushleft}
proceedings are bound by the rules of evidence).\textsuperscript{178}

5. **IMPROVED RELATIONSHIPS AMONG PROFESSIONAL AND REGULATORY BODIES**

Perhaps one of the most noteworthy results of the Australian adoption of lawyer mobility reform has been the development of closer working relationships among professional and regulatory bodies.\textsuperscript{179} These relationships have resulted in agreements\textsuperscript{180} among the various organizations that have responsibility for the issuance of practicing certificates and the bringing of disciplinary proceedings. Specifically, these agreements require all such bodies to inform each other of decisions respecting the removal of lawyers from the rolls of legal practitioners. In Queensland, for example, a recent decision made clear that state regulatory bodies are bound to report the removal of a practitioner from the roll to all other states and territories in Australia, including the High Court of Australia.\textsuperscript{181}

**B. REGULATION OF LAWYER MOBILITY IN CANADA**

With a population of some 35.2 million, Canada is roughly a tenth the size of the United States, although the country itself is significantly larger in area. Constitutionally, Canada is a federation consisting of ten provinces and three territories. There are currently over 125,000 lawyers in Canada who are licensed members of law societies that exist in each jurisdiction.\textsuperscript{182} Similar to the United States, the regulation of the legal profession is handled at the provincial (or territorial) level, with each law society exercising broad jurisdiction conferred under provincial statutes. These statutes stress that the key role of each law society is the protection of the public interest.\textsuperscript{183}

178. See generally Model Bill, supra note 123, ch 6 (noting that all clauses are denoted as “Not Core” and can therefore vary between states).

179. See, e.g., Legal Profession Act 2007 (Tas) div 11 s 406 (requiring claims to be forwarded to a corresponding authority where there are issues); id. s 408 (providing for cooperation with other authorities, including the law societies). These provisions ensure the integrity of the applications for practicing certificates that are made cross-jurisdictionally.

180. See, e.g., Legal Profession Act 2007 (Qld) pt 2.6 s 96 (notifying other jurisdictions about removal from local roll). These provisions are mirrored in all jurisdictions throughout Australia.

181. Legal Servs Comm’r v Johnston [2015] QCAT 480 (bringing charges for a failure to exercise competence and diligence, making false representations, and trust account breaches).


Canada’s law societies have worked together under the aegis of a national coordinating group—the Federation of Law Societies of Canada—to lower barriers to practice by lawyers from different provinces.

1. Regulation of the Legal Profession and Historic Restrictions on Lawyer Mobility

The multijurisdictional practice of law in Canada is governed by a system founded upon the legislation, rules, and by-laws that govern the legal profession in each province and territory, as well as two inter-jurisdictional agreements.\(^{184}\) In the early years of settlement, the lack of local lawyers led to fairly liberal attitudes towards lawyers transferring from other jurisdictions.\(^{185}\) Ontario in 1797 welcomed any qualified lawyer from other parts of Canada, or even England, as long as they undertook to live there.\(^{186}\) Louis Riel, a Métis leader and politician who was the founder of Manitoba, was tried for high treason for leading the North-West rebellion against Canadian encroachment on Métis lands. He was defended at his trial in Regina, in what was to become Saskatchewan, by a team of lawyers from Québec and Ontario.\(^{187}\) After unsuccessful appeals to the

---


Court of Queen’s Bench of Manitoba and to the Judicial Committee of the Privy Council, Riel was hanged. At that time, there “were few barriers to transferring between jurisdictions.” 188 “[R]eciprocity prevailed between the provinces until transfer fees began to create a barrier in the early twentieth century.” 189 But, by the start of the last century, protectionist barriers started to be erected by local lawyers through examinations on local laws accompanied by sizeable transfer fees. 190 Before 1994, lawyers who came from outside a particular province had to obtain a permit to provide legal services there on a temporary basis. 191 Permanent mobility (transfer) required transfer examinations 192 and, in certain circumstances, articling (that is, an apprenticeship of up to a year working in a local law firm). 193

One of the authors of this Article became aware of the extent of these former barriers to practice when he had the opportunity to work with a retired Chief Justice of the High Court of Ontario, James McRuer. 194 The judge had been admitted to the bar before the Great War and was still working at the age of eighty-five. Back in the 1930s, he had been one of the country’s most distinguished antitrust lawyers. The statute regulating competition and antitrust, the Combines Investigation Act, was a federal statute enacted under the federal authorities’ criminal law power. 195 The elderly judge recounted that he had once been retained to prosecute a major tobacco company that had been charged with illegal price-fixing. The tobacco company was based in Alberta and the criminal trial was set to take place in Edmonton.

189. Id.
192. For an example of an attempt to standardize such requirements, see Special Comm., Conference of Governing Bodies of the Legal Profession in Can., Uniform Standards as to Reciprocal Arrangements for the Transfer of Barristers and Students from a Common-Law Province to Another, 15 SASK. B. REV. & LAW SOCY GAZ. 21, 22 (1950) (under the chairmanship of Dean V.C. MacDonald).
193. This was held to be an acceptable requirement. Casey v. Law Soc’y of Nfld., 1986 CarswellNfld. 162, para. 20–21 (Can. Nfld. T.D.) (WL).
194. PATRICK BOYER, A PASSION FOR JUSTICE: THE LEGACY OF JAMES CHALMERS MCRUER 84 n.11 (Univ. of Toronto Press 1994). McRuer (1890–1985) was described as Canada’s most influential non-politician lawyer. MOORE, supra note 188, at 284.
Although the judge was recognized as one of the leading antitrust counsels in the country, he was not a member of the Alberta Bar. Consequently, he explained to the Federal Justice Minister that he would be unable to appear for the prosecution. The Minister stressed that they wanted him to appear, and would do whatever was necessary to make that happen.

So the judge left his family, got on the train for a three-day journey across the prairies and close to the Rocky Mountains, based himself in the Macdonald Hotel for three months, and started studying to take local examinations to ensure his competence. He had to pass examinations on wills and estates and real estate conveyancing, even though the trial he was appearing in concerned a federal statute with which he was fully familiar, and the evidentiary and procedural rules in the criminal trial were identical across the country. The Alberta Law Society appointed Gordon Steer (later Chief Justice of Alberta) as examiner. Two hours before the examination, Steer called up McRuer and said, “Well, I have another appointment, the examination is over. You passed.” The sole interest served by subjecting McRuer to this farce was the protection of the members of the local bar who specialized in antitrust law.

Pure protectionism could not last, however, and a variety of measures were put in place over time to permit occasional appearances in court by lawyers like the former Chief Justice. Unfortunately, these depended on discretionary decisions by law societies, which meant that they could not be consistently relied upon. Nonetheless, they were better than flat prohibitions.

At the same time, it is important to note that even in the era of strict control over multijurisdictional practice, there were exceptions justified by the lack of lawyers in remote communities. One such exception involved the extraordinarily named mining community of Flin Flon that straddles the borders of Manitoba.

196. See Legal Profession Act, R.S.A. 1922, c 206, s 34.
197. Boyer, supra note 194, at 84.
198. In an earlier antitrust prosecution, R. v. Simington, 1926 CarswellBC 167 (Can. B.C. S.C.) (WL), McRuer had been treated with more kindness by the British Columbia Law Society, which waived an examination requirement for counsel from other provinces under the Legal Professions Act, R.S.B.C. 1924, c 136, s 37(3)(b)(2), though it did charge him a courtesy fee that was equivalent to three months’ wages of an average worker (CS12,500 in contemporary dollars).
200. See Laprairie, supra note 190, § 1.30, at 1-8, § 1.36, at 1-10; see, e.g., SASK. RULES R. 70; Legal Profession Act, S.S. 1990, c L-10.1 s 10(i), 30 (Can. Sask.).
and Saskatchewan. Its population of just over 6,000 is split between the two provinces, but all are served by Manitoba lawyers in the north end of town. To tell the Saskatchewan residents that they must use a licensed Saskatchewan lawyer would deny them access to legal services, as the nearest lawyers in Prince Albert are a four-and-a-half hour drive away. Similarly, the town of Lloydminster is split between the provinces of Saskatchewan and Alberta, and each province tolerates lawyers from either side of town practicing in their local courts. Lastly, Canada’s capital, Ottawa, borders the Ottawa River. To its north is the city of Gatineau in the French-speaking province of Québec. While Gatineau has roughly thirty percent of Ottawa’s population, it has only eleven percent as many lawyers. So in areas like criminal law where the law and procedure are the same in both cities, French-speaking defense counsels from Ottawa from time to time used to appear in criminal trials in Gatineau. These three situations were always tolerated as exceptional anomalies to structural barriers to cross-border practice between provinces.

2. CONSTITUTIONAL PRESSURES FOR MOBILITY REFORM

It took a number of years for these barriers to multijurisdictional practice to start crumbling, but the key factor was the adoption in 1982 of a new national Constitution, including a Charter of Rights and Freedoms. Before the Charter came into effect, there was no constitutional mechanism for challenging restrictions on practice imposed by local law societies, including, for example, a citizenship requirement that blocked an American student from becoming a

202. The Flin Flon Extension of Boundaries Act, S.M. 1989–90, c 73, and its parallel law in Saskatchewan, Statutes of Saskatchewan, R.S.S. 1952 c 62, provided a mechanism for extending the laws of Manitoba and Saskatchewan to the community, as needed.


207. This is because, in Canada, criminal law and criminal procedure fall under federal jurisdiction.

lawyer in Alberta. But the adoption of the Charter of Rights and Freedoms changed all of that.

Section 6(2) of the Charter states:

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
   (a) to move to and take up residence in any province; and
   (b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to
   (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence . . .

What this provision did was establish the constitutional basis for arguments that restrictive barriers to multijurisdictional practice should be dismantled. Very shortly after this provision came into force, two lawyers used the Constitution to argue that it had given them the right to practice outside their home province. Six months after the Charter of Rights was enacted, an Ontario lawyer sought a declaration that he was entitled to appear on a temporary basis in a Québec court considering a variety of securities offenses, despite not being a member of the Québec Barreau. The Chief Justice of the Cour Supérieure rejected the application, saying that restrictions did not discriminate on the basis of residence, but on the basis of considerations relating to the good administration of justice—that being a member of another province’s bar, the applicant could not meet the standards of knowledge and competence of local members of the Barreau. But in doing so, the Chief Justice differentiated between permissible and protectionist measures.

---

210. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.). Two leading Canadian scholars have argued that this section is, in fact, a damp squib:
   “The Charter has not significantly dismantled the barriers to the mobility of labour, goods, services, and capital in [Canada]. Section 6, it has been argued, does not apply to corporations, allows discrimination on interregional bases, exempts affirmative action programs aiding the economically disadvantaged (which may allow governments to protect ailing industrial sectors), and allows discrimination on the basis of non-residence if the government can also advance a legitimate reason for the discrimination.”

211. Since Québec had excluded itself from the constitutional reforms that included the Charter, the issue was highly charged politically.
213. The French text from the judgment is taken from Malartic Hygrade Gold Mines Québec Ltd. c. Québec, 1982 CarswellQue 870, para. 53, 54 (Can. Que. C.S.) (WL); see also Malartic Hygrade, 1982 CanLII 2870 (providing English translation).
Differences in the prevailing law, particularly in a country as large as Canada, may justify the situation where a province imposes certain restrictions on the mobility of lawyers based, for example, on their prior knowledge of the legal system in force in that province. It would be unrealistic not to see here a concern for ensuring the general interest against malpractice which might be caused by incompetence.

But there could be other restrictions born of less noble motivation and which, based—covertly—only on economic interest, for example, would tend to exclude lawyers from one province from going to another province only by reason of their residence in that other province. The Charter does not tolerate this type of restriction and the principle of mobility rights must always prevail.

In English Canada, Andrew Roman, the founding General Counsel of the Public Interest Advocacy Centre, was approached by two Saskatchewan residents who wanted wheelchair access to a cinema and guide dog access to a hospital and believed that they had been denied the protection of human rights laws on the basis of disability. They approached Mr. Roman, who sought temporary admission to the Saskatchewan bar to appear in the Saskatchewan courts, on a pro bono basis to argue their disability rights. He argued that “the Saskatchewan Law Society has gone beyond its powers when it limits a lawyer’s place of practice, because the society is supposed to protect the public and ‘not their own pocketbooks.’”

The Law Society commenced a complicated chess game of requirements requiring Roman to take examinations on Saskatchewan statutes and pay significant transfer fees, despite the limited nature of his mandate. It is difficult, reviewing the delays, adjournments, and scheduling complexities, to avoid the conclusion that Mr. Roman’s admission, if it occurred, would have been so seriously delayed as to make him unable to take the pro bono cases. Twice he sought judicial review, and his application was rejected on the basis of mootness, given that the substantive hearings had already taken place. Twice he appealed to the Court of Appeal and twice the gates were shut against him. Roman was told

by local friends in the Bar that he would need to have both the time and the money to take the case to the Supreme Court of Canada before he stood any chance of success.\textsuperscript{215} It took a further six years for Canada’s top court, the Supreme Court of Canada, to recognize the impact of section 6(2) of the Charter of Rights and Freedoms.

As previously noted, the statutes setting up the law societies stress that their mandate is the protection of the public interest, and not to safeguard the prerogatives of the legal profession. In Manitoba, for example, the statute says explicitly that the society’s mandate is to “uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.”\textsuperscript{216} So, while the legal profession is self-governing, the prime concern is the public interest. This statutory directive has been reinforced by a series of decisions of the Supreme Court of Canada\textsuperscript{217} that recognize the importance of the roles played by the legal profession.

Uniquely in the common law world, the Supreme Court of Canada has established such clear principles for the law of the legal profession that reading only professional conduct rules will not illustrate how Canadian lawyers are expected to behave. In the last thirty years, for example, the Supreme Court has:

- Blessed the construction of institutional ethical screens to manage confidentiality concerns for lawyers changing firms.\textsuperscript{218} These are now used extensively to manage conflicts of interest;\textsuperscript{219}


\textsuperscript{216} Legal Profession Act, C.C.S.M. c L107, s 3(1) (Can. Man.); \textit{see also} Legal Profession Act, S.N.S. 2004, c 28, s 4(1) (Can. N.S.); Legal Profession Act, S.B.C. 1998, c 9, s 3 (Can. B.C.); Legal Profession Act, R.S.P.E.I. 1988, c L-6.1, s 4 (Can. P.E.I.); Legal Profession Act, R.S.Y. 2002, c 134, s 3 (Can. Yukon); Professional Code, C.Q.L.R. c C-26, s 23 (Can. Que.); Law Society Act, R.S.O. 1990, c L.8, s 4(2) (Can. Ont.).

\textsuperscript{217} The jurisdiction of the Supreme Court of Canada is much wider than that of the U.S. Supreme Court, since appeals from all courts in the country can ultimately end up there if the issue is considered to be one of national interest. This means that in many areas of private law, including contracts, professional malpractice, conflicts of interest, and fiduciary obligations, a single court has the power to set the governing principles for the entire country.

\textsuperscript{218} \textit{See} MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235, 1264 (Can.).

\textsuperscript{219} \textit{See Task Force on Conflicts of Interest, Canadian Bar Ass’n, Conflicts of Interest Final Report, Recommendations & Toolkit} (2008), \url{http://www.cba.org/Publications-Resources/Resources/Ethics-and-...
• Confirmed that the attorney-client privilege is so important to the justice system that it enjoys a quasi-constitutional status;

• Liberalized lawyer advertising restrictions and reminded legal regulators that constraints on competition in the legal marketplace must have public interest justification;

• On the same logic, struck down barriers to forming national law firms;

• Struck down citizenship restrictions on admission to practice law;

• Rejected the issuance of warrants for the search of lawyers’ offices and developed general principles for police to follow in such cases, and

• Held that equity partners are not employees who can invoke age discrimination laws to attack mandatory retirement.

Individually, these actions of the nation’s highest court may seem unremarkable, but it would be highly unlikely for these kinds of law-practice-related issues to reach the United States Supreme Court. Taken together, they signify the Canadian Supreme Court’s recognition that the integrity of the legal profession is critical to the integrity of the justice system. Thus, the Court has inched closer to connecting the independence of the bar to those principles of fundamental justice constitutionally protected in Canada’s Charter of Rights and Freedoms.

The Court has consistently reminded legal regulators that their role is not to protect the prerogatives of the legal profession, but to advance the public interest. Two recent quotations make the point. The Supreme Court of Canada said in Finney v. Barreau du Québec:


An independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian society . . . . [O]ur tradition of allowing the legal profession to regulate itself can largely be attributed to a concern for protecting that independence and to lawyers’ own staunch defence of their autonomy. In return, the delegation of powers by the State imposes obligations on the governing bodies of the profession . . . .

And in the Mangat case, the same court stressed:

Provincial law societies or bars are entrusted with the mandate of governing the legal profession with a view towards protecting the public when professional services are rendered. In exchange for a monopoly on the exercise of the profession and in accordance with the primary purpose of protecting the public in its dealings with lawyers, the bar must establish criteria for jurists to qualify as members, rules of discipline and mechanisms to enforce them, the contours of professional liability, a system of professional insurance, and guidelines and rules on the handling of trust funds.

Three cases established the principle that barriers to law society membership and legal practice must pass constitutional scrutiny. The first challenged citizenship restrictions on admissions to the legal profession. The case involved a British permanent resident and an American law student, both of whom wanted to be admitted to the British Columbia bar. They met all the qualifications except that of Canadian citizenship. The Supreme Court of Canada had to assess whether citizenship requirements breached equality rights as guaranteed by the Charter of Rights and Freedoms, or could be justified under the section of the Charter that permits reasonable limits on constitutional rights that can be demonstrably justified in a free and democratic society.

The Court held that rules that prohibited non-citizens from being admitted to the bar, without consideration of educational and professional qualifications or other attributes or merits, infringed fundamental guarantees of equality before the law. Legislating citizenship as a necessary condition to be admitted to practice law harbored the potential for undermining the essential values of a free and democratic society committed to equality before the law. The restrictions could

230. Id. at 159.
231. Id.
not be justified as reasonable limits protected by the Charter’s justification section.\textsuperscript{235}

The Supreme Court, in \textit{Black v. Law Society of Alberta},\textsuperscript{236} next liberalized inter-provincial practice, by striking down restrictions on lawyers’ ability to operate national firms and provide legal services across the country.\textsuperscript{237} Up to that point, the rules of the Law Society of Alberta prohibited lawyers in Alberta from entering into a partnership with anyone who was not an active member ordinarily resident in that province.\textsuperscript{238} A second rule prohibited lawyers in Alberta from being partners in more than one firm.\textsuperscript{239} The validity of these rules was contested before the Supreme Court on the basis that they infringed constitutional guarantees of mobility rights.\textsuperscript{240}

The Court noted that the mobility rights provisions in the Constitution protected the rights of residents to move around the country, to live wherever they wished, and to pursue a livelihood without regard to provincial boundaries.\textsuperscript{241} While the Court recognized that the law society could regulate the legal profession, it could not do so simply by pointing to a provincial boundary to justify discriminatory distinctions—to do so would derogate from constitutional rights to be treated equally across the country.\textsuperscript{242} The Court by a three to two majority struck down the Alberta Law Society rules on the basis that they discriminated by residence, prohibiting Alberta lawyers and lawyers from outside the province from associating to practice law.\textsuperscript{243} The Court recognized the legitimate interest in regulating local competence and ethical behavior, but found that provincial residency restrictions were disproportionate to this objective.\textsuperscript{244} The Court felt the law society could regulate interprovincial firms in a way that did not drastically affect mobility rights.\textsuperscript{245} As one of the justices, La Forest J., stated, the mobility rights provision “guarantees not simply the right to pursue a livelihood, but more specifically, the right to pursue the livelihood of choice to

\textsuperscript{235} Id. at 158 (Wilson, J.), 204 (La Forest, J.).
\textsuperscript{236} [1989] 1 S.C.R. 591 (Can.). Just six months before the Supreme Court of Canada decision, a challenge to the British Columbia restrictions on inter-jurisdictional firms had been successful on the same basis as \textit{Black}. See Martin v. British Columbia (Att’y Gen.), 1988 CarswellBC 917, para. 67–69 (Can. B.C. S.C.) (WL); Alexander J. Black, \textit{Canadian Lawyer Mobility and Law Society Conflict of Interest}, 18 \textit{FORDHAM INT’L L.J.} 118, 122, 123 n.20 (1994) [hereinafter \textit{Black, Canadian Lawyer Mobility}].
\textsuperscript{238} See \textit{Black}, [1989] 1 S.C.R. at 599. This section was enacted in February 1982, two months after the formation of an interprovincial law firm involving Alberta members.
\textsuperscript{239} Id.
\textsuperscript{240} Id. at 597.
\textsuperscript{241} Id. at 612.
\textsuperscript{242} Id. at 621.
\textsuperscript{243} Id. at 625.
\textsuperscript{244} Id. at 633.
\textsuperscript{245} Id.
the extent and subject to the same conditions as residents.”

Faced with the court’s decision, the law societies collectively set up a task force, under the aegis of the Federation of Law Societies, to develop a response that balanced the competing interests. That effort led, four years later, to the mobility reforms.

The third case that chipped away at the prerogatives of the law societies in regulating the profession was Law Society of British Columbia v. Mangat, which concerned an immigration consultant who was the subject of an unauthorized practice prosecution. Mangat had been a lawyer in Punjab, India, but was not qualified in Canada. Canada’s Immigration Act, however, authorized non-lawyers to appear on behalf of clients before federal immigration tribunals. The courts thus had to assess the apparent conflict between that federal law and provincial statutes that gave exclusive authority to the Law Society to regulate all types of legal services in British Columbia, including arguably the power to stop Mangat from appearing. The Supreme Court held that under Canada’s constitutional interpretation doctrines, the federal Immigration Act carved out an area of practice where non-lawyers would not breach unauthorized practice prohibitions, and hence Mangat’s appearance in immigration tribunals could not be prohibited by the Law Society of British Columbia. As a result of this decision, a number of federal initiatives have taken place to attempt to regulate immigration consultants, though the results have been somewhat checkered.

Subsequent courts have reviewed additional rules on multijurisdictional practice and generally chipped away at excessive restrictions. Requiring lawyers to have three years seniority before permitting them to move to practice outside their province was struck down as a restriction not relevant to protecting the

246. Id. at 617–18.
248. [2001] 3 S.C.R. 113 (Can.).
249. Id. at para. 2.
250. Immigration Act, R.S.C. 1985, c I-2, ss 30, 69(1) (Can.).
252. Id. at para. 24–74.
public interest. 254 Occasional fees imposed on lawyers from other provinces have been found to be acceptable, 255 but excessive fees raise effective barriers and are more likely to be struck down. 256 A law society cannot require a lawyer to maintain a permanent office in a province. 257 Requiring that an out-of-province lawyer pay an insurance levy applied to provincial lawyers practicing in a particular practice area does not breach the constitution 258—and transfer examinations as such have been found not to breach constitutionally guaranteed rights. 259 Faced with the case law, the legal profession’s leaders had no choice but to embrace reform.

3. ANTITRUST PRESSURES FOR MOBILITY REFORM

Apart from the constitutional pressures for reform exerted by the courts, in the mid-2000s, Canada’s antitrust authorities started looking at barriers to practice within the legal profession. 260 In an earlier decision, 261 the Supreme Court of Canada had established that the legal profession was subject to competition and antitrust laws, and rejected an argument that law was a regulated industry, which would establish a jurisdictional barrier to antitrust oversight. In 2007, the federal antitrust regulator, the Competition Bureau, published an inquiry into the professions in the course of which it assessed whether any of the legal profession’s regulatory practices impeded competitive markets, and thus were not justified in the public interest. 262 They looked at potential or actual restrictions on competition, including:


259. See O’Neill, 1993 CanLII 6586; Black, Canadian Lawyer Mobility, supra note 236, at 133–34 (discussing O’Neill).


262. See SELF-REGULATED PROFESSIONS, supra note 260. The study was followed up four years later with a POST STUDY ASSESSMENT. See SELF-REGULATED PROFESSIONS: POST-STUDY ASSESSMENT, COMPETITION BUREAU (Nov. 5, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03407.html [https://perma.cc/SCN7-...
• Entry, accreditation and mobility,
• Scope of practice—restrictions on the ability of related professions to offer similar or identical services,
• Business structures,
• Fee schedules, and
• Advertising.  

The 2007 report concluded that “[f]rom a competition standpoint, complete mobility of lawyers across Canada is optimal.” It endorsed the National Mobility Agreement (described below), which would facilitate the movement of lawyers between jurisdictions to ensure complete temporary and permanent mobility throughout Canada.

Although further investigations have not proceeded in the decade since the 2007 report, the fact that a competition watchdog had examined their practices served as a wake-up call to the law societies and prompted additional considerations of reform. The law societies were keenly aware that in England, the Law Society of England and Wales had faced similar inquiries into its practices, including the handling of public complaints, and had been so criticized by the inquiries that Parliament had stripped the legal profession of self-regulation. Instead, a number of independent regulatory bodies (primarily the Legal Services Board and the Solicitors Regulation Authority) had taken over the role of setting professional standards and policing the legal profession. The Law Society lost its powers of self-regulation and became effectively a trade association. While Canada’s federal system would make it much more difficult to

---

263. See SELF-REGULATED Professions, supra note 260.
264. Id. at 67.
265. Id.
strip the law societies of their historic role, the Competition Bureau’s inquiry was clearly a warning shot across the bow.

4. PRESSURES FROM TRADE LIBERALIZATION AGREEMENTS FOR MOBILITY REFORM

The trade liberalization discussions, which culminated in 1994 in the North American Free Trade Agreement among the United States, Canada, and Mexico, included provisions dealing with the temporary entry of professionals, including lawyers. In light of these developments, the Federation of Law Societies of Canada was required to develop procedures to recognize so-called foreign legal consultants, who practiced the law of their home jurisdictions while present in Canada. While there have not been many such foreign legal consultants, the scheme worked well, ensuring adequate protection of the public interest. So, when the Supreme Court of Canada laid down the constitutional challenge to residency restrictions on the legal profession, the Federation of Law Societies of Canada already had experience negotiating multi-party agreements dealing with practitioners from outside the jurisdiction in question.

Canadian governments also entered into an Agreement on Internal Trade in 1994 to facilitate the mobility of people, investments, and services across Canada. That Agreement mandated that barriers to cross-border business should be demolished unless they served a public purpose. Liberalizing mobility restrictions for the legal profession simply took that principle to heart. Chapter 7 of the internal trade agreement stipulated that those qualified in one

269. NAFTA includes a chapter on legal services, which sets out a process for moving towards the establishment of mutual foreign legal consultancy regimes. This has not yet been implemented; however, See INT’L BAR ASS’N, CANADA INTERNATIONAL TRADE IN LEGAL SERVICES (2014), http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/ITILS_Canada.aspx [https://perma.cc/Z385-2W5T].
271. This has not proved a popular route to practice. There are currently only 309 foreign legal consultants in the entire country. See FED’N OF LAW SOC’YS OF CAN., 2014 STATISTICAL REPORT, http://docs.flsc.ca/2014-Statistics.pdf [https://perma.cc/STA5-M8AH].
273. AGREEMENT ON INTERNAL TRADE 1994, supra note 272, art 100, 101.
Reforming Lawyer Mobility

A jurisdiction must have access to similar employment in other Canadian jurisdictions. Professions are subject to these requirements, which bind provincial and territorial governments to agree to accredit those licensed in another jurisdiction, without any requirement for additional training, experience, examinations, or assessments. A regulatory authority, such as a law society, could impose requirements that were substantially the same as those imposed as part of its normal licensing process, including fees, insurance, providing evidence of good character, or demonstrating knowledge of the measures applicable to the practice of the profession in a jurisdiction, provided that they were no more onerous than those demanded of local practitioners.

5. The Legal Profession’s Move Toward Multijurisdictional Practice

Responding in part to all of the pressures described above, the Federation of Law Societies of Canada, in the early 1990s, launched a process of negotiations among its member societies to consider ways in which rules governing lawyer mobility might be reformed. At the outset, desirable goals were defined and basic principles were agreed upon. The August 2002 National Mobility Agreement set out the principles upon which mobility reforms were based:

The signatories recognize that

- they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practice law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,
- differences exist in the legislation, policies and programs pertaining to the signatories, particularly between common law and civil law jurisdictions, and
- it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.

274. Id. art 701.

275. Id. art 706, 708.


279. Id.
One notable component was the concept of reciprocity. Initially, the law societies were willing to open their borders to practice by lawyers from other provinces only to the extent that the other provinces granted reciprocal rights. As it became clear, however, that virtually all provinces were willing to embrace a new regulatory regime, the reciprocity issue became moot and was effectively dropped. Confidence grew as the negotiating teams from the various provinces became familiar with one another and as personal relationships replaced past suspicions.

The negotiating process was also helped by the fact that all of the law societies required their members to carry professional malpractice insurance of at least one million dollars, unless they were employed by governments or corporations and not providing legal services to the general public or business entities. The principle agreed was that the insurance policy of a lawyer’s “home jurisdiction” would respond to claims. It was also agreed that a temporary lawyer would have to meet the professional standard of care of lawyers practicing in the location in which he or she was temporarily providing legal services and that “dabblers” would be discouraged. Concerns about qualifications of temporary lawyers were lessened by the small number of Canadian law schools, the consistency in legal education standards among the schools, and the fact that their degrees had been treated as equivalent for some time.


283. A separate agreement established a fund to compensate clients who were the victims of defalcations by lawyers practicing under the scheme, although, to date, it does not appear that such an arrangement has been needed.


286. Until recently, Canada has had no need for accrediting bodies like the American Bar Association.
In a book published two years ago, one of the authors summarized how thinking progressed during the negotiating process:

For those who negotiated mobility for lawyers, this took over a decade, starting with small, tentative steps that weren’t threatening. They made reciprocity fundamental. In the years of negotiations, regulators got more comfortable with counterparts from other provinces and learned how similar standards and processes were. Canada has similar legal education, licensing processes, and ethical rules across the country. Today, the regulators are increasingly thinking of Canada as a single national market. And importantly, clients do not think law is local. They believe a lawyer is a lawyer is a lawyer. Regulators, it seems, are increasingly following suit.

a. The First Step to Reform: The Inter-jurisdictional Practice Protocol

In 1994, all of the common law provincial law societies signed the Inter-jurisdictional Practice Protocol, with the Barreau du Québec signing the agreement in 1996. The remote northern territories did not sign at that time. Under the Inter-jurisdictional Practice Protocol that was regarded as a temporary measure, members of participating provinces were allowed to practice temporarily without a permit in reciprocal jurisdictions on a maximum of ten legal matters, for no more than twenty days in a twelve-month period (provided certain conditions were met). This arrangement, which included a framework for the protection of the public, was commonly referred to as the “10-20-12” regime. Under this system, those wanting to transfer permanently to another province were required to confirm that they had read required local law materials.

In 2001, the law societies of Western Canada agreed to expand the ability to practice temporarily without a permit to a maximum of six months out of any

---


293. Id. at 21.
twelve-month period (provided certain conditions were met). This came to be known as the “6 in 12” system, which lapsed when all of the Western jurisdictions implemented the National Mobility Agreement (described below) in its place.

The Western modification of the Inter-jurisdictional Practice Protocol was important, however, in helping to break down lingering reservations among the provinces about embracing full reform. In 2001, the Law Societies conducted a detailed comparative survey, which reviewed rules on Admissions, Credentials, Educational Requirements, Good Character, Transfer Rules, Occasional Practice Rules, Foreign Legal Consultants, Professional Liability Insurance, Defalcation Insurance and Compensation Funds, Trust Accounting, Retention of Records, Requalification and Refresher Programs, Practice Review, Spot and Focused Audits, and Specialist Certification.

b. Adoption of the National Mobility Agreement

In December 2002, the Law Societies of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, Newfoundland and Labrador, and the Barreau du Québec, signed the National Mobility Agreement. Under the National Mobility Agreement, members of participating provinces can practice without a permit in other National Mobility Agreement jurisdictions for up to one hundred days per year (provided certain conditions are met). With permission of the CEO or Executive Director of a law society, a common-law lawyer in good standing may also exceed that one hundred days or continue to practice pending permanent transfer to a new jurisdiction. If a lawyer seeks a practice certificate in a new jurisdiction but cannot meet the strict requirements for such a permit—for example, if the lawyer has a discipline record—she or he can still apply for a permit to practice temporarily.

Under the National Mobility Agreement, if a lawyer establishes an economic nexus with another province, the lawyer must go through permanent mobility procedures. Economic nexus is established by actions inconsistent with a temporary basis for providing legal services. This includes providing legal services beyond the permitted number of days, opening a law office, becoming a

294. McLaughlin Speech, supra note 184.
295. See id.
297. Laprairie, supra note 190, § 1.40, at 1-11; NATIONAL MOBILITY AGREEMENT 2002, supra note 278. New Brunswick and Prince Edwards Island subsequently signed the Agreement and had fully implemented it by 2006.
298. See LAW SOC’Y OF SASK., FAQs, supra note 280, at 4.
299. See id. at 5.
301. See, e.g., LAW SOC’Y OF SASK., FAQs, supra note 280, at 6-7.
provincial resident, operating a trust account, or holding oneself out as qualified to practice local law.\textsuperscript{303}

Uniquely, in the western province of Alberta, special provisions automatically enroll a corporate counsel who is working in Alberta and is qualified in another Canadian province or territory to become an Alberta lawyer, as long as she or he acts exclusively on behalf of the corporate employer and its subsidiaries or affiliates.\textsuperscript{304} This overcomes the problem faced by corporate counsel who are required to transfer to a different office in another province in which they are not qualified, even though their work is virtually the same in both locations.

The National Mobility Agreement has effectively resolved the issues related to lawyer mobility in Canada’s common law provinces. There are, however, special arrangements that pertain to the northern territories and to Québec.

c. Canada’s Remote Northern Territories and the National Mobility Agreement

The one barrier to full lawyer mobility that remains in effect is in Canada’s three remote northern territories: Yukon, the Northwest Territories, and Nunavut. Together these territories have a population that represents less than a third of one percent of Canada’s total population. Yet their combined geographic area is larger than India. Distances are vast and lawyers few. For example, Nunavut, which is three times larger than Texas, has only thirty-five resident lawyers in private practice.\textsuperscript{305}

The Territorial Mobility Agreement was adopted in 2006 by the Federation of Law Societies of Canada to address the unique characteristics of the law societies in the three remote northern territories, and the challenges presented by legal practice in the far north.\textsuperscript{306} It was recognized that simply permitting southern lawyers to fly in and skim off the best work in the territories would harm lawyers committed to those communities without any countervailing public benefit.\textsuperscript{307} Consequently, the Territorial Mobility Agreement allows the territorial law societies to participate in national mobility as reciprocating governing bodies with respect to permanent mobility (or transfer of lawyers from one jurisdiction to another), without requiring them to participate in the temporary mobility

---

\textsuperscript{303} See NATIONAL MOBILITY AGREEMENT 2002, supra note 278, at 9.

\textsuperscript{304} Legal Profession Act, R.S.A. 2000, c L-8, s 42 (Can.).


\textsuperscript{306} Laprairie, supra note 190, § 1.41, at 1-12; see Fed’n OF LAW SOC’YS OF CAN., TERRITORIAL MOBILITY AGREEMENT 3–4 (2013), http://www.lawsocietyyukon.com/forms/territorial_mobility_agreement.pdf [https://perma.cc/75QR-V2NK] [hereinafter TERRITORIAL MOBILITY AGREEMENT 2013].

\textsuperscript{307} Personal communications in February 2012 with the Presidents of the Law Societies of the Northwest Territories and Nunavut, and the President of the Federation of Law Societies of Canada, in Yellowknife.
provisions. Lawyers from the southern provinces of Canada seeking to practice in any of the three territories are required to pay a single appearance fee (which is roughly the same as the annual territorial bar dues) and have the option, under full permanent mobility principles, of joining a territorial law society without having to pass qualifying examinations.

d. The Special Situation of Québec

One Canadian province, Québec, which contains a quarter of Canada’s population, follows a civil law tradition, with the working language of the courts being French. These two facts limit the potential use of the new mobility regime by English-speaking common-lawyers wishing to practice in Québec. Québec has not formally ratified the National Mobility Agreement but did adopt the prior Inter-jurisdictional Practice Protocol. Consequently, its lawyers are governed in their practice outside Québec by the IPP, which (as previously noted) permits them to work without a permit on ten legal matters for no more than twenty days in twelve months, although the CEOs or executive directors of the law societies of the provinces in which they are working may grant permission to do so for a more extended period.

The failure of Québec to ratify the more expansive National Mobility Agreement arose from a very unusual political controversy involving appointments to the Supreme Court of Canada. The Supreme Court of Canada, set up

---

311. Lee, supra note 310, at 258–59; see Black, Case Comment, supra note 272, at 125.
312. Laprairie, supra note 190, § 1-40.1, at 1-11; see Law Soc’y of Alta., History, supra note 289; 1994 FLSC Protocol, supra note 247, at 8; see also Regulation Respecting the Issuance of Special Permits of the Barreau du Québec, C.Q.L.R., c B-1, r 8 (Can.).
313. These consist of advocates, who are members of the Barreau du Québec, and notaries (responsible for wills, estates, and land sales), who are members of the Chambre des Notaires.
314. For history of the Agreements, see Law Soc’y of Alta., History, supra note 289; see also Law Soc’y of Sask., FAQs, supra note 280; Report to Convocation 2001, supra note 280, at 3; 1994 FLSC Protocol, supra note 247, at 9.
315. See Kent Roach, The Supreme Court on Trial: Judicial Activism or Democratic Dialogue 422–24 (Rev. ed. 2016); Erin Crandall, Defeat and Ambiguity: The Pursuit of Judicial Selection Reform for the Supreme Court of Canada, 41 QUEEN’S L.J. 73, 98–99 (2015); Christopher Manfredi, Conservatives, The Supreme Court
by an Act of Parliament in 1875, consists of nine justices, three of whom were required to have ten years or more experience at the Québec Bar or as a judge in the Québec courts.\textsuperscript{316} The justices hold office until they reach age seventy-five, when, unlike their U.S. counterparts, they must retire.\textsuperscript{317} The Supreme Court has the final decision not only on constitutional questions but also on any case of civil and criminal law\textsuperscript{318} coming from the provincial courts of appeal, which it considers to be of national importance.\textsuperscript{319}

The Conservative government, which was in power at the national level from 2006 to 2015, endured a series of defeats when its legislation on tough on crime sentencing was struck down by the Supreme Court of Canada as violating Canada’s Charter of Rights and Freedoms.\textsuperscript{320} The government also suffered high profile losses on issues of assisted suicide,\textsuperscript{321} prostitution,\textsuperscript{322} and Senate reform.\textsuperscript{323} Justices of the Supreme Court are nominated by the Prime Minister, and the Conservative Prime Minister Stephen Harper had long expressed a wish to limit the Supreme Court’s progressive stance in the interpretation of constitutional rights\textsuperscript{324}—the ability to nominate sympathetic individuals to the Supreme Court would help advance that aim.\textsuperscript{325} On September 30, 2013, the Prime Minister of Canada announced the nomination of Justice Marc Nadon, a supernumerary judge of the Federal Court of Appeal, to the Supreme Court of Canada to occupy a seat vacated by the resignation of Justice Morris Fish, as one of the three judges appointed from Québec under section 6 of the Supreme Court of Canada, and the Constitution: Judicial-Government Relations, 2006–2015, 52 OSGOODE HALL L.J. 951, 971 (2015); John Goddes, Rush to Judgment: Beneath the Legal Dispute over Marc Nadon’s Supreme Court Eligibility Lies a Politically Fraught Mystery: Why Did Harper Wade into the Controversy in the First Place?, MACLEAN’S, Jan. 27, 2014, at 16; Michael Plaxton & Carissima Mathen, Purposive Interpretation, Québec, and the Supreme Court Act, 22 CONST. FORUM 15, 15 (2013); Philip Slayton, The Worst Appointment in History, CANADIAN LAW. MAG., Jan. 2014, at 16; Oliver Fitzgerald, Distant Echoes: Discussing Judicial Activism at Canadian and American Supreme Court Nomination Hearings, 25 CONST. FORUM 37, 37 (2016).


317. Supreme Court Act, R.S.C. 1985, c S-26, s 9(2) (Can.).

318. Forsey, supra note 316, at 32.

319. Id.


323. See Reference re Senate Reform, [2014] 1 S.C.R. 704, 757–79 (Can.).


325. Technically, this is done under section 4(2) of the Supreme Court Act by the Governor in Council by letters patent under the Great Seal, an expression which refers to the Federal Cabinet. By convention, however, the Prime Minister (who is the leader of the party in the House of Commons, which can command a majority because of the number of seats won in elections) makes the appointment.
Press reports described Justice Nadon as sympathetic to the Conservative government’s policy positions, and skeptical about the extension of constitutional rights. 

The Supreme Court Act does not explicitly say that a judge from the Federal Court can be appointed to fill a Québec seat, and Justice Nadon had been a member of the Federal Court’s trial and appeal divisions for the previous twenty years. Before that he was a lawyer for twenty years specializing in maritime law, mostly based in Montréal. His appointment was challenged as being illegal and the issue was referred to the Supreme Court of Canada on an expedited basis. The Court ruled that to appoint Judge Nadon for a Québec seat on the top bench would be an unconstitutional change to the composition of the Supreme Court of Canada, which would require the unanimous approval of Parliament and the provinces. Hence, the Court ruled six to one that Judge Nadon was not legally qualified for the job. It said that the purpose of the special appointment rules for Québec judges is “to ensure civil law expertise and the representation of Quebec’s legal traditions and social values on the Court, and to enhance the confidence of Québec in the Court.”

Why does this matter for lawyer mobility? Because the Quebec government and its legal profession regulator, the Barreau of Québec, feared that the Nadon appointment had highlighted possible routes for the appointment to a Québec seat on the top court of someone who was neither a practicing Québec lawyer, nor a judge on one of Québec’s courts. Questions were raised about whether the

---


332. See id. question 1. For an extraordinary rebuttal to the implications of the Supreme Court’s analysis for the competence of members of the Federal Court who came from the province of Québec, see Marc Noël, Chief Justice of the Fed. Court of Appeal, Speech to the Members of the Conseil du Barreau du Québec (Dec. 4, 2014), http://cas-cdc-wwww02-cas-sat-j.gc.ca/fca-caf/pdf/Speech-Barreau-du-Quebec_eng.pdf [https://perma.cc/KE8G-KCD7].

333. The only reference to the geographic origin in the provisions dealing with appointment to the Supreme Court of Canada is the requirement that three members of the nine justices on the court must come from Québec:
mobility protocol could be used to rebrand a common-law lawyer as a Québec lawyer, and thus qualified for appointment to one of the Québec seats. Québec has not yet formally signed the National Mobility Agreement and there are no signs it will do so quickly.

6. EXPERIENCE SINCE MOBILITY REFORM

Since there is no requirement to register when a lawyer is relying on the National Mobility Agreement to practice temporarily in another province, there are no statistics available to gauge the frequency with which lawyers are actually using the new protocol. Litigation counsel do appear regularly in appellate courts and tribunals outside their home jurisdictions, and employment lawyers practicing in provinces with similar labor laws to those in adjoining provinces do seem to provide more legal services there than in the past. There also appears to be more use of the National Mobility Agreement to enable cross-border practices specifically it states that “at least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Québec or from among the advocates of that Province.” Hugo Cyr, The Bungling of Justice Nadon’s Appointment to the Supreme Court of Canada, 67 SUP. CT. L. REV. 73, 75 (2014) (quoting The Supreme Court Act, R.S.C. 1985, c S-26). However, by convention, Ontario (which has 38.5 percent of the national population to Québec’s twenty-three percent) has an equivalent three justices appointed from among its lawyers and judges. Two justices by convention come from Canada’s western provinces (which have thirty-two percent of the population in total)—and northern territories too, although there has never been such an appointment—and one from the four Atlantic provinces (which have 6.6 percent of the national population). See PETER W. HOGG, 1 CONSTITUTIONAL LAW OF CANADA § 8.3, at 8-7 (5th ed. Supp. 2015).

For general discussions of the crisis, see Cyr, supra; see also Daryl Barton, Analysis of Reference Re Supreme Court Act: The Implied Currency Requirement for Québec Seat Appointees to the Supreme Court, CONST. F. CONSTITUTIONNEL 19 (2015).


Les modifications ont été proposées au ministère de la Justice, à l’Office des professions, mentionne le bâtonnier. « Présentement il y a un pépin majeur qui fait en sorte que le ministère ne veut pas adopter pour l’instant les amendements législatifs proposés parce que ça ferait en sorte que les avocats d’autres provinces pourraient venir pratiquer au Québec, donc obtenir un permis d’exercer au Québec sans avoir fait leur droit civil ».

The changes were proposed to the Ministry of Justice and the Office of the professions, said the Batonnier, [Bernard Synnott]. “Currently there is a major glitch that ensured that the department is not adopting proposed legislative amendments at this time because it would ensure that lawyers from other provinces could practice in Québec, and get a license in Québec without knowing civil law.”

Id.
in adjacent provinces with common traditions, like the Western provinces or Atlantic Canada.

That said, anecdotal evidence suggests that many lawyers remain somewhat wary of taking advantage of the new mobility rules, even in situations where the National Mobility Agreement could be helpful. On two recent occasions during continuing professional development programs in Ontario, one of the authors of this Article raised hypotheticals involving simple contract matters where a client asked about the enforceability of contract provisions in multiple provinces. Surprisingly, over ninety percent of the audiences responding said that they would hire local counsel to advise in such circumstances, even if local counsel were simply asked to confirm their primary opinions. The fact that the National Mobility Agreement would permit faster, cheaper service to the client did not appear to overcome inherent lawyer reluctance to practice outside their home provinces. This result was confirmed in a subsequent survey of large firm partners in five provinces, responsible for closing opinions in commercial transactions. Again, only ten percent of the respondents said they would avail themselves of the National Mobility Agreement and avoid retention of local counsel. Of course, these results could change over time, but it is interesting that Canadian lawyers seem to remain cautious about routinely engaging in at least some sorts of practice outside their own provinces.

One fear that has not materialized is harm to the clients. One of the factors that led to a slow, deliberate, gradual approach to reform was the worry that malpractice claims by out-of-province lawyers availing themselves of the rights conferred under the National Mobility Agreement would negatively affect the financial assumptions underlying the law society primary insurance policies: remember that Canadian provinces all require that all lawyers in private practice

335. Note that, with the exception of a few consumer protection statutes, contract law in the common-law provinces of Canada is substantially the same across the country. The sale of goods law (the Canadian equivalent of Article 2 of the Uniform Commercial Code) is made uniform by a common Sale of Goods Act and the implementation across the country of the International Sale of Goods Act, which in turn implements the United Nations Convention on Contracts for the International Sale of Goods (the so-called Vienna Convention).

336. Audience polls conducted at three Law Society of Upper Canada programs: The Annotated Shareholder Agreement 2012; Entertainment & Media Law Symposium 2013; and 6th Annual Business Law Summit 2016. One of the audience surveys conducted at the Law Society of Upper Canada Entertainment and Media Law Symposium 2013 included a hypothetical involving three provinces, standard industry contracts, and a fee sensitive client. Nevertheless, the audience split, with sixty percent opting to hire local counsel, forty percent sending the file to a national firm with offices in the three provinces, and no one prepared to take advantage of the National Mobility Agreement to provide one-stop services for legal advice for the client.


338. See Simon Chester, Survey on National Mobility Agreement Presentation to Toronto Opinions Group (May 6, 2015), https://prezi.com/z_0k1z3dwfsa/torog/ [https://perma.cc/KG2J-Q75Y].
maintain professional liability insurance at a minimum of one million dollars. The expansion of mobility reforms beyond the initial tentative 2002 reforms, and the dropping of the reciprocity limitation depended upon the negotiating parties being satisfied that there was no such impact. It helped, of course, that lawyers who had a history of discipline issues or existing malpractice claims were excluded from the pool of lawyers who could take advantage of the mobility reforms. In addition, stipulating that the home insurance policies of the lawyer’s province of residence would respond to any claims meant that any impact would be felt by the insurer already providing coverage to the lawyer. There are no available statistics detailing claims, but informal communications with primary insurers have revealed no history of significant claims. The malpractice worry has proved a red herring.

Mobility reform is a topic that is closely related to other regulatory trends, and the Canadian experience shows that cooperation in this area can lead to uniform or coordinated approaches in other aspects of professional regulation. As the President of the Federation of Law Societies of Canada put it in a recent speech:

[O]ne key aspect stands out—the days are long behind us where regulating the legal profession is simply a provincial or territorial endeavour. It is a national project.

Legal regulation in Canada is far different today than even 10 years ago. In the last 10 years, all law societies have decided to recognize the credentials, indeed the competence and integrity, of every member of the legal profession no matter where they were first admitted to the bar without any additional training or evaluation.

So it begs the question—if any lawyer can move anywhere and have his or her licence recognized by any law society, is there any principled reason why the regulation of lawyers should be approached differently from one jurisdiction to the next? What should the average member of the public think?

The answer to that question, of course, is no, there is no principled reason for any substantial variation in how the public is protected by legal regulators anywhere in Canada . . . .

But be under no illusions—arriving at consistent approaches with our Canadian federation is hard work.

Canada’s experience may be instructive for American reformers, because the drivers towards reform have been operating on so many different planes

340. See REPORT TO CONVOCATION 2001, supra note 280, at 9; 1994 FLSC PROTOCOL, supra note 247, at 10. For an example of this, see LAW SOC’Y OF SASK., FAQs, supra note 280, at 3.
341. See Lawyers’ Prof’l Indemnity Co., supra note 282.
(constitutional prompts, court decisions, trade agreements, the pressures of globalization, and antitrust concerns) and because the process of reform has been so measured. Over twenty years of careful negotiations took place. Indeed, looking at the innumerable tentative drafts and careful incremental reforms it is hard to avoid the conclusion that they would have been unsuccessful if an ambitious end goal of comprehensive lawyer mobility had been articulated at the outset. Instead, a slow process of measured negotiation, assessing achievements and setbacks as they happened, was vital to success. The chair of the Federation National Committee on Mobility summed up the lessons of the Canadian experience:

What appeared to be radical in a federal system when we introduced the concept in 2001 now, in 2016, appears to be quite prosaic. From inception to signing of the final agreement took all of 18 years. We succeeded because there was a meeting of minds on the desirability of legal mobility if we were sincere in our eloquence that our primary responsibilities were to protect the public interest, and provide effective and efficient services to our clients. To that end, we met each challenge by ensuring that we satisfied all competency, insurance, and professional regulatory requirements to protect the public interest. The biggest unspoken challenge was to persuade the legal profession that mobility would not undermine their economic interests and, indeed, would promote it. In retrospect, that all appears to have been proven accurate. It is a frequent lesson in life that what is considered radical today will be prosaic within half a generation.343

Protectionist worries and narrow parochialism never manifested themselves in the negotiations, perhaps reflecting the courts’ insistence that legal regulators’ proper mandate was the protection of the public interest—this kept negotiators focused.

V. LESSONS LEARNED FROM THE AUSTRALIAN AND CANADIAN REFORM PROCESSES

Reflecting on the experiences of Australia and Canada in moving toward reform of their multijurisdictional practice rules, it is useful to focus on key lessons that might be of benefit to similar reform efforts in the United States.

First, it is important to note that the driving forces behind the reform initiatives in both Australia and Canada were broader concerns about national public policy and the expansion of protections for consumers of legal services. In Australia, these concerns reflected a national competition policy designed to make the country more competitive in international markets and a recognition that a more

343. Private correspondence on October 14, 2016 with Professor Vern Krishna, Ex-Treasurer of the Law Society of Upper Canada (elected head of the Bar) and Chair of the National Committee on Mobility, Federation of Law Societies of Canada.
flexible and mobile legal profession able to engage nationally and internationally was an important component of that effort. There was also a strong commitment, in this process, to assuring adequate consumer protections and to improving the administration of justice by eliminating overly burdensome regulations.

In Canada, reform was driven by a recognition that existing restrictions on lawyer mobility were essentially inconsistent with key constitutional principles embodied in Canada’s Charter of Rights and Freedoms, as well as with commitments to trade liberalization reflected in both national and international agreements. There was also a concern that the restrictions involved anti-competitive behavior that impeded the free market for legal services and could not be justified as serving the public interest.

The constitutional and legal structures of the United States are, of course, different in many ways from those of both Australia and Canada, but it is nonetheless important that we also focus on the broader public policy implications of our current restrictions on multijurisdictional practice. We too must ask serious questions about the extent to which our current policies inhibit our competitiveness in international markets, impede the development of a more competitive national market for legal services, drive up the cost of legal services for consumers, and frustrate legitimate client demands and expectations. We must no longer allow the debate of these issues to be dominated—directly or indirectly—by primary concerns about protecting the traditional franchises of local lawyers.

Second, it is instructive to observe that, in both Australia and Canada, agreement on the principle of mutual recognition of rights of practice was an important first step in building trust among lawyers and law societies in different states/provinces. In Australia, it was the Mutual Recognition Acts adopted by the various states and territories in 1992 that led to the *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services*—adopted by the Law Council of Australia in 1994—and ultimately to the mobility protocols in the late 2000s. 344 In Canada, it was the principle of reciprocity agreed to early in the negotiations undertaken by the Federation of Law Societies of Canada in the early 1990s that proved an important confidence-building measure, particularly as representatives of the various law societies came to know and trust one another. 345

In the United States, there are a number of important reform measures that should be seriously considered by state bar associations to enable the U.S. legal profession to adapt to the challenges of the twenty-first century market for legal services. In his previously cited article, Professor Stephen Gillers

344. See supra notes 107–09, 113, 144 and accompanying text.
345. See supra Part IV.B.5.
lists eleven such measures, and other commentators might add even more. The problem with such a long list of potential reform measures is that the task of implementing them is so daunting as to discourage even the most optimistically minded reformers from even trying.

We suggest that a more productive—and potentially more successful—approach to reform might well be to start with a single concept that could, if broadly adopted, serve as a confidence-building measure to create a climate in which other reforms could then be pursued. Reflecting the experience of both Australia and Canada, we suggest that an ideal such concept could be mutual recognition of rights to practice, a concept that would seem foundational to most of the additional reform measures proposed by Professor Gillers.

And third, it is worth noting that, in both the Australian and Canadian experiences of mobility reform, the path to final success was long and arduous. In Australia, it took nineteen years to move from the issuance of the Blueprint by the Law Council of Australia in 1994 to the final adoption of implementing Legal Profession Acts in all of the states and territories in 2013. In Canada, thirteen years elapsed between the Supreme Court’s highlighting of the constitutional problems with barriers to multijurisdictional practice in 1989 and the adoption of the National Mobility Agreement by the common-law provinces in 2002. And these lengthy periods of negotiation occurred notwithstanding that the numbers of jurisdictions involved in both countries were relatively modest (eight in the

346. The eleven measures discussed by Professor Gillers include (i) creating a single bar examination with separate state scoring; (ii) permitting lawyers to physically relocate their practice from one jurisdiction to another without retaking the bar examination; (iii) permitting a lawyer admitted in any U.S. jurisdiction to practice virtually in any other jurisdiction within the scope of his or her competence; (iv) accommodating cross-border legal advertising, creation of a uniform rule identifying minimum standards and disclosure requirements; (v) permitting motion admission without requiring an office or minimum practice in the new jurisdiction; (vi) requiring lawyers to have malpractice insurance; (vii) creating a presumption that, unless lawyer and client agree otherwise, the conflict rules of the jurisdiction in which the client resides (or does business) govern the client’s relationship with counsel; (viii) requiring internet providers of legal products to include appropriate disclosures and disclaimers prominently throughout their websites, promotional materials, and advertising; (ix) permitting nonlawyers to have equity interests and management authority in for-profit law firms; (x) easing temporary and permanent admission to practice in the United States for applicants with foreign law degrees; and (xi) increasing the likelihood of competent representation through devices like certifications in specialties. See Gillers, supra note 62, at 999–1021.


348. See supra notes 112–13, 146, 161 and accompanying text.

349. See supra Part IV.B.5.
case of Australia—130 and thirteen in the case of Canada—131—at least as compared to the United States.

Against this background—and particularly considering the experience with adoption by the states of Model Rule 5.5—we believe that it is simply impractical to wait for agreement and action by the fifty-six jurisdictions that make up the United States. 132 Accordingly, in the next section, we propose a solution to the problem of lawyer mobility that sidesteps this process.

VI. REFORM OF LAWYER MOBILITY IN THE UNITED STATES: A PROPOSED WAY FORWARD

In the previous sections, we have described the current problems with the regulation of lawyer mobility in the United States; the compelling reasons for revising our approach to lawyer mobility; and the reform of lawyer mobility rules in Australia and Canada, both—like the United States—common law countries with federal constitutional systems and traditions of lawyer regulation at the state/provincial level. In this section, we offer our proposal for reforming the rules governing multijurisdictional practice in the United States.

In offering our proposal as a way forward, we are mindful of the strong traditions in this country of self-regulation by the legal profession and of the primacy of regulation at the state level. Nonetheless, for practical reasons (mostly involving the sheer number of jurisdictions involved), we believe that the way forward must involve federal legislation. That said, our proposal is quite narrow and designed to both honor and preserve the traditional principle of primary regulation of the legal profession remaining at the state level.

Specifically, we propose that Congress should adopt a narrowly drawn statute that mandates mutual recognition of rights of practice by lawyers across state borders as described below:

1. Acting under its constitutional authority to regulate interstate and foreign commerce 133 and its general legislative powers, 134 the Congress should mandate that:
   - In all matters pending before the courts of the United States;
   - In all matters involving federal law;
   - In all matters involving international treaties;
   - In all matters involving tribal law; and
   - In all matters affecting interstate or foreign commerce;

---

350. See supra note 74 and accompanying text.
351. See supra Part IV.B.
352. For these purposes, the United States includes the fifty states, the District of Columbia, and the territories of Puerto Rico, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, and American Samoa.
353. U.S. CONST. art. I, § 8, cl. 3.
any person licensed to practice law and in good standing in any
United States jurisdiction will be deemed qualified to practice law in
every other United States jurisdiction (whether or not specifically
licensed there), subject only to the restrictions set out below.

(2) Any person who holds himself or herself out to the public as
regularly practicing or as a practitioner licensed in a jurisdiction in
which the practitioner is not licensed must comply with the
qualification requirements of that jurisdiction, regardless of the
broad practice rights described in paragraph (1) above.

(3) Any person who, pursuant to the practice rights described in
paragraph (1) above, practices law in a jurisdiction in which he or
she is not otherwise admitted to practice shall be subject to the
disciplinary rules of such jurisdiction with respect to his or her
activities in such jurisdiction, provided that the requirements
imposed under such rules are no more onerous than requirements
imposed on persons who are licensed to practice in such jurisdiction.

In formulating this proposal, we are mindful of several important consider-
ations. First, we believe that there can be no reasonable question that the statute
we propose would be constitutional. While the regulation of the legal profession
in the United States has by tradition been left to the states, there is no legal
constraint on Congress’s ability to inject itself into the process, certainly not in
the very limited way that we propose. As noted by one leading commentator:
“The practice of law is increasingly national rather than local in scope, and the
United States Congress no doubt has constitutional power (under the Commerce
Clause) to enact a regime of national rather than state-by-state licensure.”

It is a well-settled law that Congress has the constitutional power to enact
legislation that either directly or indirectly regulates the legal profession. Perhaps
the leading case on this point is Goldfarb v. Virginia State Bar, in which the
Supreme Court held that a minimum-fee schedule published by a county bar
association and enforced by the Virginia State Bar violated Section 1 of the
Sherman Act, the antitrust statute enacted by Congress pursuant to its powers
under the Commerce Clause. Brushing aside arguments that the precise legal
activity involved (a title examination required for the purchase of a home) lacked
sufficient impact on interstate commerce, the Court clearly articulated the
expansive scope of congressional power in such matters:

355. 2 HAZARD ET AL., supra note 5, § 46.5, at 46-12.
As the District Court found, “a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia,” and “significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia.” Thus in the class action the transactions which create the need for the particular legal services in question frequently are interstate transactions. The necessary connection between the interstate transactions and the restraint of trade provided by the minimum-fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrower . . . . Thus a title examination is an integral part of an interstate transaction . . . . Given the substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected . . . .

Other Supreme Court rulings have also confirmed the power of Congress to impose requirements on the legal profession. For example, in *United States v. Williams*, the Supreme Court noted Congress is “free to proscribe” rules relating to prosecutorial conduct in grand jury proceedings. Congress has enacted similar legislation regulating the legal profession in debt-collection litigation and for attorneys appearing before the Securities and Exchange Commission. It is equally settled that acts of Congress concerning the legal profession supersede state law. In *Sperry v. Florida ex rel. Florida Bar*, the United States Supreme Court vacated an injunction order by the Florida Supreme Court that prohibited non-lawyers from practicing before the United States Patent Office. The Florida Supreme Court relied upon a Florida statute concerning the unauthorized practice of law in upholding the lower court’s injunction order. In vacating the injunction, the U.S. Supreme Court found that federal statute

---

363. At the time of the decision, Section 2, Article II of the Integration Rule, Florida Bar, 31 F.S.A., provided:

No person shall engage in any way in the practice of law in this state unless such person is an active member of the Bar, in good standing, except that a practicing attorney of another state, in good standing, who has professional business in a court of record of this state may, upon motion, be permitted to practice for the purpose of such business only, when it is made to appear that he has associated and appearing with him in such business an active member of the Bar.

That provision was amended in 1988 and 1992, and now provides: “Persons shall initially become a member of The Florida Bar, in good standing, only upon certification by the Supreme Court of Florida in accordance with the rules governing the Florida Board of Bar Examiners and administration of the required oath.” *RULES REGULATING FLA. BAR* Bylaw 2-2.1. Unauthorized practice of law in Florida is now governed by *RULES REGULATING FLA. BAR* R. 4-5.5.
expressly permitted non-lawyers to practice before the Patent Office and pre-empted the Florida statute.\footnote{364} The Court reiterated its long-standing precept that “\textit{[n]}o State law can hinder or obstruct the free use of a license granted under an act of Congress.”\footnote{365}

Second, we realize that the broad mutual recognition approach that we propose will strike some observers as moving “\textit{too far too fast},” and that they might prefer a more incremental approach that would retain more restrictions, for example, some version of the Canadian model of limiting temporary practice rights to only one hundred days per calendar year.\footnote{366} In our view, such restrictions (while evidently workable in Canada) would impose unnecessary administrative burdens and, in fact, would not solve the problem. It is not hard to imagine, for example, that a lawyer licensed to practice in the District of Columbia who lives in Maryland or Virginia and regularly works from home by computer almost every night and on weekends could easily run up against the one hundred-day limitation almost every year. And, in the end, what public interest is being served by holding such a lawyer in violation of the unauthorized practice rules? By contrast, the approach we propose is clear and clean: there would be no artificial limits on a lawyer’s ability to engage in cross-border practice so long as he or she did not hold himself or herself out as a practitioner who regularly practiced or was licensed to practice in that jurisdiction.

And third, while the provision of paragraph (3) stating that a lawyer temporarily practicing in another jurisdiction should be subject to the disciplinary rules in that jurisdiction is perhaps unnecessary because it is arguably already covered in the \textit{Model Rules},\footnote{367} including it in the proposed federal statute serves to underscore that it is not the intent of the legislation to undermine the regulatory authority of state bars except in the limited way related to temporary practice by out-of-state lawyers. As drafted, the provision also makes clear that states would not be permitted to impose rules on out-of-state lawyers that are more burdensome than those applicable to in-state lawyers.

We believe that our proposal represents a reasonable and measured way forward in addressing a nagging and increasingly serious issue confronting U.S. lawyers and law firms. We are also hopeful that, if implemented, our proposal could serve as a confidence and trust building measure that would make it possible, over time, to pursue additional areas of needed reform. As regards issues of lawyer mobility, however, we strongly believe that the time to act is now. In concluding his previously cited article, Professor Gillers ends with this statement that—in the present context—we heartily endorse:

\footnote{364} Sperry, 373 U.S. at 385, 404.\footnote{365} Id. at 385 (quoting Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 566 (1851)).\footnote{366} See supra note 298 and accompanying text.\footnote{367} See Model Rules R. 8.5(a).
Institutions and government will sometimes change rules to facilitate or encourage behavior deemed beneficial. More often, perhaps, they react to changes when and as appropriate. Reaction often will be the wiser course, so as to prevent precipitous action. What is not wise is intransigence when the gap between socially beneficial conduct and the rules that constrict the conduct grows large. We have entered such a period for the rules governing the legal marketplace, and it is in large part a product of changing technology and the cross-border activity of lawyers and clients. Reasonable people will disagree on when and how the profession and the courts should react to this gap. But doing nothing is not an option . . .

**CONCLUSION**

In the preceding sections, we have described in detail the current problems with the regulation of lawyer mobility in the United States and the compelling reasons that a fundamental change in our approach is required. Simply put, our current rules regarding multijurisdictional practice by licensed lawyers impede the ability of clients to achieve more efficient and cost effective legal services, are unnecessary to protect the interests of clients, and undermine the integrity of our overall regulatory structure by articulating requirements that as a practical matter cannot be complied with. Drawing on lessons from Australia and Canada, both common-law countries with a long tradition of regulation of the legal profession at the state/provincial levels, we have offered a proposal for the mutual recognition of rights of practice of lawyers in all American jurisdictions; a proposal that, if adopted, would enable clients to use counsel of their choice on a nationwide basis. Such a change is, in our view, critical if American lawyers are to remain responsive to the legitimate expectations and demands of their clients and true to the highest standards of professionalism.

---

ARTICLES
A RULE TO FORBID BIAS AND HARASSMENT IN LAW PRACTICE: A GUIDE FOR STATE COURTS CONSIDERING MODEL RULE 8.4(g)  
Stephen Gillers

REPLY: A PAUSE FOR STATE COURTS CONSIDERING MODEL RULE 8.4(g)  
The First Amendment and “Conduct Related to the Practice of Law”  
Josh Blackman

LAWYER DISCIPLINE IN AN AUTHORITARIAN REGIME: EMPIRICAL INSIGHTS FROM ZHEJIANG PROVINCE, CHINA  
Judith A. McMorrow, Sida Liu, and Benjamin van Rooij

MINISTERS OF JUSTICE AND MASS INCARCERATION  
Lissa Griffin and Ellen Yaroshefsky
Advisory Board

BRIAN C. BUESCHER  
Partner  
Kutak Rock LLP

TONIO DESORRENTO  
CEO  
Vemo Education

JONATHAN Epstein  
Partner  
Holland & Knight LLP

MICHAEL S. FRISCH  
Ethics Counsel and Adjunct Professor of Law  
Georgetown University Law Center

TERRENCE J. GALLIGAN  
Assistant Dean of Career Development Office  
University of California, Berkeley, School of Law

SUSAN HACKETT  
Chief Executive Officer and Chief Legal Officer  
Legal Executive Leadership

JAMES M. McKNIGHT  
Member  
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

MILTON C. REGAN, JR.  
Professor of Law  
Georgetown University Law Center

DOUGLAS R. RICHMOND  
Senior Vice President, Aon Global Professions Practice  
Aon Risk Services

LAUREN A. WEEMAN  
Trial Attorney, Civil Division  
United States Department of Justice