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# The Two Faces of Multi-jurisdictional Practice

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# THE TWO FACES OF MULTI - JURISDICTIONAL PRACTICE

By Gerard J. Clark <sup>1</sup>  
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(Final draft)

## I. INTRODUCTION

Bar admission and membership as a condition for the practice of law made their appearance after World War I <sup>2</sup>. At the behest of the American Bar Association, states established admission requirements that involved a process of inclusion and exclusion typically included residency, good moral character <sup>4</sup> and proof of competency <sup>5</sup>. <sup>3</sup>which

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<sup>2</sup>Hurst, J., The Growth of American Law (1950) p. 323.

<sup>3</sup>Auerbach, Jerold S. Unequal Justice (London, Oxford University Press, 1976) p. 120 et seq.

<sup>4</sup>Konigsberg v. State Bar 353 U.S. 252 (1961) (Bar allowed to ask if applicant is a member of the communist party); In re Anastaplo 366 U.S. 82 (1961) (extensive examination of

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associations not allowed); Schwartz v. Board of Bar Examiners 353 U.S. 232 (1957) (past membership in communist party is no basis for exclusion); Law Students Research Council, Inc. v. Wadmond 401 U.S. 154 (1971) (approving an oath of loyalty to the Constitution); Rhode, Good Moral Character as a Professional Credential 94 Yale L. Rev. 491 (1984) (empirical survey showing widespread array in application of this criterion)

<sup>5</sup>While the differences in state law cited in justification of individual bar exams, now, typically half of the bar exam is literally the same exam, the Multistate Bar Exam (MBE). In addition, a number of states require the nationally standardized Multistate Performance Test. Every state except for Maryland requires the Multistate Professional Responsibility Exam. While sixteen jurisdictions within the United States do not accept MBE scores from exams taken in other jurisdictions, only four do not accept MPRE scores from exams taken in other jurisdictions. The MBE, MPT, and MPRE exams are nationally administered examinations, and are uniform in each state. If the Full Faith and Credit Clause of the United States Constitution applied, it would require the acceptance of scores from exams taken in other jurisdictions.

In 1930 the ABA's Committee on Unauthorized Practice was founded and was successful in its campaign to convince the states to prohibit the practice of law except for duly licensed practitioners<sup>6</sup>. A primary impetus for the movement was to eliminate the uneducated and the untrained from the practice and also to define fields of practice reserved to the bar and to eliminate competition for this work from outsiders. One by one the states established their admission requirements, with little attention paid to the problem of the out-of-state lawyer. Prior to that time multi-jurisdictional practice was a non-issue. Clarence Darrow, James Webster, Alexander Hamilton and William Jennings Bryan traveled to states distant from their homes to advocate the causes of their unpopular clients.<sup>7</sup>

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<sup>6</sup>Wolfram, Modern Legal Ethics p.825. Jerold Auerbach, Unequal Justice, Lawyers and social Change in Modern America, London: Oxford University Press, 1976. Pp.94 -101.

<sup>7</sup>Justice Stevens in his dissent in Leisy v. Flynt, infra, quoted the lower court opinion as follows: "Nonresident lawyers have appeared in many of our most celebrated cases. For example, Andrew Hamilton, a leader of the Philadelphia bar, defended John Peter Zenger in New York in 1735 in colonial America's most famous freedom-of-speech case. Clarence Darrow appeared in many states to lead the cause of a unpopular client, including the famous Scopes trial in Tennessee where he opposed another well-known, out-of-state lawyer, William Jennings Bryan. Great lawyers from Alexander Hamilton and Daniel Webster to Charles Evans Hughes

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and John W. Davis were specially admitted for the trial of important cases in other states. A small group of lawyers appearing pro hac vice inspired and initiated the civil rights movement in its early stages. In a series of cases brought in courts throughout the South, out-of-state lawyers Thurgood Marshall, Constance Motley and Spottswood Robinson, before their appointment to the federal bench, developed the legal principles which gave rise to the civil rights movement. "There are a number of reasons for this tradition. The demands of business and the mobility of our society are the reasons given by the American Bar Association in Canon 3 of the Code of Professional Responsibility. That Canon discourages 'territorial limitations' on the practice of law, including trial practice. There are other reasons in addition to business reasons. A client may want a particular lawyer for a particular kind of case, and a lawyer may want to take the case because of the skill required. Often, as in the case of Andrew Hamilton, Darrow, Bryan and Thurgood Marshall, a lawyer participates in a case out of a sense of justice. He may feel a sense of duty to defend an unpopular defendant and in this way to give expression to his own moral sense. These are important values, both for lawyers and clients, and should not be denied arbitrarily."

The enforcement of unauthorized practice rules is often the responsibility of an unauthorized practice committee appointed by and under the supervision of the state's highest court<sup>8</sup>. While focusing primarily on the practice of law by non-lawyers, the statutes and rules, requiring a local license applied as well to the out-of-state lawyer, who did not hold a local license. This placed the out-of-state lawyer in the same position as the non-lawyer, namely a non-licenseholder and thus equally prohibited from serving the legal needs of the state's population.<sup>9</sup>

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<sup>8</sup>For example, Rule VII, entitled Unauthorized Practice of Law, of the Ohio Rules for the Governance of the Bar of Ohio state in Section 1. (A) There shall be a Board of Commissioners on the Unauthorized Practice of Law of the Supreme Court consisting of seven members appointed by this Court. The term of office of each member of the Board shall be three years, beginning on the first day of January next following the member's appointment.... Section 2, entitled Jurisdiction of Board states:

(A) The unauthorized practice of law is the rendering of legal services for another by any person not admitted to practice in Ohio under Rule I and not granted active status under Rule VI, or certified under Rule II, Rule IX, or Rule XI of the Supreme Court Rules for the Government of the Bar of Ohio.

(B) The Board shall receive evidence, preserve the record, make findings, and submit recommendations concerning complaints of unauthorized practice of law.

Section 19, entitled Review by Supreme Court of Ohio; Orders; Costs states:

(A) Show Cause Order. After the filing of a final report of the Board, the Supreme Court shall issue to respondent an order to show cause why the report of the Board shall not be confirmed and an appropriate order granted. Notice of the order to show cause shall be served by the Clerk of the Supreme Court on all parties and counsel of record by certified mail at the address provided in the Board's report.

<sup>9</sup>The question of what constitutes the practice of law, setting the boundaries between what lawyers must do and what non-lawyers are prohibited from doing, arises in the enforcement of unauthorized practice prohibitions against non-lawyers. While many federal agencies have their own admission criteria which might include non-lawyers, some states have refused to allow their administrative agencies to allow such practices. West Virginia St. Bar v. Earley 144 W. Va 504 (1959) (Limiting representation before the state's worker compensation commission to lawyers). Note, Representation of Clients before Administrative Agencies: Authorized or Unauthorized Practice of Law? 15 Val. U.L. Rev. 567 (1981). Certain kinds of lobbying are limited to lawyers. Baron v. City of Los Angeles 2 Cal. 3d 535, 469 P.2d 353 (1970) (Publication of legal do-it-yourself books may be unauthorized practice); Project, The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis 86 Yale L. Rev. 104 (1976); Florida Bar v. Mills 410 So. 2d 498 (Fla., 1982) (advising friends in estate planning); Committee on Profession Ethics v. Gartin, 272 N.W. 2d 485 (Iowa, 1978) (preparing income tax returns); Professional Adjusters, Inc. v. Tandon 433 N.E. 2d 779 (Ind., 1982) (statute allowing public adjusters to represent members of the public is unconstitutional, invading the court's inherent powers over the practice of law). This has led to some nasty battles. For instance, after the Arizona Supreme Court issued a decision in Arizona St. Bar v. Arizona Land Title & Trust Co. 90 Ariz. 76, 366 P.2d 1 (1961), which strictly restricted that activities of real estate brokers

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with respect to the residential sales of real estate, are referendum amended the Arizona Constitution so as to insure the right of real estate brokers to present for purchase and sales agreements to their clients. Adler, Are Real Estate Agents Entitled to Practice a Little Law 4 Ariz L. Rev 188 (1963); see also Wolfram, Modern Legal Ethics p.842. Unauthorized practice rules prohibit most prose representation of corporations, partnerships, and unions. Wolfram, Modern Legal Ethics p.840; Osborne v. Bank of the United States 22 U.S. (9 Theat.) 738, 830 (1824) (per Marshall, C.J.) (“a corporation... can appear only by attorney”). Indeed, all kinds of professional practices are a matter of necessity. An accountant advises on tax returns; the real estate agent may be asked about the zoning of a parcel; Joyce Palomar, The War Between Attorneys and Lay Conveyancers - Empirical Evidence says “Cease Fire!” 31 Conn. L. Re. 423 (1999) an architect must know and follow the building codes; police officers interpret the law when they decide what to charge a lawbreaker with ABA Model Code of Professional Responsibility, E.C.3 -5 (acknowledging that lay people often have the responsibility to interpret the law); the state bureaucrat answers telephone inquiries about the requirements for driver’s license applications. Deborah Rhode, Policing the Professional Monopoly: A Constitutional and an Empirical Analysis of the Unauthorized Practice Prohibitions 34 Stan. L. Rev. 1 (1981); Weckstein, Limitations on the Right to Counsel: The Unauthorized Practice of Law 1978 Utah 649.

As interstate practice expanded, a large segment of the bar, including the ABA, recognized that enforcement of these prohibitions against the out-of-state lawyer undermines the interests of clients to coherent, competent and economical representation. At the same time, the prohibitions enacted remained resistant to change and local bar associations recognized that exclusion of outsiders meant increased demand for their own services. Hence the schizophrenia: academics, the ABA, corporate and government counsel and big firm lawyers call for reform, while the local bar and judiciary resist.

The problem became exacerbated as these rules found their way into fee disputes and motion to disqualify adversary counsel. In such contexts, the party raising the unauthorized practice frequently raises it to gain an advantage in litigation rather than to protect the public. 10

## II. RECENT CASE LAW

A survey of recent cases evidence bizarre results, where protection of the innocent and unsuspecting client public seems very distant to the courts' deliberations.

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<sup>10</sup>One may legitimately ask whether the adversary party in a civil proceeding has standing to raise the unauthorized practice of the adversary party's lawyer; or, alternatively, whether unauthorized practice statutes vest individual rights not to be the opponent of an out-of-state practitioner. Kenneth L. Penegar, The Loss of Innocence: A Brief History of Law Firm Disqualification in the Courts 8 Geo. J. Legal Ethics 831 (1995)

In the *Birbrower* Case <sup>11</sup>, the California Supreme Court denied the plaintiff New York law firm's claim for one million dollars in legal fees against its client, ESQ Business Services, Inc., a software developing and marketing company, for representation provided to the client in a dispute with Tandem Computers Incorporated, a Delaware corporation with its principal place of business in California. The retainer agreement was declared void, unenforceable and illegal as a violation of the California unauthorized practice statute. The dispute between ESQ and Tandem was settled in August of 1993 by the *Birbrower* attorneys after they invoked the arbitration clause of the contract which was to be governed by California law. Afterwards, however, ESQ sued *Birbrower* for malpractice and *Birbrower* counterclaimed for its fees under a retainer agreement and for quantum meruit. ESQ claimed an unauthorized practice as an affirmative defense because of the fact that *Birbrower*'s two lawyers that handled most of the work on the case originated out of a New York law firm and were not licensed to practice law in California. The background of the relationship was that ESQ originated in New York ("ESQ -NY") as did its principal in the early eighties and as its California business expanded, the principal and his brother formed a second corporation in California ("ESQ -CA").

The California Supreme Court partially affirmed and partially reversed and remanded the decision of the Court of Appeal's affirming a grant of summary judgment by the trial court, dismissing the *Birbrower* counterclaim for legal fees because the retainer agreement was illegal, although the quantum meruit claims survived and was remanded. <sup>12</sup>

The Court cited the Merchants<sup>13</sup> case of 1922 for its definition of the practice of law: "the doing and performing services in a court of justice," but then added "legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation." Under this definition, the negotiation, the invocation of arbitration and the settlement of the dispute with Tandem was found to constitute the practice of law, over a vigorous dissent. Strangely, however, the Court ruled that any work for ESQ -CA performed by the lawyers while they were physically present in New York (and assumedly en route to California) is severable from the illegal California based work and thus the case is remanded for trial of the question of quantity of work performed in what locus, which will assumedly be joined with the quantum meruit counterclaim as a set-off against the primary malpractice claim <sup>14</sup>. The locus of the work

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<sup>11</sup>Birbrower, Montalbano, Condon & Frank v. Superior Court 17 Cal.4<sup>th</sup> 119; 949 P.2d 1 (1998)

<sup>12</sup>The Court relied upon the California statute making unauthorized practice a misdemeanor: "No person shall practice law in California unless the person is an active member of the State Bar." California Business and Professional Code, sec. 6125

<sup>13</sup>People v. Merchants Protective Corp. 189 Cal. 531, 535 (1922)

<sup>14</sup>Quantum meruit is an equitable claim where the defense of unclean hands is available and the Court has labeled the lawyer's representation a crime. Vista Designs, Inc. v. Melvin K. Silverman P.C. 774 So.2d 884; (2001 Fla. App.) (Disallowing the payment of an earned fee and rejecting a claim for quantum meruit, on behalf of a registered patent lawyer whose advice strayed from the strict confines of patent law) In Sperry, the United States Supreme Court determined that Florida could not join a nonlawyer registered to practice before the United

performed standard was further muddied by the Court in stating that “in California” does not necessarily “require the unlicensed lawyer’s physical presence in the state.” “[A]dvising a California client on California law in connection with a California legal dispute by telephone, fax, computer or other modern technological means” may constitute unauthorized practice as well.<sup>15</sup>

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States Patent Office from preparing and prosecuting patent applications in Florida, even though those activities constitute the practice of law.

<sup>15</sup>This locus of the lawyer theory of *Birbrower* was followed by a decision of the California Court of Appeal in Condon, which involved a dispute over attorneys’ fees under the California Probate Code. The court held that section 6125 was not violated by the activities of a Colorado attorney who advised his client, a co-executor of a California-originated estate who resided in Colorado, on matters concerning the estate. The Court found that the Colorado attorneys gave advice on California law while they were physically located in Colorado and the communications between the firm and its client took place entirely with [redacted] in Colorado. Estate of Condon, 65 Cal. App. 4th 1138; 76 Cal. Rptr. 2d 922; (1998)

The dissent defined the practice of law as “representation of another in a judicial proceeding or an activity requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind.”<sup>16</sup> and argued that the activities of the New York firm on behalf of ESQ -CA were not includable because the representation involved the preparation for an arbitration, which are “not ordinarily constrained to decide according to the rule of law.”<sup>17</sup> Representation by non-lawyers is allowed, indeed, encouraged in arbitration proceedings.<sup>18</sup>

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<sup>16</sup>Baron v. City of Los Angeles 2 Cal.3d 535 (1970)

<sup>17</sup>Birbrower supra, at p. 145.

<sup>18</sup>Almost immediately after Birbrower the California Code of Civil Procedure was amended. The 1998 amendment states, at sec. 1282.4:

(b) Notwithstanding any other provision of law, including Section 6125 of the Business and Professions Code, an attorney admitted to the bar of any other state may represent the parties in the course of, or in connection with, an arbitration proceeding in this state, provided that the attorney, if not admitted to the State Bar of California, timely files the certificate described in subdivision (c) and the attorney's appearance is approved by the arbitrator, the arbitrators, or the arbitral forum.

(c) Prior to the first scheduled hearing in an arbitration, the attorney described in subdivision (b) shall serve a certificate on the arbitrator or arbitrators, the State Bar of California, and all other parties and counsel in the arbitration whose addresses are known to the attorney. In the event that the attorney is retained after the first hearing has commenced, then the certificate shall be served prior to the first hearing at which the attorney appears. The certificate shall state all of the following:

- (1) The attorney's residence and office address.
- (2) The courts before which the attorney has been admitted to practice and the dates of admission.
- (3) That the attorney is currently a member in good standing of, and eligible to practice law before, the bar of those courts.
- (4) That the attorney is not currently on suspension or disbarred from the practice of law before the bar of any court.
- (5) That the attorney is not a resident of the State of California.
- (6) That the attorney is not regularly employed in the State of California.
- (7) That the attorney is not regularly engaged in substantial business, professional, or other activities in the State of California.
- (8) That the attorney agrees to be subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California.
- (9) The title of the court and the cause in which the attorney has filed an application to appear as counsel pro hac vice in this state or filed a certificate pursuant to this section in the preceding two years, the date of each application, and whether or not it was granted.
- (10) The name, address, and telephone number of the active member of the State Bar of California who is the attorney of record.

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(d) Failure to timely file the certificate described in subdivision (c) or, absent special circumstances, repeated appearance shall be grounds for disqualification from serving as the attorney of record in the arbitration in which the certificate was filed.

(e) An attorney who files a certificate containing false information or who otherwise fails to comply with the standards of professional conduct required of members of the State Bar of California shall be subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of the arbitration.

(f) Notwithstanding any other provision of law, including Section 6125 of the Business and Professions Code, an attorney who is a member in good standing of the bar of any state may represent the parties in connection with rendering legal services in this state in the course of and in connection with an arbitration pending in another state.

(g) Notwithstanding any other provision of law, including Section 6125 of the Business and Professions Code, any party to an arbitration arising under collective bargaining agreements in industries and provisions subject to either state or federal law may be represented in the course of, and in connection with, those proceedings by any person, regardless of whether that person is licensed to practice law in this state.

(h) Nothing in this section shall apply to Division 4 (commencing with Section 3201) of the Labor Code.

(i) (1) In enacting the amendments to this section made by Assembly Bill 2086 of the 1997 Regular Session, it is the intent of the Legislature to respond to the holding in *Birbrower v Superior Court* (1998) 17 Cal. 4th 117, as modified at 17 Cal. 4th 643a (hereafter *Birbrower*), to provide a procedure for nonresident attorneys who are not licensed in this state to appear in California arbitration proceedings. -98

(2) In enacting subdivision (g), it is the intent of the Legislature to make clear that any party to an arbitration arising under a collective bargaining agreement governed by the laws of this state may be represented in the course of and in connection with those proceedings by any person regardless of whether that person is licensed to practice law in this state.

(3) Except as otherwise specifically provided in this section, in enacting the amendments to this section made by Assembly Bill 2086 of the 1997 Regular Session, it is the Legislature's intent that nothing in this section is intended to expand or restrict the ability of a party prior to the decision in *Birbrower* to elect to be represented by any person in a nonjudicial arbitration proceeding, to the extent those rights or abilities existed prior to that decision. To the extent that *Birbrower* is interpreted to expand or restrict that right or ability pursuant to the laws of this state, it is hereby abrogated except as specifically provided in this section.

(4) In enacting subdivision (h), it is the intent of the Legislature to make clear that nothing in this section shall affect those provisions of law governing the right of injured workers to elect to be represented by any person, regardless of whether that person is licensed to practice law in this state, as set forth in Division 4 (commencing with Section 3200) of the Labor Code.

j) This section shall be operative until January 1, 2006, and on that date shall be repealed. (Added by Stats. 1961, ch. 461. Amended by Stats. 1998, ch. 915, Stats. 2000, ch. 1011.)

The dissenting opinion was certainly vindicated by the legislature which overruled the Court's specific holding with respect to arbitration. However, the case stands as a statement by the California Supreme Court about how it views out of state lawyers practicing in the nation's most populous, richest and most diverse state. Further the Court's ruling makes no sense. Why should the locus of the lawyer when he or she is working for the California client, interpreting California law make a difference. But if locus is important, why should phone or fax messages be different from letters or other kind of work rendered for the client?

In In re Jackman, 165 N.J. 580, 762 A.2d 1103 (2000), Jackman was an applicant to the bar of New Jersey. He was a member of the Massachusetts bar who had practiced in a large Boston corporate firm for six years before taking a job with a large New Jersey firm. He worked under senior partners in the large transactional practice. The Court delayed his admission because Jackman waited for six years before taking the New Jersey exam and applying for admission. The Court criticized Jackman for his "improper practice and his failure to be responsible in discerning his personal obligation to satisfy our admission and practice requirements." The Court struck a familiar, but irrelevant tone: lawyering is a profession of "great traditions and high standards. Consistently this Court has referred to bar admission as a "privilege burdened with conditions. The core conditions... resonate as soundly in the Twenty-First Century as they did when uttered: "good moral character, a capacity for fidelity to the interests of clients, and for fairness and candor in dealings with the courts. Today those concepts are joined together in the overall "fitness to practice" standard set forth in R. 1:25... [T]he fitness requirement is rooted in the State's fundamental interests in regulation of the legal profession: first, the protection of prospective clients, and second, the assurance of the proper, orderly and efficient administration of justice... These exigencies arise because the technical nature of law provides the unscrupulous attorney with a frequent vehicle to defraud a client. Further, the lawyer can obstruct the judicial process in numerous ways, e.g., by recommending perjury, misrepresenting case holdings, or attempting to bribe judges or jurors... [A] bar applicant must possess certain sets of traits -- honesty and truthfulness, trustworthiness and reliability, and a professional commitment to the judicial process and the administration of justice. These personal characteristics are required to ensure that lawyers will serve both their clients and the administration of justice honorably and responsibly. (citation omitted)." Of course all of this overblown rhetoric sounds great, but has nothing to do with applicant Jackman. No one denied he continued to have the good moral character that Massachusetts found that he had when he applied there twelve years earlier. None of his corporate clients voiced any complaint that he was anything but an honest competent corporate practitioner. Why is the Court talking about "trustworthiness" and "commitment to the judicial process"?

In In re Ferrey,<sup>19</sup> the Rhode Island Supreme Court stated that the actions of an out-of-state lawyer, who applied for and received permission of the Energy Facility Siting Board to appear before it on behalf of the developer of a new electrical generation facility, was probably guilty of the

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<sup>19</sup>774 Atl2d 68 (2001)

misdeemeanor or the felony of unauthorized practice<sup>20</sup>. The court held that only the Supreme Court could henceforth grant the motion to appear pro hac vice before any court or agency state or municipal, and thus the Board's earlier granted permission was void. Ferrey's motion for nuncpro tunc<sup>21</sup> approval of what he had already quite innocently done was denied as "tantamount to affixing an ex post facto imprimatur of approval on what might be construed as the unauthorized practice of law."<sup>22</sup> In denying the nuncpro tunc portion of Ferrey's motion the Court implies that all of the fees that Ferrey has earned are illegal and the acceptance of money would only compound his crime.<sup>23</sup> We learn from the dissent that the nuncpro tunc motion is about the attempts by the municipal opponent to have all hearings and testimony offered in the presence of this out-of-state attorney voided, thus forcing the applicant for the construction permit to start over and re-offer all of the expensive expert testimony. Indeed, Rhode Island has an unusual statutory provision called "visiting attorney"<sup>24</sup> which the dissent felt covered Ferrey.

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<sup>20</sup>R.I.G.L. sec. 11-27-5 states that: "No person, except a member of the bar of this state, whose authority as a member to practice law is in full force and effect, shall practice law in this state."

Subsection 2 provides a very comprehensive definition of the practice of law: "As used in this chapter, "practice of law" means the doing of any act for another person usually done by attorneys at law in the course of their profession, and, without limiting this generality, includes: (1) The appearance or acting as the attorney, solicitor, or representative of another person before any court, referee, master, auditor, division, department, commission, board, judicial person, or body authorized or constituted by law to determine any question of law or fact or to exercise any judicial power, or the preparation of pleadings or other legal papers incident to any action or other proceeding of any kind before or to be brought before the court or other body; (2) The giving or tendering to another person for a consideration, direct or indirect, of any advice or counsel pertaining to a law question or a court action or judicial proceeding brought or to be brought; (3) The undertaking or acting as a representative or on behalf of another person to commence, settle, compromise, adjust, or dispose of any civil or criminal case or cause of action; (4) The preparation or drafting for another person of a will, codicil, corporation or organization, amendment, or qualification papers, or any instrument which requires legal knowledge and capacity and is usually prepared by attorneys at law."

<sup>21</sup>See Strong, v. Labor Relations Commission 23 S.W.3d 234 (2000 Mo. App.) (a similar attempt at retro-active approval which is similarly rejected)

<sup>22</sup>Yogi Berra could not have said it better.

<sup>23</sup>

3. Any person, partnership, corporation, or association that receives any fee or any part of a fee for the services performed by an attorney at law shall be deemed to be practicing law contrary to the provisions of this chapter.

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This strange poorly written opinion causes the reader to ask what is the story behind the story and, as is so often true in the unauthorized practice field, there is such a story <sup>25</sup> Again, there is no

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13. The provisions of §§ 11-27-1, 11-27-2, and 11-27-5--11-27-14 shall not apply to visiting attorneys at law, authorized to practice law before the courts of record in another state, while temporarily in this state on legal business, or while permitted to conduct or argue any case in this state according to the rules of practice of the supreme court. No visiting attorney shall issue or indorse, as attorney, any writ of any court of this state.

<sup>25</sup> When the Rhode Island Ethics Commission voted to withdraw its rule prohibiting the acceptance by legislators of any gifts from lobbyists and replace it with a limit of \$450 per year

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per lobbyist per legislator, Common Cause of Rhode Island and Operation Clean Government filed a complaint with the Commission that the vote of the Commission violated Rhode Island conflict of interest laws because one of the votes in its 5-4 decision was cast by member, Thomas Goldberg, who shared his law office with his brother Robert Goldberg, who received more than \$120,000 in the year 2000 from lobbying. The Commission could not find a Rhode Island attorney to investigate the complaint, and thus turned to one Daniel Small, a lawyer admitted only in Massachusetts to do the investigation. The Commission Executive Director Healy stated that he asked the Supreme Court Chief Justice Williams by telephone whether a pro hac vice application should be filed by Small and the Chief told him no. After the investigation was begun, Robert Goldberg complained about Small being guilty of unauthorized practice leading Small and the Commission to move his admission pro hac vice before the Supreme Court. The Court in a one sentence order refused the application, in effect barring Small from continuing and effectively stopping the investigation. Recusing herself from the Supreme Court deliberations on the motion, along with the Chief Justice was Associate Justice Maureen McKenna Goldberg, wife of Thomas Goldberg. Subsequently Executive Director Healy was fired by the Chief Justice and no less than three justices sought to justify the denial of Small's application by writing op-ed pieces or letters to the editor in the Providence Journal. Providence Journal March 8, 13, 16, 18, 20, 23, 27, April 12, 26, May 10, 2001.

claim from the client that Ferrey gave anything but exemplary service. It was only the lawyers  
for his municipal opponents who sought tactical advantage out of their opposition to his  
representation.

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These strange doings stripped off the lawyers opposing the siting of the electrical plant  
advocated by Ferrey and he decided that perhaps he had better ratify his previously received pro  
hac vice permission from the Siting Board before the Supreme Court. The Court's bizarre  
opinion is motivated, to some degree, by justices need to respond to the public criticism  
surrounding the Small expulsion

On September 19, 2001 the Court amended its rule for admission of out of state lawyers  
and laid out procedures which require an affidavit from the applying lawyer and the payment of a  
fee of 150 dollars. Boston Law Tribune, October 1, 2001.

In Cleveland Bar Association v. Misch <sup>26</sup>, the defendant attorney admitted in Illinois and by the federal court in Ohio attempted to characterize his work on behalf of clients as federal work involving mostly bankruptcy and federal tax advice. However the Court found examples where his advice required reliance on Ohio state law. At other times the respondent was acting as chief executive officer and general counsel for a corporation; but the court noted that he never took advantage of an Ohio rule <sup>27</sup> that allows attorneys employed full time by non-governmental entities may be admitted for limited purposes of advising the employer.

Office of Disciplinary Counsel v. Pavlik <sup>28</sup> was a companion case to Misch, in which a partner of the firm out of which Misch worked was also found guilty of facilitating an unauthorized practice, by introducing him to the firm's clients and allowing him to use the firm's

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<sup>26</sup>82 Ohio St.3d 256, 695 NE2d 244 (1998)

<sup>27</sup>Ohio Rules of Court - Rules for the Governance of the Bar, Rule VI(4).

<sup>28</sup>89 Ohio St.3d 458, 732 N.E.2d 985 (2000); See also Office of Disciplinary Counsel v. Fucetola 93 Ohio St.3d 145; 753 N.E.2d 180 (2001) (New Jersey attorney found guilty of unauthorized practice after assuming, erroneously, that a pro hac vice permission secured in a prior case extended to a subsequent one); Cleveland Bar Association v. Moore 87 Ohio St.3d 583; 722 N.E.2d 514 (2000) (out-of-state lawyer doing non-litigational tasks in an Ohio firm is guilty of unauthorized practice) In the Matter of Murgatroyd 741 N.E.2d 719 (Ind., 2001) (Out-of-state class action personal injury solicitor cases from the families of victims of a fair linedisaster are guilty of unauthorized practice); Torrey v. Leesburg Regional Medical Center 769 So.2d 1040; (Fla., 2000) (pleadings filed by an out-of-state attorney are an nullity); Crews v. Buckman Laboratories International, Inc. 2001 Tenn. App. (in-house counsel must be a member of the bar); Cappiello Hoffman & Katz, P.C. v. Boyle 87 Cal. App. 4th 1064 (2001) (fact that law firm was not registered as a professional corporation with California bar authorities makes its activities unauthorized practice)

stationery without informing the client's that he was not admitted in Ohio. Although it appears that Misch rendered quality legal advice to all clients, the Court imposed discipline because of the principle that it is important "to protect Ohio citizens from the dangers of faulty legal representation rendered by persons not trained in, examined on, or licensed to practice by the laws of our state." Again no poor unsuspecting Ohio citizen ever raising a complaint about Misch's license.

In Cincinnati Insurance Company, et al. v. Wills,<sup>29</sup> plaintiffs asserted personal injury claims against defendants who were represented by one of their insurance company's in-house attorneys. Plaintiffs moved to disqualify the attorney, asserting that the insurance company was engaged in unauthorized practice of law. The Indiana Supreme Court held that insurance companies may represent insureds under circumstances to the extent permitted by their ethical obligations but that the use of a captive law firm name was not permissible.<sup>30</sup> Again there is no

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<sup>29</sup>717 N.E.2d 151; (1999)

<sup>30</sup>The Supreme Court of North Carolina held that a corporation engaged in the unauthorized practice of law because it appeared, through its employees, as an attorney for the insured. This appearance by the insurance corporation violated a North Carolina statute that specifically prohibited corporations from practicing law. "It shall be unlawful for any corporation to practice law or appear as an attorney for any person...." N.C. GEN. STAT. § 84-5 (1995). The court also relied on North Carolina case law that explicitly held where a corporation's employees perform acts, they are the acts of the corporation. State v. Pledger, 257 N.C. 634, 127 S.E.2d 337, 340 (N.C. 1962). A variant on this theme was adopted by the Kentucky Supreme Court in American Insurance Association v. Kentucky Bar Association, where it reasoned (using

claim of bad lawyering, only the enforcement of the details of the peculiarities of the Indiana professional regulation.

In Attorney Griev. Comm'n v. Harris - Smith<sup>31</sup>, an attorney attempted to defend herself against an unauthorized practice charge by maintaining that she was admitted to the Maryland federal court and that her practice in Maryland was exclusively in the field of bankruptcy. A Maryland Supreme Court found an unauthorized practice stating that: "(a) an unadmitted attorney may not maintain a principal office for the practice of law in Maryland; (b) interviewing, analyzing, and explaining legal issues to clients on a regular basis amount to the practice of law in this state, even if the lawyer's court appearances are limited to those federal courts in which he is duly admitted; (c) it is virtually impossible to maintain a law office in Maryland limited only to federal cases and (d) the right to practice in a specific court does not amount to the right to practice law generally within that jurisdiction."

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the term loosely) that "a corporation cannot lawfully engage in the practice of law.... Moreover, a corporation [] cannot obtain a license to practice law, since it is wholly incapable of acquiring the educational qualifications necessary to obtain a state license, nor can it possess in its corporate name the necessary moral character required therefore." 917 S.W.2d 568, 571 (Ky. 1996) (citations omitted) The case went on to invalidate flat fee arrangements between insurance companies and the lawyers they retain for their insureds.

<sup>31</sup>356 Md. 72, 737 A.2d 567 (1999),

Admission to the highest court of a state and admission to that state's federal district are separate events. Thus, the federal admission arguably authorizes the practice of federal law within the borders of the district. In Sperry v. State ex rel. Florida Bar<sup>32</sup>, the court held that Florida could not join an out-of-state lawyer registered to practice before the United States Patent Office from preparing and prosecuting patent applications in Florida, notwithstanding that such activity constituted the practice of law in Florida, in view of federal statute and Patent Office regulations authorizing the practice before Patent Office by non-out-of-state lawyers. The federal Administrative Procedure Act authorizes covered federal agencies to allow lay representation.<sup>33</sup> Many have done so including the Patent Office<sup>34</sup>, the Internal Revenue Service<sup>35</sup> and the Interstate Commerce Commission.<sup>36</sup> By analogy practitioners in federal fields like immigration, bankruptcy, admiralty, civil rights, and federal criminal defense would seem to be protected.<sup>37</sup> However, the case law does not support the analogy.<sup>38</sup>

In Illinois v. Dunson<sup>39</sup> the defendant, after conviction brought a motion for post conviction relief because the attorney, who was a staff member of the state prosecutor's office was not a member of the Illinois bar. The Court formalistic approach seems characteristic of opinions in this area: "In a criminal prosecution, are the People of the State of Illinois less worthy of protection from incompetent legal representation and charlatans than private persons engaged in civil litigation? We think not. The State appears to ignore the clear import of Munson and grossly misapprehends the common law of this State in attempting to minimize the

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<sup>32</sup>373 U.S. 379, 384, 10 L. Ed. 2d 428, 83 S. Ct. 1322 (1963)

<sup>33</sup>5 U.S.C. 555(b)

<sup>34</sup>37 C.F.R. sec. 1100.9

<sup>35</sup>31 C.F.R. Sec. 10.3 -8

<sup>36</sup>49 C.F.R. sec 1100.9

<sup>37</sup>In the famous Kaye, Scholer case, the Office of Thrift Supervision assessed heavy fines against a law firm for failing to disclose client fraud. See Charles R. Zubrzycki, The Kaye, Scholer Case: Attorneys' Ethical Duties to Third Parties in Regulatory Situations, 6 Geo J. Legal Ethics 977 (1993)

<sup>38</sup>In Servidone Construction Corp. v. St. Paul Fire and Marine Ins. Co., 911 F. Supp 560 (N.D.N.Y., 1995) the court denied compensation to a federally admitted lawyer for work done in conducting actual proceedings in the federal courts, because the lawyer maintained an office in New York and was not admitted by the state. Kennedy v. Bar Association, 561 A.2d 200 (Md., 1989) suggesting that a federal license may not authorize activities prefatory to a federal filing such as "the very act of interview, analysis and explanation of legal rights." at 210. See generally William T. Barker, op.cit. Pp. 1530 -1558. See also Attorney Grievance Commission v. Bridges, 759 A.2d 233 (Md., 2000)

<sup>39</sup>316 Ill. App. 3d 760; 737 N.E. 2d 699; (2000 Ill. App.)

deception practiced upon the court and upon the public. The criminal prosecution of an accused by the State through a representative who is unauthorized to practice law can be either ignored or condoned. As we will explain, the unlawful participation of Salafsky tainted the original trial so that it must be declared a nullity and the resulting judgment void.” The absurdity continues - Salafsky won a conviction; there is no evidence that he is a charlatan.

In summary, the case law appears to be going in the wrong direction. State supreme courts appear to be becoming more restrictive. Out of state lawyers face greater obstacles to serving their clients.

### III. PALLIATIVES

Having reviewed the strictness with which many supreme courts view local licensing requirements, are there alternatives for the multijurisdictional practitioner? Of course, an admitted lawyer can always apply for admission in the new state where she desires to practice. This would involve taking the bar exam. This requires time and preparation beyond the time constraints of the busy practitioner. Further failure would be embarrassing and might imply incompetence after competence has already been established. Some states grant admission to out of state lawyers on motion and without an exam, usually after five years of practice but many states including California do not. <sup>40</sup> Motion admittees often face restrictions not placed on “regular admittees” <sup>41</sup> and the admission process can be rigorous. <sup>42</sup> Bar membership may include

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<sup>40</sup> Twenty-six states, often in the sunbelt (e.g. Florida) and bordering large cities (e.g. New Jersey), do not allow admission on motion. Charles Wolfram, Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers 36 So. Texas L. Rev. 665, 681.

<sup>41</sup> For instance, Indiana imposes a “predominant practice” requirement that inquires where the bulk of the admittee’s practice is, at the risk of withdrawal of the membership. Wolfram, op. cit. P. 683.

<sup>42</sup> The Ohio Rule of Court, Rules for the Governance of the Bar of Ohio, Rule 9, sec 9 state:

(A) An applicant may apply for admission to the practice of law in Ohio without examination if all of the following apply:

- (1) the applicant has taken and passed a bar examination and has been admitted as an attorney at law in the highest court of another state or in the District of Columbia, which jurisdiction shall be considered the jurisdiction from which the applicant seeks admission;
- (2) the applicant has engaged in the practice of law, provided, however, that the practice of law:

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- (a) was engaged in subsequent to the applicant's admission as an attorney at law in another jurisdiction;
- (b) occurred for at least five full years out of the last ten years prior to the applicant's submission of an application pursuant to Division (C) of this Section; and
- (c) except as provided in Division (B)(5) of this Section, was engaged in on a full-time basis outside Ohio;
- (3) the applicant has not taken and failed an Ohio bar examination;
- (4) the applicant has not engaged in the unauthorized practice of law;
- (5) the applicant is a citizen or a residential alien of the United States;
- (6) the applicant intends to engage in the practice of law in Ohio actively on a continuing basis;
- (7) the applicant satisfies the general admission requirements of Divisions (A) through (C) of Section I of this Rule; and
- (8) if applicable, the applicant has registered pursuant to Gov. Bar R. VI, Section 4.
- (B) For purposes of this Section, "practice of law" shall mean:
- (1) private practice as a sole practitioner or for a law firm, legal services office, legal clinic or similar entity, provided such practice was subsequent to being admitted to the practice of law in the jurisdiction in which the practice occurred;
- (2) practice as an attorney for a corporation, partnership, trust, individual, or other entity, provided such practice was subsequent to being admitted to the practice of law in the jurisdiction in which the practice occurred and involved the primary duties of furnishing legal counsel, drafting legal documents and pleadings, interpreting and giving advice regarding the law, or preparing, trying, or presenting cases before courts, executive departments, administrative bureaus, or agencies;
- (3) practice as an attorney for the federal or a state or local government with the same primary duties as described in Division (B)(2) above;
- (4) employment as a judge, magistrate, referee, or similar official for the federal or a state or local government, provided that such employment is available only to attorneys; or
- (5) full-time employment as a teacher of law at a law school approved by the American Bar Association, whether or not such law school is located in Ohio; or
- (6) any combination of the above.
- (C) An applicant for admission to the practice of law in Ohio without examinations shall file with the Clerk of the Supreme Court an Application for Admission to the Practice of Law Without Examination. The applications shall be on forms furnished by the Court and shall include:
- (1) an affidavit that the applicant has not engaged in the unauthorized practice of law;
- (2) an affidavit that the applicant has studied the Rules for the Government of the Bar of Ohio, the Code of Professional Responsibility, and the Code of Judicial Conduct, all as adopted by the Court;
- (3) an affidavit that the applicant:
- (a) is a citizen or a residential alien of the United States; and
- (b) intends to engage in the practice of law in Ohio actively on a continuing basis;

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- (4) a certificate from the admissions authority in the jurisdiction from which the applicant seeks admission, demonstrating that the applicant has taken and passed a bar examination and has been admitted to the practice of law in that jurisdiction;
- (5) a certificate of good standing from each jurisdiction in which the applicant is admitted to practice law, dated no earlier than 60 days prior to the submission of the application;
- (6) an affidavit that demonstrates that the applicant has complied with Division (A)(2) of this Section and that includes a description of the applicant's practice of law, the dates of such practice, and, if applicable, a description of the applicant's employment subsequent to ceasing such practice;
- (7) to confirm that the applicant has engaged in the full-time practice of law for at least five full years out of the last ten years prior to the applicant's submission of the application, an affidavit from the applicant's employer or employers verifying the applicant's full-time practice of law, if the applicant has been self-employed, an affidavit from an attorney who is a member of the bar in the jurisdiction in which the applicant practiced and who knows the applicant, verifying the applicant's full-time practice of law. As used in Division (C)(7) of this Section, "full-time practice of law" means practice in which the applicant was actively and substantially engaged as a principal business or occupation;
- (8) such other evidence, as may be reasonably requested by the Court, demonstrating that the applicant has met the requirements of Division (A) of this Section;
- (9) a certificate by an attorney admitted to the practice of law in Ohio and duly registered pursuant to Gov. Bar RVI, who will present the applicant to the Court pursuant to Division (F) of this Section, stating that the applicant is of good moral character and recommending the applicant for admission to the practice of law in Ohio without examination;
- (10) fingerprint identification taken by a sheriff, deputy sheriff, municipal police officer, or state highway patrol officer;
- (11) a questionnaire, typed and in duplicate, for use by the National Conference of Bar Examiners, the Board of Commissioners on Character and Fitness, and the regional or local bar association admissions committee in conducting a character investigation of the applicant;
- (12) a non-refundable fee in the amount of \$500, by certified check or money order made payable to the Supreme Court of Ohio;
- (13) a non-refundable fee, by certified check or money order made payable to the National Conference of Bar Examiners, in the amount charged by the National Conference of Bar Examiners for its character investigation and report; and
- (14) certificates or official transcriptsevidencing compliance with Divisions (B) and (C) of Section 1 of this Rule. If the applicant's undergraduate or legal education was not received in the United States, a \$150 fee, by certified check or money order made payable to the Supreme Court of Ohio, shall accompany the application for evaluation of such education. If the applicant's legal education was not received in the United States, the application shall not be processed until such education is approved by the Court.
- (D) The Clerk shall refer the application and the report of the National Conference of Bar Examinersto the regional or local bar association admissions committee in accordance with Section 11 of this Rule. The applicant shall be reviewed and approved as to character, fitness, and moral qualifications in accordance with the procedures provided in Sections 11 and 12 of this Rule.

other burdens including fees, client security fund payments, continuing legal education requirements, IOLTA requirements, and reporting requirements involving pro bono<sup>43</sup> and malpractice insurance. Lawyers from foreign countries face a set of different requirements that vary from state to state.<sup>44</sup>

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(F) The Court shall review the application and in its sole discretion shall approve or disapprove the application.

<sup>43</sup>Schwarz v. Kogan, 132 F.3d 1387 (11th Cir. 1998) (rejecting a challenge to the Florida requirement of reporting pro bono activity)

<sup>44</sup>Each of the fifty states may or may not have independent requirements concerning the admission of foreign lawyers. It is clear that citizenship is not required. In re Griffiths, 413 U.S. 717 (1973) (States may not exclude non-citizens from bar membership) The State of New York is one of the most permissive. Its Rule § 520.6, entitled Study of Law in Foreign Country; Required Legal Education states

(a) General. An applicant who has studied in a foreign country may qualify to take the New York State bar examination by submitting to the New York State Board of Law Examiners satisfactory proof of the legal education required by this section.

(b) Legal Education.

(1) The applicant shall show fulfillment of the educational requirements for admission to the practice of law in a country other than the United States by successful completion of a period of law study at least substantially equivalent in duration to [the American requirements], in a law school or school each of which, throughout the period of applicant's study there in, was recognized by the competent accrediting agency of the government of such other country, or of a political subdivision thereof, as qualified and approved; and

(i) that such other country is one whose jurisprudence is based upon the principles of the English Common Law, and that the program and course of law study successfully completed by the applicant were the substantial equivalent of the legal education provided by an approved law school in the United States; or

(ii) if applicant does not meet the durational equivalency requirements of subdivision (b)(1) of this section but has at least two years of substantively equivalent education, or if the applicant does not meet the substantive equivalency requirements of subdivision (b)(1)(i) of this section, that applicant has successfully

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completed a full-time or part-time program  
consisting of a minimum of 20 semester hours of  
credit, or the equivalent, in professional law  
subjects, which includes basic courses in

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American law, in an approved law school in the United States; or

(2) The applicant shall show admission to practice law in a country other than the United States whose jurisprudence is based upon principles of English Common Law, where admission was based upon a program of study in a law school and/or law officer recognized by the competent accrediting agency of the government of such other country and which is

Lawyers involved in litigation across state lines can apply for admission for the limited purpose of litigating a particular case by motion pro hac vice, but the motion requires the sponsorship of a local lawyer and may be arbitrarily denied.<sup>45</sup> It is also uncertain how pro hac vice applies to trial preparation and to the work of transactional lawyers.<sup>46</sup>

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durationally equivalent yet substantively deficient under subdivision (b)(1)(i) of this section, and that such applicant has successfully completed a full-time or part-time program consisting of a minimum of 20 semester hours of credit, or the equivalent, in professional law subjects, which includes basic courses in American law, in an approved law school in the United States.

<sup>45</sup>In Leisy v. Flynt, 439 U.S. 438 (1979), a prosecution of Larry Flynt of Hustler Magazine for dissemination of harmful material to a minor, his two lawyers sought admission pro hac vice. The trial judge summarily rejected the request for reasons which Justice Stevens in dissent suggest may be related to the judge's distaste for the defendant and what he is charged with. The

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lawyers succeeded in gaining an injunction in federal court to the state criminal proceeding until the lawyers pro hac vice motion was given a hearing that met the standards of the Due Process Clause of the Fourteenth Amendment. The injunctive order was affirmed by the Sixth Circuit. The Supreme Court reversed<sup>5</sup> -4 with the majority finding no protected property interest in pro hac vice admission and in the absence of a property interest no due process is required. Justice Stevens in dissent found in Ohio practice a consistent and regular practice of granting pro hac vice applications in the absence of some articulable argument contra and that practice had created an expectation of such admissions requiring procedural fairness. Heals relied on cases that stated that admission to the bar cannot be denied because of the political beliefs of the applicants. Heals cited with approval Judge Friendly's suggestion that out -of-state lawyers have some measure of protection against arbitrary exclusion. Spanos v. Skouras Theaters Corp. 364 F.2d 161 (en banc) (CA2, 1966) The dissent stated that "history attests to the importance of pro hac vice appearances and added an extended quote from the Court of Appeals opinion. 5 74 F.2d 874, 878 -879 (CA6 1978) (footnotes omitted).

<sup>46</sup>Referencelatercitedcases.

Another often-cited solution to the problem is to associate with local counsel.<sup>47</sup> This solution takes time and multiplies the expense to the client. Further, the case law does not clearly sanction this useless and empty legal formality.<sup>48</sup> An uncertain number of states allow in-house counsel of a multi-state corporation to give advice to the corporation, but often not to its employees, but go on to prohibit activities involving litigation.<sup>49</sup> States may have other random exceptions to unauthorized practice.<sup>50</sup>

#### IV. IMPLICATIONS FOR THE MODERN PRACTICE

Changes in technology and communications as well as structural changes in the profession make the enforcement of these rules anachronistic and parochial at best or cynical and monopolistic at worst. Although the Constitutional prohibitions against interfering with interstate commerce and with the privileges and immunities of citizenship have served to

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<sup>47</sup>Martin v. Walton, 368 U.S. 25 (1961) (per curiam) (states may require out-of-state counsel to associate with local counsel)

<sup>48</sup>Ingeniv. Pelino & Lentz, 866 F. Supp. 156 (D.N.J., 1994) (duty of the local lawyer to supervise the lawyer admitted pro hac vice); In re Ferrey, *infra*, (association with local counsel ignored by the Rhode Island Supreme Court)

<sup>49</sup>Daniel A. Vigil, Regulating In-House Counsel: A Catholic onora Nostrum? 77 *Marquette L. Rev.* 307 (1994) (reporting on the results of a survey of state practices)

<sup>50</sup>For instance, the Rhode Island statutes state that unauthorized practice prohibitions “shall not apply to visiting attorneys at law, authorized to practice law before the courts of record in another state, while temporarily in this state on legal business, ...” R.I.G.L. sec. 11-27-13. But see In re Ferrey, *infra*. Many states also have student practice rules. E.g. Massachusetts see Rules of the Supreme Judicial Court Rule 3.0 3

invalidate local barriers to out-of-state competition in most of the American economy, localism in the regulation in the practice of law prevails.

Myths about the nineteenth century practitioner justify the need for licensing in every state of practice. The individual practitioners supposedly handles static disputes between immobile and unsophisticated neighbors, in which knowledge of a single state's law is sufficient.

The reality is that a majority of the one million practicing lawyers in the United States represent businesses, not individuals<sup>51</sup>; that business crosses borders, state and national, with impunity; that the demand for transactional work is higher than for litigation and that finding a finite locus for a transaction between a number of multi-nationals<sup>52</sup> is increasingly out of touch.<sup>53</sup> In-house counsel to these organizations face impossible problems.<sup>54</sup> Large law firms are growing at unprecedented rates and opening offices in the major cities of the country and the world.<sup>55</sup> Lawyer employed by federal agencies in Washington often travel to the agencies regional or area offices to advise and counsel agency personnel. Everyone seem to agree with all of this, but enforcement persists and lawyers have to sneak around local prohibitions.<sup>56</sup> When the

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<sup>51</sup>Gerard J. Clark, An Introduction to the American Legal Profession in the Year 2000 33 Suffolk L. Rev. 293 (2000) (description of the legal profession in the U.S.)

<sup>52</sup>The Europeans seem to have an easier time with all of this than we do. As early as 1977 a Legal Services Directive authorized the temporary practice of law of another state that is a member of the European Union. In 1989, the EU Commission passed the Diplomas Directive which required the member states to recognize the academic degrees from the schools of member states. The 1997 Establishment Directive established the permanent provision of legal services including local law in another EU state. Admission could be achieved through an exam or demonstration of three years working experience in the legal system in another member state. Wayne J. Carroll, Innocents Abroad: Opportunities and Challenges for the International Legal Adviser 54 Vanderbilt J. of Transnational Law 597 (2001)

<sup>53</sup>William T. Barker, Extrajurisdictional Practice by Lawyers 56 The Business Lawyer 1501 (2001) (attempting to provide guidance to the multi-jurisdictional practitioner in navigating around the difficulties presented by this problem)

<sup>54</sup>At least nine states have adopted a special admission category for in-house counsel which permits out-of-state lawyer to give legal advice as long as their only client is their corporate employers. Carol A. Needham, The Multi-jurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice 36 So. Texas L. Rev. 1075 (1995)

<sup>55</sup>Baker and Mackenzie, the nation's largest law firm now exceeds 3000 lawyers. See Clark, *op.cit.* Michael J. Maloney and Allison Taylor Blizzard, Ethical Issues in the Context of International Litigation: "Where Angels Fear to Tread" 36 So. Texas L. Rev. 933 (1995) (all problems of interstate practice are magnified in the international context)

<sup>56</sup>Charles Wolfram, Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers 36 So. Texas L. Rev. 665 (1995)

holdings, discussed above, are aggregated and rationalized, these rules would make perhaps as much as fifty percent of the routine legal work of firms that represent the largest institutions of the country a criminal violation. <sup>57</sup> With such a radical disjunction between such a large segment of the bar and the state of the law, one thrashes about to find a solution to the problem.

## V. The Monopoly Problem

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<sup>57</sup> Since most law firms are partnerships and partners are the agents of one another, one might argue that the presence in a large firm of one partner who is a local bar member serves to authorize that member's partner to appear locally as well. However, no case has been discovered to validate this argument.

It seems incontrovertible that unauthorized practice prohibitions both as applied to non-lawyer competitors and to out-of-state lawyers are anti-competitive. They have the effect of reducing the supply of providers of legal services in any particular state, and thereby assuring an increased supply of potential clients to the in-state license holders. The rule of reason, established by Justice Brandeis in the Chicago Board of Trade case<sup>58</sup>, called for a full inquiry into the “facts particular to the business to which the restraint is applied,” as well as the history, the purpose and the effect of the restraint. First, a historical analysis would look not only to the A.B.A. campaign in favor of these prohibitions,<sup>59</sup> but also to the history of the enactments in the individual states. The purpose would test the sincerity of the oft-quoted solicitude for the client public against the more cynical aggressiveness to capture the market. Second, the effect would involve economic analysis; relevant to that analysis would be the restrictive effect on interstate providers as well as the effectiveness of enforcement in protecting the public against out-of-state providers whose sole purpose is to peddle an inferior product;<sup>60</sup> also relevant would be the effect of these restrictions on efficiency and cost.

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<sup>58</sup>Chicago Board of Trade v. United States \_\_\_ 246 U.S. 231, 238 (1918)

<sup>59</sup> A major motivation was to keep undesirable out according to Auerbach, Unequal Justice, *supra*.

<sup>60</sup> A closely related question is the restriction on multi-disciplinary practice contained in Model Rule 5.4, which prohibits sharing legal fees with non-lawyers. Daniel R. Fischel,

The principle obstacle to an anti-trust challenge would be the state action defense. In Parkerv. Brown<sup>61</sup>, the Court held that the Sherman Act was not meant to proscribe state legislative judgments that regulation was superior to competition.<sup>62</sup> Since unauthorized practice is usually a criminal violation and also enforced by an instrumentality of the state's highest court it is assumedly beyond anti-trust.

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Multidisciplinary Practice 55 The Business Lawyer 951 (2000), Lawrence J. Fox, Dan's World: A Free Enterprise Dream; An Ethics Nightmare 55 The Business Lawyer 1533 (2000).

Other anti-competitive rules include Rule 1.2. Wesley v. Don Stein Buick, Inc. 987 F. supp. 884 (1997) (lawyers authoring pleadings for prose litigants unethical). Rule 1.8(e) has been interpreted, incredibly, to outlaw the flat fee. American Insurance Association v. Kentucky Bar Association 917 S.W.2d 568 (Ky., 1996)

It has been further alleged that the A.B.A. law school accreditation requirements are anti-trust violations. Massachusetts School of Law at Andover, Inc. v. American Bar Association 846 F. Supp. 374 (E.D. Pa., 1994); Gerard J. Clark, A Challenge to Law School Accreditation: Massachusetts School of Law v. the A.B.A. 24 the Advocate 62 (1994)

<sup>61</sup> 317 U.S. 341 (1943) (state program to restrict the supply of raisins, while anti-competitive, was immune from Sherman Act scrutiny)

<sup>62</sup> Stephen F. Ross, Principles of Anti-Trust Law (Westbury, N.Y., The Foundation Press, Inc., 1993) p. 497.

However, in Goldfarb v. Virginia State Bar<sup>63</sup>, the Court ruled that an attack on a Virginia State Bar attorney fee schedule that dictated minimum fees to be charged for a wide variety of legal services was not barred by the state action doctrine. The Court found that the fixed attorney fee schedule was "enforced through the prospect of professional discipline from the State Bar, and the desire of attorneys to comply with announced professional norms; the motivation to conform was reinforced by the assurance that other lawyers would not compete by underbidding."<sup>64</sup>

The Court recognized that the States have a "compelling interest" in the practice of professions "to protect the public health, safety, and other valid interests." This includes the "power to establish standards for licensing practitioners and regulating the practice of professions." The Court also recognized that some "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." At 2016

Notwithstanding, the Court found that legal services affected interstate commerce and were thus subject to federal regulation<sup>65</sup>. The practice of law did not create an antitrust violation from the Sherman Act.<sup>66</sup> "Where, as a matter of law or practical necessity, legal services are an integral

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<sup>63</sup>421 U.S. 773 (1975)

<sup>64</sup>National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978) (The trade association for the engineering profession is similarly subject to anti-trust regulation); Allied Tube & Conduit Corp. v. Indian Head, Inc. 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988) (National electrical codes subject to anti-trust scrutiny)

<sup>65</sup>FTC v. Superior Court Trial Association, 493 U.S. 411 (applying anti-trust principle to a boycott by poverty lawyers in support of increased pay)

<sup>66</sup>Section 1 of the Sherman Act, set forth in 15 U.S.C. § 1 (1976 ed.), provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among these several States, or with foreign nations, is declared to be illegal...."

part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes." <sup>67</sup>

The Court further stated, "Whether state regulation is active or dormant, real or theoretical, lawyers would be able to adopt anti-competitive practices with impunity [if learned professions are not trade or commerce]." The Court found no "support for the proposition that Congress intended any such sweeping exclusion." <sup>68</sup>

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<sup>67</sup>421 U.S. at 785, 95 S.Ct. at 2012.

<sup>68</sup>421 U.S. at 787, 95 S.Ct. at 2013.

The legal profession is clearly subject to anti-trust prohibitions. Just as clear, however, is the fact that when a state legislature or supreme court embed a prohibition in state law, it escapes the scrutiny of anti-trust regardless of the degree to which it undermines competition. Unauthorized practice prohibitions, while clearly anti-competitive, are exempt from scrutiny under the state action doctrine.<sup>69</sup>

## VI. Constitutional Argument

Claims that unauthorized practice prohibitions are unconstitutional have been unsuccessful. However, the arguments are far from frivolous.

### 1. The Privileges and Immunities Clause

The Privileges and Immunities Clause of Article IV provides the “Citizen of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>70</sup> The Framers hoped to bind the states together into a single economic unit with this clause along with the Commerce Clause.<sup>71</sup> In theory all could do business in equal terms in each of the states.<sup>72</sup> The Court has used the Clause to invalidate residency requirements as a pre-condition for admission to the bar.<sup>73</sup> These admission cases make clear that the clause applies to restrictions on

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<sup>69</sup>Morgan, The Impact of Antitrust Law on the Legal Profession 67 Fordham L. Rev. 415 (1998)

<sup>70</sup>U.S. Const., art IV sec 2, cl 2.

<sup>71</sup>U.S. Const. Art. I, sec 8.

<sup>72</sup>Toomerv. Witsell 334 U.S. 385 (1948) (invalidating differential fees for shrimping license between in-state and out-of-state applicants)

lawyering. The case law mandates that the state imposing the requirement be able to justify it quite precisely,<sup>74</sup> much like strict scrutiny equal protection.

## 2. The Commerce Clause

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<sup>73</sup>In Supreme Court of New Hampshire v. Piper 470 U.S. 274 (residency as a condition for admission); Supreme Court of Virginia v. Friedman 487 U.S. 59 (1988) (Residency as a condition for admission on motion); Barnard v. Thorstenn 489 U.S. 546 (1989) (Residency and a declaration of intent to remain as a condition for admission); Frazier v. Heebe 482 U.S. 641 (1987) (residency as a condition of admission into a district court)

<sup>74</sup>Tribe, American Constitutional Law 3<sup>rd</sup> Ed. Vol. I, p. 1270.

Concomitantly, the Commerce Clause of Article I <sup>75</sup> protects the free movement of goods and services across state lines. For instance, in H.P. Hood & Sons v. Du Mond <sup>76</sup> the Court invalidated a New York statute that prohibited out-of-state milk producers from locating plants in New York. Such blatant protection of local industry against out-of-state competition was prohibited. Like the Privileges and Immunities Clause it also protects workers against local favoritism. <sup>77</sup> C & A Carbone, Inc. v. Town of Clarkstown <sup>78</sup> invalidated a municipal law which required solid waste haulers to deposit the waste in a particular transfer station. The court stated that “[n]either the power to tax nor the police power may be used by the state of destination with the aim and the effect of establishing an economic barrier against competition with the products of another state of the labor of its residents.” <sup>79</sup> When the state engages in de jure discrimination against out-of-staters, such in unauthorized practice statutes, the state’s justifications for the discrimination will be strictly scrutinized. <sup>80</sup>

### 3. The First Amendment

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<sup>75</sup> U.S. Constitution, Art I, Sec. 8.

<sup>76</sup> 336 U.S. 525 (1949)

<sup>77</sup> White v. Massachusetts Council of Construction Employers, Inc. 460 U.S. 204 (1983) (Residency preference on city funded construction approved because of the market preference exception to the Commerce Clause)

<sup>78</sup> 511 U.S. 383 (1994)

<sup>79</sup> Citing Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 527 (1935)

<sup>80</sup> Philadelphia v. New Jersey 437 U.S. 617 (1978) (Invalidating statute that prohibited the disposal of out-of-state trash in New Jersey)

The work of the lawyer, at its core, involves speech. <sup>81</sup>The lawyer advises clients in the privacy of his or her office, negotiates with adversaries and advocates on behalf of clients in a host of public and non-public fora. Unauthorized practice prohibitions criminalize this speech. In Legal Services Corp. v. Velazquez, <sup>82</sup>the Court invalidated a prohibition on the legal services attorney from initiating “legal representation or participat[ing] in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except ... representing an individual eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law....” The restriction prevented an attorney from arguing to a court that a state statute conflicts with a federal statute or the United States Constitution. When the LSC lawyers speak on behalf of his or her private, indigent client, LSC’s regulation of private expression see Kistousean “existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning.”<sup>83</sup>

In National Association for the Advancement of Colored People v. Button, <sup>84</sup>the Court reversed a finding by the Virginia bar authorities, that lawyers employed by the NAACP were guilty of unlawful solicitation of clients in school integration cases because the lawyers’ activities were protected by the First Amendment. The Court characterized the bar’s anti-solicitation rules as “broadly curtailing group activity leading to litigation [which could] become a weapon of oppression, however even-handed its terms appear. Its mere existence could well freeze out of existence all such activity on behalf of the civil rights of Negro citizens.”<sup>85</sup>

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<sup>81</sup>There is not question that lawyers qual lawyers have constitutional rights. Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (lawyer has right to have a press conference about a case); Spevak v. Klein, 385 U.S. 511 (1967) (lawyer can invoke the Fifth Amendment privilege in a disciplinary proceeding); In re Ruffalo, 390 U.S. 544 (1968) (due process gives a lawyer the right to notice about charges pending before a disciplinary body)

<sup>82</sup>121 S.Ct. 1043 (2001)

<sup>83</sup>In support of the private nature of legal advice the court cited Polk County v. Dodson, 454 U.S. 312, 321 — 322 (1981) (holding that a public defender does not act “under color of state law” because he “works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client” and because there is an “assumption that counsel will be free of state control”).

<sup>84</sup>371 U.S. 415; 83 S.Ct. 328; 9 L.Ed. 2d 405 (1963)

<sup>85</sup>The Court relied on Thomas v. Collins, 323 U.S. 516, Thomas was convicted for delivering a speech in connection with an impending union election under National Labor Relations Board auspices, without having first registered as a “labor organizer.” He urged workers to exercise their rights under the National Labor Relations Act and join the union he represented. “Free trade in ideas means free trade in the opportunity to persuade to action, not merely to describe facts.” at 537.

In Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar<sup>86</sup> the Court reversed a solicitation conviction against a union-sponsored legal services program designed to assist members vindicate their rights under federal safety laws. The Court stated: "It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting their rights. Congress gave them in the Safety Appliance Act and the Federal Employers' Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. "The right of membersto consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel. That is the role played by the members who carry out the legal aid program. And the right of the workers personally or through a special department of their Brotherhood to advise concerning the need for legal assistance -- and, most importantly, what lawyer a member could confidentially rely on -- is an inseparable part of this constitutionally guaranteed right to assist and advise each other."

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<sup>86</sup>377 U.S. 1; 84 S.Ct. 1113; 12 L.Ed. 2d 89; 1964

The Court continued, “State could not, by invoking the power to regulate the professional conduct of attorneys, infringe in any way the right of individuals and the public to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries, cf. Gideon v. Wainwright, 372 U.S. 335, and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned as a threat to legal ethics.... We hold that the First and Fourteenth Amendments protect the right of the member through their Brotherhood to maintain and carry out their plan for advising workers who are injured to obtain legal advice and for recommending specific lawyers.... And, of course, lawyers accepting employment under this constitutionally protected plan have a like protection which the State cannot abridge.”<sup>87</sup>

In In re Primus,<sup>88</sup> the Court reversed “South Carolina’s action in punishing appellant for soliciting a prospective litigant by mail, on behalf of the ACLU. The client was one of a class of welfare recipients who were allegedly sterilized against their will as a condition for the continuation of welfare benefits. The Court approached the question in classic fashion asking whether the anti-solicitation rule could “withstand the exacting scrutiny applicable to limitations on core First Amendment rights....”<sup>89</sup> South Carolina must demonstrate “a subordinating interest which is compelling,” and that the means employed in furtherance of that interest are “closely drawn to avoid unnecessary abridgment of associational freedoms.”

The Court rejected the state’s interest in regulating “overreaching, conflict of interest, or other substantive evils when a lawyer gives unsolicited advice and communicates an offer of representation to a layman.” The less stringent standards applied to commercial speech were found inapplicable.<sup>90</sup> in favor of “significantly greater precision.”

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<sup>87</sup>The Courts similarly applied First Amendment protection to the United Mine Workers program of assisting members with workers’ compensation claims through the use of a salaried union-employed lawyer. United Mine Workers of America, District 12 v. Ill.inois State Bar Assn. 389 U.S. 217 (1967); United Transportation Union v. State Bar of Michigan 401 U.S. 576, 585 (1971) (“collective activity undertaken to obtain meaningful access to the courts is a fundamental right...”)

<sup>88</sup>436 U.S. 412; 98 S.Ct. 1893; 56 L.Ed. 2d 417 (1978)

<sup>89</sup>Citing Buckley v. Valeo, 424 U.S. 1, 44-45 (1976) (the landmark campaign financing case).

<sup>90</sup>The origin of the commercial speech doctrine is Virginia State Board of Pharmacy v. Virginia Citizen Consumer Council, Inc. 425 U.S. 748 (1976) (invalidating ban on advertising prescription drugs) The first application of the doctrine to lawyer advertising was in Bates v. State Bar of Arizona 425 U.S. 748 (1976). Bates was then broadened in In re R.M.J. 455 U.S. 191 (1982) (limitations on the content of the ad); Zauderer v. Office of Disciplinary Counsel 471 U.S. 626 (1985) (targeted advertising); Shaperov v. Kentucky Bar Ass’n 486 U.S. 466 (1988) (direct mail advertising); Peel v. Attorney Registration and Disciplinary Comm’n 496 U.S. 91 (1990) (right to declare as specialization) Florida Bar v. Went for It, Inc 515 U.S. 618 (1995)

The State's Interest

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(approving a 30-day cooling-off period in wrongful death actions) See also Ohrlik v. State Bar Ass'n 436 U.S. 447 (1978) (traditional ambulance-chasing can still be prohibited)

The three constitutional arguments suggested all ultimately can be reduced to an examination of the state's interest in unauthorized practice and then balancing <sup>91</sup>that interest against the constitutional interest in First Amendment speech, the free flow of commerce protected by the Commerce Clause, and the rights of individuals against discrimination from states in which they travel and seek business protected by the Privileges and Immunities Clause.

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<sup>91</sup>T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing 96 *Yale L.J.* 943 (1987) (most constitutional rights are balanced against state interests); Gerard J. Clark, An Introduction to Constitutional Interpretation Suffolk L.R. ev. (forthcoming) (Balancing is one of six decisional methodologies utilized by the Supreme Court).

The state interest in unauthorized practice against out-of-state lawyers must be articulated and evaluated. Those interests include client protection, protecting the local legal system, disciplinary authority over practitioners and protection of the bar against competition.<sup>92</sup> The evaluation may vary with the case. Constitutional attacks on statutes may be on their face or as applied. A client group such as a consumers union or the Chamber of Commerce might attack the unauthorized practice prohibitions by bringing a class action under the 1871 Civil Rights Act<sup>93</sup> against a state supreme court or an enforcement committee alleging violation of the Constitution. Such a facial attack is more difficult than an as-applied attack because the opponent of the law must essentially rebut the state interest in the generality of cases. Here the plaintiff class might introduce evidence that most unauthorized practice actions against out-of-state lawyers are not for the purpose of protecting clients or the state's judicial system, but at the behest of a disgruntled opposing client or lawyers. Plaintiffs might also demonstrate that a state or a federal court has almost as much disciplinary power over an out-of-state local attorney.<sup>94</sup> Plaintiffs might also demonstrate that out-of-state lawyers by practicing in the state subject themselves to the long-arm jurisdiction of the local courts and can be reached with civil process should they be guilty of malpractice.<sup>95</sup> Finally plaintiffs might show that licensing states treat out-of-state disciplinary violations every bit as seriously as in-state violations.<sup>96</sup> The goal of

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<sup>92</sup>Wolfram *Op.cit.* p.828

<sup>93</sup>42USCAsec.1983

<sup>94</sup>In re Snyder, 105 S.Ct.2874(1985)(inherent powers of a court to discipline lawyers); Ex Parte Burr, 22 U.S.(9 Wheat.)539(1824)(same)

<sup>95</sup>They would further be subject to extradition if they were guilty of a criminal violation.

<sup>96</sup>Rule 5.5 prohibits a lawyer from practicing in a jurisdiction "where doing so violates the regulation of the legal profession in that jurisdiction," and ABA Model Rules of Professional Conduct Rule 8.5 subjects a lawyer to discipline in the state of his or her admission, "regardless of where the lawyer's conduct occurs." Rule 8.5 thus establishes and supports the relationship between admission and discipline. The practitioner needs a license to practice and thus the licensor has power over his or her livelihood, regardless of the locus of the professional defalcation. That relationship is theoretically absent when the attorney enters a state in which he or she is not admitted. Certainly the foreign lawyer who enters a state to do business submit to the in personam jurisdiction of the courts of that state. Further although the Model Rules are silent on the matter, a number of states have explicitly added to their disciplinary authority power over out-of-state lawyers. While unable to directly affect the practitioners, such bar authorities have the right to publicly reprimand the lawyers, to bar the lawyer from appearing in the Alaska courts in the future, or from applying for admission. Alaska Bar Association Rule 9(c). Courts further assumedly can exercise the contempt power over all attorneys who appear before them. Further with appropriate legislation fines could be imposed. Further the imposition of such discipline would be assumedly reported to the attorney's home state, which has the clear power under Rule 8.5 to impose its own discipline. The Ethics 2000 Commission proposes a change in Rule 8.5 that would make out-of-state lawyers subject to discipline in all states where they

allofthisevidencewouldbetoinvincethetrieroffactto engageinabalancing:thatcompared totheconstitutionalvalueatissue,whetheritbethespeechinterestoftheoutofstatelawyeror oftheinstatclientwhoseektheadviseoftheoutofstatelawyer,ortheeliminationof obstructionstofreeflowoflegalservicesacrossstatelines,ortherrightoflawyertomakea livingthroughouttheunitaryeconomyoftheUnitedStates;thatwhentheseeinterestsare balancedagainsttheneedsofthestatesinprotectingtheirresidentsortheircourtsfrom such practitioners,thebalancefallsinfavoroftheconstitutionalprincipleoverthestateinterest.

Theasappliedattackisnarrower.Itsimplyarguesthat,regardlessofthegeneralvalidity ofunauthorizedpracticeprohibitionsoroftheirapplicationinothercases,thedefendanthasa defensetothechargeofunauthorizedpracticebecausetheConstitutionprotectshisorher activity.Forinstance,in Birbrower,thedefendantlawfirmwouldprovethethecircumstancesof

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practiceregardlessadmission.ThenewlyproposedRule8.5(a)readsasfollows(withthe underlinedmaterialbeingproposedadditionsandtheproposeddeletionshavingalinethrough them) DisciplinaryAuthority.Alawyeradmittedtopracticeinthisjurisdictionissubjecttothe disciplinaryauthorityofthisjurisdiction,regardlessofwherethelawyer'sconductoccurs. A lawyernotadmittedinthisjurisdictionisalsosubjecttothedisciplinaryauthorityofthis jurisdictionifthelawyerrendersorofferstorenderanylegalservicesinthisjurisdiction. A lawyermaybesubjecttothedisciplinaryauthorityofboththisjurisdictionandanother jurisdictionwherethelawyerisadmittedforthesameconduct.Rule8.5(b)dictatesthechoice oflawprincipleswhichshouldbeappliedtothelawyersconductandtheoreticallydictatethat bothdiscipliningstatesshouldbeimposinguniformdisciplinarystandardsonthelawyer's actions.SeeMaryC.Daly, ResolvingEthicalConflictsinMultijurisdictionalPractice -IsModel Rule8.5theAnswer,anAnswer,orNoAnsweratAll? 36So.TexasL.Rev.715(1995) (claimingRule8.5isill-advisedasbadconflictslaw,asignoringclientsandasignoringthe realitiesoflargefirmpractice.)ThissomewhatconfusingresultisalsocuredbyanEthics2000 Commissionproposal.

the prior relationship between the law firm and the principals of ESQ -CA and the history of the relationship between ESQ -CA and ESQ -NY. Given that relationship, the law firm would claim that the First Amendment protects the free communication between the law firm and the client and for California to prohibit that communication would require a compelling interest. Since the complaint in Birbrower sounds in malpractice and the unauthorized practice claim arises only as a defense to the counterclaim for unpaid legal fees, the client is clearly well-equipped to protect its interest and thus the state's interest is not compelling.

The as applied attack under the Commerce Clause would again recite the history of the relationship between attorney and client and then demonstrate that the creation of ESQ -CA arose directly out of the business of ESQ -NY and that the use of the same lawyer to represent these two similar corporations made economic sense and that the California unauthorized practice prohibitions obstruct this free flow of commerce and cannot survive strict scrutiny.

Finally, the as applied attack under the Privileges and Immunities Clause would focus upon the lawyers who are in the business of providing legal advice. The client's needs call for work in California and for the state to prohibit the lawyers from performing that work because of a registration barrier requires the state to justify the barrier under strict scrutiny.

The difficulty with an as applied attack is that it requires the lawyer to recognize the issue early in order to plead and preserve the questions for appeal. It also requires them to litigate the case on two independent grounds requiring very different offers of proof. For instance, in Bribrower, the law firm was defending a malpractice action and prosecuting their claim for attorney's fees, both of which require proofs which would review a history of the representation, the time and effort expended by the lawyers, the results achieved and how all of this compares to the standards of reasonable lawyering. The Constitutional attack is very different. It requires proof, usually through expert testimony, of the level of unauthorized practice in California, how much it hurts the client -public, how much it interferes with the administration of justice and how successful the enforcement effort actually is. Indeed, the brief in opposition to the Bribrower petition for certiorari to the United States Supreme Court argues that the Constitutional questions were not raised below.<sup>97</sup>

However, even if a strong factual case like Bribrower or Ferrey, were to reach the Court in a perfect procedural posture, it seems unlikely that the present Court would rule against state control of unauthorized practice. Such a ruling would violate a majority of the Court's view of federalism. Further, some justices may object that there is little evidence that the framers intended to displace state control of lawyering.

## VIII. Proposal

The goal for efforts at reform should be the elimination of every possible restriction to unbridled interstate practice by a license holder originating from any state. Every lawyering good standing with the highest court of his or her state should have full practice rights in any of the fifty states. Stated differently the states should give full faith and credit to the bar memberships

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<sup>97</sup> Respondent's Brief in Opposition to the Petition for Writ of Certiorari, Birbrower.

of every other state. Concomitantly each state should have disciplinary authority over lawyers practicing therein and their judgments should be given nationwide full faith and credit.

The effectuation of the goal is easier said than done. The A.B.A. is the source of these difficulties through its campaign of the early twentieth century to tighten the standards for admission and their advocacy of unauthorized practice prohibitions. More recently, however, they have moderated their stance. As early as 1969, the ABA declared in the ethical consideration to the Code that states should not be overly restrictive in their enforcement. <sup>98</sup>

Indeed the Ethics 2000 Commission proposals are certainly a step in the right direction and will be presented to the House of Delegates at the February 2002 Meeting. The proposed new rule is as follows:

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<sup>98</sup> “...Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.”

EC 3 -9, in its entirety reads:

“Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice elsewhere where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society posed distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal professions should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.” ABA Code of Professional Responsibility Ethical Consideration 8 -3

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or.

(b) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when:

(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or

(2) other than engaging in conduct governed by paragraph (1):

(i) a lawyer who is an employee of a client acts on the client's behalf or, in connection with the client's matters, on behalf of the client's commonly owned organizational affiliates;

(ii) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice; or

(iii) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation.

The proposal thus solves the four problems: (1) trial preparation for a proceeding where the lawyer expects to appear pro hac vice, or where the particular tribunal allows the lawyer to appear; (2) most of the work of an unadmitted house counsel; (3) the local practitioner whose representation of a client requires out of state legal work;<sup>99</sup> (4) the lawyer who associates out of state with local counsel.

Unresolved, however, by the proposal are numerous other situations: (1) transactional work where the locus of the client or of the transaction is difficult to establish; (2) the federal law and federal tribunal practitioner -expert whose services are nationwide clientele; (3) the attorney who practices in a large firm in which there are local bar members but the attorney in question is not; (4) the in-house counsel's relationship with the employer falls short of being an employee; (5) the federal agency lawyer who travels throughout the country.

Other useful proposals include thirty days of visitation as of right or a simple registration requirement which may be further linked with additional requirements such as with submission to jurisdiction of the state's courts or disciplinary bodies.<sup>100</sup> A simpler alternate proposal would apply unauthorized practice only to the lawyer, unadmitted by this state, who has established an office in the state and engages in a continuing course of business in the state.

Ultimately, however, ABA Proposals are just that: the stated opinions of a commission of anational lawyer trade association. They do not have the force of law. Their chances of being adopted at the local level present fifty distinctive political problems.<sup>101</sup> One can expect

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<sup>99</sup> American Law Institute, Restatement of the Law, The Law Governing Lawyers (St. Paul, ALI Publishers, 2000) Vol. I, p. 24.

<sup>100</sup> Geoffrey C. Hazard Jr., New Shape of Lawyering National Law Journal, July 23, 2001

<sup>101</sup> Fred C. Zacharias, A Nouveau Realist's View of Interjurisdictional Practice Rules 36 So. Texas L. Rev. 1037 (reform is politically and practically complicated)

opposition to change from the unauthorized practice committees appointed by the highest courts in many states. Sunbelt states and those located near large cities have shown little inclination to embrace out of state lawyers. Change would be complicated in some states by virtue of the existence of statutory law that would require legislative response.

A federal response to the problem is in line with a long tradition of federal intervention in situations where individual state regulation is counter-productive.<sup>102</sup> Congress's power over interstate commerce is extensive indeed.<sup>103</sup> Goldfarb<sup>104</sup> made clear that the practice of law is

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<sup>102</sup>Fred C. Zacharias, Federalizing Legal Ethics, 73 Texas L. Rev. 335 (1994) (going much further than the proposals made here and suggesting that the whole field of lawyer regulations should be federalized)

<sup>103</sup>Wickard v. Filburn, 317 U.S. 111 (1942) (upholding federal wheat production limitations); Perez v. United States, 402 U.S. 146 (1971) (upholding federal loan-sharking statute); Katzenbach v. McClung, 397 U.S. 461 (1964) (approving the application of the 1964 Civil Rights Act to a local restaurant because of the effect on interstate commerce); United States v. Lopez, 514 U.S. 549 (1995) (invalidating Gun-Free School Zones Act); United States v. Morrison, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act)

<sup>104</sup>Supra at n. \_\_\_. Hirshon v. King and Spaulding, 467 U.S. 69 (1984) (Title VII applied to denial of partnership in a law firm because of gender)

commerce and that it is subject to federal legislation. Making use of this undoubted federal legislative power,<sup>105</sup> Congress should enact the following statute:<sup>106</sup>

Any lawyer duly admitted to practice in any of the fifty states shall have the right to practice law in any of the fifty states

1. In any matter affecting interstate commerce.

2. In any matter where the gravamen of the legal issues are federal.

The rulings of the lawyer disciplinary bodies in the individual states shall be subject to the full faith and credit clause.<sup>107</sup>

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<sup>105</sup> Comisky and Patterson, The Case for a Federally Created National Bar by Rule or by Legislation, 55 Temp. L. Q. 945 (1982) (calling for the creation of a nationwide federal bar)

<sup>106</sup> Of course, a similar result could be achieved under the treaty power, by negotiating for reciprocal privileges to practice law in the EEC or with the NAFTA countries.

<sup>107</sup> U.S. Constitution Art IV, sec 4.

The federal courts have extensive experience defining the phrase “affecting interstate commerce.” While local residential real estate closings, will preparation and criminal defense may remain out side of the reach of the statute,<sup>108</sup> most business and transactional work would be covered. In addition, Congress has additional power under the Necessary and Proper Clause to pre-empt state regulation of lawyers with respect to any matter arising under federal law.<sup>109</sup> Congress could also address the question of the right of foreign lawyers to practice in the United States under its power over international commerce as well. In the alternative Congress may decline to act unilaterally but await negotiations with our trading partners to have reciprocal rights in each country.<sup>111</sup>

## Conclusion

A mere recitation of the cases cited earlier herein makes clear that the bar has a problem which appears to be getting worse. The ABA has created a Commission on Multi-jurisdictional Practice and it is inviting statement and testimony from the bar in preparation for a report at the 2002 Annual Meeting in August. The testimony, available at the Commission web-site<sup>112</sup>, overwhelmingly favors change. For instance, the American Corporate Counsel Association favors a "drivers' license" model, “an inferred license would be recognized by all states for all US lawyers whose practices take them occasionally or temporarily into a non-Home-State jurisdiction under the following terms: 1. no separate admission, fee, exam, or other non-Home-State registration would be required (full faith and credit would be accorded to other States' lawyers);...” However, another commission report is insufficient; federal pre-emption of local control through Congressional action is the only solution and ABA should get behind it and make it happen.

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<sup>108</sup> Indeed, Congress could make findings that the practice of law in any of its manifestations affects interstate commerce. Recall that in Wickard supra the Court found that the consumption of homegrown wheat affected interstate commerce, and that in Perez supra the fact that Congress found loan-sharking to part of a national problem was sufficient to justify federalizing the local crime

<sup>109</sup> U.S. Constitution Art. I, Sec. 8.

<sup>110</sup> Congress, however demonstrated an inclination to move in the opposite direction in 1998 with the enactment of the Ethical Standards for Attorneys for the Government, 28 U.S.C.A. sec. 530B. For an excellent and highly critical essay of same, see Fred C. Zacharias and Bruce A. Green, The Uniqueness of Federal Prosecutors 88 Geo. L. Rev. 210 (2000); In re Howes 123 N. M. 311, 940 P. 159 (1997) (per curiam) (state court has disciplinary authority over federal prosecutor); United States v. Klubock 832 F.2d 664 (1<sup>st</sup> Cir., 1987) (state rules, adopted by the district court, bind the federal prosecutor)

<sup>111</sup> Of course, a similar result could be achieved under the treaty power, by negotiating for reciprocal privileges to practice law in the EEC or with the NAFTA countries.

<sup>112</sup> <http://www.abanet.org/cpr/mjp-home.html>