

# Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age

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## I. INTRODUCTION

Complaints about the legal profession’s self-regulation abound. Clients and critics argue, often persuasively, that the rules of professional conduct systematically favor lawyers’ interests over clients’ and societal interests,<sup>1</sup> that the rules are chronically underenforced,<sup>2</sup> and that enforcement, if and when it does take place, tends to be too lenient.<sup>3</sup>

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1. Examples of rules favoring lawyers’ interests include American Bar Association (ABA) Model Rule of Professional Conduct 1.6(b)(5), the so-called self-defense exception to confidentiality allowing lawyers to reveal confidential client information in order to defend against allegations of wrongdoing and collect their fees; Model Rule 5.5 prohibiting nonlawyers from practicing law and providing the legal profession a monopoly over the provision of legal services; and Model Rule 6.1, recommending but not requiring the provision of pro bono legal services. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(5), 5.5, 6.1 (2010). A recent example is ABA Formal Opinion 09-455, *Disclosure of Conflicts Information When Lawyers Move Between Law Firms*, in which another exception to confidentiality was recognized to make attorney lateral moves easier. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 09-455 (2009) (on file with author); see Eli Wald, *Lawyer Mobility and Legal Ethics: Resolving the Tension Between Confidentiality Requirements and Contemporary Lawyers’ Career Paths*, 31 J. LEGAL PROF. 199, 227–28, 233, 272–77 (2007) (advocating a solution to the tension between confidentiality and conflict rules that does not come at clients’ expense).

2. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 648 (1981) (“[S]tudy after study has shown that the current rules of professional conduct are not enforced.”); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 493 (1990) (noting rules of professional conduct tend to be “systematically underenforced”).

3. See, e.g., Benjamin H. Barton, *Do Judges Systematically Favor the Interests of the Legal Profession?*, 59 ALA. L. REV. 453, 465 (2008) (“The enforcement of the Rules of Professional Conduct has been notoriously lax.”); Deborah L. Rhode, *The Profession*

Lawyers, understandably and self-servingly generally defenders of self-regulation,<sup>4</sup> also complain about the rules of professional conduct, asserting that the rules are antiquated and often out of touch with practice realities.<sup>5</sup>

Nowhere is lawyers' own critique of the rules more compelling than in the context of the nationalization and globalization of the practice of law. Although technological advances continue to flatten our world,<sup>6</sup> clients' needs increasingly span jurisdictional, regional, and national borders<sup>7</sup>; large law firms become national, even global entities;<sup>8</sup> and outsourcing and off-shoring legal services become a reality,<sup>9</sup> still, the regulation of the legal profession continues to be state based.<sup>10</sup> States

*and the Public Interest*, 54 STAN. L. REV. 1501, 1512 (2002) (citing examples of lax lawyer discipline).

4. This is not to suggest that the legal profession is a monolith with uniform and consistent interests. Although most lawyers favor self-regulation because it serves their interests disallowing competition by nonlawyers, disagreement abounds regarding other aspects of the organized bar's implementation of self-regulation. Solo practitioners and small law firms have long complained, not without merit, that the rules are promulgated and enforced with a bias against them and in favor of large law firms and their lawyers. See, e.g., Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017, 1111 n.355 (2004) (discussing discriminatory enforcement against solo practitioners).

5. See, e.g., Symposium, *Multidisciplinary Practice*, 20 N.Y.L. SCH. J. INT'L & COMP. L. 153, 158 (2000) ("The Model Rules are antiquated. Facetiously put, they were designed for a handful of ethnically-compatible gentlemen practicing in the small town not within a hundred miles of an ocean and with a view of the river. They do not work.").

6. Jack P. Sahl, *Foreword: The New Era—Quo Vadis?*, 43 AKRON L. REV. 641, 642 n.2 (2010); Laurel S. Terry, *The Legal World Is Flat: Globalization and Its Effect on Lawyers Practicing in Non-Global Law Firms*, 28 NW. J. INT'L L. & BUS. 527, 531–47 (2008).

7. See, e.g., Anthony E. Davis, *Regulation of the Legal Profession in the United States and the Future of Global Law Practice*, 19 PROF. LAW., no. 2, 2009 at 1, 8–11.

8. James R. Faulconbridge et al., *Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work*, 28 NW. J. INT'L L. & BUS. 455, 455–59 (2008); Carole Silver et al., *Between Diffusion and Distinctiveness in Globalization: U.S. Law Firms Go Glocal*, 22 GEO. J. LEGAL ETHICS 1431, 1438–45 (2009).

9. See, e.g., Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2139, 2166–67 (2010).

10. The ABA Commission on Legal Ethics 20/20 is examining the impact of globalization and technology on the legal profession. Among other issues, the commission is looking into liberalizing national and some aspects of global law practice. To date, the commission has released issues papers on the ability of foreign lawyers to practice law in the United States, see AM. BAR ASS'N, COMM'N ON ETHICS 20/20, MEMORANDA AND TEMPLATES FOR COMMENT—INBOUND FOREIGN LAWYERS ISSUES (2010) [hereinafter INBOUND FOREIGN LAWYERS], available at <http://www.armfor.uscourts>.

administer varying admission standards, generally restrict the practice of law within their jurisdictions to lawyers licensed in the state, promulgate state rules of professional conduct, and enforce discipline at the state level, rendering self-regulation outdated and increasingly inconsistent with practice realities.

Strikingly, although many recent scholarly contributions have begun to explore the meaning and consequences of the globalization of law practice,<sup>11</sup> precious little has been done about a perhaps less sexy but nevertheless more immediate and pressing development—the nationalization of law practice.<sup>12</sup> The goal of this Article is to address this scholarly oversight, advocating the partial nationalization of the regulatory approach to law practice. It analyzes the ongoing nationalization and globalization of law practice exploring its causes and effects, argues that the current state-based approach to the regulation of the legal profession ill fits the new landscape of law practice, and studies several approaches to responding to the nationalization of law practice.

At one end, the profession can adhere to the status quo and continue to self-regulate at the state level. This approach may be warranted if—the growing gap with practice realities notwithstanding—there are compelling reasons to retain the current state-based regulatory apparatus. Establishing that such reasons do not exist, the Article examines an approach at the other end, nationalizing the regulatory approach to law practice. This approach would entail nationalized admission standards, a nationalized licensing scheme, a national code of ethics, and national enforcement; practically speaking, this approach would be achieved by federalizing regulation, thus significantly altering and arguably

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gov/ConfHandout/2011StephenGillersABA4.pdf, on the ABA Model Rule on Admission by Motion, *see* AM. BAR ASS'N COMM'N ON ETHICS 20/20, FOR COMMENT: ISSUES PAPER CONCERNING THE ABA RULE ON ADMISSION BY MOTION (2010) [hereinafter ADMISSION BY MOTION], *available at* [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/ethics\\_2020/admission\\_motion.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/admission_motion.authcheckdam.pdf), and on multijurisdictional practice, *see* AM. BAR ASS'N COMM'N ON ETHICS 20/20, FOR COMMENT: ISSUES PAPER CONCERNING MULTIJURISDICTIONAL PRACTICE (2011) [hereinafter MULTIJURISDICTIONAL PRACTICE], *available at* [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).

11. Sahl, *supra* note 6, at 653–54, 656–61; International Legal Ethics Conference IV: The Legal Profession in Times of Turbulence, held by the Stanford Center on the Legal Profession and the American Bar Association for Professional Responsibility (July 15–17, 2010), *available at* <http://blogs.law.stanford.edu/ilec4/>.

12. *See infra* Part II. Revealingly, in a recent essay assessing a 2002 amendment to ABA Model Rule 5.5 governing multijurisdictional practice, Arthur Greenbaum notes that although the amendment promoted uniformity across states and was the product of compromises, it did not even strive, let alone succeed, in promulgating the “best” rule regarding national law practice. Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5—An Interim Assessment*, 43 AKRON L. REV. 729, 730, 732–36 (2010).

weakening self-regulation,<sup>13</sup> and shifting regulatory power from the states to the federal government. Concluding that such a dramatic regulatory reform is not yet warranted either conceptually or by empirical findings regarding the extent of national law practice, the Article advocates a third, intermediary approach: retaining the current state-based admissions, licensing, and disciplinary apparatus, while adopting an open-border national jurisdiction for purposes of lawyers' authorized law practice. This intermediary approach to nationalizing law practice addresses pressing client needs ignored by the current state-based approach while respecting longstanding arguments supporting the ability of states to regulate law practice and arguments favoring self-regulation over the federalization of the practice of law.

To date, the best case for nationalizing law practice is a 1994 article by Professor Fred Zacharias, entitled *Federalizing Legal Ethics*, a paper that, ironically, falls short of actually calling for the nationalization of law practice and only calls for the nationalization, via federalization, of legal ethics rules.<sup>14</sup> Zacharias's argument for federalizing legal ethics consists of four analytical steps. First, significant ongoing changes in the practice of law bring about the nationalization of law practice. Second, the nationalization of law practice renders the current legal ethics rules ineffective<sup>15</sup> because legal ethics rules are promulgated and enforced at the state level and vary from state to state, and lawyers who increasingly have a national practice find themselves subject to the conflicting regulation of several jurisdictions.<sup>16</sup> Third, the growing mismatch between the national practice of law and the state-based regulation of lawyers can only be resolved by nationalizing legal ethics and putting in place a uniform set of rules of practice.<sup>17</sup> Finally, practically speaking, the only workable avenue of nationalizing legal ethics is federalization.<sup>18</sup>

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13. By replacing state-based regulation, promulgated and enforced by judges and lawyers, with federal regulation, promulgated by Congress and enforced by a federal administrative agency.

14. Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 345 (1994). The article also explores briefly nationalizing, by federalizing, enforcement of legal ethics rules. It does not, however, deal with admissions standards and multijurisdictional practice.

15. "The changes in professional regulation and in the nature of legal practice have contributed to a sense that current [ethics] codes may no longer be effective." *Id.* at 344.

16. *Id.*

17. *Id.*

18. *See id.*

This Article is organized as a response to Zacharias's influential paper, revisiting each of his four analytical steps. Following Zacharias, Part II documents the growing nationalization and globalization of law practice, and argues that the transformation of law practice renders the state-based regulation of lawyers ineffective. Part III parts ways with Zacharias's thesis. It asserts that nationalizing, by federalizing, legal ethics is not warranted by changing practice realities and that, worse, federalizing the rules of legal ethics without more will leave some of the most troubling aspects of the transformation of law practice, including client needs, unaddressed. Instead, Part III argues that the growing nationalization of law practice on the ground requires nationalizing the regulatory approach to law practice and offers a blueprint for such reform. In other words, it concludes that although *Federalizing Legal Ethics* may not have succeeded in compellingly justifying a need to federalize the rules of professional conduct, it accomplished a far much more ambitious agenda—laying a foundation for the nationalization of law practice.<sup>19</sup> Finally, Part IV briefly explores some of the implications of nationalizing the regulatory approach to law practice in the context of the increased globalization of law practice.

## II. THE GROWING GAP BETWEEN NATIONAL LAW PRACTICE AND STATE-BASED REGULATION OF THE LEGAL PROFESSION

### A. *National Law Practice*

The practice of law is increasingly national in nature. Writing in 1994, Professor Zacharias observed:

To service increasingly mobile individual clients and national commercial clients, lawyers and firms have broadened their practices. Most major firms maintain branch offices in several states. Virtually all lawyers have become accustomed to representing clients in multistate transactions and litigation. Lawyers no longer can afford to confine their activities to local courts, because the expansion of federal jurisdiction and administrative regulation create the possibility that almost any matter will become subject to federal law . . . . Conversely, servicing clients in more routine matters requires local lawyers to offer advice and representation that cross state lines. The practices of both multistate law firms and less ambitious practitioners thus have become national in nature.<sup>20</sup>

Since 1994, the causes and processes nationalizing law practice have significantly intensified. To begin with, client needs have dictated an expansion in cross-state practices as client interests increasingly span

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19. See also Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 *FORDHAM L. REV.* 125, 127 (1991) (predicting the adoption of a “Federal Code of Lawyering”).

20. Zacharias, *supra* note 14, at 342–43 (footnotes omitted).

state jurisdictional borders.<sup>21</sup> For example, a client domiciled and doing business in state *A* may be negotiating with counterparties, lenders, suppliers, creditors, and clients in states *B*, *C*, *D*, *E*, and *F*, and agreeing to arbitrate or litigate subject to the laws of state *G*. Such a client will need legal advice about the law and its application in several states, may need a lawyer to negotiate on its behalf out of state *A*, and may subsequently need legal representation out of state. Or a national entity client may be doing business in multiple states, therefore requiring legal advice on the law of several states in multiple areas and representation in multiple jurisdictions where it may sue and get sued regularly.

Next, federal law has continued to expand significantly and with it, lawyers practicing federal law irrespective of state borders.<sup>22</sup> Moreover, state law claims related to federal law further blur jurisdictional lines and expand the scope of national law practice. For example, an illegal immigrant client seeking representation in conjunction with deportation proceedings may have at the same time claims for unpaid wages, triggering additional bodies of federal law and state law.<sup>23</sup>

At the same time as increased client demand and growth in federal law have expanded the scope of national law practice, technological advances have revolutionized the practice of law, making it much easier to practice law nationally, from research tools that make studying law and gaining competence nationally quick, easy, and relatively cheap, to advances that allow lawyers to be virtually present everywhere.<sup>24</sup> These

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21. Helen W. Gunnarsson, *A Proposed Makeover for the Rules of Professional Conduct*, 96 ILL. B.J. 128, 129 (2008); Laurel S. Terry et al., *Transnational Legal Practice*, 42 INT'L LAW. 833, 833–34 (2008); Raymond J. Werner, *Licensed in One State, but Practicing in Another: Multijurisdictional Practice*, PROB. & PROP., Mar.–Apr. 2003, at 6, 9.

22. MODEL RULES OF PROF'L CONDUCT R. 5.5(d)(2) (2010) (generally allowing out-of-state lawyers to practice federal law); see Cynthia L. Fountaine, *Have License, Will Travel: An Analysis of the New ABA Multijurisdictional Practice Rules*, 81 WASH. U. L.Q. 737, 743–55 (2003) (explaining rule 5.5's approach and rationale); see also Mark Pruner, *The Internet and the Practice of Law*, 19 PACE L. REV. 69, 79–80 (1998) (“The licensing of lawyers for most purposes is regulated at the state level. Some practice areas that primarily involve federal laws have federal licensing requirements. Areas such as federal tax law and patent law have separate licensing laws, so lawyers can practice their ‘federal’ specialty without being licensed in the state where they have an office.”).

23. See, e.g., Christine N. Cimini, *Ask, Don't Tell: Ethical Issues Surrounding Undocumented Workers' Status in Employment Litigation*, 61 STAN. L. REV. 355, 383–85 (2008).

24. See *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 6 (Cal. 1998) (allowing virtual law practice subject to several conditions); N.C.

advances have made national law practice feasible and accessible to clients and lawyers alike.

Increased supply followed the growing demand for national legal services, evidenced by the significant expansion in the number and size of large law firms<sup>25</sup>—a prime example of providers of legal services on a national level<sup>26</sup>—as well as of franchise law firms.<sup>27</sup> Indeed, the practice of law is increasingly becoming not only national but even global. Global law firms are growing in number and size,<sup>28</sup> alliances between law firms across the globe abound,<sup>29</sup> outsourcing and offshoring legal services are expanding,<sup>30</sup> even global law schools emerge.<sup>31</sup> In turn, the nationalization and globalization of law practice create and sustain new career paths for lawyers, which increasingly include increased mobility.<sup>32</sup>

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State Bar, 2005 Formal Ethics Op. 10 (2006), reprinted in N.C. STATE BAR, THE 2006 LAWYER'S HANDBOOK 318 (2006), available at 2006 WL 980309 (same); see also Thomas D. Morgan, *Conflicts of Interest and the New Forms of Professional Associations*, 39 S. TEX. L. REV. 215, 242 (1998) (foreseeing the advent of virtual law firms); J. Clayton Athey, Note, *The Ethics of Attorney Web Sites: Updating the Model Rules To Better Deal with Emerging Technologies*, 13 GEO. J. LEGAL ETHICS 499, 508 (2000); see generally J.T. Westermeier, *Ethics and the Internet*, 17 GEO. J. LEGAL ETHICS 267 (2004).

25. See Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1882–84 (2008); see also MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM 112–13 (1991).

26. Zacharias, *supra* note 14, at 341–42.

27. See Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J. LEGAL ETHICS 1485, 1491 n.19 (2009). But see Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 FORDHAM L. REV. 719, 723 (2001) (“The franchise law firm movement appears to be facing serious financial difficulties: Jacoby & Meyers has dissolved and Hyatt Legal Services has shrunk dramatically. Many other so-called legal clinics have decided to concentrate almost exclusively on personal injury work” (footnotes omitted)). See generally JERRY VAN HOY, FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES (1997) (discussing the growth of franchise law firms and arguing that such firms mass market and produce services at low cost, but at the expense of quality).

28. See articles cited *supra* note 8.

29. John Flood, *Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions*, 14 IND. J. GLOBAL LEGAL STUD. 35, 56 (2007); John Flood & Fabian Sosa, *Lawyers, Law Firms, and the Stabilization of Transnational Business*, 28 NW. J. INT'L L. & BUS. 489, 506–13 (2008); Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051, 2059 (2010).

30. See, e.g., Regan & Heenan, *supra* note 9, at 2139, 2166–67.

31. See, e.g., JINDAL GLOBAL LAW SCHOOL, [http://www.jgls.org/jg\\_default.aspx?this=3](http://www.jgls.org/jg_default.aspx?this=3) (last visited Apr. 24, 2011); see also Joseph Weiler, Remarks, *The Globalization of the American Law School*, 101 AM. SOC'Y INT'L L. PROC. 189, 189–92 (2007).

32. Wald, *supra* note 1, at 199–200.



The nationalization of the practice of law is perhaps most visible in the practice of large law firms representing large entity clients.<sup>33</sup> A national entity client, let alone an international client, may have legal needs in multiple jurisdictions and may have legal issues that span across jurisdictions. Its representation might thus inherently entail practice across state lines and cooperation among firm lawyers in multiple offices nationwide and worldwide.<sup>34</sup> Yet it is important to note that the national practice of law is not merely the domain of national law firms servicing national clients. To service increasingly mobile individual clients, lawyers and firms of all sizes have broadened their practices.<sup>35</sup> Indeed, servicing clients even in “routine matters requires local lawyers to offer advice and representation that cross state lines. The practices of both multistate law firms and less ambitious practitioners thus have become national in nature.”<sup>36</sup>

It is noteworthy, however, that although there is a general consensus that the practice of law is becoming more national and global<sup>37</sup>—as well as indirect indicia of growing national law practice such as the rise in the number and size of national law firms—there is little empirical evidence systematically quantifying the various aspects of the nationalization and globalization of law practice.<sup>38</sup> We have little information about how

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33. On the separation of hemispheres in law practice, whereby large law firms tend to service large entity clients and solo and small law firms commonly serve individual clients, see JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 319–20 (1982), which coins the classic term “hemispheres” of lawyers to denote that the legal profession consists of two categories of lawyers whose practice settings, socioeconomic and ethno-religious backgrounds, education, and clientele differ considerably.

34. Zacharias, *supra* note 14, at 352 (“When national lawyers represent or sue national corporations, the problems are exacerbated. A firm that has several members representing a corporation may find an issue simultaneously governed by the codes in (1) the state in which the firm’s lawyers communicate with the corporation (*e.g.*, the firm’s headquarters); (2) the home states of the lawyers representing the corporation; (3) the home state of the corporation; and (4) the state in which the legal issue arises.”).

35. See Duncan T. O’Brien, *Multistate Practice and Conflicting Ethical Obligations*, 16 SETON HALL L. REV. 678, 678 (1986) (attributing the increase in multistate practice to the increased mobility of lawyers and clients, the interstate scope of many business transactions, the growth of specialization, and the pervasiveness of federal law).

36. Zacharias, *supra* note 14, at 342–43.

37. Sahl, *supra* note 6, at 645.

38. *Id.* at 645–46; see also Carole Silver, *What We Don’t Know Can Hurt Us: The Need for Empirical Research in Regulating Lawyers and Legal Services in the Global Economy*, 43 AKRON L. REV. 1009, 1016 n.19 (2010) (“This debate [over multijurisdictional practice] is difficult to resolve, in large part, because of the absence of

many lawyers and law firms practice multijurisdictionally and nationally, and about the scope of their national practice. In particular, we do not know how many lawyers are authorized to practice law in multiple jurisdictions, let alone how many lawyers are engaged in the unauthorized national practice of law. Disciplinary complaints provide only a crude measure of the extent of the unauthorized practice of law, if only because discipline is chronically underenforced.<sup>39</sup> Nonetheless, it seems clear that national, and global, law practice is growing, and is only likely to expand even further in the future.

### B. State-Based Regulatory Approach

Although the practice of law grows national, the regulation of the legal profession continues to be state based in four fundamental interrelated ways.<sup>40</sup> First, admission to the legal profession, including administration of the bar exam, is done at the state level. To be sure, some aspects of the admission process are “national,” for example, the MBE portion of the bar exam, a multiple-choice section testing common law doctrines in six areas,<sup>41</sup> and the MPRE, the legal ethics component of the bar exam, are used by a vast majority of the states. Moreover, some states are exploring the adoption of a nationalized bar exam.<sup>42</sup> Yet

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empirical evidence about how the elimination of jurisdictional restrictions would affect law practice in the United States, and the inability to obtain such evidence without authorizing national practice.” (quoting AM. BAR ASS’N CTR. FOR PROF’L RESPONSIBILITY, CLIENT REPRESENTATION IN THE 21ST CENTURY 16 (2002))).

39. *Supra* note 2. Moreover, the focus of unauthorized practice of law enforcement has traditionally been nonlawyers, not unauthorized lawyers admitted in other states. See Charles W. Wolfram, *Expanding State Jurisdiction To Regulate Out-of-State Lawyers*, 30 HOFSTRA L. REV. 1015, 1042 (2002).

40. It should be noted that in different times different actors within the state apparatus assumed primary responsibility for the regulation of the profession. See Michael J. Powell, *Professional Divestiture: The Cession of Responsibility for Lawyer Discipline*, 1986 AM. B. FOUND. RES. J. 31, 33–35 (examining the processes by which state supreme courts assumed responsibility for overseeing disciplinary system in place of bar associations). Moreover, the dominance of state-based regulation has been somewhat eroded as of late by the expansion of federal law and with it the federalization of law practice. See Daniel R. Coquillette & Judith A. McMorro, *Zacharias’s Prophecy: The Federalization of Legal Ethics*, 48 SAN DIEGO L. REV. 123, 124–27 (2011); Bruce A. Green, *ABA Ethics Reform from “MDP” to “20/20”: Some Cautionary Reflections*, 2009 J. PROF. LAW. 1, 4–7 (arguing that future reform to the regulation of lawyers may require abandoning the state-based approach).

41. See *The Uniform Bar Examination (UBE)*, NAT’L CONFERENCE OF BAR EXAM’RS, <http://www.ncbex.org/multistate-tests/ube/> (last visited Apr. 24, 2011).

42. Rachel M. Zahorsky, *Several States Move Closer to National Bar Exam*, A.B.A. J. (Nov. 23, 2009, 1:49 PM), [http://www.abajournal.com/news/article/several\\_states\\_move\\_closer\\_to\\_national\\_bar\\_exam/](http://www.abajournal.com/news/article/several_states_move_closer_to_national_bar_exam/); see also Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L.J. 969, 974 (1992); *Essays on a Uniform Bar Examiner*, B. EXAMINER,

states continue to administer different admission processes and criteria, including different bar examinations.

Second, licensing, and hence the ability to practice law, is state based. Although the language of ABA Model Rule 5.5(a)—the nearly uniformly adopted rule of professional conduct titled “Unauthorized Practice of Law; Multijurisdictional Practice of Law”—is somewhat unclear on this point, stating that “[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction,”<sup>43</sup> comment 1 to the rule clarifies that “[a] lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice.”<sup>44</sup> Generally speaking, authorization to practice law in a jurisdiction is granted via a license, valid only within the issuing state’s jurisdiction. Inherently, therefore, the regulatory approach to law practice is state based, authorizing lawyers to practice only in a state where they are licensed and forbidding national law practice.

In 2002, the ABA adopted a Model Rule on Admission by Motion,<sup>45</sup> which permits a lawyer who meets certain conditions to practice law in host jurisdiction.<sup>46</sup> The Admission by Motion Rule has been adopted by ten jurisdictions, and thirty additional jurisdictions adopted a more restrictive version, either requiring reciprocity or imposing additional conditions for admission.<sup>47</sup> Importantly, while the Admission by Motion Rule allows lawyers to practice outside of their home jurisdiction, the rule is a classic example of a state-based regulatory approach: it requires

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Feb. 2009, at 6–43, available at [http://www.ncbex.org/fileadmin/mediafiles/downloads/UBE/780109\\_be\\_essays.pdf](http://www.ncbex.org/fileadmin/mediafiles/downloads/UBE/780109_be_essays.pdf).

43. MODEL RULES OF PROF’L CONDUCT R. 5.5(a) (2010).

44. *Id.* R. 5.5 cmt. 1.

45. See ADMISSION BY MOTION, *supra* note 10, at 2–3.

46. Pursuant to the rule, an applicant for admission by motion must be admitted in another United States jurisdiction, hold an approved law degree, engage in the continuous practice of law for a specified period of time, be in good standing in all jurisdictions where admitted, have a clean disciplinary record, meet “character and fitness” requirements, and designate the clerk of the jurisdiction’s highest court for service of process. *Id.*

47. *Id.* For a comparison chart of states’ admission rules, see AM. BAR ASS’N, COMPARISON OF ABA MODEL RULE ON ADMISSION BY MOTION WITH STATE VERSIONS (2010) [hereinafter COMPARISON OF MODEL RULE ON ADMISSION BY MOTION], available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission\\_motion\\_comp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_motion_comp.authcheckdam.pdf). See also AM. BAR ASS’N JOINT COMM. ON LAWYER REGULATION, ADMISSION BY MOTION RULES (2010) [hereinafter ADMISSION BY MOTION RULES], [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission\\_motion\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_motion_rules.authcheckdam.pdf) (presenting a fifty-state survey of the existing admission procedures for out-of-state lawyers).

out-of-state attorneys to apply for admission in each state as a condition precedent for practice and grants individual states the power to approve or deny applications as they see fit. In other words, it continues to vest in states admission, licensing, and enforcement powers.

Third, rules of professional conduct are adopted by state courts or, less commonly, by state legislatures, and apply to lawyers admitted and practicing in the state.<sup>48</sup> Although the rules of conduct in most states follow the ABA's *Model Rules of Professional Conduct*—with the exception of California—they do vary, sometimes in significant ways. And while federal statutes increasingly regulate the conduct of lawyers, and sometimes attempt to preempt conflicting state rules of ethics,<sup>49</sup> such federal regulation usually governs only the practice of law before federal agencies, that is, federal legal ethics rules apply only in the context of practice before federal agencies and do not attempt to replace state legal ethics rules as the generally applicable body of law regulating lawyers' conduct.<sup>50</sup>

Finally, enforcement of the rules takes place at the state level and applies within a state. Specifically, states usually attempt to discipline only lawyers admitted in their respective jurisdictions and not out-of-state lawyers, even if their conduct impacts state interests.<sup>51</sup> In most states, state supreme courts are nominally charged with disciplinary enforcement but delegate investigatory and disciplinary authority to regulatory agencies that report to them.<sup>52</sup> Increasingly, however, when federal statutes regulate the conduct of lawyers, they vest enforcement authority in federal agencies, such as the Securities and Exchange Commission pursuant to section 307 of the Sarbanes-Oxley Act.<sup>53</sup>

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48. *Id.* R. 5.5(a); *see also* Wolfram, *supra* note 39, at 1016–21.

49. *See* Coquillette & McMorrow, *supra* note 40.

50. That states play a leading role in promulgating rules of professional conduct does not suggest, however, clarity in terms of the rules' content. Indeed, exactly because the rules are promulgated on a state basis by multiple state actors, great confusion arises as to conflicting rules both within states and among states. *See* Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149 (2010).

51. Wolfram, *supra* note 39, at 1017–18, 1050–52 (arguing for increased state disciplinary enforcement vis-à-vis nonadmitted, out-of-state lawyers).

52. In Massachusetts, for example, attorney discipline is administered by the Board of Bar Overseers, essentially an arm of the Supreme Judicial Court. *Board of Bar Overseers, Office of the Bar Counsel*, MASS.GOV, <http://www.mass.gov/obcbbo/> (last visited Apr. 24, 2011). In California, attorney discipline is a function reserved to the California Supreme Court and exercised through the California State Bar, a legislatively created public corporation that serves as the administrative arm of the supreme court and is answerable to the court. *See In re Attorney Discipline Sys.*, 967 P.2d 49, 55–55, 58–59 (Cal. 1998); *Husted v. Workers' Comp. Appeals Bd.*, 636 P.2d 1139, 1142–44 (Cal. 1981).

53. 15 U.S.C. § 7245 (2006) (“[T]he [Securities and Exchange] Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum

*C. The Growing Gap Between National Law Practice and a State-Based Regulatory Approach*

The growing gap between lawyers' practice realities that grow national in character and the regulatory approach that remains state based is disconcerting for several reasons. Fundamentally, the regulatory approach appears to have become antiquated and out of touch with practice realities. Conceptually, its underlying premise—that most lawyers practice locally—no longer accurately reflects many attorneys' practice realities. Consequently, the regulatory approach ought to be reconsidered and realigned with practice realities or risks becoming of little relevance to practicing attorneys. Of course, it is possible that compelling arguments exist that might justify adherence to a state-based regulatory approach and might provide reasons for resisting practice-based pressures to nationalize law practice. If so, however, such arguments must be advanced explicitly by the legal profession because in the face of the transformation of law practice realities, upholding the state-based regulatory approach on the grounds of tradition, historical-path dependencies, and aversion to change will likely prove insufficient to stop the rules from becoming obsolete.

Practically speaking, some might argue that the troubling conceptual gap between lawyers' increasingly national practice realities and a state-based regulatory approach is mitigated by loose and broad interpretation of the rules of professional conduct, supported by underenforcement of the rules.<sup>54</sup> That is, although the regulatory approach purports to be state based, both its construction and lack of enforcement in fact allow lawyers to practice nationally to some extent, and that therefore rethinking and reforming the regulatory approach is unnecessary; this line of thinking may be supported by the lack of empirical evidence regarding the extent and scope of national law practice and enforcement of the state-based approach. Such "if-it-ain't-broke-don't-fix-it" approach, however, is unpersuasive. The text of the rules of professional conduct does, and should, matter. The rules provide guidance to lawyers, frame and shape enforcement, inform client expectations, and

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standards of professional conduct for attorneys appearing and practicing before the Commission . . .").

54. For an analysis of the extent to which the existing regulatory scheme, although formally taking a state-based approach, nonetheless permits, by employing broad and loose interpretation, recognizing exceptions and underenforcing, significant national law practice, see *infra* Part II.C.1.

impact attorney-client representations. A regulatory approach that formally purports to adopt a state-based approach but in fact permits national law practice is illegitimate, confusing, and unpredictable.

### *1. National Law Practice and the Unauthorized Practice of Law*

State-based administration of bar exams and admission procedures would be of little consequence if a lawyer admitted in any state could use the lawyer's license to practice law nationally. The state-based regulatory approach comes into practical life when it generally restricts the practice of law within state jurisdictional lines and deems practice in a state without a license the unauthorized practice of law. Such a regulatory constraint on national practice does not meaningfully limit the practice of lawyers with local, state practice. Consider the following example: a lawyer licensed, domiciled, and practicing out of a law office in state *A* can obviously represent a client domiciled in state *A*, give advice about the laws of state *A*, and appear in the courts of state *A* on behalf of the client. Historically, such state-based representation constituted the paradigmatic practice of law and was consistent with a state-based regulatory approach.

Consider, however, a basic example of a lawyer engaged in national law practice: can a lawyer licensed, domiciled, and practicing out of an office in state *A* represent a client domiciled in state *A*, give advice about the laws of state *B*, and appear in the courts of state *B* on behalf of the client? A strict reading of rule 5.5(a) would suggest that a lawyer in state *A* would not be able to give advice about the laws of state *B* or represent clients in the courts of state *B*, and that doing so would constitute the unauthorized practice of law. If this indeed were the case, then the growing gap between national law practice and a state-based regulatory approach would have significant and disturbing consequences for clients and lawyers. In this simple scenario, for example, a client would be forced to retain a lawyer in state *B* to advise the client on the laws of state *B*, and a client with interests triggering questions about the laws of multiple states would be forced to retain lawyers in multiple jurisdictions, escalating the costs of legal advice and significantly compromising the ability of clients to do business nationally.

Rule 5.5, however, does not clearly forbid a lawyer in state *A* from giving a client in state *A* advice about the laws of state *B* in all circumstances. Rather, it answers the question with a case-by-case "maybe." Rule 5.5(c) states that "[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” in four situations delineated in the rule.<sup>55</sup> In other words, rule 5.5(c) opens the door to national practice and allows a lawyer admitted in state *A* to offer advice about the laws of state *B* and appear in state *B*’s courts if the lawyer’s practice in state *B* is “on a temporary basis.”

Comment 6 states,

There is no single test to determine whether a lawyer’s services are provided on a “temporary basis” in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be “temporary” even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.<sup>56</sup>

The constraint on a lawyer’s “temporary basis” services in a jurisdiction where the lawyer is not licensed is set in rule 5.5(b), which states in relevant part: “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.”<sup>57</sup> Comment 4 explains that “[p]resence may be systematic and continuous even if the lawyer is not physically present here.”<sup>58</sup> Read together, pursuant to the rule, a lawyer may practice nationally on a temporary basis. A lawyer in state *A* cannot open an office or establish “systematic and continuous presence” in state *B*, but the lawyer may, per the comment, visit state *B* on a recurring basis, or for an extended period of time, if the lawyer is representing a client in a single lengthy negotiation or litigation.

The rule and comment shed additional light on the ability to practice nationally by specifying four sets of circumstances under which a lawyer may practice nationally on a temporary basis, although it should be noted that rule 5.5(c) is not meant to be read as a closed list of temporary basis circumstances.<sup>59</sup>

Subsection 5.5(c)(1) permits a state *A* lawyer to offer legal services in state *B* that are undertaken in association with a state *B* lawyer “who

55. MODEL RULES OF PROF’L CONDUCT R. 5.5(c) (2010).

56. *Id.* R. 5.5 cmt. 6.

57. *Id.* R. 5.5(b).

58. *Id.* R. 5.5 cmt. 4.

59. Comment 5 to Model Rule 5.5 clearly states in relevant part: “Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized.” *Id.* R. 5.5 cmt. 5.

actively participates in the matter.”<sup>60</sup> This authorization of national law practice is of little comfort to clients. To be clear, the provision is sensible: a lawyer whose client has material interests in state *B* would be prudent to consult with—and in appropriate instances, associate with—a state *B* attorney with relevant expertise on the laws of state *B*. In this sense, subsection 5.5(c)(1) is near obvious and would come at clients’ expense, as clients would incur the costs and fees of state *B* lawyer. Moreover, comment 8 clarifies that “[f]or this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must *actively participate* in and share responsibility for the representation of the client.”<sup>61</sup> This means that a state *A* lawyer would not be able to essentially practice in state *B* by nominally associating with a state *B* lawyer. For example, a state *A* lawyer would not be able to research, prepare, and give advice on the laws of state *B* and then simply have a state *B* attorney “rubber-stamp” the advice, by printing it, without more, on its stationary. Rather, a state *B* lawyer would have to “actively participate in and share responsibility for the representation of the client.”<sup>62</sup>

Subsection 5.5(c)(2) permits a state *A* lawyer to offer legal services in state *B* that are “reasonably related” to a proceeding before a tribunal in state *B*, if the lawyer “is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized.”<sup>63</sup> Subsection 5.5(c)(2) tracks what is commonly known as the *pro hac vice* provision. A *pro hac vice* is permission granted a lawyer by a court to appear before it on a limited basis and would allow, for example, a state *A* lawyer to represent a client in proceeding before a state *B* court. Although *pro hac vice* permissions are generally granted to lawyers in good standing, it should be noted that many states limit the number of *pro hac vices* an out-of-state attorney may seek in a given year.<sup>64</sup>

Nonetheless, subsection 5.5(c)(2) represents a significant move toward the nationalization of law practice as it allows a state *A* lawyer to represent a client in state *B* courts. Comment 11 to rule 5.5 further clarifies that when a lawyer is authorized by subsection 5.5(c)(2), lawyers who are associated with that lawyer in the matter but who do not expect to appear before the court or administrative agency are also

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60. *Id.* R. 5.5(c)(1).

61. *Id.* R. 5.5 cmt. 8 (emphasis added).

62. *Id.* R. 5.5(c)(1).

63. *Id.* R. 5.5(c)(2).

64. See generally Clint Eubanks, *Can I Conduct This Case in Another State? A Survey of State Pro Hac Vice Admission*, 28 J. LEGAL PROF. 145 (2004); Peter S. Margulies, *Protecting the Public Without Protectionism: Access, Competence and Pro Hac Vice Admission to the Practice of Law*, 7 ROGER WILLIAMS U. L. REV. 285 (2002).



authorized.<sup>65</sup> Accordingly, a state *A* lawyer may have a state *A* associate conduct research, review documents, and attend meetings with witnesses in support of the lawyer's appearance before a state *B* court. Similarly, subsection 5.5(c)(3) permits a state *A* lawyer to offer legal service in state *B* that is reasonably related to arbitration, mediation, or other alternative dispute resolution proceeding in state *B*.<sup>66</sup>

Perhaps most importantly, subsection 5.5(c)(4) permits a state *A* lawyer to offer legal services in state *B* that "arise out of or are reasonably related to the lawyer's practice" in state *A*.<sup>67</sup> Comment 14 to rule 5.5 explores the variety of factors evidencing such a relationship:

The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.<sup>68</sup>

As comment 14 makes clear, a state *A* lawyer may practice nationally in state *B* if a factual or legal nexus exists to the lawyer's practice in State *A*. Such nexus may exist if the client has "substantial contacts" to state *A* or if the matter has a "significant connection" to state *A*.<sup>69</sup> Although neither the rule nor comment state so explicitly, it seems clear, therefore, that if a state *A* lawyer represents a client in a complex transaction and an incidental question regarding state *B* laws arises, state *A* lawyer can research and give the client advice about the laws of state *B*. The rule's broad reading of "temporary basis" and "reasonably related," combined with comment 14's broad construction of the circumstances that would constitute a reasonable relationship to a

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65. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 11.

66. *Id.* R. 5.5(c)(3).

67. *Id.* R. 5.5(c)(4).

68. *Id.* R. 5.5 cmt. 14.

69. *Id.*

lawyer's home state, practically amounts to a limited license for lawyers to practice law nationally.<sup>70</sup>

Although subsection 5.5(c)(4) does allow limited national law practice, it is important, however, not to overstate its scope. Consider the following example. A client in state *B* wishes to retain state *A* lawyer to represent the client in a transaction that would take place in state *B*, where the counterparty is a state *B* citizen and the governing laws would be state *B* laws. Can state *A* lawyer represent the client? Subsection 5.5(c)(4) would suggest not because the factors enumerated in comment 14, requiring a factual or legal nexus to state *A* to allow the lawyer to represent the client, are mostly not present. The client has not been previously represented by state *A* lawyer, the client is not a state *A* resident and has no contacts to state *A*, and the matter has no significant connection to state *A*. Moreover, no significant aspects of lawyer *A*'s work will be conducted in state *A*, and no aspect of the matter involves state *A* laws. The only relevant factor referenced in comment 14 is state *A* lawyer's "recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of . . . nationally uniform . . . law."<sup>71</sup> Note, however, that even if the transaction calls for such "recognized expertise," the expertise might not suffice to trigger subsection 5.5(c)(4), and the lawyer risks engaging in the unauthorized practice of law if the lawyer agrees to represent the client in this transaction. Of course, state *A* lawyer may associate with a state *B* lawyer per subsection 5.5(c)(1), but the cost of such affiliation will fall on the client.

In sum, rule 5.5 codifies and implements a state-based regulatory approach. As an exception, it allows for only temporary national practice, incidental national practice, or limited national practice that has a strong factual or legal nexus to the state where a lawyer is licensed. Although not an insignificant exception, the growing gap between, on the one hand, clients' needs and demand for national law practice and the resulting national law practice, and on the other hand, rule 5.5's state-based regulatory approach, constitutes a significant problem in need of a solution. Moreover, to the extent the rule does allow broad "temporary" national practice if it is "reasonably related" to the lawyer's

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70. *Id.* R. 5.5(c). Rule 5.5's approach, requiring a factual or legal nexus to the state where the lawyer is licensed, is grounded in the old, state-based paradigm of law practice. Consider, for example, a commercial real estate transaction. The location of the property constitutes an important aspect of the transaction and would likely permit a lawyer licensed in the state where the property is located to represent an out-of-state buyer or seller, even if the lender was also out-of-state and the transaction governed by out-of-state law.

71. *Id.* R. 5.5 cmt. 14.

practice in the lawyer's home state, it does so in a confusing and counterintuitive way, by stating a state-based limitation in subsection 5.5(a) only to permit limited national practice in open-ended and likely indeterminate and confusing language in the comment.

It should be noted that the *Restatement of the Law Governing Lawyers* takes a much more relaxed approach to national law practice, stating in relevant part:

[A] lawyer conducting activities in the lawyer's home state may advise a client about the law of another state, a proceeding in another state, or a transaction there, including conducting research in the law of the other state, advising the client about the application of that law, and drafting legal documents intended to have legal effect there. There is no per se bar against such a lawyer giving a formal opinion based in whole or in part on the law of another jurisdiction, but a lawyer should do so only if the lawyer has adequate familiarity with the relevant law.<sup>72</sup>

Practically speaking, however, a lawyer may be reluctant to give a formal opinion on the law of another jurisdiction: even if a lawyer has the relevant expertise to opine on the law of another jurisdiction,<sup>73</sup> the lawyer's insurer may not cover such an opinion,<sup>74</sup> and parties to the transaction may demand an opinion from an attorney licensed in the state.

In addition, a majority of jurisdictions permit some form of admission by motion.<sup>75</sup> Although admission by motion certainly opens the door to

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

73. Model Rule 1.1, which addresses attorney competence, requires that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge . . . reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010). But comment 2 clarifies in relevant part that "[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. . . . A lawyer can provide adequate representation in a wholly novel field through necessary study." *Id.* R. 1.1 cmt. 2. By analogy, it seems clear that a state *A* lawyer may be competent to give advice about the laws of state *B* through the necessary study of state *B*'s laws.

74. On the expanding role of insurance companies in regulating lawyer's conduct, see Anthony E. Davis, *Professional Liability Insurers As Regulators of Law Practice*, 65 *FORDHAM L. REV.* 209, 210–11 (1996), which argues that insurance is becoming a more formal regulatory tool; and Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 *VAND. L. REV.* 1657, 1725–29 (1994), which asserts that mandatory malpractice requirements allow insurers to determine who practices law. See also John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio's Struggle To Reform Its Disciplinary System*, 68 *U. CIN. L. REV.* 65, 101–02 (1999) ("Professional responsibility experts agree that . . . malpractice liability will play an increasing role in regulating attorney conduct.").

75. See notes 45–47 and accompanying text.

multijurisdictional practice by allowing out-of-state attorneys to practice in host jurisdictions, the measure falls short of nationalizing law practice. First, a majority of the jurisdictions that acknowledge admission by motion require reciprocity,<sup>76</sup> thus the rule may be more accurately characterized as taking a bilateral, as opposed to a national, approach. Second, admission by motion is quite expensive, creating a practical barrier for such multijurisdictional practice.<sup>77</sup> Finally, the admission-by-motion approach fails to effectively respond to some changing practice realities: on the one hand, it requires out-of-state attorneys to apply for admission, which their client needs and practice may not require thus granting more privileges than out-of-state lawyers may require, and at the same time, because it is bilateral, state specific, and costly it does not grant sufficient flexibility for out-of-state attorneys.

Consider the following example. State A attorney represents a national client. In January, the client's needs require attorney to practice law in state B, in April attorney needs to practice for a while in state C, in July the client's interests trigger questions under the laws of state D, and in November attorney must address issues in state E. The client's needs do not require permanent admission by motion in states B, C, D, or E, and the cost and delay in seeking admission by motion in any and all of these states would be significant.<sup>78</sup> Rather, such national law practice requires a more systemic solution, nationalizing the regulatory approach to the practice of law.

## *2. National Law Practice and Splintered Rules of Professional Conduct*

Even in circumstances when a lawyer is authorized to practice multijurisdictionally or even nationally, for example, on a "temporary basis" or because a lawyer is licensed in multiple jurisdictions, other limiting aspects of the gap between national law practice and a state-based regulatory approach remain. Rule promulgation has long been

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76. See note 47 and accompanying text.

77. See ADMISSION BY MOTION RULES, *supra* note 47 (listing admission by motion fees); COMPARISON OF MODEL RULE ON ADMISSION BY MOTION, *supra* note 47.

78. The ABA Commission on Ethics 20/20 questions whether a revised admission by motion rule should create a category of admission short of full membership. See ADMISSION BY MOTION, *supra* note 10, at 5. Such a new category, however, would be unnecessary pursuant to proposed rule 5.5(a), *infra* Part III.C.3, because out-of-state attorneys who meet the proposal's criteria would be allowed to practice law on a national basis without the obligation to seek admission by motion.

state based.<sup>79</sup> As the practice of law becomes nationalized, however, “lawyers have found themselves increasingly subject to the regulation of several jurisdictions. Their ability to find guidance in a single state’s code of conduct has virtually disappeared. . . . [L]awyers are often subject to multiple sets of professional codes and disciplinary authorities.”<sup>80</sup> The growing gap between lawyers’ national law practice and a regulatory approach that is state based has dire consequences for the legal profession: “the splintering of regulation undermines a national practitioner’s ability to find guidance. As a practical matter, the splintering creates conflict-of-law issues that lawyers cannot reasonably be expected to resolve.”<sup>81</sup>

Large law firms with offices in multiple jurisdictions exemplify the shortcomings of state-based rules of conduct, as demonstrated by Zacharias:

[M]embers of the same law firm who belong to different bars or who practice through offices in different states are covered by distinct rules. The ability to represent a client therefore may vary from lawyer to lawyer in the same firm. The liability of firm members for their conduct also may vary, for malpractice norms increasingly depend on standards in the applicable professional codes. These discrepancies create quandaries both for the individual lawyers engaged in national practice and for the national firms.<sup>82</sup>

Moreover,

[a] firm that has several members representing a corporation may find an issue simultaneously governed by the codes in (1) the state in which the firm’s lawyers communicate with the corporation (*e.g.*, the firm’s headquarters); (2) the home states of the lawyers representing the corporation; (3) the home state of the corporation; and (4) the state in which the legal issue arises.<sup>83</sup>

The mismatch between an increasingly common national law practice and state-based rules, however, is not a problem of large law firms alone. Rather, it applies to and affects all lawyers. Zacharias explores, for example, conflicting rules regulating advertisement<sup>84</sup> and the ability

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79. Although the dominance of state-based regulation has been somewhat eroded as of late by the expansion of federal law and with it the federalization of law practice. *See* Coquillette & McMorrow, *supra* note 40; Green, *supra* note 40 (arguing that future reform to the regulation of lawyers may require abandoning the state-based approach).

80. Zacharias, *supra* note 14, at 344–45.

81. *Id.* at 352–53.

82. *Id.* at 346–47 (footnotes omitted).

83. *Id.* at 352.

84. *Id.* at 347–50.

of law firms, large and small, to associate themselves with nonlawyers.<sup>85</sup> Additional examples of rule variances that impact all lawyers, working in large and small offices alike, include conflict-of-interest rules—in particular rules pertaining to the representation of coclients<sup>86</sup>—and ethical screens;<sup>87</sup> as well as rules regarding fees,<sup>88</sup> trust accounts,<sup>89</sup> and communicating with clients about malpractice liability coverage.<sup>90</sup>

Moreover, the splintering of legal ethics rules in the context of a national law practice affects core aspects of the practice of law, such as confidentiality and attorney-client communications. Consider the following example regarding the doctrine of confidentiality. A criminal defense attorney represents a client accused of crimes in New York and Florida and learns that the client intends to kill witnesses in both jurisdictions. Representing the client in New York, the lawyer will be subject to subsection 1.6(b)(1), which gives the lawyer permission to disclose the information but does not mandate disclosure.<sup>91</sup> Representing the very same client in Florida, however, the lawyer would be subject to rule 4-1.6(b)(2), mandating disclosure of the information.<sup>92</sup> If the lawyer decides not to disclose the confidential information pursuant to New York’s rule 1.6(b)(1), the lawyer will be placed in the difficult situation of having different and contradictory rules impact a core aspect of representing the client.

Or take, for example, the doctrine of attorney-client communications—the bedrock of an attorney-client relationship.<sup>93</sup> Consider a California-based law firm with offices in Colorado, the District of Columbia, Nevada, and New Mexico. In California, the firm’s lawyers would communicate with clients pursuant to rule 3-500 about “significant developments relating to the employment or representation.”<sup>94</sup> In Colorado, however, firm lawyers would follow rule 1.4 based on the *ABA Model Rules* mandating communications designed to “keep the client reasonably informed about the status of the matter.”<sup>95</sup> Firm lawyers would have to determine whether California’s rule is

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85. *Id.* at 350.

86. MODEL RULES OF PROF’L CONDUCT R. 1.7 cmts. 29–33 (2010).

87. *See, e.g.*, COLO. RULES OF PROF’L CONDUCT R. 1.10(e) (2010).

88. MODEL RULES OF PROF’L CONDUCT R. 1.5 (2010).

89. *Id.* R. 1.15.

90. Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 792–97 (2008) (exploring various approaches to communicating with clients regarding malpractice coverage).

91. N.Y. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2010).

92. FLA. RULES OF PROF’L CONDUCT R. 4-1.6(b)(2) (2010).

93. Wald, *supra* note 90, at 747–48.

94. CAL. RULES OF PROF’L CONDUCT R. 3-500 (2010).

95. COLO. RULES OF PROF’L CONDUCT R. 1.4(a)(3) (2010).

broader, calling for communications about both the “employment” and the “representation,”<sup>96</sup> as opposed to Colorado’s rule that only covers the “status of the matter,”<sup>97</sup> or narrower, because California’s rule is limited to only “significant developments”<sup>98</sup> whereas Colorado’s rule speaks in terms of keeping the client “reasonably informed.”<sup>99</sup> Lawyers in the firm’s D.C. office might reasonably wonder too about the scope of their obligations because their rule 1.4 follows the old ABA rule that did not specify instances mandating communications,<sup>100</sup> and attorneys in the New Mexico office, unlike any of their colleagues, would be subject to subsection 16-104(C) mandating communications about their malpractice liability coverage.<sup>101</sup> Finally, although the firm’s Nevada lawyers would follow the same rule as their Colorado colleagues, they would have to maintain a detailed “Lawyer’s Biographical Data Form” pursuant to rule 1.4(c).<sup>102</sup> In sum, as Professor Zacharias contends, state-based splintered rules of professional conduct seem to ill fit a practice of law that is increasingly national in orientation.

Notably, the splintering of legal ethics rules is not only a problem for lawyers. To the extent that state-based rules inhibit lawyers’ national law practice, the limitation imposes costs and delays on clients. To begin, when a client needs to call upon a lawyer to explore aspects of the rules of ethics in multiple jurisdictions, not to mention to resolve complex questions of choice of law among competing rules of ethics, the client will typically incur the costs of the lawyer’s analysis.<sup>103</sup> Next, when the limitation on national law practice requires the lawyer to

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96. CAL. RULES OF PROF’L CONDUCT R. 3-500.

97. COLO. RULES OF PROF’L CONDUCT R. 1.4(a)(3).

98. CAL. RULES OF PROF’L CONDUCT R. 3-500.

99. COLO. RULES OF PROF’L CONDUCT R. 1.4(a)(3).

100. Compare D.C. RULES OF PROF’L CONDUCT R. 1.4(a) (2010), with MODEL RULES OF PROF’L CONDUCT R. 1.4 (2000).

101. N.M. RULES OF PROF’L CONDUCT R. 16-104(C) (2010).

102. NEV. RULES OF PROF’L CONDUCT R. 1.4(c) (2010).

103. In large law firms, for example, prior to the institutionalization and professionalization of risk management processes, near-retired or partly retired senior partners would often assume the role of “ethics counsel” or informal “ethics guru.” See Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 346–47 (2003); Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 563–65, 569–70, 589–91 (2002) (describing the emergence of the legal ethics counsel industry); Susan Saab Fortney, *Law Firm General Counsel as Sherpa: Challenges Facing the In-Firm Lawyer’s Lawyer*, 53 U. KAN. L. REV. 835, 835–38 (2005).

associate with local counsel in a particular jurisdiction,<sup>104</sup> the costs of representation escalate significantly.

### 3. *National Law Practice and Rule Enforcement*

The mismatch between state-based rules and a national law practice impacts not only lawyers, and therefore their clients, but also the disciplinary authorities charged with enforcing the rules of professional conduct. It is important for each jurisdiction to enforce its standards because failure to do so breeds distrust of the profession and encourages poor quality of practice. Yet enforcement of the rules has long been plagued by underenforcement.<sup>105</sup> Historically, states have appropriated resources sufficient only for disciplinary action against the most egregious misconduct and focused their enforcement efforts only on lawyers admitted in their own states.<sup>106</sup> The cost of full enforcement appears to be much for the states to bear. The nationalization of law practice further aggravates the problem of underenforcement: at the same time, as more lawyers practice multijurisdictionally, it increases the number of lawyers practicing in any given state, makes it more difficult to discipline them because a growing number of lawyers are out-of-state attorneys, and creates possible disputes over authority and willingness to discipline.

### 4. *Does the Growing Gap Between National Law Practice and a State-Based Regulatory Approach Constitute a Problem?*

Skeptics might argue that the growing gap between a national law practice and a state-based regulatory approach is merely a conceptual academic problem that the profession need not worry about. In particular, such critics might point to the fact that there is little empirical support to suggest a problem, for example, increased complaints about and discipline of unauthorized practice, and no outcry, from lawyers or clients evidencing a concern.

The growing gap between practice realities and the regulatory approach, however, must be addressed for three interrelated reasons. First, even if the growing gap were merely conceptual, it could not be left unattended. The *Model Rules of Professional Conduct* are meant to guide lawyers' conduct, provide advice, and inform attorneys'

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104. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2 (2010) ("Competent representation can also be provided through the association of a lawyer of established competence in the field in question.").

105. See articles cited *supra* note 2.

106. Wolfram, *supra* note 39, at 1042.



decisionmaking. For that reason, they cannot afford to fall behind practice realities and cannot offer inconsistent and confusing guidelines. In addition, the *Model Rules of Professional Conduct* symbolically represent the commitment of the profession to the public to self-regulate its own members. To live up to that promise, the rules must indeed effectively regulate actual practice realities.

Second, several factors may explain the lack of empirical evidence documenting the gap between practice realities and the regulatory approach and its consequences. Because rule 5.5(c)(1) allows out-of-state lawyers to associate with local lawyers to provide legal services out of state, client needs for national law advice are not unmet; rather, they are simply more expansive, and clients shoulder the additional cost. Accordingly, out-of-state lawyers do not engage in the unauthorized practice of law but instead roll additional costs of providing national law advice to their clients. In addition, some lawyers may engage in the unauthorized practice of law by providing legal services out of state and go undetected, either because their clients do not know or do not care about it.

Third, the current state of affairs serves lawyers' interests, and the profession has little incentive to explore it—let alone address it. Under the state-based regulatory approach, clients pay the additional costs of their out-of-state lawyers' consulting with local counsel. In other words, state-based, unauthorized-practice-of-law regulations result in additional work for lawyers at clients' expense. Moreover, liberalizing the regulatory approach and allowing a national law practice might come at the expense of local and regional lawyers, who tend to be powerful actors in state-level regulation and have ample incentive to oppose reform.

In sum, although self-interest, the status quo, and tradition may explain the bar's skepticism and reluctance to admit that the growing gap between national law practice and a state-based regulatory approach constitutes a significant problem in need of addressing, commitment to effective client service and to professional values requires, at a minimum, that the profession engages in a serious examination of the problem. Indeed, the ABA Commission on Ethics 20/20 is examining the impact of nationalization and globalization on law practice,

contemplating several rule revisions meant to address the growing gap between practice realities and the state-based regulatory approach.<sup>107</sup>

### III. CLOSING THE GAP BETWEEN NATIONAL LAW PRACTICE AND A STATE-BASED REGULATORY APPROACH

#### A. *Nationalizing, by Federalizing, Legal Ethics*

The growing mismatch between an increasingly national law practice and a state-based regulatory approach to the regulation of law practice constitutes a problem. In his influential article, *Federalizing Legal Ethics*, having identified the splintering of legal ethics rules as the problem to be addressed, Professor Zacharias focused his attention on one solution to it—nationalizing, by federalizing, the rules of legal ethics.<sup>108</sup> In hindsight, however, it has become apparent that the splintering of legal ethics rules is only part of the problem of the growing gap between a national practice and a state-based regulatory approach, and focusing on the rules of ethics risks distracting attention from other, arguably more significant, challenges of the nationalization of law practice. In particular, the legal profession's experience with national law practice since 1994 suggests that *Federalizing Legal Ethics* may have simultaneously underexplored and overargued some aspects of the mismatch problem.

On the one hand, a focus on nationalizing the rules of ethics without more leaves other threshold problems of a state-based regulatory approach in a world of a national law practice—the unauthorized practice of law and splintered enforcement—underexplored.<sup>109</sup> The fundamental issue plaguing a lawyer with a national law practice is that a law license only grants a lawyer the authority to practice law within the bounds of the state issuing it. The representation of clients outside of the lawyer's state of admission is generally prohibited and characterized as the unauthorized practice of law. As a result, a lawyer is significantly limited in representing clients with national needs and helping them pursue their interests outside of a lawyer's state of admission. Similarly, a large law firm with multiple offices is limited in representing its national clients. It generally cannot represent clients in jurisdictions in which it does not have offices and licensed attorneys, and even where it does have offices, its representation is limited, for example, the client's primary lawyer at the firm may not be able to give it advice or even

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107. See *supra* note 10.

108. Professor Zacharias also briefly addresses and dismisses alternative approaches to nationalizing legal ethics. Zacharias, *supra* note 14, at 396–402.

109. *Id.* at 356–57.

represent it when the client's interests fall outside of the primary lawyer's state of admission.

Conceptually, the unauthorized-practice-of-law limitation has nothing to do with nationalizing, by federalizing, the rules of professional conduct because a uniform rule adopted by all states can simply forbid multijurisdictional practice. A recent change to the rules governing the unauthorized practice of law illustrates the point. Following the ABA's *Model Rules of Professional Conduct*, a majority of states have revised their rules of professional conduct governing multijurisdictional practice. Although the new rule was meant to achieve greater uniformity, which it did,<sup>110</sup> it still by and large forbids the regular and continuous representation of clients on a national basis, outside of a lawyer's state of admission. Because most jurisdictions now follow the same legal ethics rule regarding the unauthorized practice of law, the rules on this issue are not splintered. Practically speaking, most states now follow the same rule, and the rule regarding the unauthorized practice of law approaches a national rule, but this national rule, an example of the very solution advocated by Professor Zacharias, does little to address the limited ability of lawyers to represent clients nationally because it continues to forbid multijurisdictional practice.<sup>111</sup>

The solution for the fundamental barrier to a national law practice and the effective cross-state-borders representation of clients has to do with allowing multijurisdictional law practice, and inherently has little to do with nationalizing the rules of legal ethics. Certainly, nationalizing law practice may include nationalizing the rules of ethics, but the reverse does not follow: nationalizing, by federalizing, or otherwise, the rules of ethics does not entail or lead to nationalizing law practice. In fact, as the recently promulgated ABA rule on the unauthorized practice of law demonstrates, national uniform rules may further inhibit national law

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110. Greenbaum, *supra* note 12, at 732–36.

111. If Congress, in addition to federalizing legal ethics by promulgating a federal code of conduct, was also to create a federal agency and vest it with disciplinary enforcement power, such agency might, over time, come to exercise authority over national admission, collapsing the questions of the unauthorized practice of law and rule uniformity. Indeed, a significant body of literature asserts that often disputes about who should regulate lawyers are in essence ultimately disputes over the content of the rules. *See* Wald, *supra* note 50, at 154 (“Notably, the distinction between promulgating and enforcing rules, while conceptually clear, is complicated in practice because the two forms of regulation intertwine. . . . This simplifying assumption was heavily challenged by critics who point out that disputes over rule enforcement are often a cover for disagreements about rule-promulgation and content.”).

practice by having most states continue to reject multijurisdictional practice.

At the same time as *Federalizing Legal Ethics* downplays the unauthorized practice of law aspect of the problem of a national law practice, it also overstates the impact of the mismatch between a national law practice and state-based ethics rules and therefore the need to nationalize legal ethics. In many of the examples Professor Zacharias develops, the solution to the tension and inconsistencies between the states' ethics rules does not necessitate nationalizing legal ethics. Fundamentally, if lawyers could overcome the hurdle of the unauthorized practice of law, they could fashion solutions to comply with the splintered rules of conduct.<sup>112</sup> Indeed, Zacharias appears to have conceded this point, asserting:

A lawyer can avoid discipline in her home state and a foreign jurisdiction only if she can identify a course of conduct that neither code forbids. That may result either in her pursuing the lowest common denominator among the multiple codes or violating the spirit of one permissive code provision by blindly following a mandatory provision on the same subject in the second state. Alternatively, the lawyer may be driven to ignore the conflict in the rules altogether.<sup>113</sup>

Although Zacharias is obviously correct that “[a] lawyer can avoid discipline in her home state and a foreign jurisdiction only if she can identify a course of conduct that neither code forbids,” the rest of the argument does not follow. Although some lawyers may pursue “the lowest common denominator,” violate the spirit of one permissive code, or ignore the conflict in the rules, other lawyers may in good faith comply with the rules by employing a choice-of-law analysis and proceeding accordingly.<sup>114</sup>

More importantly, many of the differences between state rules are more academic than substantive. For example, in all of their formulations, attorney-client communication rules are meant to ensure effective attorney-client communications. An attorney attempting to comply with the rules in good faith may comply with the rules in all jurisdictions simply by effectively communicating with the client. Moreover, in many instances, the rules provide only the floor for effective communications. Competitive market conditions may impose much more stringent demands, rendering the inconsistencies between state rules purely academic.

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112. By, for example, employing choice of law mechanisms, such as rule 8.5(b). See MODEL RULES OF PROF'L CONDUCT R. 8.5(b) (2010).

113. Zacharias, *supra* note 14, at 346 (footnotes omitted).

114. See MODEL RULES OF PROF'L CONDUCT R. 8.5 (2010).

The globalization of law practice may provide an instructive lesson here regarding rule nationalization: because of the vast differences between the rules of ethics and regulatory approaches worldwide, a global code of ethics would likely be based on agreement around core values, not specific language.<sup>115</sup> If a global code of ethics might one day soon become a reality, one would think that a national approach to codes of ethics should be easier to accomplish based on agreements about core values because many of the differences between various states' rules have to do more with language than with substance. That said, as Professor Zacharias convincingly asserts, one should not underestimate the problem of lack of uniformity and rule splintering. For example, even if forty-nine jurisdictions adopted a new rule on conflicts of interest permitting a law firm to represent a client adverse to another client as long as the matters are unrelated and the tainted attorney has been timely and effectively screened,<sup>116</sup> it will take only one state's refusing to adopt the rule to render adoption by all other states irrelevant from the perspective of a law firm with an office in that one outlier jurisdiction.

In conclusion, nationalizing, by federalizing, legal ethics solves too little and too much of the mismatch problem between a national law practice and a state-based regulatory approach. Because it does not address the fundamental problem of cross-border national practice—the unauthorized practice of law—it solves too little of the mismatch problem, and in demanding a federalized code of legal ethics it demands a solution to what may not be, practically speaking, a serious problem, splintered state-based rules.

Before exploring other solutions to the challenges of the growing reality of national law practice, however, one must consider the additional arguments advanced by Professor Zacharias in favor of nationalizing the rules of legal ethics. To begin with, Professor

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115. See H.W. Arthurs, *A Global Code of Ethics for the Transnational Legal Field*, 2 *LEGAL ETHICS* 59, 64–65 (1999) (discussing the difficulties of creating a universal or global code of ethics and criticizing such codes as ineffective); Andrew Boon & John Flood, *Globalization of Professional Ethics? The Significance of Lawyers' International Codes of Conduct*, 2 *LEGAL ETHICS* 29, 50–51 (1999) (arguing that the absence of discourse about the international codes is a barrier to the globalization of professional ethics); Laurence Etherington & Robert Lee, *Ethical Codes and Cultural Context: Ensuring Legal Ethics in the Global Law Firm*, 14 *IND. J. GLOBAL LEGAL STUD.* 95, 106–07, 108 & n.54 (2007).

116. Compare COLO. RULES OF PROF'L CONDUCT R. 1.10(e) (2010), with MODEL RULES OF PROF'L CONDUCT R. 1.10(a) (2010).

Zacharias explored in great length another justification for nationalizing legal ethics—client perception regarding splintered rules. He argued that “splintered rules negatively affect the image of lawyers and clients’ ability to trust lawyers, because the splintered rules skew client perceptions of lawyer obligations.”<sup>117</sup>

Client perception of the legal profession is indeed an important consideration. Respect for law and lawyers is fundamental for the effective operation of our legal system and the rule of law, and the legal profession is particularly sensitive for claims regarding its status and perception in part out of concern for the rule of law, in part out of self-interest. Yet it is doubtful whether the growing mismatch between a national law practice and state-based rules plays a meaningful role in sustaining or eroding public trust in the profession. The public perception of the rule of law is more likely influenced by considerations such as access to justice, especially by those unable to afford private legal services and the fairness of the criminal justice system.<sup>118</sup> Even when it comes to lawyers, it seems that clients and the public are concerned with lawyers’ ineffective communication skills and harsh zeal, and not with the rules of professional conduct or their enforcement.<sup>119</sup> Indeed, Zacharias himself recognizes the relative weakness of the argument stating, “I do not mean to overstate the case. I have already noted that client perceptions often stem from factors other than professional regulation and media accounts of lawyer conduct.”<sup>120</sup>

Even so, it is just unclear how nationalization of the rules of legal ethics would impact public perception of the profession. Clients likely do not know and do not care what the rules of professional conduct say in a particular jurisdiction and whether they are uniform across jurisdictions. Clients may care indirectly about nationalizing legal ethics to the extent that the current splintered rules inhibit effective client service, and a national approach to regulation would result in more effective legal services, and to the extent that nationalizing legal ethics may result in a more effective disciplinary system to address attorney misconduct. Yet because nationalizing the rules does little to address the fundamental problem of national law practice—multijurisdictional practice—nationalizing legal ethics is not likely to impact client service

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117. Zacharias, *supra* note 14, at 345.

118. See, e.g., Robert A. Stein, *Causes of Popular Dissatisfaction with the Administration of Justice in the Twenty-First Century*, 30 *HAMLIN L. REV.* 499, 505–06 (2007); see also Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the United States? An Alternative Perspective and New Empirical Evidence*, 27 *J. LEGAL STUD.* 503, 508–10 (1998).

119. Wald, *supra* note 90, at 747–48.

120. Zacharias, *supra* note 14, at 364.

significantly and therefore will have little impact on client perception, even if most clients generally wish to conduct themselves in accordance with the law and wish to have their lawyers represent them accordingly. Similarly, as Professor Zacharias noted, nationalizing legal ethics may result in more effective enforcement only if a new, federal agency will assume responsibility for enforcement,<sup>121</sup> an unlikely proposition. Therefore, the argument that nationalizing legal ethics will improve the perception of the legal profession appears somewhat doubtful.

Next, Zacharias argues that “[t]he existing models of regulation tend to focus only on litigation and to minimize the importance of transactional and advice-based practice.”<sup>122</sup> Zacharias is correct that the rules of professional conduct have long been justly criticized for assuming litigators as the paradigmatic lawyers and regulating accordingly.<sup>123</sup> Of course, in historical hindsight, until the late nineteenth century, most lawyers were generalists and many, at least on occasion, appeared in court. The emphasis of early codes, for example, the Alabama code<sup>124</sup> and even the *ABA Canons*,<sup>125</sup> on litigators was thus understandable. Since then, as corporate lawyers have come to have equal claim to represent mainstream practice and so many lawyers practice outside of the courtroom, the ABA has been struggling to amend its rules to reflect the diversity of practice settings and realities.<sup>126</sup> The rules’ emphasis on litigators and relative neglect of so many other practice areas indeed constitutes a disturbing problem.<sup>127</sup>

As is the case with the public perception of lawyers, however, it is unclear that nationalizing the rules of legal ethics and promulgating a

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121. *Id.* at 384–85, 404.

122. *Id.* at 370.

123. See, e.g., Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys’ Loyalty to Clients*, 40 ST. MARY’S L.J. 909, 934–35 (2009).

124. *Id.* at 928.

125. See L. Ray Patterson, *Legal Ethics and the Lawyer’s Duty of Loyalty*, 29 EMORY L.J. 909, 935 (1980).

126. Indeed, this was part of the mandate of the ABA Ethics 2000 Commission and is once again a mandate for the newly established ABA 20/20 Commission. See *Ethics 2000 Commission*, AM. BAR ASS’N, [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission.html) (last visited Apr. 24, 2011); *ABA Commission on Ethics*, AM. BAR ASS’N, <http://www.abanet.org/ethics2020/> (last visited Apr. 24, 2011).

127. On the need for contextual regulation, see generally David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992). Four years later, an entire symposium issue revisited Wilkins’s analysis. See Symposium, *Institutional Choices in the Regulation of Lawyers*, 65 FORDHAM L. REV. 33 (1996).

national code of ethics will resolve this problem. At best, promulgating a new code of conduct constitutes an opportunity to draft rules that will be more sensitive to other types of practice. At the same time, promulgating a “one-size-fits-all” national code of conduct applicable to all lawyers may further aggravate the problem of abstract regulation, detached from the actual practices of lawyers. For example, the solution for the increased specialization of lawyers and expansion of practice areas may be regulating these specialties in context via multiple codes of ethics. And even if the most effective way to regulate an increasingly diverse legal profession is to insist on a “one-size-fits-all” approach, it may very well be that in the short run a state-based approach allowing for experimentation with contextual regulation may be superior to a national code approach.

Finally, Professor Zacharias asserts that:

federal decisions and administrative regulation already undermine the force of state rules, thereby distorting lawyers’ views of how they must approach advocacy. Without uniform guidance, lawyers and clients may soon become unable to rely on a single vision of the attorney-client relationship and accordingly may be unable to order their conduct.<sup>128</sup>

Once again Professor Zacharias astutely identifies an important development with far-reaching consequences but does not explain fully how it might be addressed by nationalizing legal ethics. It is true that the ongoing federalization of legal ethics undermines the force of state rules.<sup>129</sup> And Professor Zacharias may even be right that the “ever-increasing impact of federal professional regulation on the conduct of lawyers” might mean that “federal law now provides the ‘dominant vision’ of lawyers’ proper role.”<sup>130</sup> It is certainly also the case that some commentators have suggested that federal law attempts to promote a vision of lawyers as gatekeepers, who owe duties to nonclients, the legal system, and the public, and as public citizens.<sup>131</sup>

Yet it is an overstatement to suggest that these developments distort “lawyers’ views of how they must approach advocacy,” and that “lawyers and clients may soon become unable to rely on a single vision of the attorney-client relationship.”<sup>132</sup> The issues are much more complex than that. First, the most significant attacks on the traditional conception of lawyers’ role as client advocates, or the “standard

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128. Zacharias, *supra* note 14, at 345.

129. Coquillette & McMorrow, *supra* note 40.

130. Zacharias, *supra* note 14, at 368.

131. See, e.g., JOHN C. COFFEE JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 231–32, 348–51 (2006).

132. Zacharias, *supra* note 14, at 345.



conception,<sup>133</sup> have come from leading legal ethicists, not federal regulation.<sup>134</sup> Second, the standard conception has proven to be extremely robust and resistant to change. If at all, client-centered ideology to the exclusion of lawyers as officers of the court and as public citizens is more dominant today than it has ever been.<sup>135</sup> Ironically then, to the extent that splintered federal regulation has undermined the dominant view of the lawyer's role, which is doubtful, that would arguably be a desirable outcome, and any kind of nationalization agenda would have to be mindful of not bolstering the standard conception even further.

In sum, the nationalization, even globalization, of law practice is without a doubt a significant development. Client needs increasingly require cross-border and multijurisdictional representation. A regulatory approach that limits lawyers to law practice within state borders is growing increasingly anachronistic. In particular, one consequence of the mismatch between a national law practice and a state-based regulatory approach is that the state-based rules of ethics create a splintered and challenging reality for lawyers and their clients. Yet such mismatch is not sufficiently addressed by nationalizing legal ethics because nationalizing the rules does little to address issues such as nationalizing admissions, ability to practice, and enforcement. In fact, nationalizing legal ethics may further hinder a national law practice with a national rule adopted by most states forbidding multijurisdictional practice.

Fred Zacharias's *Federalizing Legal Ethics* is an excellent, even prophetic, article correctly anticipating practice developments and

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133. See Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980); see also William H. Simon, Commentary, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 37.

134. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 148–49, 160–74 (1988) (arguing for a system of “‘moral activism’: a vision of law practice in which the lawyer who disagrees with the morality or justice of a client’s ends does not simply terminate the relationship, but tries to influence the client for the better”); DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 19–64 (2007) (criticizing the principle of nonaccountability for protecting lawyers from moral culpability for a client’s conduct); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 22–30 (1988) (developing the concept of purposive lawyering); David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 645; Simon, *supra* note 133, at 113–19.

135. Russell G. Pearce & Eli Wald, *Law Practice as a Morally Responsible Business: Reintegrating Values into Economics and Law* (Sept. 2010) (unpublished manuscript) (on file with author).

compellingly identifying a serious flaw in the state-based regulatory approach to law practice. And although Zacharias's overall argument in favor of nationalizing legal ethics ultimately does not succeed, the case remains that as the practice of law becomes increasingly national, a state-based approach to regulating lawyers makes less and less sense. At the end of the day, *Federalizing Legal Ethics* may have lost the battle for nationalizing legal ethics but won the war over the future of the regulatory approach to law practice by demonstrating that it must abandon a state-based approach in favor of a multijurisdictional approach.

### B. Nationalizing Law Practice

The regulatory response to a practice of law that is becoming increasingly national seems straightforward—it too needs to become national in orientation. The case for nationalizing law practice is equally straightforward: the legal profession is a service vocation, and if clients' needs are increasingly national and require lawyers who can serve them on a national basis then the legal profession ought to transform itself into a national-based profession. In other words, if client needs cannot be met because state-based rules restrict the ability of lawyers to provide national service, then the solution seems obviously clear—relax the restrictive state-based rules unless there are compelling reasons to keep them in place.

The case for nationalizing law practice is bolstered by the sense that the legal profession's traditional stance against nationalizing law practice smacks of self-interest and protectionism.<sup>136</sup> A state-based regulatory approach, instituted by unauthorized practice of law rules, greatly benefits lawyers at the expense of clients. It creates a cottage industry of "local counsel" and inflated legal fees forcing clients to pay for both their regular lawyers and a host of local counsel. The *ABA Model Rules'* approach to unauthorized practice illustrates the point: the old version of rule 5.5 demanded that lawyers affiliate with local counsel,<sup>137</sup> and the new so-called liberal approach goes even further. Although it allows residual temporary practice for out-of-state lawyers, it demands that local counsel participate *meaningfully* in the representation,<sup>138</sup> ensuring local counsel greater fees.

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136. See, e.g., Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977, 998 (2003).

137. Compare MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(1) (2010), with MODEL RULES OF PROF'L CONDUCT R. 5.5 (2002).

138. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(1).

Furthermore, the state-based approach appears to impose higher costs on national clients and lawyers with a national practice as a result of deference to local professional interests. The spectacular rise and expansion of large law firms with multijurisdictional presence lends support to this hypothesis:<sup>139</sup> the state-based approach appears to unabashedly protect local professional interests at clients' and national lawyers' expense. First, it encourages large law firms to open offices in local jurisdictions and hire local attorneys. Large law firms may very well be able to offer more efficient legal services without opening regional offices directly from their out-of-state home office. Yet state-based rules and unauthorized practice of law rules discourage such an approach. For example, a state-based approach arguably protected the California bar from the East Coast invasion in the 1970s and 1980s,<sup>140</sup> and it continues to protect smaller jurisdictions from invasions by large law firms and relatively insulates large jurisdiction lawyers from each other. Second, the need to have local counsel transfers legal fees from large national law firms to such local counsel.

Nationalizing law practice returns us to Zacharias's article because the only practical way to accomplish the task appears to be to federalize the practice of law. Federalizing law practice, however, is much broader than federalizing legal ethics. It would involve, at least, uniform national admission standards, national licenses to practice throughout the United States, uniform national rules of ethics, and a uniform national enforcement agency.<sup>141</sup>

History, tradition, anxiety about the unknown, and resistance from both local bar interests and the organized bar fearing that nationalization by federalization will be the end of self-regulation all stand in the way of nationalizing law practice. History and tradition are always forces delaying progress, and this is especially the case for a profession that builds on respect for authority, established rules, hierarchal systems, and history, as well as on precedent. Fear of the unknown, a universal hurdle to change, is similarly applicable to the legal profession that has for long

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139. See *supra* note 25.

140. See, e.g., TONY MASSARO, F. DANIEL FROST: WESTERN LAWYER, LEADER, ENTREPRENEUR, PHILANTHROPIST (forthcoming 2011) (studying the transformation of California-based law firm of Gibson, Dunn & Crutcher into a global law firm including its response to East Coast invasion of California by large Wall Street law firms).

141. Zacharias did endorse, but did not elaborate on, a federal enforcement agency. Zacharias, *supra* note 14, at 371.

benefited from elevated social and cultural—not to mention financial—standing. Local lawyers, often a powerful constituency with regard to rule promulgation and enforcement, have reasons to oppose nationalizing law practice, and the organized bar has an interest in preserving self-regulation. All of these powerful, practical considerations notwithstanding, are there compelling justifications against nationalizing law practice in the interest of clients?

Four types of arguments come to mind. First, states have long argued that they have a legitimate interest in regulating lawyers practicing in their jurisdiction in order to protect their citizens and exercise control over state power within their respective jurisdictions.<sup>142</sup> In *Goldfarb v. Virginia State Bar*, the Court recognized that states regulate lawyers to protect the public's health and safety,<sup>143</sup> explaining that “[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’”<sup>144</sup> A couple years later in *Bates v. State Bar of Arizona* the Court reiterated that “the regulation of the activities of the bar is at the core of the State’s power to protect the public.”<sup>145</sup> In *Supreme Court of New Hampshire v. Piper*,<sup>146</sup> Justice Rehnquist, dissenting, explained that often state lawmakers are also lawyers<sup>147</sup> and stated:

Put simply, the State has a substantial interest in creating its own set of laws responsive to its own local interests, and it is reasonable for a State to decide that those people who have been trained to analyze the law and policy are better equipped to write those state laws and adjudicate cases arising under them.<sup>148</sup>

Justice Rehnquist explained that a “State’s interest [does not] end with enlarging the pool of qualified lawmakers. A State similarly might determine that because lawyers play an important role in the formulation of state policy through their adversary representation, they should be intimately conversant with the local concerns that should inform such policies.”<sup>149</sup>

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142. See *Keller v. State Bar of Cal.*, 496 U.S. 1, 13–14 (1990) (describing state interests to include “improving the quality of legal services”); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (“The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been ‘officers of the courts.’”).

143. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

144. *Id.*

145. *Bates v. State Bar*, 433 U.S. 350, 361–62 (1977).

146. *Supreme Court v. Piper*, 470 U.S. 274 (1985).

147. See *id.* at 292 (Rehnquist, J., dissenting).

148. *Id.*

149. *Id.* at 293.

History and tradition further support states' claim to regulate lawyers as an expression of their exercise of state power. Jose Arambulo gives a brief summary of the constitutional basis for state regulation of lawyers:

“Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions.” With this regulatory power, “[t]he States prescribe the qualifications for admission to practice and the standards of professional conduct” and “are responsible for the discipline of lawyers.” This state power to oversee the practice of law within their jurisdiction is exercised through the respective state supreme courts which have “the authority to discipline and ultimately to disbar lawyers whose conduct departed from prescribed standards.” These state courts in turn entrust the authority to prescribe the qualifications for admission to practice law and the standards of professional conduct for lawyers within their states to their respective state bars.

Deference to states' authority to regulate the practice of law has been recognized by the highest court in the land pursuant to the states' police powers, and the states' regulatory authority over the legal profession is only limited by certain circumstances.”<sup>150</sup>

In more recent decisions, however, courts have refined the analysis, framing the justification for state regulation of lawyers less in terms of abstract protection of state citizens and the exercise of state power, and more in terms of protecting clients from attorney abuse and offering quality control measures with regard to legal services. For example, in *Florida Bar v. Went For It, Inc.*, the Court held that the “protection of potential clients' privacy is a substantial state interest,”<sup>151</sup> and in *Mason v. Florida Bar*, the Eleventh Circuit Court of Appeals held that “the Supreme Court confirmed long ago that the state has both a *general interest in protecting consumers*, as well as a special responsibility to regulate lawyers”<sup>152</sup>

The modern justification for state-based regulation of lawyers is therefore consumer based. Based on the assumptions that many clients seek legal advice when they are vulnerable, and that often clients are not in a position to evaluate the quality of legal services they receive, state-

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150. Jose A. Arambulo, *O Where, O Where Has My Legal Job Gone?: Examining the Realities of “Offshoring” Legal Work and Why States Can Regulate the Practice Despite Congress' Broad Power Under the Foreign Commerce Clause*, 38 SW. L. REV., 195, 211–12 (2008) (footnotes omitted).

151. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) (internal quotation marks omitted).

152. *Mason v. Fla. Bar*, 208 F.3d 952, 956 (11th Cir. 2000) (emphasis added). See also *Keller v. State Bar*, 496 U.S. 1, 13–14 (1990) (describing state interests to include “improving the quality of legal services”).

based regulation is meant to protect clients from predatory conduct such as in-person solicitation, unreasonable fees, and betrayal of client trust.<sup>153</sup>

Although consumer protection is an important goal, it is unclear that state-based regulation of lawyers best achieves it, or even reasonably achieves it. States have traditionally delegated the regulation of the legal profession to the organized bar,<sup>154</sup> and the self-regulation apparatus implemented by state bars has been consistently criticized for being inefficient, underenforced, and generally too favorable to lawyers at the expense of clients.<sup>155</sup> Moreover, even if state-based regulation does accomplish its job, there is little reason to believe that a federal apparatus would be less effective. To be sure, states have a legitimate interest in protecting their citizens from wrongdoing, in particular from abuse by lawyers, and nationalizing law practice would entail ceding enforcement power to a federal enforcement agency thus compromising state power and opportunity to offer protection to its citizens. Yet states' relative poor record of disciplinary enforcement undermines the strength of this argument. Moreover, restricting national law practice in the name of protecting clients is ironic given that national law practice is a client-driven development serving client interests.

A second argument in favor of state-based regulation has to do with ensuring access to legal services.<sup>156</sup> States have a legitimate interest in ensuring that their citizens have access to legal services, and state-based regulation, at least in theory, allows them to pursue this goal. Once again, although access to legal services is a fundamental aspect of a legitimate legal system, state-based regulation has a poor record in promoting it. To begin with, states have essentially abandoned attempts to erect barriers to entry and foregone any serious attempts to restrict the number of lawyers licensed in their jurisdictions.<sup>157</sup> In other words, they have allowed the market to control the number of lawyers practicing law and, with the exception of some aspects of criminal law where access to lawyers and representation is mandated by the Constitution, leave to

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153. See TALCOTT PARSONS, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY* 34 (rev. ed. 1954); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *HUM. RTS.* 1, 16–17 (1975).

154. Wald, *supra* note 50, at 9–12.

155. See sources cited *supra* notes 1–3.

156. See, e.g., *Mason*, 208 F.3d at 956 (“The Bar also asserts an interest in ensuring that the public has access to relevant information to assist in the comparison and selection of attorneys. Again, there is little question that the state, as part of its duty to regulate attorneys, has an interest in ensuring and encouraging the flow of helpful, relevant information about attorneys” (citing *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91, 110 (1990))).

157. RICHARD L. ABEL, *AMERICAN LAWYERS* 72–73 (1989).

market forces of supply and demand the issue of access to lawyers. More importantly, states have done little to increase access to legal services. They have traditionally not sponsored legal clinics, legal aid societies, or mandatory pro bono initiatives. If at all, the federal government has as good, yet still a relatively poor, track record in terms of enhancing access to legal services.<sup>158</sup>

It is true that nationalizing law practice could very well have significant impact on access to legal services. Franchise law firms may displace solo and small firm lawyers as the primary providers of legal services, akin to Walmart's displacing local grocers and Barnes & Noble's crowding out of neighborhood bookshops,<sup>159</sup> and large law firms may attract the most profitable and lucrative clients and business away from local lawyers, essentially shifting power and money away from local bars and regional lawyers to national law firms. Yet it is unclear that any of these changes would harm local client consumers.<sup>160</sup>

Third, Professor Stephen Gillers develops a thought-provoking argument in favor of protecting local bars:

[T]here is reason to accept the proposition that the legal profession is a different kind of business because its members have historically played a role in the governance of their communities. Sometimes this role is formalized, as when state law compels membership in the state's bar association and assigns it governmental duties. Sometimes the role is informal, as when lawyers work pro bono or volunteer to work on court committees or as members of government commissions.

The question must be asked—Will easy cross-border practice result in the exodus of desirable work as clients, perhaps solicited, gravitate toward lawyers in adjacent states or even more distant places, thereby weakening the economic base of the local bar and depleting the time and personnel available to do pro bono and volunteer work for individuals, government, non-profit groups, and the justice system?<sup>161</sup>

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158. See, e.g., Earl Johnson, Jr., *Equality Before the Law and the Social Contract: When Will the United States Finally Guarantee Its People the Equality Before the Law the Social Contract Demands?*, 37 *FORDHAM URB. L.J.* 157, 189 (2010).

159. VAN HOY, *supra* note 27, at 137; Lance J. Rogers, *Speakers Review, Seek Reform of Rules that Inhibit Multijurisdictional Law Practice*, 17 *LAW. MANUAL ON PROF. CONDUCT* 351 (2001).

160. Silver, *supra* note 38.

161. Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 *ARIZ. L. REV.* 685, 703 (2002) (footnote omitted).

Professor Gillers is quick to disavow promoting the profession's self-interest.<sup>162</sup> And although cynics might be quick to dismiss his defense of local bars, his argument is certainly supported by history and traditional cultural understanding of lawyers as public citizens and leaders in their communities. To be clear, to the extent that lawyers serve the public interest solely by serving the private interests of their clients, it is indeed hard to see how protecting local bars would benefit clients and the communities in which they practice. To the extent, however, that lawyers serve the public good in ways other than and in addition to serving clients, destabilizing and weakening local bars might very well diminish lawyers' contributions to the public good. For example, to the extent that local lawyers serve as local leaders, community organizers, and benefactors of the community, crowding them out may harm the communities in significant ways.

Finally, one cannot dismiss a significant practical impediment to nationalizing law practice: the opposition of the legal profession and the reluctance of the federal government. Zacharias assumed that the legal profession would generally endorse nationalizing legal ethics because practicing nationally in a state-based regulatory environment was costly for lawyers.<sup>163</sup> The reality, however, is more complex, and the legal profession has turned out to be an opponent of nationalizing legal ethics for four interrelated reasons. The legal profession consists of different constituencies with different interests and does not speak in one voice. Although large law firms with significant national practice and other lawyers with a growing national constituencies would likely benefit from a more liberal approach to multijurisdictional practice, other segments of the profession might suffer from such a transformation. Local bars, for example, would likely lose significant clients, business, and prestige, and local lawyers tend to be influential in local bars that would have to give up state-based regulation.

Next, the organized bar is likely to oppose nationalization of legal ethics because it would constitute a significant step toward giving up on self-regulation. Because nationalizing law practice could practically only be accomplished by federalizing law practice, the shift would entail not only shifting power from state and local lawyers to a centralized system, but also shifting power from state courts and local lawyers<sup>164</sup> to the federal branch. And although lawyers would no doubt be involved in the federal branch, promulgation of a federal code of ethics will likely

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162. "Nor do I mean to embrace that part of the 'professionalism' campaign that is little more than institutional self-promotion." *Id.* at 702–03.

163. Zacharias, *supra* note 14, at 345–54.

164. Wald, *supra* note 50.



yield power to Congress, and enforcement of such a code would fall to a federal agency. The organized bar has consistently and systematically fought off attempts—real and perceived—to diminish the profession’s self-regulation. And although the federalization of legal ethics has been an ongoing phenomenon,<sup>165</sup> the organized bar is likely to oppose and resist the nationalization of law practice to the extent that it involves yielding power to self-regulate.

In addition, and perhaps counterintuitively, large law firms with a growing national practice—arguably the one constituent within the legal profession with the most incentive to push for nationalizing law practice—actually have an incentive to oppose such a change as well. State-based enforcement of legal ethics rules has long been lacking, suffering from being understaffed, underbudgeted, bogged down by ineffective bureaucracies, and a poor reputation for enforcement.<sup>166</sup> Many state regulatory agencies already find that they cannot enforce the existing rules. Instead, they focus their enforcement efforts against egregious offenders in the most severe cases.

In particular, state enforcement agencies have mostly shied away from regulating the conduct of large law firms and focused their attention on solo practitioners and small law firms.<sup>167</sup> The reasons for this priority are complex: large law firms’ clients tend to be sophisticated powerful actors vis-à-vis their lawyers, and they tend to “discipline” their lawyers privately rather than resort to filing a disciplinary complaint. In other words, protecting clients of large law firms tends to be a low priority for disciplinary agencies. Next, enforcing against large law firms is likely to consume significant resources that disciplinary agencies do not have. Large law firms are likely to fight discipline because of their concern for reputational implications and protecting their elevated status within the profession, and can both outspend and outnumber the disciplinary offices. Consequently, large law firms are hardly the target of significant disciplinary efforts.

This means that under the current regulatory regime large law firms relatively get away with violations of the ethics rules, including rules regarding the unauthorized practice of law. A shift to a national system with a more effective federal enforcement agency might make large law

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165. Coquillette & McMorrow, *supra* note 40, at 124–25.

166. *Id.* at 147–48.

167. Fisher, *supra* note 4.

firms more of a target of regulation. Put differently, although in theory large law firms and their clients should benefit from nationalizing law practice, in practice, given the underenforcement of rules vis-à-vis large firms, they may have little to gain and quite a bit to lose from a shift to a nationalized system. Indeed, instead of pushing for an overhaul of the regulatory system, large law firms have focused their attention—and successfully so—on piecemeal revisions to the rules that best suit their interests, such as relaxing confidentiality demands to allow for conflict checks,<sup>168</sup> and relaxing imputation of conflicts of interests with “ethical screens” to avoid disqualification.<sup>169</sup>

Lastly, the federal branch has shown little interest in stepping in to federalize law practice, and its reluctance is quite understandable. The cost of promulgating a federal code of ethics is likely to be high, the cost of enforcing it very high, the legal profession could be counted on to resist such efforts, and the benefit might flow initially to large entity clients and their lawyers, not a particularly attractive constituency in terms of public relations. Of course, if large entities and their lawyers lobbied for such a reform, Congress might get more motivated to act, but as we have seen because state-based enforcement is ineffective when it comes to large law firms, these firms and their clients have little incentive to lobby Congress for a change.

In conclusion, nationalizing law practice seems premature conceptually and infeasible practically. In theory, nationalizing law practice would allow lawyers to serve clients more effectively and would therefore likely reduce the costs of legal services and enhance access to legal services. In reality, however, some serious concerns about the consequences of nationalizing law practice would have to be addressed before abandoning the state-based regulatory approach. States may have a legitimate interest in, and may do a better job of, regulating lawyers than a national entity could. Nationalizing the regulatory approach to law practice may compromise access to legal services and may impact the quality of legal services, and nationalizing law practice may undermine local bars and may diminish the ability of lawyers to act as public citizens. For example, to the extent that local lawyers are invested in their communities, contribute to them, and help address local legal needs, weakening them would be undesirable. The point, to be clear, is not to support localism, protectionism, and state-based regulation at the expense of enhanced competition in the market for legal services; rather, it is to acknowledge that given the role of law and lawyers in the United States, the market for legal services may have

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168. Wald, *supra* note 1, at 204.

169. *Id.* at 260–61.

some unique features that would require consideration before allowing national competition with the possible weakening of local lawyers.

At the end of the day, nationalization of law practice may be inevitable. Client needs increasingly demand it, and arguments against it, both conceptual and practical, are not compelling. Certainly, there is little reason to resist nationalization of law practice on the ground that it would harm the financial interests of local lawyers. Yet until further analysis and empirical evidence regarding the consequences of nationalizing law practice becomes available,<sup>170</sup> an interim solution may be appropriate.

*C. An Intermediary Approach to Addressing the Mismatch  
Between a National Law Practice and a State-Based  
Regulatory Approach: An Open-Border  
Multidisciplinary Practice*

Client needs demand a national law practice. Although nationalization of law practice could include the adoption of national admission standards, including a national bar exam, national licensing scheme, national rules of ethics, and national enforcement of discipline, effectively addressing client needs does not require such a comprehensive transformation. At least in the short run, a significant aspect of the mismatch problem could be effectively addressed by allowing multijurisdictional and national practice. An intermediary approach, not going quite as far as nationalizing law practice, would simply relax the general prohibition against multijurisdictional practice, codified in ABA Model Rule 5.5, allowing lawyers to practice nationally while retaining state control over admission, licensing, and discipline.

*1. Open-Border Multijurisdictional Approach:  
The Colorado Experience*

Rule 5.5's general prohibition of multijurisdictional practice and its narrow exceptions make it clear that out-of-state lawyers cannot offer legal services in a host jurisdiction on a regular, systematic, and continuous basis. Given its relatively strict prohibition of multijurisdictional practice, it is somewhat surprising that the rule, the result of the ABA's

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170. Silver, *supra* note 38.

multidisciplinary committee's reform, is considered a step on the road to nationalizing law practice.<sup>171</sup>

The rule, however, could be easily amended to allow multijurisdictional and national practices, following the Colorado example. Colorado's Rule of Professional Conduct 5.5, as implemented by its rules of civil procedure, has essentially adopted an intermediary "open border" approach pursuant to which any out-of-state attorney may offer transactional counseling or any other out-of-court legal services in Colorado without fear of violating the proscription on unauthorized practice of law.<sup>172</sup> The relevant rules define an "out-of-state" attorney as one who (1) is licensed to practice law and is on active status in another jurisdiction in the United States; (2) is a member in good standing of the bar of all courts and jurisdictions in which the attorney is admitted to practice; (3) has not established domicile in Colorado; and (4) has not established a place for the regular practice of law in Colorado from which the attorney holds out to the public as practicing Colorado law or solicits or accepts Colorado clients.<sup>173</sup> Colorado's rules generally still require an out-of-state attorney wishing to appear before a Colorado tribunal to seek a *pro hac vice*, and notably its rules do not apply to any foreign attorney.<sup>174</sup>

The first out-of-state Colorado requirement is arguably a quality control measure. An attorney without a Colorado law license could still practice law in Colorado if the attorney obtains a law license in another United States jurisdiction, presumably implying pursuing a legal education at an American accredited law school, passing a bar exam, and completing a bar application. All of these measures in turn are meant to establish a basis of competence, and therefore if these standards have been satisfied in another United States jurisdiction, they address Colorado's interest in ensuring quality and competence.<sup>175</sup> Similarly, the second out-of-state standard, requiring an active status in good standing, reflects a commitment to ensuring a basic measure of quality. The objective underlying Colorado's third and fourth requirements is not as straightforward. Perhaps the issue of establishing a domicile and a permanent office reflects an assumption that these correlate with having

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171. Greenbaum, *supra* note 12.

172. COLO. RULES OF PROF'L CONDUCT R. 5.5 (2010); *see also* Robert R. Keatinge et al., *Colorado Adopts Rules Governing Out-of-State Attorneys*, COLO. LAW., Feb. 2003, at 27.

173. COLO. R. CIV. P. 220.

174. *Id.*

175. States, of course, may differ in their preference for quality controls. Colorado, for example, may deem that another state's admission standards are too low to guarantee quality control or too demanding in their reach.

a majority of Colorado clients, in which case Colorado wants to have a more direct regulatory nexus and would require such attorneys to get admitted in Colorado.

Importantly, Colorado's rules require an out-of-state attorney practicing in Colorado to comply with the *Colorado Rules of Professional Conduct* and the rules applicable to attorney regulation in Colorado, including attorney discipline.<sup>176</sup> This provision protects the Colorado public from misconduct by out-of-state lawyers because it grants Colorado's disciplinary agency, the Office of Regulation Counsel, authority to prosecute ethical violations committed by out-of-state attorneys in Colorado, rather than referring them to the disciplinary agency in the out-of-state lawyer's home jurisdiction.

The arguments against nationalization have failed to materialize in Colorado. Having subjected out-of-state lawyers to its disciplinary jurisdiction, Colorado has retained the ability to protect its citizens from abuse, consistent with the rationale of offering citizens consumer protection. And out-of-state lawyers and law firms have not compromised access to legal services in the state, nor have they significantly destabilized the leadership of the local bar.<sup>177</sup> It should be conceded, however, that Colorado's experience may be limited to its circumstances: although the actual number of out-of-state lawyers practicing Colorado law is unknown, there is little reason to believe it is a significant number. Moreover, unlike, for example, Delaware's corporate law, Colorado's laws are not commonly known to be in use outside of Colorado,<sup>178</sup> and unlike New York and California, Colorado's law is not commonly chosen by choice-of-law provisions to govern contracts outside of Colorado. Similarly, Colorado has not seen an influx of large law firms moving into the state, crowding out its local law firms and legal elite.<sup>179</sup> In other words, some of the risks inherent in the nationalization of law practice were unlikely, and did not affect

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176. COLO. R. CIV. P. 220.

177. Eli Wald, *The Other Legal Profession and the Orthodox View of the Bar: The Rise of Colorado's Elite Law Firms*, 80 U. COLO. L. REV. 605, 678–79 (2009) (noting the stability of Colorado's elite law firms and the relative inability and disinterest of large national law firms to establish significant presence in Colorado).

178. Although, Colorado has adopted an LLC statute that has gained some national influence. See Carol R. Goforth, *The Rise of the Limited Liability Company: Evidence of a Race Between the States, But Heading Where?*, 45 SYRACUSE L. REV. 1193, 1222–23 (1995).

179. See article cited *supra* note 177.

Colorado negatively, but may be of little relevance with regard to jurisdictions that are likely to experience significant out-of-state practice.

Colorado's approach may serve as a blueprint for the limited nationalization of law practice: it opens the doors of a host jurisdiction to out-of-state practitioners other than in litigation, subject only to their good standing, acceptance of the host's disciplinary authority such that the host state retains the ability to offer consumer protection to its citizens, and avoidance of establishing a permanent presence in the host jurisdiction.

## *2. Open-Border Multijurisdictional Practice Subject to Some State Control*

Requiring an out-of-state attorney to be admitted in another United States jurisdiction, maintain an active status, and be in good standing as conditions of granting the attorney permission to engage in multijurisdictional practice seems to be reasonably related to the legitimate state goals of regulating lawyers—ensuring quality and providing some measures of consumer protection.

Using domicile and the establishment of a permanent office as disqualifying factors for multijurisdictional practice, however, seems ill advised. These provisions seem to be in place in order to protect the home state's residents from attorney wrongdoing. They are based on the assumption that a lawyer domiciled in a state or a lawyer with a permanent office in a state will likely serve mostly clients from that state. In other words, domicile and a permanent office are used as proxy to identify lawyers who serve clients in a particular state. To the extent that these provisions are meant to allow a state to exercise its police power and more directly regulate lawyers who serve its residents, the provisions are outdated and not likely to prove effective. Today's technological advances allow lawyers to be virtually present in any state without being there physically. Thus, an out-of-state attorney can develop a practice representing nearly exclusively clients from a jurisdiction, without establishing a domicile or opening a permanent office in it. As a proxy meant to identify an attorney's clients, domicile and the location of one's permanent office are somewhat effective but increasingly less so.

To be sure, virtual representation has its limitations. Law practice is inherently a service industry and in-person contact is in many ways an indispensable aspect of it, at least in some practice areas. If the goal of employing domicile and the location of one's permanent office, however, is to ensure that lawyers who represent many clients from a

particular jurisdiction have a closer nexus to that jurisdiction, this legitimate objective, related to the states' exercise of their police power, could be achieved more effectively by adopting a registration provision applicable to out-of-state lawyers akin to Nevada's Rule 5.5A.<sup>180</sup> Such a registration regime can then be used to quantify the extent and scope of an attorney's practice in the state, and states may specify certain thresholds of practice within their borders that would trigger an obligation to seek admission in their jurisdiction.<sup>181</sup>

Next, Colorado's insistence that out-of-state lawyers subject themselves to the regulatory power of the Colorado disciplinary agency is consistent with legitimate state interests. It ensures that an out-of-state lawyer could be held accountable for misconduct in Colorado, without relying on enforcement in the out-of-state lawyer's home state, which may be limited by the home state's limited resources and relatively limited interest in enforcing discipline regarding conduct that took place outside of its borders. Accepting the jurisdiction of the disciplinary agency also makes sense because it provides an out-of-state attorney who wishes to enjoy the benefits of law practice in a given jurisdiction the incentive to accept the consequences of doing so, including the risk of discipline.

Moreover, it seems that an out-of-state lawyer's acceptance of the benefits and risks of an out-of-state practice requires a stronger measure of accountability: a presumptive application of out-of-state discipline in a lawyer's home jurisdiction, including suspension and disbarment. This could be thought of as the consequence of engaging in a true national practice and would prevent an out-of-state lawyer from committing misconduct out of state and escaping the consequences by simply returning to the lawyer's home jurisdiction or moving on to another out-of-state jurisdiction. Furthermore, lawyers with a national practice would have every incentive to comply with the host jurisdiction's rules of

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180. NEV. RULES OF PROF'L CONDUCT R. 5.5A (2010). Other examples of registration regimes include the European model pursuant to the Lawyers Establishment Directive, *see* Directive 98/5/EC, of the European Parliament and of the Council of 16 February 1998 To Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other than That in which the Qualification Was Obtained, 1998 O.J. (L 077) 36, and the ABA model rule registration of in-house counsel, *see* INBOUND FOREIGN LAWYERS, *supra* note 10, at 3–6.

181. NEV. RULES OF PROF'L CONDUCT R. 5.5A. Incidentally, such a registration regime would allow for collection of accurate information as to the number of lawyers engaged in national law practice.

professional conduct because failure to do so would trigger consequences for their ability to practice nationwide.

Practically speaking, a rule of professional conduct could not force the high court of one state, traditionally charged with regulating lawyers, to presumptively accept the discipline imposed by another state's high court. Other measures, however, may achieve this result: a multijurisdictional practice rule may condition an out-of-state attorney's authority to practice in a state on the out-of-state's lawyer's home court holding it would honor out-of-state discipline. This could be accomplished by invoking the doctrine of comity or the doctrine of estoppel against the disciplined attorney and justified on the ground that an attorney who chooses to practice out of state assumes the risk of discipline there, as evidenced by registering to practice there. Because lawyers have a mandatory duty to report professional misconduct,<sup>182</sup> an out-of-state attorney would be obligated to report any discipline imposed on the attorney out of state to the attorney's home jurisdiction and any other out-of-state jurisdiction in which the attorney practices, in order to allow these jurisdictions to honor the discipline imposed.

In the alternative, a national attorney database may be created logging disciplinary information about all lawyers licensed by any state. Such a national database could be modeled (1) after the National Practitioner Data Bank (NPDB),<sup>183</sup> which contains information about errant behavior by medical professionals, and would allow states to share data about lawyers' misconduct; (2) after the National Discipline Data Bank run by the ABA, which contains information concerning public discipline of lawyers by state bar associations and state and federal courts;<sup>184</sup> or (3) after state law enforcement and correctional officers databases, which document broader categories of misconduct,<sup>185</sup> unlike the NPDB for medical professionals, which lists only those professionals who have engaged in specified significant misbehavior.<sup>186</sup>

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182. MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2010).

183. The National Practitioner Data Bank was authorized under part B of the Health Care Quality Improvement Act of 1986, Pub. L. No. 99-660, 100 Stat. 3784 (codified at 42 U.S.C. §§ 11101-11152 (2006)).

184. *National Lawyer Regulatory Data Bank*, AM. BAR ASS'N, [http://www.americanbar.org/groups/professional\\_responsibility/services/databank.html](http://www.americanbar.org/groups/professional_responsibility/services/databank.html) (last visited Apr. 24, 2011).

185. See generally Roger L. Goldman & Steven Puro, *Revocation of Police Officer Certification: A Viable Remedy for Police Misconduct*, 45 ST. LOUIS U. L.J. 541 (2001).

186. The reasons for reporting to the NPDB for medical professionals include loss of state licensure or other sanctions by the state medical board, loss of staff privileges for more than thirty days, and malpractice judgments or settlements. 42 U.S.C. §§ 11131-11133 (2006).



Next, excluding litigation from the general permission to engage in multijurisdictional practice, although well grounded in history and tradition, seems antiquated and ill justified. First, if out-of-state lawyers could be trusted to attain the necessary competence to practice law in a host state outside of the courtroom, surely they could attain the same necessary level of competence in the courtroom. Second, if out-of-state lawyers failed to attain the requisite competence, they would risk not only referral to the disciplinary agency in the host state but could also be sanctioned directly by the court, providing ample protection to host jurisdictions against the wasting of judicial time and resources.

Finally, states do have a legitimate interest in administering reasonable admission standards, and as the difficulties in administering a national bar exam illustrate, states differ greatly in their interpretation of “reasonable” standards.<sup>187</sup> Indeed, host jurisdictions may have a legitimate concern that under an open border multijurisdictional practice regime, a “race to the bottom” will ensue with law students flocking to take the bar exam and seek admission in states with the lowest admission standards and then practicing out-of-state subsequently. To an extent, market-based regulation may address this concern with law firms and other employers hiring reluctantly candidates who are admitted in “low-admission-standards” states and subsequently seek employment out of state. In addition, a multijurisdictional practice rule could grant out-of-state lawyers permission to practice in the state subject to a requirement of a specified period of time engaged in the practice of law actively and in good standing in the attorney’s home jurisdiction.

Such an open-border approach could also address some of the mobility challenges that have plagued regulatory enforcement. Under the current state-based approach an attorney moving to a new state may be placed in a difficult spot: because the attorney is moving to and will establish a permanent presence in a new state, the attorney cannot qualify as an out-of-state attorney. Consequently, an experienced attorney who cannot waive into a new jurisdiction may not be able to practice for months until obtaining a license in the new state. The insights of an open-border approach may be implemented accordingly to address this situation. A lawyer, admitted and in good standing in any jurisdiction, could be conditionally and temporarily admitted to practice in any other jurisdiction, as long as the lawyer (1) sits for the bar exam of the new

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187. *Supra* note 42.

state at the first possible date, (2) does not hold out to be admitted in the new state until the lawyer is admitted to it, and (3) accepts the rules of professional conduct of the new state.<sup>188</sup>

3. *Proposed Rule 5.5(a), Unauthorized Practice of Law;  
Multijurisdictional Practice of Law*

Based on the above discussion, a potential rule for the multijurisdictional practice of law would look something like the following:

- (a) A lawyer shall not:
  - (1) practice law in this jurisdiction without a license to practice law issued by the [state's highest court] unless specifically authorized as an out-of-state attorney as defined by this section;
    - (A) An attorney who meets the following conditions is an out-of-state attorney for the purpose of this Rule:
      - (i) The attorney is licensed to practice law, has practiced law continuously for at least five years, and is on active status in another jurisdiction in the United States;
      - (ii) 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;
      - (iii) The attorney is not currently subject to lawyer discipline or the subject of pending disciplinary matter in any other jurisdiction;
    - (B) An out-of-state attorney practicing law under this Rule is subject to the [state] *Rules of Professional Conduct* and rules of procedure regarding attorney discipline, and designates the clerk of the jurisdiction's highest court for service of process.
    - (C) An out-of-state attorney practicing law under this Rule shall communicate to clients in this jurisdiction that the attorney is not licensed in this jurisdiction.
    - (D) An out-of-state attorney practicing law under this Rule will promptly report any discipline imposed on him or

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188. A similar approach has been suggested by the ABA Commission on Ethics 20/20 pursuant to which an out-of-state lawyer who pursues admission through one of the procedures that a jurisdiction authorizes, such as admission by motion, in-house counsel registration, or passage of that jurisdiction's bar examination, would be granted temporary authorization to practice law in the jurisdiction per rule 5.5(d). See MULTIJURISDICTIONAL PRACTICE, *supra* note 10, at 4–5.

her in [this state] to the disciplinary authority in all United States jurisdictions where he or she is licensed to practice.

- (E) An out-of-state attorney practicing law under this Rule shall file an annual report, along with a reporting fee of \$ [\_\_\_\_], with the State Bar of [state]. The annual report shall encompass January 1 through December 31 of a single calendar year, and shall be filed on or before January 31 of the following calendar year. The report shall include the following information:
- (i) The lawyer's residence and office address;
  - (ii) The courts before which the lawyer has been admitted to practice and the dates of admission;
  - (iii) That the lawyer is currently a member in good standing of, and eligible to practice law before, the bar of those courts;
  - (iv) That the lawyer is not currently on suspension or disbarred from the practice of law before the bar of any court; and
  - (v) The nature of the client(s) (individual or business entity) for whom the lawyer has provided services that are subject to this Rule, and the number and general nature of the transactions performed for each client during the previous twelve-month period. The lawyer shall not disclose the identity of any clients or any information that is confidential or subject to attorney-client privilege.

Failure to timely file the report described in this paragraph may be grounds for discipline under [state's] rules of professional conduct as misconduct and prosecution under applicable state laws. The failure to file a timely report shall result in the imposition of a fine of not more than \$[\_\_\_\_].

- (2) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction;
- (3) assist a person who is not authorized to practice law pursuant to subpart (a) of this Rule in the performance of any activity that constitutes the unauthorized practice of law; or

- (4) allow the name of a disbarred lawyer or a suspended lawyer who must petition for reinstatement to remain in the firm name.

The adoption of proposed rule 5.5(a) would necessitate corresponding changes to the existing subsections of current rule 5.5. Current subsection 5.5(b) would be deleted: subsection 5.5(b)(1) would be unnecessary because authorized out-of-state attorneys would be allowed to establish an office or other systematic and continuous presence in the jurisdiction for the practice of law, and subsection 5.5(b)(2), forbidding an out-of-state lawyer from holding oneself out as authorized to practice law in the jurisdiction, would be replaced by proposed subsection 5.5(a)(1)(C), mandating communicating to clients in the jurisdiction that one is an out-of-state attorney not admitted in the state.

Current subsections 5.5(c)(2) and 5.5(c)(3) would be deleted as unnecessary because out-of-state attorneys would be allowed to practice law in the jurisdiction subject to new proposed rule 5.5(a). Current subsections 5.5(c)(1) and 5.5(c)(4) would remain intact, allowing attorneys who do not meet the proposed out-of-state standards or who do not wish to qualify as out-of-state attorneys to, respectively, continue and temporarily associate with admitted lawyers, per 5.5(c)(1), and temporarily provide legal services in the jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice, per 5.5(c)(4), which will be renumbered. Accordingly, subsection 5.5(c) will read:

- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
  - (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
  - (2) arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Finally, current subsection 5.5(d) will remain intact.

Proposed rule 5.5(a) would enable lawyers to serve clients on a national basis by allowing members of the profession in good standing to qualify as out-of-state attorneys in any United States jurisdiction, while allowing states to exercise control and discipline over such out-of-state attorneys. As to opponents' two principal objections to an open-border approach—protecting clients by ensuring the quality of legal

services provided and maintaining the integrity of local bars—the proposal addresses both concerns. With respect to ensuring quality, out-of-state attorneys would only qualify to practice law in a jurisdiction if they were in good standing in their home jurisdiction for at least five years and not the subject of discipline for misconduct.

Practically speaking, it is simply hard to see what additional quality controls are provided to clients by requiring lawyers in good standing to take the bar exam in the jurisdiction. The ABA Commission on Ethics 20/20 candidly noted that “a state may conclude that by requiring passage of its bar examination as a condition of admission, it weeds out those whose interest in the state is casual or peripheral and who have no commitment to the state’s administration of justice.”<sup>189</sup> Yet the statement nonetheless reveals confusion and ambivalence regarding drawing the line between appropriate quality control measures and acting in the profession’s self interest. A lawyer with a national client may very well have only a “casual or peripheral” interest in a particular state, not out of having “no commitment to the state’s administration of justice,” but rather simply because the lawyer’s national client’s interests in the state are peripheral. Subjecting such a lawyer to the state’s bar examination as a condition precedent for practicing law in the jurisdiction would not only contradict current practice realities but could also create a reasonable impression that the profession is more concerned with its own self-interest than it is with genuinely protecting the public from lawyer abuse and incompetence.

Indeed, it is important to bear in mind that pursuant to rule 5.5(a) all out-of-state attorneys will be subject to rule 1.1 ensuring competence.<sup>190</sup> Comment 2 to rule 1.1 instructively states that: “A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience.”<sup>191</sup> Just as the *Model Rules of Professional Conduct* trust lawyers to acquire the necessary expertise to handle any case and, in particular, trust new attorneys to develop the necessary skill and expertise by appropriate preparation, so should the rules expect out-of-state lawyers to master any jurisdiction’s laws or risk facing discipline.

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189. ADMISSION BY MOTION, *supra* note 10, at 6.

190. MODEL RULES OF PROF’L CONDUCT R. 1.1 (2010).

191. *Id.* R. 1.1 cmt. 2.

Incidentally, by relying on rule 1.1 to ensure the competence of out-of-state attorneys, proposed rule 5.5(a) avoids the misstep by the *Restatement*, which inadvertently suggests a separate standard of competence for out-of-state attorneys.<sup>192</sup>

In addition, jurisdictions legitimately concerned with providing their residents additional measures of quality control can do so by adding an appropriate legal education requirement to proposed rule 5.5(a). For example, borrowing from the ABA Model Rule on Admission by Motion,<sup>193</sup> proposed rule 5.5(a)(1)(A) could add a fourth requirement (iv) specifying that an out-of-state lawyer must hold a first professional degree in law—J.D. or LL.B.—from a law school approved by an appropriate accrediting agency, for example, from the Council of the Section of Legal Education and Admissions to the Bar of the ABA.

Next, proposed rule 5.5(a) would allow lawyers with subject-matter expertise to offer legal services on a national basis, allowing clients nationwide to benefit from their expertise irrespective of state borders. And proposed subsection 5.5(a)(1)(C), mandating communications between out-of-state attorneys and clients regarding the lawyer's status, would allow clients to make informed decisions about the lawyer's quality and qualifications.<sup>194</sup>

Moreover, not only would states' legitimate interest in ensuring the quality of legal services provided to their residents be maintained, but clients would likely benefit from lower costs as the result of both increased competition in the market for legal services and savings from not having to pay for separate local counsel.

With respect to states' legitimate interest in protecting the valuable contributions of local bars, local attorneys would continue to have comparative advantages compared with out-of-state attorneys. Local lawyers would be able to offer in-person representation, offer a high

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192. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (2000). The *Restatement* states that out-of-state lawyers providing legal advice in a jurisdiction should do so only when they have "adequate familiarity" with the jurisdiction's laws, deviating from rule 1.1's standard of competence. *Id.*; *see also* text accompanying note 72.

193. *See* ADMISSION BY MOTION, *supra* note 10, at 2–3.

194. Current comment 20 to rule 5.5 states:

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

MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 20 (2010) (emphasis added). Comment 20 reflects what I have elsewhere described as the profession's tendency to not take clients seriously by failing to mandate communications of material information to clients. *See* Wald, *supra* note 90.

level of expertise concerning state laws, and relative superior level of knowledge of relevant state and regional level culture, politics, and legal landscape.<sup>195</sup> In fact, the failure of franchise law firms to expand greatly in recent years<sup>196</sup> suggests that fears about the rise of Walmart-style giant providers of legal services that would crowd out local lawyers may have been exaggerated.

#### IV. GLOBALIZATION AND THE FUTURE OF THE AMERICAN LEGAL PROFESSION

Colorado's open-border approach is silent with regard to foreign lawyers' ability to practice in the jurisdiction,<sup>197</sup> leaving unaddressed the issue of the globalization of law practice. Yet because the American legal profession is beginning to experience global competition for the provision of legal services and is reconsidering its position about admission standards for foreign attorneys,<sup>198</sup> Colorado's and proposed rule 5.5(a)'s approaches are nonetheless instructive with regard to identifying some of the relevant considerations for applying open borders globally.

Proposed rule 5.5(a)'s requirement that an out-of-state attorney be licensed in another United States jurisdiction implicitly assumes and relies on American legal education in an accredited law school and thus, implicitly, proficiency in the English language and a bar admission process that includes an American bar examination and application procedure. Similarly, proposed 5.5(a)'s requirement that an out-of-state

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195. To some extent, proposed section 5.5(a)(1)(C), mandating communicating to clients one's status as an out-of-state attorney, although intended to provide clients with relevant material information to allow them to exercise informed judgment regarding legal services consumed, would benefit local lawyers because some clients may draw an inference that out-of-state lawyers are not as knowledgeable about the state's laws as local attorneys are.

196. Carle, *supra* note 27, at 723; *see also supra* note 27.

197. COLO. RULES OF PROF'L CONDUCT R. 5.5 (2010). Notably, *Virginia's Rules of Professional Conduct* define an out-of-state attorney to include foreign lawyers. VA. RULES OF PROF'L CONDUCT R. 5.5(d)(1) (2010).

198. *See, e.g.*, INBOUND FOREIGN LAWYERS, *supra* note 10 (discussing the ability of foreign lawyers to practice law in the United States). Currently, thirteen states permit pro hac vice admission by foreign lawyers, *see* Am. Bar Ass'n, Center for Prof'l Responsibility, Joint Comm. on Lawyer Regulation, *Comparison of ABA Model Rule for Pro Hac Vice Admission with State Versions and Amendments Since August 2002* (Mar. 14, 2011), [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/prohac\\_admin\\_comp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/prohac_admin_comp.authcheckdam.pdf); *see also* Peter D. Ehrenhaft, *A 21st Century Model Rule for Temporary Practice of Foreign Lawyers*, INT'L L. NEWS, Winter 2011, at 11 (questioning the prudence and enforceability of rules pertaining to foreign lawyers).

attorney be in good standing implies reliance on American-styled regulatory and disciplinary approaches.

These assumptions, however, are increasingly being challenged. Foreign LL.M. students and some common law foreign attorneys can qualify to take the New York and California bar exams and could, upon obtaining a New York or a California license, qualify as out-of-state lawyers in Colorado without meeting some of these assumptions. Historically, elite American law schools offering LL.M. programs have attracted students with strong credentials who, for example, evidenced strong English-language skills.<sup>199</sup> But LL.M. students only spend a year in an American law school and lawyers from common law countries not even that. Indeed, as American law schools extend their global reach by offering executive LL.M. programs over one summer,<sup>200</sup> a Colorado-based approach could not even assume a year-long exposure to American legal education.<sup>201</sup>

The open-border approaches adopted in Colorado and proposed rule 5.5(a) therefore raise questions about the qualifications out-of-state lawyers, including foreign attorneys, should possess. What is the inherent importance, if any, of American legal education as a condition precedent for the practice of law in the United States? Does the special role of law and lawyers in the United States necessitate some special training and immersion in American culture? What is the inherent importance, if any, of proficiency in English as a condition precedent for the practice of law? On the one hand, effective attorney-client communications seem to require some assurances regarding ability to communicate. On the other hand, language is but one important consideration regarding effective communications. Foreign lawyers may be in some circumstances better able to communicate with some American clients, for example, given their proficiency in Spanish or as well positioned to bridge class, socioeconomic, and status gaps.<sup>202</sup>

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199. See Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 CARDOZO J. INT'L & COMP. L. 143, 157–58 (2006); Carole Silver & Mayer Freed, *Translating the U.S. LLM Experience: The Need for a Comprehensive Examination*, 101 NW. U. L. REV. COLLOQUY 23, 23–24 (2006), <http://www.law.northwestern.edu/lawreview/colloquy/2006/3/LRColl2006n3Silver-Freed.pdf>.

200. See, e.g., Debra Cassens Weiss, *Berkeley To Offer Two-Summer LL.M. Program for International Students*, A.B.A. J. (June 13, 2008, 9:19 AM), [http://www.abajournal.com/news/article/berkeley\\_to\\_offer\\_two\\_summer\\_llm\\_program\\_for\\_international\\_students/](http://www.abajournal.com/news/article/berkeley_to_offer_two_summer_llm_program_for_international_students/).

201. Concerns regarding foreign lawyers' legal education could be addressed by requiring out-of-state attorneys to hold an accredited law degree. See *supra* note 193 and accompanying text.

202. See Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2247–48 (2010) (exploring the question of who is qualified and entitled to speak on behalf of others).



Moreover, one basic theme of the *Model Rules of Professional Conduct* is to require disclosure and competence, not impose paternalistic requirements.<sup>203</sup> Arguably, as long as clients are well informed about the risks inherent in communicating and dealing with foreign attorneys, clients should be entitled to be represented by the lawyer of their choice.

To be clear, the point is not that states should readily allow foreign lawyers to practice law in their jurisdictions without adequately protecting their residents from abuse and without taking appropriate measures to ensure the quality of services provided by foreign attorneys. Certainly, states should demand assurances regarding a foreign lawyer's basic capacity to effectively communicate with clients the foreign lawyer's quality of legal studies and competence. Proposed rule 5.5(a) does, however, challenge traditional assumptions and conventions about quality and competence, as well as about who should regulate and assess these qualifications, opening the door to a much needed debate about whether and how to allow foreign lawyers to provide legal services to American clients.<sup>204</sup>

Proposed rule 5.5(a)'s approach to disciplinary enforcement is also instructive regarding applying an open-border approach to foreign lawyers. Requiring out-of-state lawyers to submit to the jurisdiction's rules of professional conduct<sup>205</sup> assumes that such a condition is sufficient to protect a jurisdiction's clients from attorney abuse. Once an out-of-state attorney submits to discipline in the jurisdiction, clients should have some recourse and the disciplinary authority some measures of deterring and punishing misconduct. Similarly, the proposed rule 5.5(a)'s approach assumes implicitly that judgments in the jurisdiction might be relatively easily enforced against out-of-state attorneys and that the its registration requirements might provide reputational disincentive for out-of-state attorneys to engage in wrongdoing.<sup>206</sup>

These assumptions may not hold with regard to foreign attorneys. A foreign lawyer's acceptance of a state's disciplinary rules may have little practical effect on the state's ability to enforce discipline when appropriate. A United States jurisdiction may not expect foreign jurisdictions to

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203. See Wald, *supra* note 90, at 773–75.

204. See ADMISSION BY MOTION, *supra* note 10, at 2–3.

205. See *supra* Part III.C.3. For the specific section of the proposed rule, see section 5.5(a)(1)(B) in Part III.C.3.

206. See *supra* Part III.C.3. For the specific section of the proposed rule, see section 5.5(a)(1)(E) in Part III.C.3.

honor and enforce its discipline, and the reputational effects of American-imposed discipline on foreign lawyers may vary greatly. One possible solution might be to require foreign attorneys to acquire and show proof of malpractice liability coverage as a condition precedent to obtaining a license to practice in the United States.<sup>207</sup>

## V. CONCLUSION

The nationalization of law practice is a significant contemporary development, and globalization of law practice is likely soon to follow. The natural and obvious regulatory solution to nationalization and globalization of law practice is the nationalization, and perhaps down the road the globalization, of the regulatory approach to law practice. Yet as some aspects of establishing a national regulatory approach to law practice remain underexplored, an intermediary solution allowing national law practice while maintaining significant state involvement in admissions, licensing, and disciplinary enforcement seems most appropriate.

In *Federalizing Legal Ethics* Professor Zacharias argued for one such intermediary approach—the nationalization, by federalization, of legal ethics rules. This Article establishes, however, that nationalizing, or federalizing, legal ethics rules alone would not address the most significant consequences of the mismatch between a national law practice and a state-based regulatory approach—the problem of the unauthorized practice of law. The Article instead advocates an alternative intermediary approach: an open border permission to practice subject to continued state control over admission, licensing, and disciplinary enforcement.

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207. Wald, *supra* note 90, at 792–97 (summarizing the debate regarding requiring mandatory disclosure of malpractice coverage as a condition precedent for law practice).