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## Multijurisdictional Practice and Transactional Lawyers: Time for a Rule That Is Honored Rather Than Honored in Its Breach

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# Multijurisdictional Practice and Transactional Lawyers: Time for a Rule That Is Honored Rather Than Honored in Its Breach

*James Geoffrey Durham*\* & *Michael H. Rubin*\*\*

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## INTRODUCTION

Model Rule 5.5 of the American Bar Association’s Model Rules of Professional Conduct<sup>1</sup> addresses two interrelated issues: the unauthorized

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1. MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS’N 2019). Model Rule 5.5, Unauthorized Practice of Law; Multijurisdictional Practice of Law, states:

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
  - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

practice of law, which applies to lawyers and nonlawyers alike, and multijurisdictional practice, which applies to lawyers who are licensed to practice in one state but whose work may involve or take them to states where they are not licensed.

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(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;  
(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

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

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

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

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

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

(e) For purposes of paragraph (d):

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

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

Unlike litigators, who can file motions for pro hac vice admission in courts in states in which they are not licensed to practice,<sup>2</sup> no easy solution is available either to transactional lawyers<sup>3</sup> or to any attorney who would like to telecommute.<sup>4</sup> Because of its restrictions and limitations, Model Rule 5.5 is more often honored in the breach than in the observance by transactional lawyers and telecommuters, and scholars have noted that “[s]ince the first imposition of restrictions limiting lawyers’ ability to

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2. Some states prevent unlimited pro hac admissions. See, for example, MISS. R. APP. P. 46, requiring the association of a Mississippi attorney in any case where an out-of-state lawyer seeks to appear, and prohibiting out-of-state attorneys to “argue orally, or file briefs or any paper in any cause” if they have made appearances in “more than five (5) separate unrelated causes or other matters before the courts or administrative agencies of this state within the twelve (12) months immediately preceding the appearance in question.” The ABA has conducted a state-by-state analysis of pro hac rules, updated through January 26, 2017. AMERICAN BAR ASSOCIATION, CPR POLICY IMPLEMENTATION COMMITTEE, COMPARISON OF ABA MODEL RULE FOR PRO HAC VICE ADMISSION WITH STATE VERSIONS AND AMENDMENT SINCE AUGUST 2002 (Jan. 26, 2017), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/prohac\\_admin\\_comp\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/prohac_admin_comp_authcheckdam.pdf) [<https://perma.cc/X5N3-BUNG>]. This analysis shows that three states (Minnesota, Mississippi, and New Mexico) and the District of Columbia have a cap of five appearances in any calendar year, three (Ohio, Arizona, and Florida) cap it a three appearances within a year, one (Rhode Island) at three appearances in a five-year period, one (Iowa) at five appearances in 24 months, one (Nevada) at five appearances during a three-year period, and one (Virginia) at 12 appearances in 12 months, while Montana’s rule sets the limit at a total of two appearances without regard to any time frame. *Id.*

3. This Article uses the term “transactional lawyer” to refer to attorneys handling matters that do not involve appearing in court and that are not in preparation for existing or future litigation in which the lawyer may seek to appear. This phrase does not refer to work involving a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding. Thus, the use of this term excludes those whose activities are covered by Model Rule 5.5(c)(2) and (c)(3). MODEL RULES OF PRO. CONDUCT r. 5.5(c)(2)–(3) (AM. BAR ASS’N 2019).

4. This Article uses the word “telecommute” to mean a lawyer who works electronically while physically in a jurisdiction in which the attorney is not licensed to practice, even though the work on the attorney’s computer, laptop, or cell phone creates a “virtual desk” identical to the one the attorney would see if sitting in the attorney’s office in the lawyer’s “home” jurisdiction, where the lawyer is licensed.

practice law beyond the boundaries of a state in which they were admitted to the bar, commentators have been issuing calls for reform.”<sup>5</sup>

In addition, after the COVID-19 pandemic began in March 2020, many law firms found that state or local restrictions and health concerns required all or a significant portion of their attorneys to work remotely. Telecommuting ceased being a matter of convenience and became a matter of necessity. For law firms that needed lawyers to work during the pandemic, the locale in which a lawyer sat while telecommuting may have been irrelevant as long as the lawyer was able to access the firm’s virtual private network or computer system and perform the tasks necessary. For each individual lawyer, however, the constraints of each state’s version of Model Rule 5.5 in the jurisdiction from which the lawyer worked were not altered, with very few exceptions.<sup>6</sup>

This Article focuses on how Model Rule 5.5 impacts transactional lawyers and telecommuters, discusses how the rationale for Model Rule 5.5 has been undermined by the multi-state bar exam, and offers several alternatives to the current rule.

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5. Carol A. Needham, *Negotiating Multi-State Transactions: Reflections on Prohibiting the Unauthorized Practice of Law*, 12 ST. LOUIS U. PUB. L. REV. 113 (1993).

6. See *infra* Part VII.D. See *infra* text accompanying notes 165–69 for a discussion of opinions in Utah and Florida allowing lawyers to telecommute. In addition, the District of Columbia Court of Appeals Committee on Unauthorized Practice of Law issued *Opinion 24-20: Teleworking from Home and the COVID-19 Pandemic* on March 23, 2020, stating that a lawyer not licensed in the District of Columbia may practice from a personal residence in the District:

Under the ‘incidental and temporary practice’ exception of Rule 49(c)(13) if the attorney (1) is practicing from home due to the COVID-19 pandemic; (2) maintains a law office in a jurisdiction where the attorney is admitted to practice; (3) avoids using a District of Columbia address in any business document or otherwise holding out as authorized to practice law in the District of Columbia, and (4) does not regularly conduct in-person meetings with clients or third parties in the District of Columbia.

DIST. OF COLUMBIA COURT OF APPEALS, COMM. ON UNAUTHORIZED PRACTICE OF LAW, OPINION 24-20: TELEWORKING FROM HOME AND THE COVID-19 PANDEMIC (2020), <https://www.dccourts.gov/sites/default/files/2020-03/CUPL-Opinion-24-20.pdf> [<https://perma.cc/KHM7-Y7S3>].

## I. THE EVOLUTION OF THE REGULATION OF THE UNAUTHORIZED PRACTICE OF LAW

Historically, American jurisdictions allowed nonlawyers to engage in many activities that today would be considered the unauthorized practice of law.<sup>7</sup> Eventually, statutes were enacted and rules were adopted to limit the ability of those not licensed to practice law in a state from engaging in the types of services that lawyers provided.<sup>8</sup> Initially, these efforts focused

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7. See Charles W. Wolfram, *Expanding State Jurisdiction to Regulate Out-of-State Lawyers*, 30 HOFSTRA L. REV. 1015, 1041 (2002).

During most of American history prior to the twentieth century, a great deal of transactional work—such as the preparation of deeds, mortgages, bonds, contracts, wills, and similar documents—was performed by nonlawyers, such as notaries public, justices of the peace, minor courthouse officers, or simply literate men and women with copies of ubiquitous form books at hand. [FN 112]

[FN112]: . . . Perennial best sellers during a great part of the eighteenth and nineteenth centuries in America were variations on the English concept of a “conductor generalis”—a formbook that was designed (almost certainly by one or more lawyer authors, as they invariably claimed) to be used in most of the everyday drafting situations that had legal significance. See, e.g., Anonymous, *A New Conductor Generalis* (Albany 1803). The long title of the work continues “Being a Summary of the Law Relative to the Duty and Office of Justices of the Peace, Sheriffs, Coroners, Constables, Jurymen, Overseers of the Poor, etc., etc. With . . . a Variety of Practical Forms . . . Which Will Be Found Useful to Citizens, Lawyers and Magistrates.” *Id.* The anonymous author is identified on the title page only as “A Gentleman of the Law.” *Id.* The earliest of such a Conductor Generalis was printed in Philadelphia in 1722. See Alfred L. Brophy, “*Ingenium Est Fateri Per Quos Profeceris*,” *Francis Daniel Pastorius’ Young Country Clerk’s Collection and Anglo-American Legal Literature 1682-1716*, 3 U. CHI. L. SCH. ROUNDTABLE 637, 640 n.5 (1996). These were near copies of works of the same name that were quite popular in England during the same period. See Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1097-98 (1994).

8. For a history and evolution of the unauthorized practice of law rules, see Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981). See also Matthew Longobardi, *Unauthorized Practice Of Law and Meaningful Access to the Courts: Is Law Too Important to Be Left to Lawyers?*, 35 CARDOZO L. REV. 2043 (2014) (citing LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 81–82 (1973); Laurel A. Rigertas, *Lobbying and Litigating*



on preventing nonlawyers from undertaking any activities encompassed within the phrase “the practice of law,”<sup>9</sup> although there is no uniform, universal accepted definition of that phrase.<sup>10</sup> As the Pennsylvania

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*against ‘Legal Bootleggers’—The Role of the Organized Bar in the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 73–76 (2009)). The concept of “unauthorized practice” has never been applied to the ability of criminal defendants to represent themselves. As was stated in *Faretta v. California*, discussing the history of self-representation in court and the right to counsel in criminal cases:

In the American Colonies the insistence upon a right of self-representation was, if anything, more fervent than in England.

The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of [lawyers]. When the Colonies were first settled, “the lawyer was synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King’s Court, all bent on the conviction of those who opposed the King’s prerogatives, and twisting the law to secure convictions.” This prejudice gained strength in the Colonies where “distrust of lawyers became an institution.” Several Colonies prohibited pleading for hire in the 17th century. The prejudice persisted into the 18th century as “the lower classes came to identify lawyers with the upper class.” The years of Revolution and Confederation saw an upsurge of antilawyer sentiment, a “sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class.” In the heat of these sentiments the Constitution was forged.

This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. Colonial judges soon departed from ancient English practice and allowed accused felons the aid of counsel for their defense. At the same time, however, the basic right of self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer. Indeed, even where counsel was permitted, the general practice continued to be self-representation.

*Faretta v. California*, 422 U.S. 806, 826–28 (1975).

9. See Rhode, *supra* note 8.

10. No universal definition of the “practice of law” exists, and thus there is no universal, accepted definition of what constitutes the “unauthorized” practice. See, e.g., *State v. Niska*, 380 N.W.2d 646, 648 (N.D. 1986) (“[W]hat constitutes the practice of law does not lend itself to an inclusive definition . . . .”); *State Bar of Ariz. v. Ariz. Land Title & Trust Co.*, 366 P.2d 1, 8–9 (Ariz. 1961) (“In the light of the historical development of the lawyer’s functions, it is impossible to lay down an exhaustive definition of ‘the practice of law’ by attempting to enumerate every conceivable act performed by lawyers in the normal course of their work.”); Shane L. Goudey, *Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law by Real Estate Brokers*, 75 OR. L. REV. 889, 893

Supreme Court explained in a 1937 opinion, the purpose of the unauthorized practice prohibitions “is not to secure to lawyers a monopoly, however deserved, but, by preventing the intrusion of inexperienced and unlearned persons in the practice of law, to assure to the public adequate protection in the pursuit of justice, than which society knows no loftier aim.”<sup>11</sup>

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(1996) (“The vast array of duties and responsibilities of a lawyer prohibit an exhaustive definition of the ‘practice of law.’”); Kimberly Ann Clemens, *The Unlicensed Practice of Law: Overstepping the Boundary*, 1 FLA. COASTAL L. J. 535 (2000) (“A comprehensive definition of what constitutes the unauthorized practice of law is difficult, actually almost impossible.”); David McGowan, *Two Ironies of UPL Laws*, 20 CHAP. L. REV. 225 (2017) (“Definitions of the practice of law tend to be embarrassing. Some states offer definitions so general they say little more than that judges or bar officials will know unlicensed practice when they see it, which was Justice Stewart’s definition of obscenity.”). Despite the American Bar Association’s efforts to create a model definition of the practice of law, the best the ABA could do was to come up with a recommendation that every state adopt a definition that “should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity.” See AMERICAN BAR ASSOCIATION, MODEL DEFINITION: DEFINITION OF THE PRACTICE OF LAW DRAFT (Sept. 18, 2002), [https://www.americanbar.org/groups/professional\\_responsibility/task\\_force\\_model\\_definition\\_practice\\_law/model\\_definition\\_definition/](https://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition/) [<https://perma.cc/GW5Z-EZKS>] (“A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another: (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others; (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person; (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or (4) Negotiating legal rights or responsibilities on behalf of a person.”).

11. *Shortz v. Farrell*, 193 A. 20, 24–25 (Pa. 1937); see also *State v. Pledger*, 127 S.E.2d 337 (N.C. 1962) (“The [unauthorized practice] statute was not enacted for the purpose of conferring upon the legal profession an absolute monopoly in the preparation of legal documents; its purpose is for the better security of the people against incompetency and dishonesty in an area of activity affecting general welfare.”); *State v. Sperry*, 140 So. 2d 587, 595 (Fla. 1962) (“The reason for prohibiting the practice of law by those who have not been examined and found qualified to practice is frequently misunderstood. It is not done to aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop. It is done to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe.”).

Despite the claimed rationale that the public must be protected from nonlawyers engaging in the “practice of law,” the U.S. Supreme Court has recognized that, even though there are actions that might constitute the practice of law in a particular state, local jurisdictions may not prevent nonlawyers from functioning in certain capacities overseen by federal agencies. In *Sperry v. Florida*,<sup>12</sup> the Court held that Florida could not enjoin a nonlawyer whom the Patent Office had registered to practice as a patent agent from performing activities within the scope of his registration, even though the individual’s actions constituted the “practice of law” in Florida.

Over time, the rules expanded the concept of “unauthorized practice” to include lawyers practicing outside the jurisdiction in which they were licensed. One might ask why competency-by-geography is such a major concern if lawyers are trained in the law, are educated in legal reasoning and analysis, and are expected to be competent the fields in which they practice—is its primary purpose the protection of the public or the protection of local lawyers?<sup>13</sup>

This debate is not new. In 1894, a Pennsylvania lawyer asked the Pennsylvania court to void a writ obtained by a lawyer who was not admitted to practice in the county where the writ was granted. The court refused to do so.<sup>14</sup> While the discussion in the case is short, it is apparent that the underlying issue was not the competency of the lawyer but rather the attempt of local attorneys to create a geographic barrier to protect their practices.

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12. *Sperry v. Florida*, 373 U.S. 379, 83 (1963).

13. See Bryant G. Garth, *Rethinking the Legal Profession’s Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 WIS. L. REV. 639, 650 (1983) (“In 1938, participating in a symposium condemning ‘the unauthorized practice of law,’ Karl Llewellyn asked a somewhat embarrassing question: ‘Who is worrying about unauthorized practice, and why? Is it the public, complaining of quacks? Is it the profession concerned about the public welfare? Or who and why?’ As Llewellyn and other commentators have recognized, the lack of paying work in the depression to a large extent explained the bar’s sensitivity to the problem of unauthorized practice, or competition by nonlawyers. Neither public demand nor concern about public welfare adequately justified the sudden emphasis on eliminating the unauthorized practice of law. It was primarily the profession’s issue—not that of the general public.”).

14. *Hooven Mercantile Co. v. Morgan*, 4 Pa. D. 48 (Ct. of Common Pleas of Pa. 1894).

## II. THE EVOLUTION OF MODEL RULE 5.5

The ABA Code of Professional Responsibility, enacted in 1969, consisted of three parts: Canons, Ethical Considerations (ECs), and Disciplinary Rules (DRs). The Canons were essentially aspirational subject headings, the ECs were hortatory statements, and the DRs were mandatory rules which lawyers were required to follow.<sup>15</sup>

Canon 3 was entitled “A Lawyer Should Assist in Preventing the Unauthorized Practice of Law.” DR 3-101(B) stated that a “lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.” The majority of the ECs to Canon 3 focused on the differences between lawyers and nonlawyers. EC 3-1 noted that the “prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services.”<sup>16</sup> Yet, while acknowledging that the practice of law is “accomplished principally by the respective states, and that “the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere,”<sup>17</sup> EC 3-9 gave a nod to what is now called “multijurisdictional practice” when it stated that the “demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states” and contending that, in “furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client.”<sup>18</sup> Despite this

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15. See, e.g., John F. Sutton, Jr., *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255, 265 (1970) (“In offering the new Code, the ABA committee stressed that many existing standards of the traditional canons were sound in substance but in need of restatement. Without restatement, ‘[m]ost of the Canons do not lend themselves to practical sanctions for violations; . . .’ . . . Many of [the pre-1969 canons] were not relevant to disciplinary actions, but represented attempts to state the aspirations of the profession or to guide lawyers in making ethical decisions when no law controlled the lawyers’ conduct. Some of the generalities may have been embryonic explanations of the roles of lawyers in the legal process. Those generalities were restated as ethical considerations to serve their proper functions. This placement also is an aid in avoiding the misuse by disciplinary authorities of such generalities.”).

16. MODEL CODE OF PRO. RESP. EC 3-1 (AM. BAR ASS’N 1969).

17. *Id.* EC 3-9.

18. *Id.* The full text of EC 3-9 states:

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,

acknowledgment, however, the DRs made no provision for lawyers who were licensed in one state to perform legal services in a different state.

When the Model Rules were first promulgated in 1983,<sup>19</sup> superseding the 1969 Model Code of Professional Responsibility, Model Rule 5.5's regulation of multijurisdictional practice was succinct. It tracked former DR 3-101 and prohibited the practice of law "in a jurisdiction where doing so violates the regulation of the legal profession." The rule contained no exceptions. The Comment to then Model Rule 5.5 stated that the "definition of the practice of law is established by law and varies from place to place," and that this rule "protects the public against the rendition of legal services by unqualified persons."<sup>20</sup>

Scholars immediately criticized Model Rule 5.5. A book published one year after the 1983 enactment proclaimed that "[i]nterstate practice is not only a fact of life, it is a frequent and common occurrence."<sup>21</sup> The criticism was well-founded because implicit in the tight restrictions contained in the former formulation of Model Rule 5.5 was that, because Model Rule 1.1 required competency, the rule treated a lawyer not licensed in the state as incompetent if the attorney provided legal services in that state. Creating a categorical ban that essentially deemed all out-of-state lawyers incompetent to do work in the state not only was at odds with Model Rule 1.1, it also elevated geography (where one was admitted to

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and it is improper for a lawyer to engage in practice 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 pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession 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.

19. It has been contended that "[t]he 1983 ABA Model Rules were adopted amidst contentious disagreements about the scope and content of the rules, in addition to continued opposition to the necessity of a revision of the ABA Model Code in the first place." Jane Y. Kim, *Refusing to Settle: A Look at the Attorney's Ethical Dilemma in Client Settlement Decisions*, 38 WASH. U. J. L. & POL'Y 383, 395 (2012).

20. Robert H. Aronson, *Washington Survey: An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 WASH. L. REV. 823, 882 n.315 (1986).

21. L. RAY PATTERSON, *LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY* 646 (2d ed.1984).

practice) over competency (the knowledge sufficient to render the legal advice sought).<sup>22</sup>

In 2000, the ABA established the Commission on Multijurisdictional Practice (the MJP Commission) with the aim of making recommendations to supplement the report of the “Ethics 2000” Commission.<sup>23</sup> The MJP Commission held a symposium about multijurisdictional practice. An article about the symposium by one of its participants noted that “outside the context of litigation,”<sup>24</sup> the scope of unauthorized-practice-of-law prohibitions “is vastly uncertain as well as, potentially, far too restrictive.”<sup>25</sup>

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22. See generally MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS’N 2019); *id.* r. 5.5. For more on this issue under the current formulation of the Model Rules, see *infra* Part IV. For a discussion of the evolution of the competency issue, see Garth, *supra* note 13, which stated:

“Competence” appeared as a subject of explicit professional regulation for the first time in 1969 as a canon of professional ethics. The specific term, however, is not defined in the Canons, nor is it defined in the current Code of Professional Responsibility. In the Code, ethical considerations, which have only an “aspirational” quality, prescribe that the lawyer “act with competence and proper care,” keep “abreast of current legal literature and developments,” and “prepare adequately for and give appropriate attention to his legal work.” Incompetence becomes a matter for discipline only if the lawyer handles a matter that “he knows or should know he is not competent to handle,” fails to undertake “preparation adequate in the circumstances,” or “neglects a legal matter entrusted to him.”

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The A.B.A.’s proposed Model Rules of Professional Conduct, proffered in revised form in 1981 by the Kutak Commission as potential successors to the Code, respond to the concern with upgrading. Competence is placed *first* among all ethical requirements. Further, according to Model Rule 1.1, “competence consists of the legal knowledge, skill, thoroughness, preparation and efficiency reasonably necessary for the representation.”

23. Don Burnett, *Multijurisdictional Practice: An Emerging Issue for a Changing Profession*, 46-JUN ADVOCATE (IDAHO) 33 (2003).

24. Bruce A. Green, *The Need to Bring the Professional Regulation of Lawyers into the 21st Century*, [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/commission\\_on\\_multijurisdictional\\_practice/mjp\\_bruce\\_green\\_report/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice/mjp_bruce_green_report/) [<https://perma.cc/8STK-6GDJ>] (last visited Mar. 10, 2020).

25. *Id.*

The MJP Commission's final report, adopted in 2002,<sup>26</sup> formed the basis of the text of Model Rule 5.5 adopted that year by the ABA House of Delegates.<sup>27</sup> Some transactional lawyers welcomed the reformulated rule. For example, the ABA's Real Property, Probate and Trust Law Section, "dominated by solo practitioners and lawyers practicing in small firm settings," was supportive of the changes.<sup>28</sup>

The MJP Commission also recommended other changes that the ABA House of Delegates adopted, including: (1) amendments to Model Rule 8.5 that subject a lawyer providing legal services in a state to the disciplinary authority of that state regardless of the attorney's state of admission;<sup>29</sup> (2) a Model Rule for Temporary Practice by Foreign Lawyers that allows a foreign lawyer to provide legal services on a temporary basis

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26. The ABA's Center for Professional Responsibility maintains a website about the Commission and its work. *See generally The Commission on Multijurisdictional Practice*, ABA, [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/commission-on-multijurisdictional-practice/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission-on-multijurisdictional-practice/) [<https://perma.cc/88PX-DTWP>] (last visited Jan. 6, 2021).

27. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1982-2013 643 (Art Garwin ed., 2013).

28. DAVID K.Y. TANG, ENDORSEMENT OF THE REPORT OF THE ABA COMMISSION ON MULTIJURISDICTIONAL PRACTICE BY THE ABA SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mjp\\_migrated/srpt\\_7\\_02.doc](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrated/srpt_7_02.doc) [<https://perma.cc/WYK5-MJ4Q>] (last visited Sept. 9, 2019). The Chair of the Section wrote the Commission wrote:

We think it is noteworthy to add that our Section's membership, numbering close to 30,000, is dominated by solo practitioners and lawyers practicing in small firm settings, and that the issues of multijurisdictional practice addressed by the Report are issues that the majority of our members, regardless of their firms' size, have struggled with for years. Our members are regularly asked by their clients, who may be individuals, small businesses or large multi-state or multinational enterprises, to assist such clients beyond the borders of the lawyer's state of licensure, and the degree to which our members are asked to engage in multijurisdictional representation is not linked to the size or breadth of their practices.

29. These proposed amendments became the basis for Model Rule 8.5(a). MODEL RULES OF PRO. CONDUCT r. 8.5(a) (AM. BAR ASS'N 2002).

in the United States;<sup>30</sup> (3) a Model Rule on Pro Hac Vice Admission;<sup>31</sup> and (4) a Model Rule on Admission by Motion permitting a lawyer to pursue admission to another jurisdiction's bar without taking its bar examination.<sup>32</sup>

Additionally, there were two linked changes: an amended Model Rule 6A,<sup>33</sup> and a proposed Model Rule 22 promoting reciprocal disciplinary enforcement by a state in which the attorney has practiced and the state in which the attorney is admitted.<sup>34</sup>

The ABA House of Delegates in 1983 approved Model Rule 5.5 in its original form.<sup>35</sup> Model Rule 5.5 took its current structure through amendments passed by the ABA House of Delegates in 2002 based on recommendations from the Ethics 2000 Commission. The ABA House of Delegates filed those recommendations in 2001, but the House did not act on them until 2002, after the House also received the report of the MJP Commission.<sup>36</sup> With a few modifications,<sup>37</sup> the current Model Rule 5.5 has been in place for almost 20 years.

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30. See AMERICAN BAR ASSOCIATION, COMMISSION ON MULTIJURISDICTIONAL PRACTICE, REPORT 201J (2002), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mjp\\_migrate\\_d/201j.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrate_d/201j.pdf) [<https://perma.cc/RSW5-V6P3>].

31. See AMERICAN BAR ASSOCIATION, COMMISSION ON MULTIJURISDICTIONAL PRACTICE, REPORT 201F (2002), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mjp\\_migrate\\_d/report\\_201f.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrate_d/report_201f.pdf) [<https://perma.cc/S4GA-V5UQ>].

32. See AMERICAN BAR ASSOCIATION, COMMISSION ON MULTIJURISDICTIONAL PRACTICE, REPORT 201G (2002), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mjp\\_migrate\\_d/report\\_201g.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_migrate_d/report_201g.pdf) [<https://perma.cc/Y2WL-CLNT>].

33. See MODEL RULES OF PRO. CONDUCT r. 6 (AM. BAR ASS'N 1984), available at [https://www.americanbar.org/groups/professional\\_responsibility/resources/lawyer\\_ethics\\_regulation/model\\_rules\\_for\\_lawyer\\_disciplinary\\_enforcement/rule\\_6/](https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_6/) [<https://perma.cc/S2D6-NNNK>].

34. See MODEL RULES OF PRO. CONDUCT r. 22 (AM. BAR ASS'N 2002), available at [https://www.americanbar.org/groups/professional\\_responsibility/resources/lawyer\\_ethics\\_regulation/model\\_rules\\_for\\_lawyer\\_disciplinary\\_enforcement/rule\\_22](https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_22) [<https://perma.cc/S7XF-73BQ>].

35. See A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1982-2013, *supra* note 27.

36. *Id.*

37. In 2007 the rule was modified on the recommendation of the ABA Standing Committee on Client Protection by adding Comment 14. *Id.* at 656–57. In 2012 on the recommendation of the Commission on Ethics 20/20 to protect corporate counsel from being charged with the unauthorized practice of law. *Id.* at 643, 657–58. And again in 2013 on the recommendation of the Commission on



Model Rule 5.5 is showing its age. It was only after the adoption of the current structure of Model Rule 5.5 that the iPhone debuted,<sup>38</sup> that firms started vigorously eliminating vast libraries filled with books and using primarily online research tools, that video-conferencing emerged as a usual and customary way of interacting with clients and potential clients, and that law firm consolidations continued escalating each year at a record pace.<sup>39</sup>

Given the fact that lawyers today are increasingly asked “by their clients, who may be individuals, small businesses or large multi-state or multi-national enterprises, to assist such clients beyond the borders of the lawyer’s state of licensure,”<sup>40</sup> the question that arises is whether the existing text of Model Rule 5.5 adequately addresses clients’ needs and appropriately balances those needs with regulating the practice of law.

The evolution of Model Rule 5.5 involves more than just lawyer mobility: “Applied literally, the old restrictions on practice of law in a state by a lawyer admitted elsewhere could seriously inconvenience clients who have need of such services within a state.”<sup>41</sup> If a client were always forced to retain local counsel, as the original version of Model Rule 5.5 required, the client would be denied its chosen of counsel and would be subjected to increased legal fees (at least the amount charged by new counsel for the time necessary to get acquainted with the matter).<sup>42</sup>

Today, Model Rule 5.5 has been broadened and permits transactional lawyers to engage in the practice of law in which they are not licensed, but only if the work is “on a temporary basis” and is either “undertaken in

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Ethics 20/20 to define the permitted practice areas of lawyers admitted in foreign countries. *Id.* at 659–61.

38. The first iPhone was released in 2007. See Dan Grabham & Robert Jones, *History of the iPhone 2007-2017: The Journey to iPhone X*, T3 SMARTERLIVING (Jan. 10, 2018), <https://www.t3.com/us/features/a-brief-history-of-the-iphone> [<https://perma.cc/25AL-PMBE>].

39. See Roy Strom, *After a Record 2017, No Signs of Law Firm Merger Mania Slowing*, AM. LAW. (Jan. 3, 2018, 01:04 PM), <https://www.law.com/americanlawyer/sites/americanlawyer/2018/01/03/after-a-record-2017-no-signs-of-law-firm-merger-mania-slowing/> [<https://perma.cc/G73U-KHU4>]. See generally *Altman Weil Mergerline*, ALTMAN WEIL INC., <http://www.altmanweil.com/MergerLine/> [<https://perma.cc/24LV-S5YG>] (last visited Mar. 14, 2020).

40. TANG, *supra* note 28. This comment, which was raised by the ABA’s Section of Real Property, Probate and Trust Law in a letter to the Commission before the 2002 report, is even more pertinent now as multistate transactions continue to proliferate. *Id.*

41. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (AM. L. INST. 2000).

42. *Id.*

association with a lawyer who is admitted to practice in this jurisdiction”<sup>43</sup> or arises “out of or [is] reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.”<sup>44</sup>

Model Rule 5.5 is not the only formulation dealing with lawyers who are licensed in one state who seek to practice, or whose clients request them to practice, in another state. The American Law Institute’s Restatement (Third) of the Law Governing Lawyers addresses this as well, as discussed in Sections VI and VII, below. The Restatement permits transactional lawyers to engage in “extra-judicial practice” if it is “reasonably related” to the lawyer’s practice in the state(s) where the lawyer is licensed—there is no requirement that the work be done there on a temporary basis.<sup>45</sup>

### III. THE CURRENT STRUCTURE OF MODEL RULE 5.5

Model Rule 5.5, as it currently exists, consists of two mandatory restrictions—5.5(a) and 5.5(b)—and two exceptions to those restrictions—5.5(c) and 5.5(d).

#### A. Model Rule 5.5(a)

Model Rule 5.5 opens with the broad proclamation in 5.5(a) that a “lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”<sup>46</sup> This requires that practitioners look beyond the scope of the Model Rule’s adoption in each state, for not only does the rule specifically omit any definition of the practice of law, but the comments to the rule note that the definition “varies from one jurisdiction to another.”<sup>47</sup> Moreover, this same comment declares that whatever the definition is, “limiting the practice of law to members of the bar protects the public

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43. MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS’N 2002).

44. *Id.* r. 5.5(c)(4).

45. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (AM. L. INST. 2000).

46. MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS’N 2002) (emphasis added).

47. *Id.* r. 5.5 cmt. 2. For a state-by-state comparison of what constitutes the “practice of law,” see the ABA Task Force on the Model Definition of the Practice of Law contained in AMERICAN BAR ASSOCIATION, STATE DEFINITIONS OF THE PRACTICE OF LAW APPENDIX A, [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/model-def\\_migrated/model\\_def\\_statutes.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/model_def_statutes.pdf) [<https://perma.cc/GD9N-W8NU>] (last visited Mar. 14, 2020).

against rendition of legal services by unqualified persons.” This formulation, which applies only to lawyers, appears to treat any lawyer not licensed in that jurisdiction as unqualified, even though the lawyer is a well-experienced practitioner, perhaps a recognized expert in one or more specific practice areas, and licensed in one or more other jurisdictions.

One might ask how or why a lawyer licensed to practice law in one state is treated as an “unqualified person” in another state simply because of a lack of licensing in the second state. After all, under the current formulation of Model Rule 1.1, competency is a touchstone of any legal representation,<sup>48</sup> and a comment to Model Rule 1.1 acknowledges that a “lawyer can provide adequate representation in a wholly novel field through necessary study.”<sup>49</sup> Yet, the comments to Model Rule 5.5 seem to equate competency with only two areas: work (a) that is “reasonably related to the lawyers’ practice” in a jurisdiction where the lawyer is licensed, a criterion that implicitly looks at the laws of the licensing state, or (b) that involves a “particular body of federal, nationally-uniform, foreign, or international law.”<sup>50</sup> In other words, the comments to Model Rule 5.5, which appear to be implicitly based on the uniqueness of each state’s law, seem to treat competency in a far narrower fashion than do the comments to Model Rule 1.1.

### *B. Model Rule 5.5(b)*

While Model 5.5(a) addresses the practice of law in “a jurisdiction,” Model Rule 5.5(b) prohibits two actions in “this jurisdiction.”

The first prohibition is against establishing “an office or other systematic and continuous presence in *this jurisdiction* for the practice of law.”<sup>51</sup> The second prohibition prevents a lawyer who is not licensed in “this jurisdiction” from holding out to the public or otherwise representing “that the lawyer is admitted to practice law in this jurisdiction.” The focus of this Article is the first prohibition.

As in Model Rule 5.5(a), the “practice of law” is not defined.<sup>52</sup> Additionally, there is no definition of what constitutes a “systematic and

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48. MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 2 (AM. BAR ASS’N 2002). Model Rule 1.1 states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

49. *Id.* r. 1.1 cmt. 1.

50. *Id.* r. 5.5 cmt. 14.

51. *Id.* r. 5.5(b)(1) (emphasis added).

52. *Id.* r. 5.5(a). For a discussion of the difficulty in arriving at consensus as to what constitutes the practice of law, see discussion *supra* note 10.

continuous presence,” although apparently it is something other than a presence that is “temporary,” a matter dealt with in Model Rule 5.5(c). The comments to Model Rule 5.5, however, make it clear that presence “may be systematic and continuous even if the lawyer is not physically present here.”<sup>53</sup>

While the comments to Model Rule 5.5 do not reference the origin of the term “systematic and continuous,” the phrase “continuous and systematic” has a long jurisprudential history in cases dealing with the general jurisdiction of federal courts. *International Shoe*<sup>54</sup> established the rule that a court “may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially at home in the forum State.”<sup>55</sup> The jurisdictional criteria for “continuous and systematic” contacts usually include both physical presence and the active solicitation of business in the state.<sup>56</sup>

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53. MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 4 (AM. BAR ASS’N 2002).

54. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

55. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

56. See *Ashbury Int’l Grp., Inc. v. Cadex Defence, Inc.*, No. 11-CV-79, 2012 WL 4325183 (W.D. Va. Sept. 20, 2012). As was stated in *Ashbury International Group, Inc. v. Cadex Defence, Inc.*:

In applying the “continuous and systematic” contacts test, courts have focused on two areas. First, they look for some kind of deliberate physical presence in the forum state, such as corporate facilities, bank accounts, agents, registration, or incorporation. In this regard, the Supreme Court’s decision in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952) “remains [t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum.” *Goodyear*, 131 S.Ct. at 2856 (internal citation and quotation marks omitted). . . .

In addition to looking for elements of physical presence, courts have also considered whether the defendant has actively solicited business in the forum state and the extent to which the defendant has participated in the state’s economic markets. See *Tuazon v. R. J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1172 (9th Cir. 2006) (listing, as indicia of continuous and systematic contacts, “volume,” “economic impact,” “continuity,” and “integration into the state’s regulatory or economic markets”). In other words, courts have examined the “economic reality” of the defendant’s activities in the forum state. *Id.* at 1173 (internal citation and quotation marks omitted); see also *Trierweiler v. Croxton & Trench Holding Co.*, 90 F.3d 1523, 1533 (10th Cir.1996) (cited with approval in *Delta Sys., Inc. v. Indak Mfg. Corp.*, 4 F. App’x 857, 860 (Fed.Cir. 2001)) (listing, as relevant to the general jurisdiction analysis, whether the defendant

The Supreme Court's 2011 ruling in *Goodyear Dunlop Tires*<sup>57</sup> put an additional gloss on *International Shoe*, holding that foreign subsidiaries of a U.S. parent corporation are not amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum state. *Goodyear Dunlop Tires* noted that a pure "stream of commerce" theory fails to distinguish between specific jurisdiction and general jurisdiction.<sup>58</sup> Cases decided after *Goodyear Dunlop Tires* have found general jurisdiction over foreign entities when the foreign entity has actively solicited work in that state even if there is no physical presence and even if the percentage of

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actively solicits business in the state and the volume of business conducted in the state by the defendant).

57. *Goodyear*, 564 U.S. 915.

58. As was stated in *Goodyear*:

The North Carolina court's stream-of-commerce analysis elided the essential difference between case-specific and all-purpose (general) jurisdiction. Flow of a manufacturer's products into the forum, we have explained, may bolster an affiliation germane to *specific* jurisdiction. *See, e.g., World-Wide Volkswagen*, 444 U.S., at 297, 100 S.Ct. 559 (where "the sale of a product . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve . . . the market for its product in [several] States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise *has there been the source of injury to its owner or to others*" (emphasis added)). But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant. *See, e.g., Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.*, 647 F.2d 200, 203, n. 5 (C.A.D.C.1981) (defendants' marketing arrangements, although "adequate to permit litigation of claims relating to [their] introduction of . . . wine into the United States stream of commerce, . . . would not be adequate to support general, 'all purpose' adjudicatory authority").

A corporation's "continuous activity of some sorts within a state," *International Shoe* instructed, "is not enough to support the demand that the corporation be amenable to suits unrelated to that activity." 326 U.S., at 318, 66 S.Ct. 154. Our 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains "[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum." *Donahue v. Far Eastern Air Transport Corp.*, 652 F.2d 1032, 1037 (C.A.D.C.1981).

*Id.* at 927–28.

work in the “local” state is small in comparison to the entity’s overall work.<sup>59</sup>

Model Rule 5.5(b) is not one of jurisdiction, however. Model Rule 8.5 grants local disciplinary bodies authority over all attorneys who practice in the state, whether on a temporary basis or otherwise, regardless of the state in which they are licensed. All Model Rule 5.5 does is to delineate certain “safe harbors” for attorneys who are not licensed in the local jurisdiction but who wish to perform one or more legal functions in that jurisdiction.

Some have argued that the text of Model Rule 5.5(b) contains a narrow and circumscribed view of what is “systematic and continuous.” They assert that the phrase “for the practice of law” in Model Rule 5.5(b)(1)’s prohibition against establishing “an office or other systematic and continuous presence in this jurisdiction *for the practice of law*” requires that one read the italicized language as limiting the test of “systematic and

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59. *Id.* As was stated in *Hess v. Bumbo Int’l Tr.*, 954 F. Supp. 2d 590, 595–96 (S.D. Tex. 2013):

In fact, Bumbo’s contacts with Texas surpass those present in other post-*Goodyear* cases in which district courts have found general jurisdiction over foreign entities. *See, e.g., Ruben v. United States*, 918 F.Supp.2d 358, 360–61 (E.D.Pa.2013) (finding general jurisdiction over an architecture firm that had several high-profile projects in Pennsylvania, but had no office, bank accounts, or property in Pennsylvania and derived only 1% of its U.S. revenue there); *Ashbury Int’l Grp., Inc. v. Cadex Def., Inc.*, No. 3:11 CV00079, 2012 WL 4325183, at \*\*7–8 (W.D.Va. Sept. 20, 2012) (finding general jurisdiction based on defendant’s targeted solicitation of Virginia-based customers and the extent to which defendant profited from participating in the state’s market for military equipment). The facts of this case put it in comfortable company with those, and especially with *McFadden v. Fuyao N. Am., Inc.*, No. 10–CV–14457, 2012 WL 1230046 (E.D.Mich. Apr. 12, 2012), where the Eastern District of Michigan found general jurisdiction over a Chinese windshield manufacturer that had contracted with a nonparty wholesale customer (General Motors) in the forum over a number of years. *Id.* at \*5. General Motors’ buyer would create contracts with the manufacturer, which allowed GM plants throughout the United States to send purchase orders for windshields that were then shipped from China to the defendant’s subsidiary in Michigan. *Id.* at \*3. In *McFadden*, as in this case, the defendant regularly interacted with the in-forum customer concerning the management of the flow of goods into the forum, thus distinguishing that case from *Goodyear* and allowing a finding of continuous and systematic contacts. *Id.* at \*4 (“[The defendant] has done more than ‘merely placing a product into the stream of commerce destined for the United States.’”).

continuous presence” to those whose primary purpose is the practice of law. They argue that those who telecommute from a lengthy stay in a hotel or vacation home in another state are not engaging in a “systematic and continuous presence” for the practice of law but that rather the practice is incidental to the vacation. This same argument would support the notion that a lawyer who lives in one state where the attorney is not licensed and telecommutes every day to give advice to clients in the state where the lawyer is licensed is outside the scope of Model Rule 5.5(b)(1)’s prohibition. These contentions contain two underlying problems. First, given the fact that the comments to the Model Rules recognize that a “[p]resence may be systematic and continuous even if the lawyer is not physically present here,”<sup>60</sup> it is difficult to believe that actual physical presence in a state, when the lawyer is actually doing legal work from a hotel, vacation home, or actual home and billing for it, is not truly “presence.” Second, this type of argument fails to consider the impact of the legal work done. For example, should there be a difference between:

(i) a lawyer who spends a month in a state (in which the lawyer is not licensed) on a transactional deal and bills the client \$25,000 for the work performed while there, which the client is happy to pay;<sup>61</sup>

(ii) a lawyer who spends one day in a state (in which the lawyer is not licensed) on a transactional deal, performs a stupendous job for the client, and bills the client \$25,000 for the work performed there, which the client is happy to pay;

(iii) a lawyer staying at a hotel (in a state in which the lawyer is not licensed) with family for a month and billing clients \$5,000 for the work performed there;

(iv) a lawyer who has a vacation home (in a state in which the lawyer is not licensed) and bills clients three hours a month for legal work while there; and

(v) a lawyer who lives in State A (where she is not licensed), but all of her work is done through telecommuting to an office in State B (where she is licensed) and all of her work involves only the law of State B?

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60. MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 4 (AM. BAR ASS’N 2002).

61. Is there a real difference to the local market of attorneys between situations (i) and (ii)? Why, when the fee is the same and the results of the work are the same, does the current text of Model Rule 5.5(b) prohibit the actions of the lawyer who spends a month in the state on a transaction but permit the actions of a lawyer who spends a day in the state? *See generally id.* r. 5.5(b).

While these issues are explored further in this Article, suffice it to say that reading the phrase “for the practice of law” as a specific limitation on “systematic and continuous” requires delving into a mixture of objective factors, the subjective intention of the lawyer, and a consideration of each state’s own definition of the “practice of law.”<sup>62</sup>

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62. See *Opinion 2004-6*, PHILADELPHIA BAR ASSOCIATION (2004), <https://www.philadelphiabar.org/page/EthicsOpinion2004-6?appNum=2> [<https://perma.cc/J3JL-QZXP>] (holding that an immigration attorney whose practice is limited to immigration courts may have an office in Pennsylvania without being admitted as a member of the bar of that state, and this office may be “in a partnership with a Pennsylvania admitted attorney”); *Opinion 597*, TEXAS CENTER FOR LEGAL ETHICS (May 2010), <https://www.legalethictexas.com/Ethics-Resources/Opinions/Opinion-597> [<https://perma.cc/ATJ5-6U8Y>] (“Under the Texas Disciplinary Rules of Professional Conduct, a Texas lawyer may practice law as a member of a law firm with lawyers who are licensed only in jurisdictions other than Texas and who practice law in offices of the law firm located outside of Texas. The Texas lawyer does not improperly assist in the unauthorized practice of law when non-Texas lawyers, who are members of the law firm duly licensed in another jurisdiction and who normally practice in offices of the law firm outside of Texas, from time to time provide, in compliance with any applicable local rules and without themselves establishing a systematic and continuous presence in Texas, legal services in Texas as members of the law firm.”); ILLINOIS STATE BAR ASSOCIATION, OPINION NO. 12-09 (2012), <https://www.isba.org/sites/default/files/ethicsopinions/12-09.pdf> [<https://perma.cc/UB4N-DD7N>] (holding that a non-Illinois lawyer violates Rule 5.5(b) when the attorney lives in Illinois, is not licensed in Illinois but rather by another state and shares an office in Illinois with an Illinois-licensed attorney. This is so even if (a) the letterhead and marketing materials clearly indicate which attorney is licensed in which state, and (b) only the Illinois-licensed attorney handles matters in Illinois courts, conducts all Illinois real estate closings, and the firm clearly indicates which lawyer is licensed in which state); *Opinion #189: Unauthorized Practice of Law in Maine by Admittees of Foreign Jurisdiction*, STATE OF MAINE BOARD OF OVERSEERS OF THE BAR (Nov. 15, 2005), [https://www.mebaroverseers.org/attorney\\_services/opinion.html?id=87369](https://www.mebaroverseers.org/attorney_services/opinion.html?id=87369) [<https://perma.cc/DE8J-73EE>] (holding that a lawyer who is not licensed in Maine but has a Maine office with Maine-licensed attorneys violates Rule 5.5(b) even if the letterhead clearly indicates that the state of the lawyer’s license and the lawyer’s practice is “self-limited to legal services concerning ‘international and domestic energy and utility law’”); ALASKA BAR ASSOCIATION, ETHICS OPINION 2010-1 (2010), <https://alaskabar.org/wp-content/uploads/2010-1.pdf> [<https://perma.cc/4XSR-3H3D>] (holding that a lawyer living in Alaska and whose office is there but whose practice is restricted to immigration matters does not violate the Alaska rules if the “lawyer clearly advises his clients that he is not an Alaska lawyer and avoids advising regarding legal issues outside of immigration law”); OHIO BOARD OF PROFESSIONAL CONDUCT, OPINION 2016-9 (Dec. 9, 2016), <https://www.ohio>



The thrust of Model Rule 5.5(b) appears to be directed at preventing lawyers licensed in another state from informing the public that they are available to be retained “in this jurisdiction.” No rationale is given for this restriction in the comments, and it could be argued that Model Rule 5.5(b) is directed more at protecting lawyers “in this jurisdiction” from competition of equally competent lawyers from other jurisdictions, because not only does Model Rule 5.5(b)(2) warn lawyers not to “hold out to the public” that they are “admitted to practice law in this jurisdiction,” but also the comments to the rule note that Model Rule 7.1, which addresses advertising, must be consulted.<sup>63</sup>

### C. Model Rule 5.5(c)

Model Rule 5.5(c) deals with lawyers who “provide legal services on a temporary basis in this jurisdiction.” It is intended to be a contrast to

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[advop.org/wp-content/uploads/2017/04/Op\\_16-009.pdf](http://advop.org/wp-content/uploads/2017/04/Op_16-009.pdf) [https://perma.cc/927P-GKLQ] (stating in its Syllabus of Opinion: “An out-of-state lawyer who is admitted and in good standing in another United States jurisdiction, and also is admitted or authorized by law to appear before a federal court or agency in Ohio, may maintain an office or other systematic and continuous presence in Ohio. An out-of-state lawyer who is engaged in a federal practice and maintains a physical office in Ohio, may not provide legal services based on Ohio law to clients. The letterhead of a lawyer not licensed to practice law in Ohio, engaged in a federal practice, and who maintains an office or other systematic and continuous presence, may include the designation ‘Attorney at Law,’ but must identify the federal courts or agencies to which the lawyer is admitted or permitted to appear and include an appropriate disclaimer regarding his or her jurisdictional limitations.”); Sylvia Stevens, *A UPL Conundrum: Where to Draw the Boundaries on Out-of-State Practice*, OREGON STATE BAR (June 2007), <https://www.osbar.org/publications/bulletin/07jun/barcounsel.html> [https://perma.cc/7XL2-F3SH] (concluding that a New York lawyer is practicing law on a “systematic and continuous basis” in Oregon in violation of Rule 5.5 if he moves to Oregon, establishes an office in his Oregon home “to serve his New York firm’s clients on various legal matters” and “all correspondence is by e-mail through the New York firm’s server; the lawyer is also able to send other correspondence remotely to staff at the New York firm who then print it on the New York firm’s letterhead.” The article goes on to state: “Handling a matter involving New York law or New York residents is not the same as practicing ‘in’ New York. The jurisdiction in which a lawyer practices is determined by where she is physically located when performing the legal services. If the locus of the client or the applicable law determined where one was practicing, there would be no need for rules like RPC 5.5, which are exceptions to the general rule that a lawyer not licensed in a jurisdiction cannot provide legal services there.”).

63. MODEL RULES OF PRO. CONDUCT r. 5.5 cmt. 4 (AM. BAR ASS’N 2002).

lawyers whose presence in a state is “systematic and continuous” (Model Rule 5.5(b)), although the word “temporary” is not defined.

Model Rule 5.5(c) contains four subparts, two that apply to litigators and those representing clients in tribunal or other proceedings—Model Rule 5.5(c)(2) and (c)(3)—and two that apply to all lawyers, whether they are litigators or transactional lawyers—Model Rule 5.5(c)(1) and (c)(4).

The litigator provisions, 5.5(c)(2) and (c)(3), provide that temporary practice in the state is acceptable if a lawyer has obtained or “reasonably expects”<sup>64</sup> to receive pro hac vice status, or is authorized to appear in a tribunal proceeding “by other law.”<sup>65</sup> Likewise, even if pro hac admission is not required, temporary practice in an “arbitration, mediation, or other alternative dispute resolution proceeding”<sup>66</sup> is acceptable, but only if “the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.”<sup>67</sup>

The other two subparts of Model Rule 5.5—(c)(1) and (c)(4)—appear to implicitly assume that the law of the state where a lawyer is not licensed to practice is so strange and unique that a lawyer cannot competently provide services in that state. Model Rule 5.5(c)(1) hinges permissible temporary practice on associating with “a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter.” Model Rule 5.5(c)(4), the catch-all provision to be used when no other subpart of 5.5 applies, permits temporary practice only for matters that “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.” Comment 14 to Model Rule 5.5 makes it clear that the ABA considers this “reasonably related” test to encompass only two areas: (1) work that is part of a “body of federal, *nationally-uniform*, foreign, or international law,”<sup>68</sup> or (2) work that deals primarily with the law of the state in which the lawyer is licensed.<sup>69</sup> Thus, a lawyer who is a national expert in mergers and

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64. *Id.* r. 5.5(c)(2).

65. *Id.*

66. *Id.*

67. *Id.* r. 5.5(c)(3).

68. *Id.* r. 5.5(c)(1) cmt. 14 (emphasis added).

69. Comment 14 states:

Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer’s client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In

acquisitions, leasing, or insurance is not within the protected categories of Model Rule 5.5(c)(4), for none of these matters are nationally uniform, even though that lawyer may be among the country's most experienced practitioners in these areas, regardless of which state law applies to the matter.

*D. Model Rule 5.5 Has Not Been Uniformly Adopted by the States*<sup>70</sup>

Although the goal of the ABA's promulgation of the Model Rules is to create uniformity across the country, the fact that a number of states have not adopted the ABA's approach verbatim<sup>71</sup> shows both the limitations of the current text and the desire of many states to have a more flexible multijurisdictional test than the one set forth in the current version of Model Rule 5.5.<sup>72</sup> A detailed chart of each state's formulation of Model

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other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [*Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*].

*Id.*

70. See Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637 (2005).

71. See AMERICAN BAR ASSOCIATION, CPR POLICY IMPLEMENTATION COMMITTEE, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW (Feb. 20, 2020), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_5\\_5.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_5_5.pdf) [<https://perma.cc/U7PX-W4CM>].

72. See Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5—An Interim Assessment*, 43 AKRON L. REV. 729 (2010).

Rule 5.5 can be found on the website of the ABA's Center for Professional Responsibility.<sup>73</sup> The chart shows that 42 states have not adopted Model Rule 5.5 intact and that a number of states have made substantial changes to the overall Model Rule 5.5 treatment.

Among the more notable reformulations of Model Rule 5.5 are those of Colorado, Arizona, Nevada, New Jersey, and North Carolina.

The Colorado version of Model Rule 5.5 contains a cross-reference to Colorado Rule of Civil Procedure 205.1, which essentially is a limited "driver's license" provision for transactional lawyers. Under that rule, a lawyer in good standing in another state can practice in Colorado as long as the attorney is not a Colorado domiciliary, does not accept or solicit Colorado clients, does not represent to the public that the attorney is practicing law in the state, and has "not established a place for the regular practice of law in Colorado."<sup>74</sup> In other words, the Colorado rules protect transactional lawyers but prohibit telecommuting because if the lawyer has "established domicile in Colorado," the rule's protection does not apply.

Arizona takes a different approach. Out-of-state lawyers "may provide legal services in Arizona that exclusively involve federal law, the law of

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73. See AMERICAN BAR ASSOCIATION, CPR POLICY IMPLEMENTATION COMMITTEE, *supra* note 71.

74. Colorado Rule of Civil Procedure 205.1 states, in part:

(1) Eligibility. An attorney who meets the following conditions is an out-of-state attorney for the purpose of this rule:

- (a) The attorney is licensed to practice law and is on active status in another jurisdiction in the United States;
- (b) The attorney is a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice;
- (c) The attorney has not established domicile in Colorado; and
- (d) The attorney has not established a place for the regular practice of law in Colorado from which the attorney holds himself or herself out to the public as practicing Colorado law or solicits or accepts Colorado clients.

(2) Scope of Authority. An out-of-state attorney may practice law in Colorado except that an out-of-state attorney who wishes to appear in any state court of record must comply with C.R.C.P. 205.3 concerning pro hac vice admission and an out-of-state attorney who wishes to appear before any administrative tribunal must comply with C.R.C.P. 205.4 concerning pro hac vice admission before state agencies. An out-of-state attorney who engages in the practice of law in Colorado pursuant to this rule shall be deemed to have obtained a license for the limited scope of practice specified in this rule.

COLO. R. CIV. P. 205.1.

another jurisdiction, or tribal law,”<sup>75</sup> but these lawyers must “advise the lawyer’s client that the lawyer is not admitted to practice in Arizona, and must obtain the client’s informed consent to such representation.”<sup>76</sup>

Nevada’s version of Model Rule 5.5 provides that the “lawyer who is not admitted in this jurisdiction, but who is admitted and in good standing in another jurisdiction of the United States, does not engage in the unauthorized practice of law in this jurisdiction when,”<sup>77</sup> among other things, the lawyer’s work in the state is on an “occasional basis” and “is acting with respect to a matter that is incident to work being performed in a jurisdiction in which the lawyer is admitted”<sup>78</sup> or “is acting with respect to a matter that is incident to work being performed in a jurisdiction in which the lawyer is admitted, provided that the lawyer is acting in this jurisdiction on an occasional basis and not as a regular or repetitive course of business in this jurisdiction.”<sup>79</sup>

New Jersey’s version of Model Rule 5.5 specifically addresses transactional lawyers and permits a lawyer from outside of the state to engage in the negotiation “of the terms of a transaction in furtherance of the lawyer’s representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice”<sup>80</sup> as long as the attorney consents in writing to a New Jersey Supreme Court form concerning service of process; however, even if the form is not signed, the attorney “shall be deemed to have consented to such appointment.”<sup>81</sup>

75. ARIZ. RULES OF PRO. CONDUCT r. 5.5(d) (2014), available at <https://www.azbar.org/for-lawyers/ethics/rules-of-professional-conduct/> [<https://perma.cc/BTX4-AHLC>].

76. *Id.* r. 5.5(f).

77. NEV. RULES OF PRO. CONDUCT r. 5.5 (2006), available at <https://www.leg.state.nv.us/courtrules/RPC.html> [<https://perma.cc/9RS9-V2EX>].

78. *Id.* r. 5.5(b)(3)–(4).

79. *Id.* r. 5.5(b)(4).

80. N.J. RULES OF PRO. CONDUCT r. 5.5(b)(3)(i) (2009), available at <https://www.njcourts.gov/attorneys/assets/rules/rpc.pdf> [<https://perma.cc/2EYA-U7NU>].

81. *Id.* r. 5.5(c)(3). New Jersey Rule 5.5(c)(3)–(4) states:

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to paragraph (b) above shall: . . . (3) consent in writing on a form approved by the Supreme Court to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer’s firm that may arise out of the lawyer’s participation in legal matters in this jurisdiction, except that a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above shall be deemed to have

North Carolina's formulation of Model Rule 5.5 maintains the Model Rule's prohibition on establishing an office or engaging in "systematic and continuous" presence, but it does away with the Model Rule's discussion of temporary practice and instead focuses on whether the work "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 and the lawyer's services are not services for which pro hac vice admission is required."<sup>82</sup>

While the rules of these five states (Colorado, Arizona, Nevada, New Jersey, and North Carolina) differ both from Model Rule 5.5 and each other, they share to one degree or another the Model Rule's antipathy to out-of-state lawyers advising in-state clients of the law of that state, even though there is no express prohibition against a lawyer doing so while sitting at the lawyer's desk in a state where the lawyer is licensed.

Not every rule that affects lawyers, however, has the same concern. The American Law Institute's Restatement (Third) of the Law Governing Lawyers takes a different approach, as discussed in Section VII, below.

#### IV. THE MYTH OF THE STAY-AT-HOME LAWYER<sup>83</sup>

As far back as 1938, noted legal scholar Karl Llewellyn wrote that the "problem of unauthorized practice of law is a problem of using the processes of the law to define and protect a monopoly."<sup>84</sup> He stated, "The Bar complains of 'overcrowding.' This means, in horse-sense terms, 'not enough income to go around comfortably.'"<sup>85</sup> He also recognized that parochialism played a role: just because a local lawyer is trained in local law does not necessarily mean that the local lawyer is the best one to give the client the best, or even the most competent, representation. Llewellyn

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consented to such appointment without completing the form; (4) not hold himself or herself out as being admitted to practice in this jurisdiction . . . .

82. N.C. RULES OF PRO. CONDUCT r. 5.5 (2016), available at <https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-55-unauthorize-d-practice-of-law/> [<https://perma.cc/QC8A-SKLW>].

83. See Charles W. Wolfram, *Sneaking around the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665 (1995). Professor Wolfram was also the Reporter for the Restatement (Third) of the Law Governing Lawyers. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (AM. L. INST. 2000).

84. K. N. Llewellyn, *The Bar's Troubles, and Poulitices — and Cures?*, 5 LAW & CONTEMP. PROBS. 104 (1938).

85. *Id.* at 109.

noted that the advice to “[c]onsult your neighborhood lawyer’ will not work. Either he does not exist, or else too often he is hardly the man to consult.”<sup>86</sup> Scholarly criticism about multijurisdictional practice restrictions continues to assert that “the real motivation, one strongly suspects, has to do with the economic threat posed for in-state lawyers”<sup>87</sup> by out-of-state lawyers.<sup>88</sup>

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86. *Id.* at 122.

87. *Id.*

88. *Cf.* RICHARD ZITRIN, CAROL M. LANGFORD & NINA W. TARR, *LEGAL ETHICS IN THE PRACTICE OF LAW* (3d ed. 2007). “It is generally recognized that New Jersey tries to be tough on bar admissions to discourage lawyers from New York and Pennsylvania, both bigger neighbors with large legal centers, from invading their courts en masse.” *Id.* at 854; *see also* Quintin Johnstone, *Multijurisdictional Practice of Law: Its Prevalence and Its Risks*, 74 *CONN. BAR J.* 343 (2000). Commenting on remarks made during a symposium held in Connecticut on multijurisdictional practice:

From the views expressed at the symposium there appear to be sharp differences of opinion within the Connecticut bar on existing legal restrictions on multijurisdictional law practice, differences that apparently also prevail in all states. Many small-firm lawyers, it seems, strongly favor the legal restrictions now in effect and are pleased with the post-*Birbrower* possibilities of stricter enforcement of multijurisdictional practice laws. These lawyers are especially concerned about the prospect of greater out-of-state competition from any cutback of existing legal restrictions on multijurisdictional practice. This concern may be greater among small-firm Connecticut lawyers near the New York border but Connecticut is geographically such a small state that this “border” vulnerability seemingly extends throughout the state. Enhanced competition, however, is not the only reason many small-firm lawyers oppose liberalizing current legal restrictions on multijurisdictional law practice. They are aware of shoddy legal work that too often occurs when out-of-state lawyers, lawyers who often lack sufficient knowledge of Connecticut law, come into the state to handle matters governed by Connecticut law. Complex real estate transactions were cited as among the kinds of matters where this too often occurs.

From what was said at the symposium, those most opposed to existing legal restrictions on multijurisdictional law practice are house counsel. They argue that the current law is an anachronism, given the national and international character of today’s economy. As one house counsel commentator said, the existing legal restrictions on multijurisdictional practice are so unrealistic as to fail the “you must be kidding test.” Moreover, he added, if these laws are strictly enforced in Connecticut, his company might consider moving its home office out of the state. The large-firm lawyers in attendance at the symposium were less vehement in their opposition but they too consider the existing law anachronistic

Despite the restrictions, multijurisdictional practice is an almost everyday occurrence for many transactional lawyers and for every lawyer who telecommutes. As one court pointed out more than a decade ago: “In the information age, geographic boundaries are dissipating and the nature of legal practice is changing. Attorneys, who are licensed to practice on a state-by-state basis, now draft and circulate documents as e-mail attachments across traditional jurisdictions.”<sup>89</sup>

Today it is not only documents that are emailed across the country for signature locally. Forty-seven states have enacted the Uniform Electronic Transactions Act (UETA).<sup>90</sup> It ensures that “electronic signatures, electronic records, and contracts based or memorialized in electronic formats”<sup>91</sup> are enforceable and cannot be rejected “merely because of their electronic nature.”<sup>92</sup> The Federal E-SIGN act<sup>93</sup> provides enforceability of electronic signatures under certain conditions, allows for electronic

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and in need of extensive modification. So the Connecticut bar is badly split on the matter. Moreover, small-firm support of the present law may intensify as more small-firm lawyers are alerted to the possible adverse consequences for them if the law is modified. And numerically, small-firm lawyers greatly outnumber the large-firm and house counsel lawyers in Connecticut and in other states, which can make them powerful adversaries in any contest over legal change.

*Id.* at 353–54.

89. *Richards & O’Neil, LLP v. Conk*, 774 N.E.2d 540, 549 (Ind. Ct. App. 2002) (Najam, J., concurring).

90. See *Electronic Transactions Act*, UNIFORM LAW COMMISSION (1999), <https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034> [<https://perma.cc/2KMX-32SU>].

91. *Guidance Note Regarding the Relationship Between the Electronic Transactions Act and Federal E-Sign Act, Blockchain Technology, and “Smart Contracts,”* UNIFORM LAW COMMISSION (2019), <https://www.uniformlaws.org/viewdocument/guidance-note-regarding-the-relatio?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034&tab=librarydocuments> [<https://perma.cc/4CQ9-ARBJ>].

92. *Id.*

93. 15 U.S.C. §§ 7001–31.



notarization,<sup>94</sup> and specifies the circumstances in which state enactments of the uniform version of UETA can supersede ESIGN rules.<sup>95</sup>

Model Rule 1.1 requires that a lawyer “shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>96</sup> The comments to Model Rule 1.1 require competence in the “relevant technology.”<sup>97</sup> Most law firms have dispensed with the bulk of their physical law libraries—vast areas of the office formerly filled with dusty books<sup>98</sup>—and almost all lawyers employ online electronic legal research giving them access to all the cases, statutes, and regulations in every state at the touch of a finger.<sup>99</sup> Gone are the days when

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94. See generally 15 U.S.C. § 7001(g). ESIGN Act § 7001(g) states:

If a statute, regulation, or other rule of law requires a signature or record relating to a transaction in or affecting interstate or foreign commerce to be notarized, acknowledged, verified, or made under oath, that requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record.

95. See *id.* § 7002.

96. MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS’N 1983).

97. See *id.* r. 1.1 cmt. 8.

98. See, e.g., Mark C. Palmer, *The Great Shrinking, Expanding Law Library, 2CIVILITY* (Aug. 31, 2016), <https://www.2civility.org/expanding-law-library/> [<https://perma.cc/Q3MG-TKDJ>]; see also Wilhelmina Randtke & Stacy Fowler, *The Current State of E-Books in U.S. Law Libraries: A Survey*, 108 *LAW LIBR. J.* 361 (2016); Tina M. Brooks, Franklin L. Runge & Beau Steenken, *The Future of Law Libraries*, 80 *BENCH & BAR* 18 (2016), available at [https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1030&context=law\\_facpub\\_pop](https://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1030&context=law_facpub_pop) [<https://perma.cc/TCB7-J762>].

99. For example, see an article written in 2002 before the development of the iPhone, iPad, and the ubiquity of smart phones and tablet computers: Christine R. Davis, *Approaching Reform: The Future of Multijurisdictional Practice in Today’s Legal Profession*, 29 *FLA. ST. U. L. REV.* 1339–40 (2002), stating:

The legal profession has entered a time in which lawyers have access to a wealth of information through the rapid increase in technological development. For example, a Florida lawyer vacationing in Europe can pull out his Palm Pilot and conduct research for a case pending back home simply by plugging the device into his cellular phone. Another lawyer in New York can access the Internet and research just about any area of the law in any part of the world. With relative speed, he can learn how to write a will in Oregon or draft articles of incorporation in California. A lawyer can easily contact a friend or partner in another state via e-mail or telephone and obtain advice regarding the law in another

a lawyer had a difficult time figuring out the laws in another jurisdiction. In fact, those materials have been online for more than two decades.<sup>100</sup>

Today transactions are multistate and multinational. One might question whether clients are better served by having a plethora of lawyers in each state where they might do business and bearing the costs of this corps of attorneys<sup>101</sup> as opposed to being able to consult with a single

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state. A lawyer can now be on the other side of the country but make it to a local court in a matter of hours after preparing for her case on a laptop in the airplane.

Also see an article written almost a decade before the Davis article, Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715, 733–34 (1995), which states:

Computer-assisted research has revolutionized multijurisdictional research. With the flip of a computer switch, a modem, and a password, lawyers and law students can now access cases, statutes, and regulations from the fifty states, the District of Columbia, Guam, Puerto Rico and the Virgin Islands within seconds. Furthermore, this material is equally accessible by subject matter (e.g., business, commercial, criminal justice, malpractice, tort law, etc.). Accessible subject-matter organization subtly diminishes the importance of state and local law distinctions, in favor of a more generic approach to legal reasoning.

Computer-assisted research brings a whole new set of efficiencies to multijurisdictional practice. No longer is it necessary to maintain voluminous collections of statutes and cases or to schedule all day trips to the nearest courthouse or bar association library. Furthermore, computer-accessed materials are updated more frequently than advance sheets and pocket parts, thereby offering greater assurances of timeliness.

100. See Daly, *supra* note 99; Wolfram, *supra* note 83, at 674 (“In former times, it could be difficult to gain access to adequate research materials about the foreign state’s law. Now those materials are on-line.”).

101. Cf. Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135 (2004). While the article is focused on the rules concerning formal admission to the bar, the article makes a point pertinent here:

Rule changes are not only desirable to ensure constitutionality, but they are also important for a legal system that has become too expensive for ordinary people to access. By enlarging the number of lawyers who can supply legal services, the recommended reforms will help to reduce the cost of legal services and make these services more widely available. They would also enable clients to have more freedom in the selection of legal representatives. Put simply, current rules do clients no favors by excessively cabining legal work within the borders of a single state.

*Id.* at 178.

lawyer who, although licensed to practice in only one state, has by dint of learning and experience mastered the relevant provisions nationwide that might affect the client's business. One might ask whether concern should be focused on making sure the lawyer rendering the advice is competent to give it rather than focusing either on where the lawyer sits when giving the advice or where the lawyer is licensed. Because many lawyers have reputations that extend beyond the borders of the state in which they are licensed,<sup>102</sup> would clients be better served by being able to rely upon these lawyers' experience and knowledge rather than being compelled to have to hire an additional lawyer in another state to "help" that experienced lawyer?

#### V. THE *BIRBROWER* CASE

The myth of the stay-at-home lawyer was dispelled, and the quiet world of transactional lawyers flying under the regulatory radar into states where they were not licensed to practice was upended, in 1998 when the California Supreme Court decided *Birbrower v. Superior Court*.<sup>103</sup> *Birbrower* and its progeny have raised the specter of transactional lawyers being disciplined for helping clients keep costs down in multistate transactions. Although *Birbrower* arose under California's rules that have since been changed,<sup>104</sup> a look at the case is nonetheless instructive.

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102. See *Finnegan v. Squire Publishers, Inc.*, 765 S.W.2d 703 (Mo. Ct. App. 1989). In this case, the court held that the statute of limitations barred an out-of-state attorney's claim of defamation. In the course of the opinion, however, the court stated:

This court will not adopt the assumption that an attorney's reputation can only be injured in the state where the attorney is licensed to practice law. . . . Damage to a professional's reputation can occur in a state other than that in which he is professionally licensed, especially when the metropolitan area within which he practices his profession extends into two states. A professional's reputation can be damaged in the opinion of his neighbors and community members, his out-of-state clients or potential clients, as well as members of the general public in the state in which the libel per se is published.

*Id.* at 706.

103. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Ct.*, 949 P.2d 1 (Cal. 1998).

104. California adopted the numbering system of the Model Rules, but its Rule 5.5 is a simple statement which its Comment states is to be read as prohibiting "lawyers from practicing law in California unless otherwise entitled to practice law in this state by court rule or other law." CAL. RULES OF PROF. CONDUCT r. 5.5

*Birbrower* involved the law firm of Birbrower, Montalbano, Condon & Frank located in a New York City suburb.<sup>105</sup> A client sued the firm, comprised of New York-licensed lawyers, for malpractice. The firm counterclaimed for attorney's fees for work it had performed in both New York and California.<sup>106</sup>

The California Supreme Court succinctly stated the question presented: "We must decide whether an out-of-state law firm, not licensed to practice law in this state, violated [California law] when it performed legal services in California for a California-based client under a fee agreement stipulating that California law would govern all matters in the representation."<sup>107</sup> Given the court's phrasing of the question, it was little surprise that the court held that the firm engaged in the unauthorized practice of law "in" California and that, as a law firm consisting of lawyers

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cmt. 1 (2018), available at <https://www.calbar.ca.gov/Portals/0/documents/rules/New-Rules-of-Professional-Conduct-5.pdf> [<https://perma.cc/D3TR-XW5C>]. In addition, Rule 9.48 of the California Rules of Court, entitled "Nonlitigating attorneys temporarily in California to provide legal services," states:

(c) Permissible activities

An attorney who meets the requirements of this rule and who complies with all applicable rules, regulations, and statutes is not engaging in the unauthorized practice of law in California if the attorney:

- (1) Provides legal assistance or legal advice in California to a client concerning a transaction or other nonlitigation matter, a material aspect of which is taking place in a jurisdiction other than California and in which the attorney is licensed to provide legal services;
- (2) Provides legal assistance or legal advice in California on an issue of federal law or of the law of a jurisdiction other than California to attorneys licensed to practice law in California; or
- (3) Is an employee of a client and provides legal assistance or legal advice in California to the client or to the client's subsidiaries or organizational affiliates.

CAL. R. CT. r. 9.48 (JUDICIAL COUNCIL OF CALIFORNIA 2020), available at [http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9\\_48](http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_48) [<https://perma.cc/V3YQ-YFU8>] (last visited Mar. 17, 2020).

105. See *Birbrower*, 949 P.2d 1. As of the date this Article was written, (a) the firm is now known as Montalbano, Condon & Frank and lists fewer than 15 attorneys on its webpage, *Attorneys*, MONTALBANO, CONDON, & FRANK, P.C., <https://www.mcfnylaw.com/Attorneys/> [<https://perma.cc/8UZ6-UBGN>] (last visited Mar. 17, 2020), and (b) Leonard Birbrower is now the senior partner in a New York personal injury firm whose website lists fewer than 10 attorneys, *Attorney Profiles*, BELDOCK & SAUNDERS, P.C., <https://bandbnnylaw.com/attorney-profiles/> [<https://perma.cc/434R-YHNQ>] (last visited Mar. 17, 2020).

106. *Birbrower*, 949 P.2d at 3.

107. *Id.* at 2.

not admitted in California, it was not permitted to collect fees for services constituting the practice of law in California. Even though California rules have been changed and the current formulation of Model Rule 5.5(c)(4) has obviated the ethical concern that out-of-state lawyers had in handling arbitrations and mediations, the facts in *Birbrower* neatly frame the modern-multijurisdictional quandary transactional lawyers continue to face.

Starting in 1986, the firm represented Kamal Sandhu, an individual, and his solely owned New York corporation, ESQ Business Services (ESQ-NY). Kamal Sandhu's brother, Iqbal Sanhu, was "the vice president" of ESQ-NY.<sup>108</sup> In 1990, Kamal requested that the firm review a proposed software marketing and development agreement between ESQ-NY and Tandem Computers,<sup>109</sup> a Delaware corporation with its principal place of business in California.<sup>110</sup> The signed agreement had a California choice-of-law provision,<sup>111</sup> and it required that disputes arising under the agreement be resolved by arbitration under the American Arbitration Association rules.<sup>112</sup> The contract also called for the application of California law and arbitration in California.

After ESQ-NY signed the agreement, a second business (ESQ-Cal) was incorporated in California with Iqbal as "a principal shareholder."<sup>113</sup> In 1991, ESQ-Cal consulted with the firm's lawyers about the Tandem agreement, and, in 1992, ESQ-NY and ESQ-Cal "jointly hired" the firm to represent them in their dispute with Tandem. The retention was through a signed contingency fee agreement in New York.<sup>114</sup>

The firm's lawyers traveled to California (Tandem's principal place of business) on more than one occasion to meet with ESQ-Cal's accountants and representatives, as well as with Tandem's representatives, in order to negotiate resolution of the dispute.<sup>115</sup> The *Birbrower* dissent noted that the firm's lawyers also met with officers of ESQ-NY in its trips to California.<sup>116</sup>

The firm initiated arbitration in California with the American Arbitration Association,<sup>117</sup> but the parties agreed to settle the matter prior

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108. *Id.* at 14 (Kennard, J., dissenting).

109. *Id.*

110. *Id.* at 3.

111. *Id.*

112. *Id.* at 14 (Kennard, J., dissenting).

113. *Id.*

114. *Id.*

115. *Id.* at 3.

116. *Id.* at 14 (Kennard, J., dissenting).

117. *Id.* at 3.

to the arbitration hearing.<sup>118</sup> Before that settlement, however, the firm and its clients renegotiated their fee agreement from a contingency fee,<sup>119</sup> but the clients refused to pay the firm's bill. In 1994, ESQ-Cal and Iqbal sued the firm for malpractice,<sup>120</sup> and the firm counterclaimed for the revised fee.<sup>121</sup> Iqbal and ESQ-Cal then amended their complaint to add ESQ-NY as a plaintiff.<sup>122</sup>

The California Supreme Court found that the firm had engaged in the unauthorized practice of law in California and could not collect fees rendered for services in California. The majority stated that the firm had engaged in "extensive practice" in California<sup>123</sup> in order to assist ESQ-Cal in resolving a dispute between two companies with their principal places of business in California, ESQ-Cal and Tandem. The full facts of the case, as augmented by the dissent, however, demonstrate that ESQ-Cal was created after its sister corporation (ESQ-NY) signed the initial agreement and that Iqbal principally owned ESQ-Cal, to whom the firm was introduced in New York by his involvement with his brother Kamal's company, ESQ-NY. Moreover, Iqbal and ESQ-Cal added ESQ-NY, a long-term New York client of the firm, as a plaintiff in the amended malpractice action, and ESQ-NY was a defendant in the firm's cross-complaint.

The facts in *Birbrower* demonstrate a modern-multijurisdictional quandary that exists today. The initial representation—negotiating the agreement on behalf of New Yorker Kamal and his solely owned New York corporation with a California-based company—is the kind of matter that attorneys take on in the usual and customary business of representing clients in their home state. When the New York-based law firm incorporated ESQ-Cal as a California entity, this action appeared to be covered by the text of current Model Rule 5.5(c)(4), for it arose out of and was "reasonably related" to the firm's practice in New York and with its prior work for Kamal. The third step of the case is the one that the *Birbrower* majority found most troubling—the New York firm's work in representing both ESQ-NY and ESQ-Cal in trying to resolve a dispute. Even though the firm had drafted the agreement in New York on behalf of

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118. *Id.* at 3–4.

119. *Id.* at 3–4. The original contingency fee called for payment of up to \$5 million (1/3 of the \$15 million amount sought by the clients); the re-negotiated amount was a flat fee of \$1 million. *Id.*

120. *Id.* at 14 (Kennard, J., dissenting).

121. *Id.* at 4.

122. *Id.* at 14 (Kennard, J., dissenting).

123. *Id.* at 7.

its New York clients and was trying to resolve a dispute related to that agreement, the California Supreme Court held that the firm had engaged in the unauthorized practice of law and was not entitled to collect any of its fees generated from practicing law in California.

The commentary on whether *Birbrower* represents the correct approach<sup>124</sup> or not<sup>125</sup> is voluminous, but the text of current Model Rule 5.5(c)(3) and (4) seems to protect lawyers today if these circumstances

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124. See, e.g., Matthew P. Vafidis et al., *Birbrower Was Right: Foreign Attorneys Are Entitled to Appear in International Commercial Arbitrations Held in California*, 70 DISP. RESOL. J. 51 (2015); Jack Balderson, Jr., *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court: A Defensible Outcome, But a Striking Example of the Need to Reform Unauthorized Practice of Law Provisions*, 36 SAN DIEGO L. REV. 871 (1999); William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501, 1508 (2001). An article by Quintin Johnstone states, “What the lawyers in the *Birbrower* case had done was similar to what has been a common practice throughout the United States when lawyers represent clients in matters requiring action in a state where the lawyers are not admitted.” Johnstone, *supra* note 88, at 343; see also *Heller v. Circle K Stores, Inc.*, No. B175801, 2005 WL 1532346 (Cal. Ct. App. June 30, 2005); *Colmar, Ltd. v. Fremantlemedia N. Am., Inc.*, 801 N.E.2d 1017, 1023 (Ill. App. Ct. 2003); *Dispatch & Tracking Solutions, LLC v. City of San Diego*, No. 2009-00087082, 2016 WL 1407739 (Cal. Ct. App. Apr. 8, 2016) (“We see no reason why an out-of-state person or entity with sufficient contacts with California to be sued in California is any less deserving of the protection from unauthorized practice of law in California than a California citizen.”); *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016) (“Colorado attorney negotiating via e-mail with Minnesota attorney regarding Minnesota judgment and Minnesota clients was unauthorized practice of law in Minnesota.”).

125. See, e.g., *Richards & O’Neill, LLP v. Conk*, 774 N.E.2d 540 (Ind. Ct. App. 2002) (Najam, J., concurring).

After all, attorneys from the firm assisted Cullman in the purchase of Day Dream, an Indiana corporation. And in doing so, attorneys spent two days in Indiana reviewing documents and communicated regularly throughout the process with Day Dream’s shareholders. In addition, Richards & O’Neil attorneys drafted an “opinion letter” for Day Dream shareholders regarding various aspects of the proposed purchase. And after disputes arose surrounding the subsequent purchase, Richards & O’Neil appeared *pro hac vice* in Indiana courts to defend a lawsuit by Day Dream and, on another occasion, came to Indiana to interview witnesses and reviewed documents in connection with a pending New York arbitration. These contacts with Indiana do not amount to the unauthorized practice of law.

*Id.* at 549.

arise in a state that has adopted the Model Rules. *Birbrower* illustrates, however, the trap for the unwary that exists for transactional lawyers any time they deal with either (1) an out-of-state client, even when that out-of-state client was an entity that was created after the lawyer became involved and that was closely connected to the firm's in-state client, which also was party to the dispute, or (2) an out-of-state matter for an in-state client.

#### VI. THE MODEL RULES AND THE RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS TAKE SIMILAR APPROACHES TO MULTIJURISDICTIONAL PRACTICE, BUT THEY DIFFER IN RESULT

There are two competing national formulations on multijurisdictional practice, Model Rule 5.5 and ALI's Restatement § 3.<sup>126</sup> Each serves a different purpose.

The Model Rules reflect the American Bar Association's view of the appropriate restrictions on the practice of law. It is ostensibly forward-looking, in that the ABA theoretically is not bound by previous rules or theories.<sup>127</sup> It is statutory in nature, filled with mandates that lawyers

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126. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (AM. L. INST. 2000). It states:

A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:

- (1) at any place within the admitting jurisdiction;
- (2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency; and
- (3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) or (2).

127. *See supra* Part III for a description of some of the changes to Model Rule 5.5 over the last five decades, as a discussion of the evolution of the ABA rules, from the 1908 Canon of Ethics through the present formulation of the Model Rules is beyond the scope of this Article. While it is true that each iteration of the rules built on the last versions, transforming what some have said were "rules of ethics as internal professional norms to rules of ethics as public law," suffice it to say that the language of today's Model Rules is statutory. Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 926 (2002). As the Part 14 of the Model Rules Preamble states, the Model Rules contain language cast as imperatives ("shall" and "shall not"), along with permissive provisions ("may"). Hortatory statements (about what a lawyer "should" do) are confined to the Comments and "do not add obligations to the



“shall” follow, actions that lawyers “shall not” take, and actions that lawyers “may” take. By contrast, the Restatement attempts to encapsulate the majority view of the jurisprudence at the time the Restatement was written; it attempts not to make policy choices but rather to reflect what the existing law is and should be, as informed by appropriate analysis.<sup>128</sup>

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Rules but provide guidance for practicing in compliance with the Rules.” MODEL RULES OF PRO. CONDUCT Preamble & Scope (AM. BAR ASS’N 1983).

128. See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (AM. L. INST. 2000).

The Foreword to the Restatement by the ALI’s late Director Emeritus, Geoffrey C. Hazard, Jr., stated:

*The scope of this Restatement goes well beyond the scope of the ethics codes in all jurisdictions . . . .* The Restatement addresses issues of civil liability of lawyers—legal malpractice—whereas the ethics codes carefully skirt the relationship between ethical standards and malpractice liability. The Restatement recognizes that lawyers can be civilly liable to third parties—“nonclients”—whereas the ethics codes recognize very limited responsibilities in that direction. Perhaps most important, the Restatement recognizes what everyone involved in the ethics codes knows (but which the codes properly do not address), namely that the remedy of malpractice liability and the remedy of disqualification are practically of greater importance in most law practice than is the risk of disciplinary proceedings.

*There is another important relationship between the Restatement and the ethics codes. This is the relationship between decisional law and statutory law. The Restatement draws heavily on decisional law, while the ethics codes in almost all jurisdictions have the form and force of statutes, or at least administrative regulation.*

*Id.* at Foreword (emphasis added). In former ALI Director Herbert Wechsler’s seminal article on the American Law Institute, he argued that a Restatement should consider not only the current state of the jurisprudence, but in areas where the jurisprudence is unsettled or non-existent, a Restatement should consider all the facts that a common law court would. See Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U. L. J. 185, 191–92 (1968) (“[I]n our system of case law any statement that the law is such and such is more than an empirical finding that the decisions have so held. It implies a normative assertion as to what should now be held, if and when the question is presented . . . . [This] permits the Restatements to attempt to be what they been and are in fact, a modest but essential aid in the improved analysis, clarification, unification, growth and adaptation of the common law.”); see also John G. Fleming, *The Restatements and Codification*, 2 JEWISH L. ANN. 108, 115 (1979) (“It must be conceded at the outset that the Restatements, even more than statutory Codes, attract the common criticism that they do not project into the future or even use the

Both Model Rule 5.5 and Restatement § 3 permit multijurisdictional practice, but they approach it from different angles. The primary thrust of the Model Rule focuses on whether the practice in another state is “systematic and continuous” (in which case it is broadly prohibited) or whether it is temporary (in which case it is permitted, but only within limited restrictions). The Model Rules permit a transactional attorney to work in a jurisdiction where the lawyer is not licensed as long as the activities “arise out of or are reasonably related” to the lawyer’s practice in the licensing state.<sup>129</sup> While Restatement § 3 uses this identical phrase in determining when “extra-judicial” practice is permissible, it does so without any requirement in the black letter of § 3 that the work be temporary,<sup>130</sup> although Restatement § 3’s comment (e) notes the fact that,

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opportunity of reforming the law.”). Professor Charles Wolfram, the Reporter for the Restatement of the Law Governing Lawyers, described the process underpinning the Restatement of the Law Governing Lawyers:

It may help at the outset to attempt some understanding of what a Restatement aims to be—at least in the view of the ALI. Important in this respect is the history of the Institute, which was established with the idea implied by the name of its founding committee, “The Committee on the Establishment of a Permanent Organization for the Improvement of the Law.” The ALI’s certificate of incorporation claims that “[t]he particular business and objects of the society are educational, and are to promote the clarification and simplification of the law and its better adaptation to social needs, [and] to secure the better administration of justice.” Notwithstanding the rather clear implication that the work of this organization would consist of more than meekly parroting existing law, the ALI perennially witnesses struggles over the concept of a Restatement.

Often heard in debates is the cry that the ALI should hew to the majority of decisions. (This is often asserted without regard to the fact that only a handful of jurisdictions has passed on the point in question.) Opposed, of course, is *the view—which we have striven to follow in the Restatement of The Law Governing Lawyers—that a substantive position in a Restatement is warranted as “restating” the law if it can be rested on the support of at least one decision in an American jurisdiction.*

Charles W. Wolfram, *Bismarck’s Sausages and the ALI’s Restatements*, 26 HOFSTRA L. REV. 817, 818–19 (1998) (emphasis added) (footnotes omitted).

129. MODEL RULES OF PRO. CONDUCT r. 5.5(c)(4) (AM. BAR ASS’N 2002).

130. THOMAS MORGAN, *LAWYER LAW: COMPARING THE ABA MODEL RULES OF PROFESSIONAL CONDUCT WITH THE ALI RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* (2005). It states:

The Restatement undertook to describe the practical rule that had evolved over time, saying that a lawyer could not open an office or seek clients in a jurisdiction in which the lawyer was unlicensed, but the

for transactional lawyers, “there is no equivalent of temporary admission pro hac vice”<sup>131</sup> for counseling or advising clients in a state where the lawyer is not licensed. Comment (e) also mentions “occasional, temporary in-state services.”<sup>132</sup> Thus, there is a tension between the black letter of § 3, which says nothing about temporary practice, and the comments to the section.

*A. Comparing the Factors in the Comments to Model Rule 5.5 and Restatement § 3*

While neither Model Rule 5.5(c)(4) nor Restatement § 3 provides a list of factors to determine if the lawyer’s activities “arise out of or are otherwise reasonably related” to a lawyer’s practice in the licensing jurisdiction in its black letter provisions, the comments to each set forth criteria that can be considered. The comparison of the factors in Model Rule 5.5 Comment 14 and Restatement § 3 Comment (e)<sup>133</sup> demonstrates their similarity, apart from Model Rule 5.5’s requirement that the work be “temporary”:

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lawyer could undertake work that required temporary activity in such a jurisdiction.

*Id.* at 11. As can be seen from the black letter of Restatement § 3, however, there is no requirement that the work be temporary.

131. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (AM. L. INST. 2000).

132. *Id.*

133. *Id.* There are five unnumbered factors in comment e. For comparison purposes, the first and fifth factors have each been divided in two.

<b>Restatement</b>	<b>Model Rules</b>
1) “[W]hether the lawyer’s client is a regular client”	“The lawyer’s client may have been previously represented by the lawyer”
2) Whether a new client “is from the lawyer’s home state, has extensive contacts with that state, or contacted the lawyer there”	The client “may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted”
3) “[W]hether a multistate transaction has other significant connections with the lawyer’s home state”	“The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction [in which the lawyer is admitted]”
4) “[W]hether significant aspects of the lawyer’s activities are conducted in the lawyer’s home state”	“[S]ignificant aspects of the lawyer’s work might be conducted in that jurisdiction”
5) “[W]hether a significant aspect of the matter involves the law of the lawyer’s home state”	“[A] significant aspect of the matter may involve the law of that jurisdiction”
6) Whether “the activities of the client involve multiple jurisdictions”	“[T]he client’s activities or the legal issues involve multiple jurisdictions”
7) Whether “the legal issues involved are primarily either multistate or federal in nature”	“[T]he services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law”

Transactional or telecommuting lawyers looking for clarity or protection in their normal, everyday multijurisdictional practices can find little solace in the “black letter” of either Model Rule 5.5 or Restatement § 3. Although the illustrations to this portion of the Restatement provide what may be illusory solace, there appears to be a disconnect between the “black letter” of the Restatement and the reality of lawyer conduct that the authors of the Restatement envisioned the rule allowing because “they arise out of or otherwise reasonably relate to the lawyer’s practice in a state of admission.”

*B. Potentially Differing Results in the Restatement and Model Rules under the Same Set of Facts*

The differences in the approach to multijurisdictional practice between the Restatement and the Model Rules become apparent when one analyzes the factual situation set forth in Illustration 5 of Comment (e) to Restatement § 3 to determine what the outcome would be under the Model Rules as opposed to the Restatement. This Illustration involves an Illinois lawyer whose client has moved to Florida and needs a codicil to a will the lawyer drafted. Implicit in the illustration is that the lawyer prepares the codicil in Illinois and travels to Florida only for the signing. While the Illinois lawyer is in Florida having the codicil signed, the existing client introduces the lawyer to another individual who wants the lawyer to prepare a similar estate planning arrangement for her. The Restatement’s Illustration concludes that it is permissible for the Illinois lawyer to assist not only the existing client who has moved to Florida, but also the new Florida-resident client whom the lawyer met while in Florida representing the existing client. The Illustration notes that is acceptable if the lawyer prepares the “similar estate arrangement” in Illinois, “frequently conferring by telephone and letter” with the new client.<sup>134</sup> Comparing and

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134. *Id.* § 3 cmt. e, illus. 5. The illustration reads, in full:

5. Lawyer is admitted to practice and has an office in Illinois, where Lawyer practices in the area of trusts and estates, an area involving, among other things, both the law of wills, property, taxation, and trusts of a particular state and federal income, estate, and gift tax law. Client A, whom Lawyer has represented in estate-planning matters, has recently moved to Florida and calls Lawyer from there with a request that leads to Lawyer’s preparation of a codicil to A’s will, which Lawyer takes to Florida to obtain the necessary signatures. While there, A introduces Lawyer to B, a friend of A, who, after learning of A’s estate-planning arrangements from A, wishes Lawyer to prepare a similar estate arrangement for B. Lawyer prepares the necessary documents and

contrasting how the Restatement deals with Illustration 5 and how Model Rule 5.5 would treat the same situation illustrates the ambiguities and problems that emerge.

First, consider the Illinois lawyer in Illustration 5 continuing to provide estate planning services to the former Illinois resident who has now moved to Florida. Under the Restatement's approach, the Illinois lawyer may continue to serve the existing client, even though the client has moved to Florida and the estate plan will be governed by Florida, rather than Illinois, law. One of the Restatement factors is met because the Illinois lawyer, by serving the existing client in Florida, furthers the client's interest in preserving the client's choice of counsel and, likely, receiving efficiently provided service.<sup>135</sup> Likewise, under Model Rule 5.5(c)(4), the lawyer's work on the codicil is "reasonably related" to the lawyer's Illinois practice even though Florida law may control the codicil; after all, Illinois is where the lawyer did the work for the client on the original will and estate plan.

The Restatement's Illustration takes the position that no unauthorized practice occurs if the lawyer takes documents to Florida to obtain the necessary signatures, and Model Rule 5.5(c)(4) may protect the lawyer in this circumstance. Assuming that the lawyer is fully informed on Florida law issues that pertain to the codicil, as well as the impact of Florida law on an Illinois will, the comments to Model Rule 5.5 appear to provide a shield for the Illinois lawyer because the attorney providing these limited legal services is doing so on a temporary basis and in a fashion that does "not create an unreasonable risk to the interest" of the client or the public.<sup>136</sup>

Additionally, another of the Restatement factors arguably is met because Illustration 5 seems to imply that the lawyer does most of the work in Illinois and only travels to Florida to obtain the client's signature on the codicil. On the other hand, although federal tax law may be involved, which is a factor under the Restatement as well as under Comment 14 to

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conducts legal research in Lawyer's office in Illinois, frequently conferring by telephone and letter with *B* in Florida. Lawyer then takes the documents to Florida for execution by *B* and necessary witnesses. Lawyer's activities in Florida on behalf of both *A* and *B* were permissible.

135. The word "efficiently" is used here rather than "less expensive"; we do not offer an opinion or guess whether the Illinois lawyer's fees would be more or less than that charged by a Florida lawyer for the same result, but we do think it is highly likely that a new Florida lawyer would take some time evaluating *A*'s estate planning needs.

136. MODEL RULES OF PRO. CONDUCT. r. 5.5 cmt. 5 (AM. BAR ASS'N 2002).

Model Rule 5.5, this alone may not be enough to create a safe harbor, for while federal law may have to be considered in the drafting of the codicil, Illustration 5 does not specify that the client's primary motive for the codicil is tax planning.<sup>137</sup>

The treatment of the new Florida client, however, is different under the Restatement and Model Rule 5.5. In Illustration 5, the Illinois attorney meets the new client in Florida, where the new client lives and where the lawyer is not admitted to practice. Although obtaining new clients is not covered by the black letter of the Restatement, and while the Illustration does not explicitly state whether the lawyer "sought" the new client in Florida (or whether the new client, upon being introduced to the lawyer by the existing client, then sought legal advice),<sup>138</sup> the Restatement approves of the lawyer's doing work for the new client and even traveling back to Florida with the documents to be signed. The Illustration does not explain why this is permitted, especially when the black letter of Restatement § 3 is silent on this matter. In looking at the § 3 comments to try to ascertain what factors might be a play, federal tax and estate law cannot be the principal basis on which to decide the issue, for it is unclear whether such law is the key motivating or determining factor here.<sup>139</sup> Further, where the

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137. For example, if the purpose of the codicil is merely to change a trustee or add additional specific bequests, it is unlikely that federal tax and estate law would play any role in advising the client or drafting the document.

138. The Illustration is not clear whether the Illinois lawyer has sought a new client or whether a new client has sought the lawyer. Under the Illustration, it is the existing client who introduces the new client to the lawyer. The point is that, when the potential new client says something like, "You did such a great job for my friend. I was wondering whether you'd do my estate plan," the Illinois lawyer has the clear choice of whether to engage in a conversation that might lead to an attorney-client relationship or to respond that, while the lawyer is flattered, the potential client could be served by one of the undoubtedly hundreds, or even thousands, of Florida lawyers who do high-quality estate planning work and who intimately know Florida law, thus permitting the lawyer to avoid worrying about potentially running afoul of unauthorized practice restrictions.

139. For example, see Nancy S. Freeman, *Brave New World: New Challenges in Florida Trusts and Estates Practice*, in STRATEGIES FOR TRUSTS AND ESTATES IN FLORIDA: LEADING LAWYERS ON ANALYZING RECENT DEVELOPMENTS AND NAVIGATING THE ESTATE PLANNING PROCESS IN FLORIDA 1, 2 (2013 ed.), 2013 WL 9715, which notes that Florida's Power of Attorney Act has significant changes from the Uniform Power of Attorney Act and that there are traps for the unwary under the Florida Trust Code. Moreover, see Eric Gurgold, *Practicing Trusts and Estate Law in Florida: A Unique Experience*, in STRATEGIES FOR TRUSTS AND ESTATES IN FLORIDA, LEADING LAWYERS ON ANALYZING RECENT

Illinois lawyer physically sits while working on the new client's estate plan appears to be irrelevant. Why is it any more permissible for an Illinois lawyer to represent a new Florida client on a one-time basis because the lawyer's seat is warming a chair in Marion rather than Miami? Moreover, what if the Illinois lawyer has picked up a new client on the first trip to Florida, and, on the second trip back to Florida to have the estate plan for the new client signed, is introduced to clients three, four, and five, and then does work for each and travels from Illinois for each to have the documents signed? Nothing in the Restatement or its Comment (e) appears to prohibit this, and the scattered statements elsewhere in the Comment about "temporary" services are never expressly considered in Illustration 5.

The Restatement's commentary does attempt to bring its goal back to client needs by pointing out that a rule requiring an out-of-state lawyer to work with local counsel likely causes the client to bear the added expense of retaining and educating the local counsel. It concludes that this "would make such required retention unduly burdensome."<sup>140</sup> This observation, of course, has everything to do with the lawyer in Illustration 5 continuing to provide estate planning services to the first client, who has moved from Illinois to Florida. On the other hand, it seems to have little relevance to the lawyer providing estate planning services for the new Florida client who neither had any previous tie to the Illinois lawyer nor even knew of that lawyer's existence.

Applying Model Rule 5.5 to the facts of this Illustration appears to lead to a different result when one considers the issue of the new Florida client. It is clear that when the lawyer meets with the new client in Florida and discusses estate planning, the lawyer is practicing law in a state where the lawyer is not licensed. Comment 2 to Model Rule 5.5 notes that the "definition of the practice of law is established by law and varies from one jurisdiction to another." Florida did not adopt Model Rule 5.5 verbatim, and the language of Florida's version of Model Rule 5.5(c)(4) differs from

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DEVELOPMENTS AND NAVIGATING THE ESTATE PLANNING PROCESS IN FLORIDA 1, 4 (2014 ed.), Westlaw 1234520, noting:

Florida's homestead laws give the estate planning practitioner another unique area of practice. If a client owns his or her principal residence in his or her own name and is a Florida resident, the principal residence will most likely be his or her homestead. The Florida Constitution and the Florida Statutes restrict how a homestead could be devised and define how it is devised if the homestead is not devised as authorized by the constitution. It often comes as a surprise to the client that they are not free to dispose of their homestead in any manner that they wish.

140. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (2000).



the Model Rule.<sup>141</sup> Moreover, in a case strikingly similar to the facts in Restatement Illustration 5, the Florida Supreme Court held that a retired Illinois lawyer who prepared a will for a Florida resident was engaged in the unlawful practice of law.<sup>142</sup> But, even under Model Rule 5.5, none of the seven factors in Model Rule 5.5 Comment 14 are present here, and one may would be hard pressed to say that the Illinois lawyer's activities on behalf of the new Florida client would not violate Model Rule 5.5's prohibitions.

#### VII. FOUR HYPOTHETICALS ILLUSTRATE THE PROBLEMS WITH MODEL RULE 5.5

As can be seen, a transactional lawyer who relies on the Restatement to service new clients in a state where the lawyer is not licensed may find that disciplinary authorities enforcing Model Rule 5.5 may not agree with the result of Restatement Illustration 5 or even find it persuasive authority. The fact situation of Restatement § 3, Illustration 5 is not the only one transactional lawyers face, and the results (as noted above) may differ depending on whether one applies the analysis of the Restatement's Illustration or the Model Rule and its comments. Leaving aside the Restatement, however, the following hypotheticals, which reflect the real world of transactional and telecommuting lawyers, illustrate additional problems with the current language of Model Rule 5.5.

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141. A redline of Florida's Rule 4-5.5(c)(4), showing how it differs from the Model Rule, follows:

(4) are not within subdivisions (c)(2) or (c)(3), and

*(A) are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice, or*

*(B) arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. (emphasis added)*

Compare R. REG. FLA. BAR 4-5.5(c)(4) (2002), with MODEL RULES OF PRO. CONDUCT. r. 5.5(c)(4) (AM. BAR ASS'N 2002).

142. Fla. Bar v. Larkin, 298 So. 2d 371, 372-73 (Fla. 1974). The facts in *Larkin* go beyond those in the Restatement, however, in that Larkin had become a resident of Florida at the time he wrote the will, as well as an antenuptial agreement, and that he had "received no direct compensation" for his activities. The Court did not sanction Larkin because he had cooperated, admitted his acts, and promised not to do it again. *Id.* at 373.

*A. The Nationally Known Lawyer, Part 1*

Hypothetical #1. Eleanor Expert is a nationally known practitioner and one of the country's leading attorneys in negotiating and drafting commercial leases in shopping centers. Eleanor handles matters involving shopping center leasing all over the country.

Eleanor is licensed only in State A. Eleanor, however, has done numerous deals in states B, C, and D, all initially with the assistance of local counsel. None of this work is either systematic or continuous.

As time goes by and Eleanor handles more and more deals in these states, but not systematically or continuously, she finds that she has acquired and researched the applicable laws of those states and knows them as well as, if not better than, local counsel.

Three new deals come in, one from New Client B in State B, one from New Client C in State C, and one in New Client D in State D. While certain aspects of federal law are triggered in each of these matters, each primarily involves state law and contractual rights.

The new clients do not have offices in State A, where Eleanor has her office. Each of these matters is unique to each state. Each client wants Eleanor to handle the drafting of each commercial lease. They want her to travel out of state from her home office to handle each deal. All the negotiations about the leases and related documents will take place in states where Eleanor is not licensed. Each client wants to keep costs down and does not want "local" counsel involved other than as minimally necessary, such as for the recordation of the lease or extract of the lease.

Under Model Rule 5.5, Eleanor cannot handle these matters under 5.5(c)(3)'s exception for matters that "are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice," because none of these matters are related to Eleanor's practice in State A.

It might be argued that as long as Eleanor handles these matters in States B, C, and D from her office in State A, she is doing something related to her practice in State A, because the clients from out of state sought assistance from her by contacting her in the State A in light of her expertise. This argument, however, may not protect Eleanor when she travels to States B, C, and D to do the negotiations, because these are new clients, and nothing about these matters concerns State A or "arise[s] out of or [is] reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." Eleanor's expertise has resulted from her nationwide work, not her limited work in State A. Further, as *Birbrower* and its progeny show, simply doing work from your "home" office may not be a sufficient defense to a charge of engaging in the

practice of law in another state.<sup>143</sup> It may be hard to argue that Eleanor is not practicing law in these other states when she is there at the clients' requests, handling negotiations, and billing the appropriate client for her activities.

Likewise, Model Rule 5.5(c)(1)'s exception involving work "undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter" does not protect Eleanor in these circumstances, for the local counsel's work in handling recording likely does not meet the "active" participation test.

Model Rule 5.5's requirements that Eleanor must satisfy to avoid having her activities labeled as "unauthorized practice" actually work against the client's interest, for the only way that Eleanor can comply with Model Rule 5.5 is to get local counsel more deeply involved in the matter, even though neither she nor the client needs that active involvement. Adding more involvement by local counsel merely adds costs to the transaction without aiding the client; all it does is protect Eleanor's license under the current Model Rules.

The arguments advanced in favor of having a local lawyer's involvement are usually twofold. The first is that it is important to disciplinary authorities in a state to be aware when an out-of-state lawyer is rendering legal services in the local area. This assertion, however, cannot withstand scrutiny, for even when a litigator obtains a court's issuance of a *pro hac vice* order, there is no necessary notice to disciplinary authorities. Having a local lawyer involved on a non-litigation transaction does not provide any notice to disciplinary authorities. Moreover, under Model Rule 8.5, a lawyer is subject to jurisdiction where the practice of law occurs, regardless of whether disciplinary authorities have been given advance notice that the lawyer is present in the jurisdiction.<sup>144</sup>

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143. See *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Ct.*, 949 P.2d 1, 5–6 (Cal. 1998). As *Birbrower* stated:

[O]ne may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person automatically practices law "in California" whenever that person practices California law anywhere, or "virtually" enters the state by telephone, fax, e-mail, or satellite.

*Id.* at 5–6.

144. Model Rules of Professional Conduct rule 8.5(a) provides:

The second argument is that a local lawyer's involvement assures competency; however, as many commentators have noted for decades, neither competency nor expertise in a particular area of the law is inextricably linked with passing a state's bar exam as a prerequisite for obtaining a local license.<sup>145</sup> Moreover, 34 states, the District of Columbia, and the Virgin Islands now utilize the Uniform Bar Examination, which by its definition does not include consideration of local laws.<sup>146</sup>

As this Hypothetical #1 illustrates, requiring in-state lawyer involvement does not increase client protection but only increases client costs. A client who desires to hire an out-of-state lawyer should not be required to also engage a local lawyer to "actively participate" in the matter, as mandated by Model Rule 5.5(c)(1), as long as the out-of-state lawyer's usual and customary practice makes that person the best and most cost-effective attorney to handle the transaction. Of course, in such

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

MODEL RULES OF PRO. CONDUCT. r. 8.5(a) (AM. BAR ASS'N 2002).

145. See, e.g., Llewellyn, *supra* note 84; see also James W. Jones et al., *Reforming Lawyer Mobility – Protecting Turf or Serving Clients*, 30 GEO. J. LEGAL ETHICS 125, 142 (2017) ("Moreover, in an age of increasing lawyer specialization, it is clearly true that lawyers trained and experienced in particular substantive areas of the law are likely to be more competent to handle matters in their fields of specialization, even in states where they are not licensed, than are non-specialist lawyers physically located in such states. An experienced real estate lawyer from New York, for example, is more likely to be able competently to handle a complex real estate financing project in Chicago than a family law practitioner who happens to be licensed in Illinois."); Wolfram, *supra* note 83, at 678 ("[It] is preposterous to think that when one of the gurus of the mergers and acquisitions bar, Joseph Flom or Martin Lipton, emerges from an airplane in a jurisdiction far from New York City that they modestly submit themselves to the "supervision" of whatever locally-admitted lawyer their firms hypothetically might have engaged in an effort to comply with local restrictions on unauthorized practice. Nor is it evident why even mere journey-person lawyers should learn to heel to a local lawyer's obedience school supervision.").

146. See *infra* Section IX.A for a more detailed discussion of this issue. Information on the Uniform Bar Examination can be found on the website of the National Conference of Bar Examiners. NCBE, <http://www.ncbex.org/exams/ube/> [<https://perma.cc/F5DT-TGXR>] (last visited Apr. 27, 2020).

instances, the attorney may need to make the client aware that the lawyer of the client's choosing is not licensed in that state.

*B. The Nationally Known Lawyer, Part 2*

Hypothetical #2. The facts are the same as in Hypothetical #1, except that the new clients contact Eleanor during a commercial leasing convention being held in State X, a state where Eleanor is not licensed to practice and where none of the new clients has any business.

While in State X, Eleanor clears conflicts with her office, generates engagement agreements on her laptop, has each of the new clients sign, and then has private meetings with each of the clients during the convention. At these private meetings, she gives each client legal advice on how to proceed in each of their states. She keeps track of her time and bills the clients for the time spent giving them advice in State X.

Under Model Rule 5.5, Eleanor has an additional problem. By having the new clients sign engagement agreements in State X and giving advice to each while she is in State X, Eleanor is clearly practicing law in State X. The fact that she bills them for this time only confirms that she is practicing law in State X. Furthermore, all the problems noted in Hypothetical #1 still exist.

*C. The Nationally Known Lawyer, Part 3*

Hypothetical #3. The facts are the same as in Hypothetical #1, but now, Eleanor, in order to avoid problems with States A, B, and C, contacts a recently licensed law school graduate in each state. Each of these lawyers maintains a solo practice and none of them has anywhere near Eleanor's experience.

Eleanor tells each of these recently licensed lawyers, "I'd like for you to actively participate in this matter in your state. I'll pass all the documents by you to see if you have any comments or suggestions, and I'll arrange with my client to directly engage you for such purposes."

Each newly licensed lawyer readily agrees.

Eleanor has now complied with the express requirements of Model Rule 5.5(c)(1), because her work in each of the three states in which she is not licensed is "undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter." Yet, one might ask who is being protected by this. Certainly not the client; the client only gets increased costs.<sup>147</sup>

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147. It is, of course, possible that one of the recently licensed law school graduates might catch something Eleanor missed, but it is unlikely any client will

Moreover, while one might argue that implicit in Model Rule 5.5 is a requirement that the local lawyer be competent, nothing in Hypothetical #3 suggests that newly licensed lawyers cannot be competent. All Model Rule 1.1 requires for competence is “legal knowledge, skill, thoroughness, and preparation.” Moreover, Comment (1) to Model Rule 1.1 indicates that it is appropriate to “associate or consult with a lawyer of established competence in the field in question.” Eleanor is the attorney with the established competence.<sup>148</sup> Therefore, nothing prohibits Eleanor’s actions here.

If “competence” is not state-specific—and it is not, because both the bar-admission-by-motion and the *pro hac vice* rules essentially acknowledge that lawyers not licensed in a state are perfectly competent to handle matters in states where they did not take the bar examination<sup>149</sup>—then requiring local lawyers on multistate transactions cannot be justified as a client protection tool.<sup>150</sup>

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be willing to pay for an additional lawyer’s review on the possibility that the expert lawyer might miss something.

148. As noted by William T. Barker in *Extrajurisdictional Practice by Lawyers*, often “the out-of-state lawyer is the real expert or, at least, the lawyer to whom the client primarily looks.” 56 BUS. LAW. 1501, 1508 (2001).

149. See Jones et al., *supra* note 145, at 142–43 (“In the United States today, forty-one states and the District of Columbia permit the admission of out-of-state lawyers to practice in their jurisdictions on motion and without the requirement that they pass the local bar examination under some circumstances. This fact in itself underscores the point that lawyers in all U.S. jurisdictions are competent professionals who need not demonstrate specialized knowledge about the substantive law or procedures of a particular state in order to practice there in a way that serves the best interests of their clients. The same point is confirmed in practices across the country relating to *pro hac vice* admission of out-of-state litigators.”). See also Anthony E. Davis, *Multijurisdictional Practice by Transactional Lawyers – Why the Sky Is Really Falling*, 11 PROF. LAW. 1, 24 (2000), in which Davis relates the tribulations of his trying to be admitted by motion to practice in Colorado after having practiced law for 20 years in New York, being a barrister in the United Kingdom, and having received his law degrees from Oxford University, which boasts the oldest continuous law faculty in the English speaking world. Davis’ application was rejected ostensibly because he did not graduate from an “accredited law school.”

150. For a strongly worded view of the local barriers erected to multijurisdictional practice, see Davis, *supra* note 149, at 25:

In short, the states’ efforts to justify maintaining local regulation of lawyers in order to protect the public are, in today’s economy, so obviously irrelevant to meaningful enforcement of national standards that they no longer even serve as a credible mask for their true purpose, namely the preservation of local monopoly. I am not advocating the

*D. The Lawyer Telecommuting from Her Out-of-State Residence*

Hypothetical #4. Tammy Tech, a technologically adept lawyer, is employed by a firm whose offices are in State A. Tammy is licensed in State A but lives in State B where she is not licensed. Tammy does not want to move to State A and is happy to work from her home, State B. She has set up her computer so that it appears just as it would if she were in the office in State A. She does not advertise in State B, does not solicit clients in State B. She only performs the kind of work that she would do if she were in the office in State A, and her work involves the law of only State A and of federal law.

Even though Tammy's work would be perfectly permissible if she both lived and worked in State A, where she is licensed, the "black letter" text of Model Rule 5.5 would appear to prohibit her from telecommuting. She lives in State B, so she has a "systematic and continuous presence"<sup>151</sup> in State B, and she is practicing law while living full time in State B; therefore, her work in State B is not "temporary."<sup>152</sup>

The issue of telecommuting is one that was not envisioned when the current version of Model Rule 5.5 was adopted, and some courts have struggled on how to interpret it. For example, in a situation similar to Tammy's, in *In Re Jones*<sup>153</sup> the Ohio Supreme Court dealt with a Kentucky-licensed lawyer whose Kentucky-based firm merged with an Ohio-based firm. After the merger, Ms. Jones applied to be admitted in Ohio but, before her application was acted on, she both transferred to the merged firm's Cincinnati office and became domiciled in Ohio. She continued to practice Kentucky law from her Cincinnati office and while living in Ohio. The Ohio Board of Commissioners on Character and Fitness considered the issue and found that Jones was engaged in the "unauthorized practice of law"<sup>154</sup> because it did "not believe that her

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abolition of regulation in favor of some purely capitalistic *caveat emptor* principle; rather, I suggest that what is needed - urgently - is a new regulatory and enforcement structure that bears a real relationship to national and global law practice. The emperor's old clothes have fallen apart, and instead of trying to mend them we must consider whether we need to replace the emperor.

151. MODEL RULES OF PRO. CONDUCT r. 5.5(b)(1) (AM. BAR ASS'N 2002).

152. *Id.* r. 5.5(c).

153. *In re Jones*, 123 N.E.3d 877 (Ohio 2018).

154. *Id.* at 878.

practice of law has been temporary as contemplated by”<sup>155</sup> Ohio’s version of Model Rule 5.5(c).<sup>156</sup>

The four-justice majority of the Ohio Supreme Court disagreed and found no violation of Rule 5.5, but only because the attorney had applied for admission first and then moved to the state.<sup>157</sup> Had she not applied for

155. *Id.*

156. The text of Ohio’s Rule 5.5(c), redlined against the Model Rule, follows:

(c) A lawyer who is admitted in another United States jurisdiction, ~~and not disbarred or suspended from practice in any jurisdiction,~~ *is in good standing in the jurisdiction in which the lawyer is admitted, and regularly practices law may provide legal services on a temporary basis in this jurisdiction that if one or more of the following apply:*

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

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

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

(4) ~~are not within paragraphs (c) (2) or (c) (3) and~~ *the lawyer engages in negotiations, investigations, or other nonlitigation activities that* arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

OHIO PROF. COND. R. 5.5(c) (2007), *available at* <http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf> [[https://perma.cc/J948-2R\\_JU](https://perma.cc/J948-2R_JU)] (emphasis added).

157. *Jones*, 123 N.E.3d at 881:

A lawyer who applies for admission without examination to the Ohio bar in accordance with Gov.Bar R. I(9) and thereafter provides legal services from Ohio in the jurisdiction where that applicant is already admitted to practice law pending the resolution of that application is providing services on a temporary basis because those services are transitory and will continue only until the application is resolved.

Here, the record establishes that Jones satisfied the requirements of Prof.Cond.R. 5.5(c)(2). She is a lawyer who is admitted in Kentucky, is in good standing in that jurisdiction, regularly practices law, and is providing legal services from an office in Ohio, and those services are reasonably related to pending or potential proceedings before tribunals



admission prior to moving to the state, the result would have been different, for the *Jones* court distinguished Ms. Jones's situation from a similar case involving another Kentucky lawyer who moved to Ohio and practiced Kentucky law while in Ohio but who waited years before applying to the Ohio Bar for admission without examination.<sup>158</sup>

A concurring justice in *Jones*, joined by two other justices, stated that he reached the same result, but on different grounds. He would have found that, under the express text of Ohio Rule 5.5(c), Ms. Jones's practice was not temporary, but that the rule itself was unconstitutional under both the federal and state constitutions, stating that "Ohio does not have any legitimate government interest in regulating an attorney who does not practice in Ohio courts or provide Ohio legal services."<sup>159</sup>

In contrast to the result in *Jones*, an "informal ethics opinion" by the Missouri Bar concluded that an Illinois-licensed attorney could not practice Illinois law from an office in Missouri while attempting to become licensed in Missouri.<sup>160</sup>

in Kentucky, where she is authorized by law to appear in such proceedings. Although Jones began practicing Kentucky law from Ohio more than two years ago, after she had applied for admission prior to moving to Ohio, her practice from Ohio pending her application is temporary because the continuation of her practice depends on the resolution of her application.

158. The case that *Jones* distinguished was *In re Egan*, 90 N.E.3d 912 (Ohio 2017).

159. *Jones*, 123 N.E.3d at 885. The concurring opinion also stated:

I would conclude that as applied to an out-of-state attorney who is not practicing in Ohio courts or providing Ohio legal services, Prof.Cond.R. 5.5(b)(1) violates Article I, Section 1 of the Ohio Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. As applied to such an attorney, the rule violates Article I, Section 1 both because it does not "bear[ ] a real and substantial relation to the public health, safety, morals, or general welfare" and because it is "arbitrary" and "unreasonable," *Williams*, 88 Ohio St.3d at 524, 728 N.E.2d 342. Similarly, applying the rule to such an attorney violates the Fourteenth Amendment because it does not bear a rational relationship to any discernable state interest. See *Washington v. Glucksberg*, 521 U.S. 702, 728, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 491, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

*Id.* at 886–87 (DeWine, J., concurring).

160. See *Opinion Number: 20030078 – Rule Number 4-5.5*, available at <http://www.mobar.org/mobarforms/opinionResult.aspx?OpinionNumber=20030078> [https://perma.cc/85XQ-GQR6] (last visited Oct. 4, 2019), which states in full:

In December 2020, the ABA's Standing Committee on Ethics and Professional Responsibility released Formal Opinion 495 on "lawyers working remotely."<sup>161</sup> The opinion states that lawyers "may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted" as long as four conditions are met: (i) "the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law," (ii) they do not hold themselves out as being licensed to practice in the local jurisdiction," (iii) they "do not advertise or otherwise hold out as having an office in the local jurisdiction," and (iv) they "do not provide or offer to provide legal services in the local jurisdiction."<sup>162</sup>

While the opinion provides solace to many lawyers who telecommute, the fact remains that the black letter provisions of Model Rule 5.5(b)(1) seem to prohibit a lawyer from having a "systematic and continuous presence" in the jurisdiction for the practice of law without being licensed in that jurisdiction.

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QUESTION: Attorney is licensed in Illinois and attempting to become licensed in Missouri. Attorney's office is located in Missouri. (1) Can Attorney practice Illinois law from the office in Missouri? (2) Can Attorney conduct any business for the Illinois practice from the Missouri office? If so, what activities can be performed from the Missouri office? (3) Can Attorney be included on Missouri office letterhead indicating attorney is licensed in Illinois only? (4) Can Attorney perform the functions of a paralegal or any other work with respect to cases pending in Missouri?

ANSWER: Questions 1. and 4. No, Attorney may not engage in conduct that constitutes the practice of law, while physically located in Missouri. However, Attorney may function as a law clerk or paralegal, as long as Attorney is not held out as an attorney in connection with those functions.

Question 2. Yes, Attorney may conduct business for the Illinois practice from the Missouri office, as long as Attorney's conduct does not constitute the practice of law and Attorney does not state or imply that Attorney is licensed in Missouri.

Question 3. Yes.

Attorney could practice law in Missouri while waiting to take the Bar exam if Attorney obtains a temporary license under Missouri Supreme Court Rule 8.115.

161. ABA, FORMAL OPINION 495 (Dec. 16, 2020), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/aba-formal-opinion-495.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-495.pdf) [<https://perma.cc/BA6W-B9HL>].

162. *Id.*

To return to the facts of Hypothetical #4, under both Ohio's *Jones* decision and the Missouri ethics opinion, the lawyer in the hypothetical, Tammy Tech, could lose her license because, although none of her work involves the laws of State B where she resides, she has not applied to be admitted to practice in that state. Tammy may seek to rely on Formal Opinion 495, but individual states may choose to accept or reject the rationale of an ABA Formal Opinion.<sup>163</sup> All of this leads one to wonder, in the words of one commentator, what the justification is for a rule "prohibiting that attorney from providing legal advice to individuals in the jurisdiction where he is not admitted about the law where he is admitted, or even counseling individuals about the law in a jurisdiction where he is not admitted, provided that proper disclosures are made about the attorney's qualifications."<sup>164</sup>

Ethics opinions issued by Utah<sup>165</sup> and Florida<sup>166</sup> take a different position than Ohio and Missouri. Under the Utah opinion, if Tammy permanently resides in Utah, she is exempt from the unauthorized practice restrictions if she does not open an office in Utah and does not hold herself out as practicing Utah law.<sup>167</sup>

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163. See, for example, *In re* Rule Amendments to Rules 5.4(a) & 7.2(c) of the Rules of Pro. Conduct, 815 A.2d 47, 52 (R.I. 2002), which held that the Rhode Island's "Ethics Advisory Panel's Advisory Opinion No. 2000-5 did not err in refusing to adopt ABA Formal Opinion 93-374 as controlling, and instead opted to consider as controlling our state statute, our Court rules, and our promulgated opinions." See also *Rico v. Mitsubishi Motors, Corp.*, 171 P.3d 1092, 1098 (Cal. 2007) (stating that "an 'ABA formal opinion does not establish an obligatory standard of conduct imposed on California lawyers'").

164. Michael E. Rosman, *Is It Time to Revisit the Constitutionality of Unauthorized Practice of Law Rules?*, 20 FEDERALIST SOC'Y REV. 74, 79 (2019).

165. UTAH STATE BAR, ETHICS ADVISORY OPINION NO. 19-03 (May 14, 2019), <https://www.utahbar.org/wp-content/uploads/2019/05/19-03.pdf> [<https://perma.cc/J3GU-345U>] [hereinafter UTAH OPINION].

166. THE FLORIDA BAR STANDING COMMITTEE ON THE UNLICENSED PRACTICE OF LAW, PROPOSED ADVISORY OPINION NO. 2019-4 (Aug. 17, 2020), <https://www-media.floridabar.org/uploads/2020/07/Complete-FAO-2019-4-Opinion-1.pdf> [<https://perma.cc/P4T5-RE8Z>] [hereinafter FLORIDA OPINION].

167. See UTAH OPINION, *supra* note 165. The Utah Opinion states the issue as: If an individual licensed as an active attorney in another state and in good standing in that state establishes a home in Utah and practices law for clients from the state where the attorney is licensed, neither soliciting Utah clients nor establishing a public office in Utah, does the attorney violate the ethical prohibition against the unauthorized practice of law? *Id.* at 1. In reaching its position that the answer is "no," the Utah opinion cites the concurrence in *In re Jones*:

The attorney sought the Florida opinion who had limited his practice to federal intellectual property law and was admitted in New York, in New Jersey, and before the United States Patent and Trademark Office.<sup>168</sup> In reaching its conclusion that the unauthorized practice of law rules did not bar his living in Florida and continuing his normal practice, the opinion shows that that the subject matter of the practice appeared to be irrelevant as long as neither Florida law nor Florida clients were involved.<sup>169</sup>

If Tammy Tech were residing in Utah or Florida, her license to practice law would be safe, but the telecommuting hypothetical need not be limited to those attorneys residing permanently in a state where they are not licensed. There are lawyers who take extended vacations out of state and work from the road. There are those who have vacation homes where they spend weeks or months at a time. In both instances, the distinction that Model Rule 5.5 creates between practicing law on visits that are “temporary” versus those that are “systematic and continuous” may create a trap for the unwary, unless a state accepts the reasoning and result of ABA Formal Opinion 495.

VIII. MODEL RULE 5.5’S MULTIJURISDICTIONAL PRACTICE RESTRICTIONS HAVE BEEN UNDERCUT BY THE UNIFORM BAR EXAM, BY ADMISSION-WITHOUT-EXAMINATION RULES, BY RECIPROCITY RULES, AND BY THE LACK OF SPECIFICITY IN CLE REQUIREMENTS

Given the structure of Model Rule 5.5 and its distinction between practices that are “systematic and continuous” as opposed to “temporary,” it is strained, to say the least, to contend that the purpose of the multijurisdictional-practice restriction and its exceptions arise from the

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The question posed here is just as clear as the question before the Ohio Supreme Court: what interest does the Utah State Bar have in regulating an out-of-state lawyer’s practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none.

*Id.* at 6–7 (citing *In re Jones*, 123 N.E.3d 877 (Ohio 2018)).

168. See FLORIDA OPINION, *supra* note 166, at 2–3.

169. *Id.* at 5–6.

It is clear from the facts in Petitioner’s request and his testimony at the public hearing that Petitioner and his law firm will not be establishing a law office in Florida. It is equally clear that Petitioner will not be establishing a regular presence in Florida for the practice of law; he will merely be living here.

The facts raised in Petitioner’s request, quite simply, do not implicate the unlicensed practice of law in Florida. Petitioner is not practicing Florida law or providing legal services for Florida residents. Nor is he or his law firm holding out to the public as having a Florida presence.

supposed uniqueness of the law of a particular state. If a practice is “temporary” within the scope of Model Rule 5.5(c), then it matters not if the legal issues arise from the peculiar laws of the state or from regulations or ordinances in the county where the issue arose. If the practice is “temporary” and otherwise fits the requirements of Model Rule 5.5(c), the out-of-state lawyer’s handling of a matter in that state is permitted.

What then is left as the purpose of Model Rule 5.5’s distinction between practices that are “systematic and continuous” as opposed to “temporary”? It cannot be to permit state bar or other officials to discipline out-of-state lawyers. That right already exists under Model Rule 8.5.<sup>170</sup> It cannot be for the protection of the public, for clients have the right to sue any lawyer for malpractice if they do not demonstrate competence, which

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170. The text of Model Rule 8.5(a) is quoted in full at *supra* note 144.

courts test by local norms<sup>171</sup>—the “locality” rule<sup>172</sup>—and to file complaints with their state’s disciplinary authorities. The only rationale

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171. See *Cook v. Irion*, 409 S.W.2d 475 (Tex. Civ. App. 1966), *disapproved on other grounds*, *Cosgrove v. Grimes*, 774 S.W.2d 662 (Tex. 1989) (a legal malpractice case where an expert legal witness from one county was held unqualified to testify against an attorney whose alleged malpractice occurred in a different county). The origin of the locality rule is described in *Russo v. Griffin*, 510 A.2d 436, 437–39 (Vt. 1986), where the court determined that a state-wide locality rule, and not county-wide rule, is the correct criterion for legal malpractice claims:

The locality rule is an exclusive product of the United States. See *Shilkret v. Annapolis Emergency Hospital Association*, 276 Md. 187, 193, 349 A.2d 245, 248 (1975). It was first applied to the medical profession approximately a century ago when there existed a great disparity between standards of practice in large urban centers and remote rural areas. *Id.* at 193, 349 A.2d at 249. “The rule was unquestionably developed to protect the rural and small town practitioner, who was presumed to be less adequately informed and equipped than his big city brother.” *Id.* at 193, 349 A.2d at 248.

The shortcomings of the locality rule are well recognized. It immunizes persons who are sole practitioners in their community from malpractice liability and it promotes a “conspiracy of silence” in the plaintiffs’ locality which, in many cases, effectively precludes plaintiffs from retaining qualified experts to testify on their behalf. *Id.* at 193–94, 349 A.2d at 249 (citing *Waltz, The Rise and Gradual Fall of the Locality Rule In Medical Malpractice Litigation*, 18 De Paul L. Rev. 408, 411 (1969); Note, *Medical Malpractice—Michigan Abandons “Locality Rule” with Regard to Specialists*, 40 Fordham L. Rev. 435, 438 (1971)). Recent developments in technology and the trend toward standardization have further undermined support for the rule. See *Shilkret*, *supra*, 276 Md. at 197, 349 A.2d at 250.

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In selecting a territorial limitation on the standard of care, we believe that the most logical is that of the state. See *Mallen & Levit*, *supra*, at 336; see also Restatement (Second) of Torts § 299A comment g (1965) (allowance for variations in type of community or degree of skill and knowledge possessed by practitioners therein has seldom been made in legal profession as such variations either do not exist or are not worthy of recognition). In Vermont, the rules governing the practice of law do not vary from community to community but are the same throughout the state. Moreover, in order to practice law in Vermont attorneys must successfully complete the requirements for admission established by this Court and administered by the Vermont Board of Bar Examiners. Among these prerequisites is the requirement that all candidates for admission

left is the one that Professor Llewellyn complained of almost 90 years ago and Professor Wolfram complained of almost two decades ago:<sup>173</sup> protection of “local” lawyers and the reduction or elimination of competition for their business.

But even if there are lingering arguments that some “local” laws are unique and require state-trained practitioners, this argument is undercut by the Uniform Bar Exam, by the admission-without-examination rules, by reciprocity rules, and by the lack of specificity in state mandatory continuing legal education requirements.

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complete a study of law in the office of a judge or practicing attorney in this state.

The relevant geographic area then is not the community in which the attorney’s office is located or the nation as a whole, but the jurisdiction in which the attorney is licensed to practice. Accordingly, we hold that the appropriate standard of care to which a lawyer is held in the performance of professional services is “that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction.” *Cook, Flanagan & Berst v. Clausing*, 73 Wash.2d 393, 395, 438 P.2d 865, 867 (1968); *see also Ramp v. St. Paul Fire & Marine Insurance Co.*, 254 So.2d 79, 82 (La.App.1971) (attorney liable for failure to exercise that degree of care, skill and diligence which is commonly possessed and exercised by practicing attorneys in his or her jurisdiction); *Hodges v. Carter*, 239 N.C. 517, 520, 80 S.E.2d 144, 146 (1954) (attorney not liable for following service of process custom which had prevailed in state for two decades and was followed generally by attorneys throughout the state); *Feil v. Wishek*, 193 N.W.2d 218, 225 (N.D.1971) (attorney liable for failure “to exercise that degree of care commonly possessed and exercised by other reasonable, careful and prudent lawyers of this State”).

*Id.*

172. For more on the locality rule, see Anna M. Limoges, *Lost in the Locality Labyrinth: A Search for the Appropriate Legal Malpractice Standard Set Forth in Hamilton v. Sommers*, 61 S.D. L. REV. 108 (2016); E. Lee Schlender, *Malpractice and the Idaho Locality Rule: Stuck in the Nineteenth Century*, 44 IDAHO L. REV. 361 (2008); Wilburn Brewer, Jr., *Expert Testimony in Legal Malpractice Cases*, 45 S.C. L. REV. 727 (1994); Dwain E. Fagerlund, *Legal Malpractice: The Locality Rule and Other Limitations of the Standard of Care: Should Rural and Metropolitan Lawyers Be Held to the Same Standard of Care?*, 64 N.D. L. REV. 661 (1988).

173. *See* Llewellyn, *supra* note 84; *see also* Wolfram, *supra* note 83.

*A. The Uniform Bar Examination Does Not Test on “Local” Law*

The Uniform Bar Examination (UBE) does not test on state law: “The UBE is designed to test knowledge and skills that every lawyer should be able to demonstrate prior to becoming licensed to practice law. It results in a portable score that can be used to apply for admission in other UBE jurisdictions.”<sup>174</sup> Of the 34 states, the District of Columbia, and the Virgin Islands utilizing the UBE, 20 states and the District of Columbia do not require an applicant for admission to have to reviewed or be tested in any way on that jurisdiction’s law.<sup>175</sup> Four states require an applicant who passes the UBE to take in-person or online classes on state law,<sup>176</sup> and 10 states and the Virgin Islands require an applicant who passes the UBE to review online materials on state law and then either to correctly answer

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174. *Uniform Bar Examination*, NCBE, <http://www.ncbex.org/exams/ube/> [<https://perma.cc/JG9K-5XHK>] (last visited Apr. 22, 2020).

175. The 20 states are Alaska, Arkansas, Colorado, Connecticut, Idaho, Illinois, Iowa, Kansas, Maine, Minnesota, Nebraska, New Hampshire, New Jersey, North Dakota, Oregon, Rhode Island, Utah, Vermont, West Virginia, and Wyoming. *See id.*

176. *See Admissions Requirements: Exam Applicants*, ALABAMA STATE BAR ADMISSIONS OFFICE, <https://admissions.alabar.org/admission-requirements-exam-applicants?keyword=online> [<https://perma.cc/4BFU-4U9Y>] (last visited Apr. 27, 2020); *Montana Bar Exam Information*, AMERIBAR, <https://ameribar.com/montana-bar-exam/> [<https://perma.cc/L6HT-MWMB>] (last visited Apr. 27, 2020); *Required Class in NM Law*, NEW MEXICO BOARD OF BAR EXAMINERS, <https://nmexam.org/events/category/required-class-in-nm-law/list/> [<https://perma.cc/R4UN-79GQ>] (last visited Apr. 27, 2020); *Tennessee Law Course*, TENNESSEE BOARD OF LAW EXAMINERS, [https://www.tnble.org/?page\\_id=57](https://www.tnble.org/?page_id=57) [<https://perma.cc/JXL7-2RTH>] (last visited Apr. 27, 2020).



hurdle questions to move from one subject to another<sup>177</sup> or to pass an open-book, multiple-choice test based on the materials.<sup>178</sup>

If a state admits bar applicants based solely on passing the UBE, it becomes difficult to assert that limitations on multijurisdictional practice are to protect the public from lawyers who are unfamiliar with that state's law. Use of the UBE means that the state is relying on the competency requirement of Model Rule 1.1,<sup>179</sup> which requires any lawyer, wherever admitted, to be competent in representing a client.

*B. Neither Admission-without-Examination nor Reciprocity Rules Deal with a "Non-Local" Lawyer's Knowledge of "Local" Law*

Many states, even some that do not solely rely on the UBE for bar admission, allow some form of admission to practice without having to

177. See *Arizona Law Course Online Registration*, AZCOURTS.GOV, <https://www.azcourts.gov/education/services/Committees/JCA/Online-Registration> [<https://perma.cc/VJ8B-FSBL>] (last visited Apr. 22, 2020); *Welcome to the New York Law Course*, NEW YORK STATE BOARD OF LAW EXAMINERS, <https://www.newyorklawcourse.org/> [<https://perma.cc/PMM3-WK3W>] (last visited Apr. 22, 2020); *Course Instructions*, BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, <https://www.ncble.org/nc-state-specific-component-course-instructions> [<https://perma.cc/DX3E-PGPE>] (last visited Apr. 22, 2020); *Candidate Course of Study*, SOUTH CAROLINA BAR, <https://www.scbar.org/shop-cc/cos/> [<https://perma.cc/2PY9-UGSF>] (last visited Apr. 22, 2020); *Texas Law Course*, TEXAS BOARD OF LAW EXAMINERS, <https://ble.texas.gov/faq.action#783> [<https://perma.cc/8EJD-46B8>] (last visited Apr. 22, 2020).

178. See *Maryland Law Component*, MARYLAND COURTS, <https://www.mdcourts.gov/ble/mdlawcomponent> [<https://perma.cc/ERQ5-G8PZ>] (last visited Apr. 22, 2020); *The Massachusetts Law Component (MLC)*, MASS.GOV, <https://www.mass.gov/how-to/the-massachusetts-law-component-mlc> [<https://perma.cc/9YZW-8BY7>] (last visited Apr. 22, 2020); *Missouri Educational Component*, MBLE, <https://www.courts.mo.gov/page.jsp?id=325> [<https://perma.cc/GW2P-HGXW>] (last visited Apr. 22, 2020); *Uniform Bar Exam Frequently Asked Questions*, THE SUPREME COURT OF OHIO & THE OHIO JUDICIAL SYSTEM, <http://www.supremecourt.ohio.gov/AttySvcs/admissions/UBE/faq.asp> [<https://perma.cc/AD4Y-BKW4>] (last visited Apr. 22, 2020); *Washington Law Component*, WASHINGTON STATE BAR ASSOCIATION, <https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/washington-law-component> [<https://perma.cc/7SXX-AVT5>] (last visited Apr. 22, 2020); *Virgin Islands Law Component*, SUPREME COURT OF THE VIRGIN ISLANDS, [http://visupremecourt.hosted.civillive.com/offices\\_of\\_the\\_court/bar\\_admission/regular\\_admissions/virgin\\_islands\\_law\\_component](http://visupremecourt.hosted.civillive.com/offices_of_the_court/bar_admission/regular_admissions/virgin_islands_law_component) [<https://perma.cc/JM9P-7SUS>] (last visited Apr. 22, 2020).

179. MODEL RULES OF PRO. CONDUCT. r. 1.1 (AM. BAR ASS'N 1983).

take the state's bar examination.<sup>180</sup> There are generally three types of admission without examination:<sup>181</sup> (1) pure-years-of-practice admission; (2) UBE or MPRE related admissions; and (3) limited-state-to-state reciprocity.

In the first group are states that permit attorneys from any other state to be admitted if they have practiced for a certain number of years and are in good standing in the states of their licensure. This is the case in North Dakota.<sup>182</sup> In the second group are states that permit reciprocity and require not only a minimum number of years in the active practice of law, but also passage of the UBE and the MPRE, the Multistate Professional Responsibility Examination, or just the MPRE.<sup>183</sup>

In the third group, the limited-state-to-state-reciprocity route, are states that automatically allow an attorney licensed in one or more specific other states to get licensed in another state simply by application and proof of character and fitness, as long as the original licensing state permits attorneys from the admitting state the same rights. These states impose a minimum years of practice requirement before admission without examination can be considered, and some of these couple this with a limited continuing legal education requirement. The reciprocity can be broad, as is the case for those states that permit admission without examination from any state with similar reciprocity, or it can be more narrowly focused with special rules of automatic reciprocity for certain states.

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180. See *Reciprocity: What States Can You Practice Law?*, ON BALANCE SEARCH CONSULTANTS, (Feb. 24, 2016), <https://www.onbalancesearch.com/blog-page/reciprocity-what-states-can-you-practice-law/> [<https://perma.cc/FXD4-FB7P>].

181. See [barreciprocity.com](http://barreciprocity.com), which seeks to assemble the reciprocity rules of every state.

182. See, for example, *Rule 7. Admission by Motion*, STATE OF NORTH DAKOTA COURTS, <https://www.ndcourts.gov/legal-resources/rules/admissionto-practicer/7> [<https://perma.cc/896M-TDQJ>] (last visited Mar. 18, 2020), which requires only five years of practice, plus proof of good standing and affidavits showing “the applicant’s good moral character and fitness to practice law.” While North Dakota requires continuing legal education, none of those CLE requirements need be on the laws of the State of North Dakota.

183. For example, to be admitted to practice law in Texas without an examination, you must be licensed in another state, have scored 85 or higher on the MPRE, and have been engaged in the active practice of law “for at least 5 of the 7 years immediately preceding your application.” See *Admission without Examination Information*, TEXAS BOARD OF LAW EXAMINERS, <https://ble.texas.gov/admission-without-examination> [<https://perma.cc/V9FS-TW43>] (last visited Mar. 18, 2020).

An example of broad reciprocity is Missouri, which permits admission without examination for any attorney licensed in a state that would do the same for Missouri attorneys.<sup>184</sup> On the other hand, a Louisiana lawyer who seeks admission by motion in Missouri cannot succeed because Louisiana does not recognize reciprocity with Missouri.<sup>185</sup>

An example of a narrower, semi-automatic form of reciprocity can be found among the states of Maine, New Hampshire, and Vermont. An attorney in Maine can be admitted on application in New Hampshire and Vermont, and vice-versa. While this three-state reciprocity requires a limited CLE session on the admitting state's "practice and procedure," there are no requirements that the CLE include any specific substantive area of the law.<sup>186</sup>

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184. Missouri Board of Law Examiners Rule 8.10 permits admission without examination only if the lawyer is licensed in a "jurisdiction that permits mutuality of admission without examination to Missouri lawyers." See *Rules Governing Admission to the Bar in Missouri – 8.01 The Board of Law Examiners*, MISSOURI BOARD OF LAW EXAMINERS, <https://www.mble.org/rule-8> [<https://perma.cc/86PG-BPWF>] (last visited Mar. 18, 2020).

185. Louisiana does not recognize reciprocal admissions. See Rule XVII(11) of the Louisiana Supreme Court, which states: "No person shall be admitted to the Bar of this state based solely upon the fact that such person is admitted to the Bar of another state or because the laws of another state would grant admission to a member of the Bar of this state . . ." *Rules of the Louisiana Supreme Court*, LOUISIANA SUPREME COURT, <http://www.lasc.org/rules/supreme/RuleXVII.asp> [<https://perma.cc/E9RW-CGS4>] (last visited Mar. 18, 2020).

186. See MAINE BAR ADMISSION RULE IV(11A)(a)(2)(A)–(B) (June 24, 2014), <http://www.mainebarexaminers.org/pages/PDF/0914%20Bar%20Admission%20Rules.pdf> [<https://perma.cc/C9W7-W94P>], which allows for reciprocal admission upon proof of character and fitness if the applicant:

2. (A) Has been an active member in good standing of the bar of the State of New Hampshire and has been primarily engaged in the active practice of law in the State of New Hampshire for no less than three years immediately preceding the date upon which the application is filed;

(B) Has been an active member in good standing of the bar of the State of Vermont and has been primarily engaged in the active practice of law in the State of Vermont for no less than three years immediately preceding the date upon which the application is filed; . . .

See also N.H. SUP. CT. R. 42(b)&(c), which provide:

(b) Vermont Applicant. An applicant who is licensed to practice law in Vermont may, upon motion, be admitted to the bar without examination, provided that the State of Vermont allows admission without examination of persons admitted to practice law in New Hampshire under circumstances comparable to those set forth in this rule. Such an applicant shall meet the Eligibility Requirements set forth in Rule

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42(IV)(a), (V)(a), and (VI), and the following additional requirements. The applicant shall:

- (1) be licensed to practice law in the State of Vermont and be an active member of the Vermont bar; and
- (2) have been primarily engaged in the active practice of law in Vermont for no less than three years immediately preceding the date upon which the motion is filed; and
- (3) establish that the applicant is currently a member in good standing in all jurisdictions where admitted; and
- (4) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction; and
- (5) have completed at least 900 minutes of continuing legal education on New Hampshire practice and procedure within one year immediately preceding the date upon which the motion is filed and be certified by the NHMCLE Board as satisfying this requirement; and
- (6) designate the clerk of the New Hampshire Supreme Court as agent for service of process; and
- (7) file with the board the required motion form, a completed petition and questionnaire for admission, and supporting documents, accompanied by the motion fee.

(c) Maine Applicant. An applicant who is licensed to practice law in Maine may, upon motion, be admitted to the bar without examination, provided that the State of Maine allows admission without examination of persons admitted to practice law in New Hampshire under circumstances comparable to those set forth in this rule. Such an applicant shall meet the Eligibility Requirements set forth in Rule 42(IV)(a), (V), and (VI), and the following additional requirements. The applicant shall:

- (1) be licensed to practice law in the State of Maine and be an active member of the Maine bar;
- (2) have been primarily engaged in the active practice of law in Maine for no less than three years immediately preceding the date upon which the motion is filed;
- (3) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;
- (4) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction;
- (5) have completed at least 900 minutes of continuing legal education on New Hampshire practice and procedure within one year immediately preceding the date upon which the motion is filed and be certified by the NHMCLE Board as satisfying this requirement; and

Regardless of the form of admission without examination, however, none of the states permitting such admissions require any kind of proof that the lawyer seeking to be licensed have any knowledge of the laws of the admitting state. Therefore, when one looks at these rules, it seems apparent that an implicit assumption behind them is that, if a lawyer has practiced for a certain number of years, the attorney has gained enough knowledge and competency to effectively represent clients in the admitting state, even if the attorney has never specifically studied the laws of that state. These admission-without-examination rules undermine any argument that the multijurisdictional-practice limitations have anything to do with providing local clients with lawyers with proven knowledge of local laws.

*C. States Do Not Require That Continuing Legal Education Courses Include “Local” Law*

For those states that mandate lawyers take continuing legal education courses to keep their licenses current, there is no requirement that the courses include ones focused on the specific laws of the state,<sup>187</sup> although many states specify that time be spent in courses on topics such as ethics, professionalism, substance abuse, or mental illness awareness.<sup>188</sup>

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(6) designate the clerk of the New Hampshire Supreme Court as agent for service of process; and

(7) file with the board the required motion form, a completed petition and questionnaire for admission, and supporting documents, accompanied by the motion fee.

*See also Admission to the Vermont Bar*, VERMONT JUDICIARY, <https://www.vermontjudiciary.org/attorneys/admission-vermont-bar> [<https://perma.cc/7H6A-MYMA>] (last visited Mar. 18, 2020). The court’s website states admission is permitted if applicants “have been admitted in New Hampshire and Maine, been actively engaged in the practice of law for no less than three years immediately preceding the filing of the application); and . . . [not] scored lower than 270 on the UBE within the five years immediately preceding the filing of the application.”

187. This statement is in reference to continuing legal education requirements that apply to all lawyers licensed in that state. It is not intended to deal with the rules of state-authorized specialization certification. The ABA maintains a web page with links to all state CLE rules. *See Mandatory CLE*, ABA, <https://www.americanbar.org/events-cle/mcle/> [<https://perma.cc/XTJ3-DUQP>] (last visited Mar. 18, 2020).

188. Examples of state CLE requirements include the description found on Florida Bar’s CLE webpage, which outlines the requirements of its Rule 6-10.3(B):

The fact that an attorney is not required to take continuing education courses in “local law” to maintain a license to practice in the state, even for “local lawyers” who have been in practice for decades and whose knowledge of changes in local laws in areas in which they do not regularly

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Effective March 5, 2019, 5 of the required 33 credit hours must be in approved legal ethics, professionalism, bias elimination, substance abuse, or mental illness awareness programs, with at least 1 of the 5 hours in an approved professionalism program.

See [https://www-media.floridabar.org/uploads/2021/02/Ch-6-2021\\_06-DEC-RR-TFB-12-4-2020-1.pdf](https://www-media.floridabar.org/uploads/2021/02/Ch-6-2021_06-DEC-RR-TFB-12-4-2020-1.pdf) [<https://perma.cc/T37G-533N>] (last visited 02/28/21).

Here is California’s description of its CLE requirements:

- Half of the 25 MCLE hours must be in activities approved for what are called “participatory” MCLE credit.
- No more than 12.5 hours can be for self-study
- Other special requirements:
  - At least four hours of legal ethics
  - At least one hour on competence issues
  - At least one hour in an area called the Recognition and Elimination of Bias in the Legal Profession and Society

*MCLE Requirements*, THE STATE BAR OF CALIFORNIA, <http://www.calbar.ca.gov/Attorneys/MCLE-CLE/Requirements> [<https://perma.cc/4XM2-S8Z6>] (last visited Oct. 5, 2019). New York’s lists the categories of courses acceptable for CLE credit as: “ethics and professionalism,” “skills,” “law practice management,” “areas of professional practice,” and “diversity, inclusion and elimination of bias.” See N.Y. STATE UNIFIED COURT SYSTEM, CATEGORIES OF CLE CREDIT AS DEFINED IN THE PROGRAM RULES 22 NYCRR 1500.2(C)-(G), available at <https://ww2.nycourts.gov/sites/default/files/document/files/2018-03/CategoriesofCredit.pdf> [<https://perma.cc/Y4XA-LKD3>] (last visited Oct. 5, 2019).

The Illinois MCLE Board describes its requirements as:

Beginning with the July 1, 2017 through June 30, 2019, and July 1, 2018 through June 30, 2020, two-year reporting periods, attorneys must continue to complete 30 total hours of credit, including at least six hours of professional responsibility (“PR”) credit. However, of those six hours of PR credit, Illinois attorneys must complete one hour of diversity/inclusion PR credit and one hour of mental health/substance abuse PR credit. Please refer to the Commission on Professionalism’s FAQs for additional information. Note, attorneys can fulfill their entire PR requirement, including the diversity/inclusion and mental health/substance abuse requirement, by completing the year-long Lawyer-to-Lawyer Mentoring Program.

*Illinois MCLE Requirements and Fees*, MCLE, <https://www.mcleboard.org/files/AttorneyMCLERequirement.aspx?MenuType=Attorney&subMenuType=mclerequirement> [<https://perma.cc/A75C-BXMJ>] (last visited Oct. 5, 2019).

practice may be weak or nonexistent, belies the argument that “local law,” with its constant statutory and jurisprudential changes, is so unique that no out-of-state lawyer can either master it or advise “local” clients about it.

#### IX. DIFFERENT APPROACHES TO DEALING WITH MODEL RULE 5.5’S ISSUES

The problems with current Model Rule 5.5 are shown not only by the fact that a majority of states have not adopted the rule verbatim, but also by the multitude of alternatives that have been advanced. Suggestions from commentators, ABA working groups, and others range from permitting a lawyer licensed in one state to practice law in another without being a resident,<sup>189</sup> having to pass the bar,<sup>190</sup> or being formally admitted to practice. These proposals have included:

- A system of national registration for attorneys;
- A local registration requirement;
- A “driver’s license” approach; and
- Altering the definition of a lawyer’s “practice.”

Each suggestion has attributes and detriments and will be discussed. The place to begin, however, is to look at what other countries are doing and what a working group of an ABA Commission has recommended.

##### *A. What Other Countries Are Doing and What an ABA Working Group Recommended*

The ABA created the Commission on Ethics 20/20 in August 2009 to examine the effect of technology and globalization on the legal profession.<sup>191</sup> The Commission met regularly as a whole and also formed several working groups which were chaired by Commission members and

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189. Colorado, for example, permits out-of-state attorneys who move to Colorado to obtain a limited admission to practice—limited to “acting as counsel for such single client (which may include a business entity or an organization and its organizational affiliates).” See COLO. R. CIV. P. 204.1.

190. There have been proposals for a national license-via-admission-to-practice-by-motion. These proposals essentially would allow a lawyer to be formally admitted to the bar of any state upon motion. See, for example, the proposal contained in Perlman, *supra* note 101.

191. See *ABA Commission on Ethics 20/20*, ABA, [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/aba-commission-on-on--ethics-20-20/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/aba-commission-on-on--ethics-20-20/) [<https://perma.cc/FF7R-7SR2>] (last visited Apr. 20, 2020).

included representatives from other ABA constituencies.<sup>192</sup> The Commission released initial proposals concerning inbound foreign lawyer issues,<sup>193</sup> confidentiality-related ethics issues arising from lawyers' use of technology,<sup>194</sup> issues related to the outsourcing of legal work,<sup>195</sup> choice of law in cross-border practice,<sup>196</sup> multijurisdictional practice issues,<sup>197</sup> nonlawyer ownership of interests in law firms,<sup>198</sup> and alternative methods for litigation financing.<sup>199</sup>

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192. *Id.*

193. See ABA COMMISSION ON ETHICS 20/20, MEMORANDA AND TEMPLATES FOR COMMENT - INBOUND FOREIGN LAWYER ISSUES (June 1, 2010), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2011build/ethics2020/inbound\\_foreign\\_lawyer\\_memo\\_templates.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011build/ethics2020/inbound_foreign_lawyer_memo_templates.pdf) [<https://perma.cc/EU77-RV3V>].

194. See ABA COMMISSION ON ETHICS 20/20, ISSUES PAPER FOR COMMENT—CLIENT CONFIDENTIALITY AND LAWYERS' USE OF TECHNOLOGY (Sept. 20, 2010), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2011build/ethics2020/clientconfidentiality\\_issuespaper.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011build/ethics2020/clientconfidentiality_issuespaper.pdf) [<https://perma.cc/3YBE-D367>]; see also ABA COMM. ON ETHICS 20/20, ISSUES PAPER FOR COMMENT—LAWYERS' USE OF INTERNET BASED CLIENT DEVELOPMENT TOOLS (Sept. 20, 2010), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2011build/ethics2020/clientconfidentiality\\_issuespaper.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011build/ethics2020/clientconfidentiality_issuespaper.pdf) [<https://perma.cc/64C3-J769>].

195. See ABA COMMISSION ON ETHICS 20/20, DISCUSSION DRAFT REGARDING DOMESTIC AND INTERNATIONAL OUTSOURCING (Nov. 23, 2010), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2011build/ethics2020/discussion\\_draft\\_outsourcing.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011build/ethics2020/discussion_draft_outsourcing.pdf) [<https://perma.cc/ZQ2C-VHAH>].

196. See ABA COMMISSION ON ETHICS 20/20, ISSUES PAPER: CHOICE OF LAW IN CROSS-BORDER PRACTICE (Jan. 18, 2011), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/2011build/20111801.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011build/20111801.pdf) [<https://perma.cc/2GX4-2MHB>].

197. See ABA COMMISSION ON ETHICS 20/20, FOR COMMENT: ISSUES PAPER CONCERNING MULTIJURISDICTIONAL PRACTICE (Mar. 29, 2011), [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/mjp\\_issues\\_paper\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/mjp_issues_paper_authcheckdam.pdf) [<https://perma.cc/CHG9-L83Z>].

198. See ABA COMMISSION ON ETHICS 20/20, FOR COMMENT: ISSUES PAPER CONCERNING ALTERNATIVE BUSINESS STRUCTURES (Apr. 5, 2011), [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/abs\\_issues\\_paper\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/abs_issues_paper_authcheckdam.pdf) [<https://perma.cc/42RU-4UEL>].

199. See ABA COMMISSION ON ETHICS 20/20, INFORMATIONAL REPORT TO THE HOUSE OF DELEGATES (Oct. 14, 2011), [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111212\\_ethics\\_20\\_20\\_alf\\_white\\_paper\\_final\\_hod\\_informational\\_report.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.pdf) [<https://perma.cc/WYC8-USME>] (discussing lawyer involvement in alternative litigation financing).



The Commission considered several proposed modifications to the Model Rules concerning the unauthorized practice of law and the multijurisdictional practice of law.<sup>200</sup> The Working Group on Uniformity, Choice of Law, and Conflicts of Interest issued a paper focused on Model Rule 5.5<sup>201</sup> which contains a discussion both of how other countries deal with the multijurisdictional practice issue and what has been called the “driver’s license” approach.

The Working Group’s Issue Paper formally endorsed a change permitting an out-of-state U.S. lawyer to begin practicing in a state immediately if the lawyer “submits an application for admission by motion, by examination, or as a foreign legal consultant within [60] days of first providing legal services in this jurisdiction,” as long as the lawyer fulfills the admission requirements at the time of application and the lawyer previously has not been denied admission in the state because of character and fitness issues.<sup>202</sup> Apparently, the Working Group did not view this proposal as controversial, citing to the fact that the District of Columbia, which has a similar rule, “has not reported any problems arising out of the existence of th[e] Rule.”<sup>203</sup> The Working Group’s proposal became Resolution 105D for the House of Delegates meeting at the ABA Annual Meeting in August 2012, and was adopted by the House of Delegates.<sup>204</sup>

What would have had a greater impact upon transactional attorneys, but not telecommuters, however, were some of the alternative approaches that were discussed but not formally endorsed in the Issue Paper: the Colorado Approach; Canada’s interprovincial compact model; the

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200. See MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS’N 2002).

201. See FOR COMMENT: ISSUES PAPER CONCERNING MULTIJURISDICTIONAL PRACTICE, *supra* note 197 (discussing issues paper concerning multijurisdictional practice).

202. *Id.* at 2; see also ABA COMMISSION ON ETHICS 20/20, INITIAL RESOLUTION MODEL RULE 5.5 (D)(3)/CONTINUOUS AND SYSTEMATIC PRESENCE (Sept. 7, 2011), [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20110907\\_final\\_ethics\\_2020\\_rule\\_5\\_5\\_d3\\_continuous\\_presence\\_initial\\_resolution\\_and\\_report\\_for\\_comment.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_rule_5_5_d3_continuous_presence_initial_resolution_and_report_for_comment.authcheckdam.pdf) [<https://perma.cc/9JRN-PXPC>].

203. FOR COMMENT: ISSUES PAPER CONCERNING MULTIJURISDICTIONAL PRACTICE, *supra* note 197, at 5 (discussing issues paper concerning multijurisdictional practice). Consider this rationale in light of the fact that Colorado “has not reported any problems arising out of the existence” of its rule.

204. See A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 1982-2013, *supra* note 27.

European Union's system of mutual recognition; and the Australian model.<sup>205</sup>

The Issue Paper noted that Colorado allows an out-of-state lawyer "to practice freely in Colorado on a temporary basis (subject only to pro hac vice requirements) as long as the lawyer does not take up residence in Colorado or establish an office there."<sup>206</sup> The paper went on to describe "Canada's Interprovincial Compact Model" as creating "avenues for lawyers to work permanently in all provinces and territories without the need for further bar examination, and temporarily in all provinces,"<sup>207</sup> including, to a more limited degree, even in civil law, French-language Quebec, "federal law, the law of their home jurisdiction, and public international law,"<sup>208</sup> which takes it beyond the Colorado Approach.

The European Union's approach is even broader than Canada's.<sup>209</sup> As described in the Issue Paper, the E.U. allows, "European lawyers from one E.U. country (home jurisdiction) to establish themselves permanently in another E.U. country (host jurisdiction) and practice law there."<sup>210</sup> This "Directive"<sup>211</sup> "applies to E.U. countries whose admission requirements range from very stringent to lenient, and it applies to both civil law and common law jurisdictions."<sup>212</sup> While the Issues Paper did not address the fact that E.U. countries have several distinctly different languages,<sup>213</sup> it went on to state that while there are "some practice limitations with respect to certain kinds of court and uniquely 'local' work, the lawyer is otherwise permitted to practice law in the host jurisdiction under his or her home title."<sup>214</sup> Yet, the E.U. Directive is tempered by a the mandate that, to gain

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205. See FOR COMMENT: ISSUES PAPER CONCERNING MULTIJURISDICTIONAL PRACTICE, *supra* note 197, at 5–9 (discussing issues paper concerning multijurisdictional practice).

206. *Id.* at 5.

207. *Id.* at 6.

208. *Id.* at 7.

209. *See id.*

210. *Id.* at 8.

211. *Id.* at 7.

212. *Id.* at 8.

213. See Claire Weber, *Hungarian and Finnish: Both Languages Evolved from a Common Language*, THOUGHTCO. (Jan. 31, 2019), <http://www.thoughtco.com/hungarian-and-finnish-1434479> [<https://perma.cc/74X7-DFY3>]. There is supposed to be a connection between Finnish and Hungarian. However, that does not do English, French, German or Spanish speakers a lot of good. For that matter, just navigating those four related languages is far beyond what reasonably might be expected of most E.U. lawyers. *See id.*

214. FOR COMMENT: ISSUES PAPER CONCERNING MULTIJURISDICTIONAL PRACTICE, *supra* note 197, at 8.

the ability to use the host jurisdiction's professional titles, the Directive requires the lawyer to practice the host jurisdiction's law "effectively and regularly" for three years . . . . At that point the lawyer is officially licensed in the host jurisdiction."<sup>215</sup>

The Issues Paper also describes "The Australian Model,"<sup>216</sup> which allows more multijurisdictional practice than does the United States, but is not as accommodating as Canada or the E.U.<sup>217</sup> In 2004 the Australian National Legal Profession Model Bill was published which "provided the states and territories with a template to draft legislation that would permit seamless practice by a lawyer from one jurisdiction to another."<sup>218</sup> This has become the model for legislation by some Australian states and territories. It requires a lawyer to be admitted in at least one jurisdiction and allows the lawyer to practice in another jurisdiction and, if notice is given to that jurisdiction, to open an office in that jurisdiction.<sup>219</sup>

The Issues Paper concluded its description of alternative approaches to multijurisdictional practice with the following bullet point questions:

- What advantages or disadvantages would such approaches have relative to the current regulation of cross-border practice in Model Rule 5.5 and admission by motion procedures? For example, would new difficulties or challenges arise for disciplinary authorities with regard to continuing legal education requirements or trust account rules if any of the above alternatives were adopted?
- Should the Commission consider proposing a system similar to Colorado's?
- Should the Commission develop a white paper that explores in detail whether the development of interstate compacts similar to those in Canada or forms of mutual recognition as

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215. *Id.*

216. *Id.*

217. In 1992, the Commonwealth of Australia "passed a Mutual Recognition Act that enabled a lawyer registered in one jurisdiction to practice in another," which was adopted by all Australian states and territories, and which required "the lawyer to register in the host state or territory and obtain a local practicing certificate." *See id.* at 8–9. Several Australian states and territories then adopted the 1998 Interstate Practice Certificate System which "was created to enable a lawyer from one Australian state/territory to practice in another without having to be admitted in the second state/territory." *Id.* at 9.

218. *Id.*

219. *See id.*

in Europe and Australia would be feasible alternatives or supplements to Model Rule 5.5?<sup>220</sup>

These questions indicate that significant changes to Model Rule 5.5 should be considered. The Working Group's report noted that the multijurisdictional practice rules needed clarification or changes,<sup>221</sup> but no

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220. *See id.*

221. The statement read:

The Commission considered other possible amendments to Model Rule 5.5 that would have resulted in more significant changes. For example, the Commission seriously considered whether to propose a restructured version of Model Rule 5.5 that would have resembled Colorado's Rule 220. That Rule permits a lawyer who is licensed in another U.S. jurisdiction to practice freely in Colorado on a temporary basis (subject only to pro hac vice requirements) as long as the lawyer does not take up residence in Colorado or establish an office there. Although the Colorado approach has many advantages, the Commission ultimately concluded that the practice authority afforded by the Colorado approach is substantially similar to the practice authority that already exists under Model Rule 5.5. The Commission had difficulty identifying common scenarios in which a lawyer would be permitted to practice in Colorado on a temporary basis, but clearly precluded from doing so in a jurisdiction that had adopted Model Rule 5.5.

To the extent that the Colorado Rule offers more practice authority than the Model Rule, the Commission thought that the difference might relate to Model Rule 5.5(c)(4). That paragraph permits lawyers to practice on a temporary basis in a jurisdiction if the matter arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Comment [14] elaborates on the meaning of this paragraph, and the Commission considered the possibility of adding clarifying language to that Comment to make clear that Model Rule 5.5(c)(4) should be interpreted liberally. The Commission determined, however, that additional guidance on the scope of Model Rule 5.5(c)(4) would be more appropriate in the form of an opinion from the Standing Committee on Ethics and Professional Responsibility. Accordingly, the Commission has referred that issue to the Standing Committee for its consideration. [emphasis added].

ABA COMMISSION ON ETHICS 20/20, REVISED DRAFT RESOLUTION FOR COMMENT—NEW ABA MODEL RULE ON PRACTICE PENDING ADMISSION (FORMERLY PROPOSED MODEL RULE 5.5(D)(3)) AND AMENDMENTS TO ABA MODEL RULE 5.5 (Feb. 21, 2012), [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120221\\_ethics\\_20\\_20\\_revised\\_draft\\_resolution\\_and\\_report\\_practice\\_pending\\_admission\\_posting\\_final.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120221_ethics_20_20_revised_draft_resolution_and_report_practice_pending_admission_posting_final.pdf) [https://perma.cc/P L2F-2CCY].

further action has been taken by the ABA at the time this Article was written.

The Ethics 20/20 Commission accepted the Working Group's ultimate recommendation that extended the right of an out-of-state lawyer admitted in at least one state to practice in a state in which she was not admitted, the Model Rule on Practice Pending Admission.<sup>222</sup> This is a stand-alone rule permitting an out-of-state lawyer to practice in association with a lawyer admitted in the state in which the lawyer is diligently seeking to be admitted by motion or by examination.<sup>223</sup>

### *B. The National Registration Approach*

Some commentators have suggested a "truly national bar"<sup>224</sup> that would eliminate all state barriers. Those who have proposed this issue posit the creation of a federal statute enacted under the constitutional authority to regulate interstate commerce. They point to the regulation of attorneys in Australia and Canada as examples to be emulated.<sup>225</sup> They also suggest what specific provisions such a statute might include.<sup>226</sup> This

222. *See id.*

223. *See id.*

224. *See* Marvin Comisky & Philip C. Patterson, *The Case for a Federally Created National Bar by Rule or by Legislation*, 55 TEMP. L. Q. 945 (1982); *see also* Wolfram, *supra* note 83, at 704; Gerard J. Clark, *The Two Faces of Multi-Jurisdictional Practice*, 29 N. KY. L. REV. 251 (2002).

225. *See* Jones et al., *supra* note 145.

226. *See id.* at 189–90.

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

(1) Acting under its constitutional authority to regulate interstate and foreign commerce and its general legislative powers, the Congress should mandate that:

- In all matters pending before the courts of the United States;
- In all matters involving federal law;
- In all matters involving international treaties;
- In all matters involving tribal law; and
- In all matters affecting interstate or foreign commerce;

any person licensed to practice law and in good standing in any United States jurisdiction will be deemed qualified to practice law in every other United States jurisdiction (whether or not specifically licensed there), subject only to the restrictions set out below.

(2) Any person who holds himself or herself out to the public as regularly practicing or as a practitioner licensed in a jurisdiction in which the practitioner is not licensed must comply with the qualification

proposal corresponds to assertions that it is unconstitutional to require out-of-state lawyers to take local bar exams in order to be admitted to practice in another state.<sup>227</sup>

Regardless of whether a “national registration” approach is proposed to be created via statute or some type of bar-related entity, it appears that this proposal will not gain traction in the current political environment. It can be anticipated that local and national bar associations will oppose federalizing the definition and licensing of the practice of law. When a similar suggestion was raised more than 40 years ago, commentators were critical of it, and it is anticipated that those same criticisms will be raised today,<sup>228</sup> for commentators have asserted that having what amounts to a mandatory national bar “threatens the independence of the legal profession and should be rejected on this basis alone. State-based regulation preserves liberty.”<sup>229</sup>

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requirements of that jurisdiction, regardless of the broad practice rights described in paragraph (1) above.

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

227. See Perlman, *supra* note 101.

228. See Wolfram, *supra* note 83, at 704. (“Again, when one presses the details, or perhaps sooner, the reasons why the idea is poor, if not absurd, are readily apparent. Most obviously, the current political environment is not conducive to such an idea. The same Congress that has set its sights on uprooting existing federal bureaucracies, in some instances wholesale, would hardly be interested in creating a new one. Beyond the pragmatic, the constitutional basis of the power of Congress to enact such a sweeping scheme is problematic. Perhaps of greatest importance, powerful lessons from history should give pause to anyone who might be tempted to think that a federal agency with plenary power to regulate lawyers would solve more problems than it would create.”).

229. Daly, *supra* note 99, at 784 (“Adjustments in power are what the legal profession is all about. The creation of a national bar would, of necessity, be a political act. It would require legislation and an administrative scheme. No matter how carefully the legislation was crafted, it would inevitably place lawyers under the thumb of Congress and an administrative bureaucracy. This new regime would curtail the role of lawyers as power adjusters, lessening the protection of individual liberty.”).

### C. A Local Registration Requirement

A local registration rule would allow an attorney licensed in one state to give a notice to the appropriate regulatory agency when undertaking any non-tribunal work in a state in which the attorney is not licensed. Reasonable minds may differ as to whether this notice would have to be given before any work was performed, during the time the work is being performed, or within a certain period of time after the work was completed, or, as an additional consideration, whether registration would not be required for one-time activities but would be required for multiple activities.

Litigation attorneys always have enjoyed a quasi-registration rule with the ability to obtain *pro hac vice* admission, although some states prohibit out-of-state litigators from *pro hac vice* admission if they, or others in their firm, have filed such motions more than X times; once the numerical goal line has been crossed, the lawyer must file a motion for in-state bar admission before filing any further papers in any state court in that jurisdiction.<sup>230</sup>

Depending on how it is drafted, a “local registration” rule might supersede and make meaningless the provisions in Model Rule 5.5(c) on temporary practice. Some have suggested a way to keep the “temporary basis” requirement is through a variation of a local registration rule—transactional lawyers would be allowed to do “one time” deals in the state if they registered for each deal. The problem here is that this type of registration potentially discloses client confidences; not only would the identity of the client have to be disclosed,<sup>231</sup> but it is possible the attorney

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230. See, e.g., MISS. R. APP. P. r. 46. It states in part:

ii. “General Practice” . . . [a]pppearances by a foreign attorney before the courts or administrative agencies of this state in more than five (5) separate unrelated causes or other matter within the twelve (12) months immediately preceding the appearance in question shall be deemed the general practice of law in this state, which may be performed only by an attorney properly admitted and in good standing as a member of the Mississippi Bar. Appearance of a foreign attorney shall commence with the first appearance and continue until final determination on the merits or until the foreign attorney has obtained an order permitting him to withdraw.

See *id.* r. 46(8)(ii); see also discussion *supra* note 2.

231. It should be noted that this approach is different than that adopted in Colorado. The Colorado rule applies only to lawyers who move to the state, not lawyers who are working temporarily there. Likewise, the Colorado rule applies only to single client, not to “deals.” This is vastly different from a rule that would

might be required to describe sufficient details for the regulator to see that this was a one-time deal.<sup>232</sup> And if the attorney would not have to disclose the particulars of a deal, how would a regulator know it was a single transaction and not another way around the purported “temporary” practice of law in the state?

There are some additional issues with a “local registration” requirement. Notice to regulators, if it were free, would seem to be unnecessary, as Model Rule 8.5 already subjects lawyers to discipline in any jurisdiction where they are found to be practicing law. States might charge a fee if registration were required.<sup>233</sup> If states use local registration as a fundraising mechanism, the costs to attorneys to register in more than one state could be huge.

While one might see this as a windfall for some state regulators, many states could be overwhelmed with registrations. For example, more than two decades ago, in writing about such a proposal, Professor Wolfram, the Reporter for the Restatement, estimated that, in some states like Delaware, New York, and California, “the number of lawyers registering might approach half a million.”<sup>234</sup> Today, those numbers might be enormous, and

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force out-of-state lawyers who have no intention of being state residents to disclose both client identity and the transactions involved.

232. See, e.g., Needham, *supra* note 5, at 130–31 (“A potentially more intractable difficulty is that limiting the admission only for legal work done for a specific matter would create implementation problems for the frequent situation in which seeking the advice is interpreted as a signal of future behavior. Clients do not want to go on record any earlier than necessary when they are considering restructuring their debt, or negotiating for something which their competitors also want to obtain—such as rights to wheel electricity across power lines. If the state’s registry required that an out-of-state attorney specify the client which he would be advising, the fact that the representation was now a matter of public record would inhibit the client’s willingness to seek the advice of an out-of-state attorney. For example, if an attorney who is a nationally known expert in bankruptcy law is required to list the name of the client whom he would be advising, a company which had been rumored to be having financial difficulties but which had not yet made those difficulties public would be reluctant to hire that attorney. Even the simple fact that the company had retained that bankruptcy expert could affect the company’s relationships with creditors, employees and potential business partners.”).

233. For example, in a litigation context, Texas currently charges \$250 for each non-resident pro hac vice motion. See *Non-Resident Attorney Fee (Pro Hac Vice)*, TEX. BD. OF L. EXAM’RS, <https://ble.texas.gov/non-resident-attorney-fee-info> [<https://perma.cc/LJ6S-3UZ2>] (last visited Oct. 5, 2019).

234. See Wolfram, *supra* note 83, at 702.



the bureaucracy such registrations might create might be large, even if states adopted online, electronic registrations.

In addition, if a fee is imposed for registration, this may give advantages to large firms to the detriment of those in smaller firms or in solo practices, because large firms with appropriate financial resources might simply register every one of their lawyers in every state. While this multiple-state registration may not be a problem *per se*, it might increase the disparity between large firms and every other provider of legal services.

#### *D. A Redefinition of Unauthorized Practice or a “Driver’s License” Approach*

The ABA Working Group discussed what some have called the “driver’s license” model. This would redefine “unauthorized practice” to exclude work by any lawyer licensed in any other state.<sup>235</sup> If an attorney was licensed in one state and in good standing there, the lawyer could then practice law in any state. To be truly equivalent to a “driver’s license” approach, however, it would have to be accompanied with a requirement that when a lawyer becomes a domiciliary or citizen of a state in which the lawyer was not licensed, re-licensing must occur in that new state. This

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235. See Davis, *supra* note 149 (“Redefine the term ‘unauthorized practice of law’ to exclude (i.e. not apply to) the practice of law by any person admitted to the bar of any state who remains in good standing in her jurisdiction(s) of admission. This system gets us all directly to the point where ‘if it looks like and duck, and swims and quacks like a duck, it’s probably at duck,’ (i.e., a lawyer is a lawyer, whatever state originally admitted her.)”); see also Davis, *supra* note 99 (“Perhaps the simplest solution to current UPL problems is to redefine UPL. This solution requires the least effort from the states, while allowing them to maintain the most control over lawyer regulation. A new definition would differentiate between persons licensed in other states and those with no legal experience. A lawyer licensed and in good standing in another jurisdiction would not automatically be disqualified from practicing within the state. The definition of unauthorized practice would allow for changes in the nature of legal services, and lawyers then would be aware of when they could be violating the rules. Amended rules also would include “safe harbor” provisions. These provisions would address all areas specific to current multijurisdictional practice, such as separate subsections relating to, among others, in-house counsel, prelitigation activities, or alternative dispute resolution. Some states have recommended a safe harbor type of reform in addition to registration. For example, California’s task force recommended that a safe harbor approach apply when an attorney’s involvement is too brief or infrequent to justify completion of a cumbersome registration process.”).

means that even a “driver’s license” approach would have to be combined with either an admission-without-examination or reciprocity rule.

The Association of Professional Responsibility Lawyers (APRL) supports the driver’s license rule<sup>236</sup> and has argued in favor its adoption in proposals or statements to different ABA bodies.<sup>237</sup> In its proposal made in 2001, APRL indicated its preference for universal admission<sup>238</sup> but settled for a definition of the unauthorized practice of law that excludes the temporary practice of law.<sup>239</sup> That proposal also included a “permanent registration” system for lawyers not admitted in a state “that will permit lawyers who are duly admitted in a state to establish practices in other

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236. The APRL position is supported by another, more discrete body, a group of Law Firm General Counsel who submitted comments on the UCLCI Issues Paper before the APRL 2011 Proposal was submitted: “We look forward to the prospect of supporting APRL in this endeavor when its report is released.” See ABA COMMISSION ON ETHICS 20/20, PROPOSALS OF LAW FIRM GENERAL COUNSEL FOR FUTURE REGULATION OF RELATIONSHIPS BETWEEN LAW FIRMS AND SOPHISTICATED CLIENTS (Mar. 2011), <https://perma.cc/C9RM-EGAY>.

237. See PROPOSAL TO THE ABA COMMISSION ON MULTIJURISDICTIONAL PRACTICE (Feb. 2011) (on file with author); see also ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS, A PROPOSAL FOR FREEDOM OF MOVEMENT OF LAWYERS AMONG THE STATES (Apr. 4, 2011), <http://aprl.net/wp-content/uploads/2016/07/2011-04.pdf> [<https://perma.cc/66FX-Q9XA>]; ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYER, STATEMENT ON ABA ETHICS 20/20 COMMISSION PROPOSED TEMPLATES RE INBOUND FOREIGN LAWYER ISSUES (Oct. 25, 2011), [https://aprl.net/wp-content/uploads/2016/07/APRL\\_Statement\\_Ethics2020.pdf](https://aprl.net/wp-content/uploads/2016/07/APRL_Statement_Ethics2020.pdf) [<https://perma.cc/U5YP-DFEE>].

238. See *The Association of Professional Responsibility Lawyers*, ABA, [https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/commission-on-multijurisdictional-practice/mjp\\_comm\\_aprl/](https://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission-on-multijurisdictional-practice/mjp_comm_aprl/) [<https://perma.cc/Q8JB-K5YK>]

APRL believes that it is of crucial importance for the bar, the states, and the public that the issue of multijurisdictional practice (“MJP”) be addressed and substantive changes made to the way in which lawyers are regulated when they practice across state borders.

The essence of the APRL proposal is that the states establish a common, uniform system permitting the free movement of lawyers, and the free trade in legal services, across state lines, without derogating from the states’ legitimate and historic interests in regulating the legal profession.

239. See *id.* (“The prohibition on the unauthorized practice of law shall not apply to an attorney duly licensed and authorized to practice law in another state while such attorney is temporarily in this state and is engaged in either (i) a particular matter, or (ii) particular matters to the extent such matters arise out of or are otherwise reasonably related to the lawyer’s practice in such other state.”) (the “model law” included in “III. The APRL Proposal, 1. Temporary Presence”).

states subject to the supervision of the states where they wish to establish themselves.”<sup>240</sup>

The APRL took a further step in a statement released in early 2011,<sup>241</sup> recommending leaving Model Rule 5.5 essentially as is but excluding from the unauthorized-practice restriction actions by lawyers tied to the number of days in any calendar year the attorney was in a jurisdiction.<sup>242</sup> This proposal attempted to quantify what current Model Rule 5.5(c) calls “temporary” practice; however, it implicitly requires detailed records of time spent in the state, a requirement not present in existing Model Rule 5.5(c). Further, to the extent that the time spent in a state must be tracked, a record-keeping requirement may require disclosure of client identity or client activities, which may run afoul of the confidentiality rules.

Later in 2011, APRL issued a “Statement” supporting the work of another of the Commission’s working groups, noting that, while APRL “supports all of the current proposals of the Commission, APRL views those proposals as simply implementing and completing the reforms adopted in 2002. APRL urges the Commission to consider further expansion of multijurisdictional practice, both within the United States and internationally.”<sup>243</sup>

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240. *Id.* The beginning of the “second tier” of the “Executive Summary.”

241. *See* A PROPOSAL FOR FREEDOM OF MOVEMENT OF LAWYERS AMONG THE STATES, *supra* note 237.

242. *See id.*

<https://aprl.net/wp-content/uploads/2016/07/2011-04.pdf> [<https://perma.cc/972T-7YCS>] (last visited 02/28/21):

(a) Without limiting any authorization to practice law afforded by any other rule or law applicable in this jurisdiction, including federal law, including paragraph (b) and (c) below, a lawyer admitted to practice law and in good standing in another United States jurisdiction may provide legal services in this jurisdiction for up to [one hundred] days in any calendar year, unless authorized to do so for a longer period under paragraphs (b) or (c).

243. *See* ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS, STATEMENT OF THE ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS ON ABA ETHICS 20/20 COMMISSION PROPOSALS RE INBOUND FOREIGN LAWYER ISSUES (Oct. 25, 2011), [https://aprl.net/wp-content/uploads/2016/07/APRL\\_Statement\\_ABARevisionsReInBoundForeignLawyers.pdf](https://aprl.net/wp-content/uploads/2016/07/APRL_Statement_ABARevisionsReInBoundForeignLawyers.pdf) [<https://perma.cc/C5S5-64Q6>].

*E. Changing the Definition of What Type of Work Is Reasonably Related to the Lawyer's Practice*

Another approach involves amending Model Rule 5.5 to permit lawyers, in matters that do not involve courts or tribunals, to practice on a temporary basis in states where they are not licensed without the requirement that local counsel be involved on an active participation basis if the work is not within Model Rule 5.5(a) or (b) but is either (i) reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or (ii) reasonably related to the lawyer's customary and usual practice of a particular area of law, or a body of federal, foreign, international, or substantially similar state law.

Requiring that the work be reasonably related to the lawyer's customary and usual practice of a particular area of law could greatly lessen concerns about competency and enhance the ability of clients to use counsel who have the ability and capacity to do multistate work without mandatorily adding the costs and expense of hiring local counsel. Of course, nothing would preclude the out-of-state lawyer or client from retaining local counsel, but this proposal would remove the mandate that they must do so in every instance.

It can be anticipated that the primary objection to this proposal is that the phrase "reasonably related to the lawyer's customary and usual practice of a particular area of law, or a body of federal, foreign, international, or substantially similar state law" is either ambiguous or so broad as to be meaningless. The response to such an argument is that the phrase is far more precise than the current "reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice"—a phrase that the current comments to Model Rule 5.5 seem to tie to both where the lawyer does the work and where the lawyer solicited the work.<sup>244</sup> As has been noted elsewhere in this Article, it seems strange, in this day and age, to tie an attorney's expertise to the state where the attorney is licensed rather than to an area of law in which the attorney has focused.

This approach is more expansive than the reference in Model Rule 5.5 Comment 14 to a "particular body of federal, nationally-uniform, foreign or international law."<sup>245</sup> It rests on the lawyer's customary and usual practice and Comment 14's reference to "the lawyer's recognized expertise developed through the regular practice of law on behalf of

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244. See, e.g., MODEL RULES OF PRO. CONDUCT r. 5.5 cmts. 13, 14 (AM. BAR ASS'N 2002).

245. *Id.* r. 5.5 cmt. 14.

clients,” while recognizing that many areas of law in which attorneys acquire expertise are not limited to uniform laws or federal laws. For example, the Uniform Limited Partnership Act has not been adopted in 10 states including New York and Michigan,<sup>246</sup> while the Uniform Limited Liability Company Act, in either its 1995 version<sup>247</sup> or its 2006 version,<sup>248</sup> has not been adopted by over 20 states; therefore, in those jurisdictions, there is no “uniform law” under the current version of Model Rule 5.5 that would shield an out-of-state attorney seeking to assist a client in a matter involving a limited partnership or limited liability company in the situations posited in Hypotheticals 1 and 2, above. Likewise, more than 30 states have not adopted the Uniform Condominium Act,<sup>249</sup> the Uniform Commercial Real Estate Receivership Act,<sup>250</sup> the Uniform Family Law Arbitration Act,<sup>251</sup> the Uniform Guardian and Protective Proceedings Act,<sup>252</sup> the Uniform Home Foreclosure Procedures Act,<sup>253</sup> the Uniform Limited Cooperative Association Act,<sup>254</sup> the Uniform Manufactured

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246. See PARTNERSHIP ACT (Unif. L. Comm’n 1997), <http://www.uniformlaws.org/committees/community-home?CommunityKey=52456941-7883-47a5-91b6-d2f086d0bb44> [<https://perma.cc/X9WL-RUPB>].

247. See LIMITED LIABILITY COMPANY ACT (1996) (Unif. L. Comm’n 1995), <https://www.uniformlaws.org/committees/community-home?CommunityKey=8a1e82f6-8b71-424e-9e12-293e4dbb2063> [<https://perma.cc/4HLU-5N9R>].

248. See LIMITED LIABILITY COMPANY ACT, REVISED (Unif. L. Comm’n 1995), <https://www.uniformlaws.org/committees/community-home?CommunityKey=bbea059c-6853-4f45-b69b-7ca2e49cf740> [<https://perma.cc/ZU8A-WVTG>].

249. See CONDOMINIUM ACT (Unif. L. Comm’n 1997), <https://www.uniformlaws.org/committees/community-home?CommunityKey=3%20304f481-3a47-4f52-9b05-73db978e33bc> [<https://perma.cc/872R-7FJD>].

250. See COMMERCIAL REAL ESTATE RECEIVERSHIP ACT (Unif. L. Comm’n 2015), <http://www.uniformlaws.org/committees/community-home?CommunityKey=f8e2d89b-f300-40eb-a419-ad41902fcad2> [<https://perma.cc/WA63-GRJN>].

251. See FAMILY LAW ARBITRATION ACT (Unif. L. Comm’n 2016), <https://www.uniformlaws.org/committees/community-home?CommunityKey=df1c9b6-65c0-4d55-bfd7-15c2d1e6d4ed> [<https://perma.cc/2YLY-NQAB>].

252. See GUARDIANSHIP AND PROTECTIVE PROCEDURE ACT (Unif. L. Comm’n 1997), <https://www.uniformlaws.org/committees/community-home?CommunityKey=d716e47d-f50b-4b68-9e25-dd0af47a13b7> [<https://perma.cc/YLL5-C5SW>].

253. See HOME FORECLOSURE PROCEDURES ACT (Unif. L. Comm’n 2015), <https://www.uniformlaws.org/committees/community-home?CommunityKey=7%20589b516-7055-4ef7-8631-c9f8c525e69f> [<https://perma.cc/YL96-WHGU>].

254. See LIMITED COOPERATIVE ASSOCIATION ACT (Unif. L. Comm’n 2007), <https://www.uniformlaws.org/committees/community-home?CommunityKey=22f0235d-9d23-4fe0-ba9e-10f02ae0bfd0> [<https://perma.cc/EK9Q-UW9F>].

Housing Act,<sup>255</sup> the Uniform Mediation Act,<sup>256</sup> the Uniform Nonjudicial Foreclosure Act,<sup>257</sup> the Uniform Powers of Appointment Act,<sup>258</sup> the Uniform Premarital and Marital Agreements Act,<sup>259</sup> the Uniform Transboundary Pollution Reciprocal Access Act,<sup>260</sup> and the Uniform Statutory Trust Entity Act.<sup>261</sup>

The lack of uniformity of laws in all of these areas demonstrates that current Model Rule 5.5's focus on federal laws or uniform state laws is far too restrictive. A proposed change to the text of Model Rule 5.5 would remedy that deficiency.

#### *F. A Change Limited to Telecommuting*

Another approach focuses on telecommuting. Because ABA Formal Opinion 495 does not have the force of law and cannot change the black letter of existing Model Rule 5.5, some have asserted that the language of 5.5 should be altered to change the definition of what constitutes a "systematic and continuous" presence in the state. It could exclude from that definition lawyers who live or spend a long period of time in a state in which they are not licensed as long as: (i) they do not maintain an office in that jurisdiction, (ii) the lawyer's work is unrelated to that jurisdiction,

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255. See MANUFACTURED HOUSING ACT (Unif. L. Comm'n 2012), <https://www.uniformlaws.org/committees/community-home?CommunityKey=96fefc9f-115e-46f0-bf6b-af42368799e5> [<https://perma.cc/58SJ-S4SX>].

256. See MEDIATION ACT (Unif. L. Comm'n 2001), <http://www.uniformlaws.org/committees/community-home?CommunityKey=45565a5f-0c57-4bba-bab-fc7de9a59110> [<https://perma.cc/KJ77-CYFN>].

257. See NONJUDICIAL FORECLOSURE ACT (Unif. L. Comm'n 2002), <https://www.uniformlaws.org/committees/community-home?CommunityKey=d873f0fc-d9eb-41b3-a6d2-e006e07a1f2c> [<https://perma.cc/296W-JNXX>].

258. See POWERS OF APPOINTMENT ACT (Unif. L. Comm'n 2013), <https://www.uniformlaws.org/committees/community-home?CommunityKey=70faefab-5c3d-4146-a51b-9b0a5b1f490d> [<https://perma.cc/DGP7-CJ9U>].

259. See PREMARITAL AND MARITAL AGREEMENTS ACT (Unif. L. Comm'n 2012), <https://www.uniformlaws.org/committees/community-home?CommunityKey=2e456584-938e-4008-ba0c-bb6a1a544400> [<https://perma.cc/4XAQ-DV5Q>].

260. See TRANSBOUNDARY POLLUTION RECIPROCAL ACCESS ACT (Unif. L. Comm'n 1982), <https://www.uniformlaws.org/committees/community-home?CommunityKey=8db64de2-794d-4d09-9fc9-360c98cf92da> [<https://perma.cc/72JS-P2QZ>].

261. See STATUTORY TRUST ENTITY ACT (Unif. L. Comm'n 2009), <https://www.uniformlaws.org/committees/community-home?CommunityKey=8277f058-520e-40f2-8413-bf1c7bc4836d> [<https://perma.cc/5G62-V5BV>].

and (iii) the lawyer's presence in that jurisdiction is invisible to the local legal market and to local clients.<sup>262</sup>

This formulation would permit lawyers who are not licensed in a state to live there permanently, have a second home there, spend a long vacation at a resort or hotel, or spend long periods of time in that state while still being able to do legal work remotely as long as that work did not concern the state where the lawyer was sitting while doing the work.

The problem with such a formulation is that it would not aid transactional lawyers who do multistate deals. Additionally, it would continue the implicit protection of the "local" market from competition by creating a legal fiction through the alteration of the phrase "systematic and continuous." Under such a reformulation, even if a lawyer was physically present in a state where the lawyer was not licensed and performing legal work in that state, under this fiction the lawyer's physical presence would not be "systematic and continuous." To go back to the origins of that phrase, it could hardly be said that a lawyer who spent weeks at a time in a state would not be subject to its general jurisdiction,<sup>263</sup> but somehow the lawyer would be treated as not subject to the rules of professional conduct in that state.

#### CONCLUSION

Multijurisdictional practice is increasing, not diminishing. It is no longer appropriate to ignore the fact that clients want their transactional attorneys to represent them regularly in multistate deals while at the same time putting attorneys' licenses at risk if they do not increase their clients' costs by obtaining local counsel each and every time they fly into or out of state, meet with new clients outside of the lawyer's home state, or document matters that may involve properties, assets, or entities in several states.

Likewise, telecommuting continues to increase. Notwithstanding ABA Formal Opinion 495, black letter rules that restrict remote practice make it difficult for lawyers to serve their clients while spending time with their families.

In order to allow transactional lawyers and telecommuters to best serve their clients, and to allow their clients to efficiently and freely choose lawyers the clients believe will best represent them, multijurisdictional

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262. Note, however, that like every change with seemingly universal coverage, not all would be covered: Ohio's Ms. Jones was working from an Ohio office while practicing Kentucky law, where she was admitted to practice. *See supra* text accompanying notes 153–56.

263. *See supra* Section II.B.

practice rules need to change. There really should be only two questions remaining—when and by how much?