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Licensing Lawyers in the Modern Economy

TRIPPE S. FRIED*

INTRODUCTION

Both the American and international economies have undergone profound changes over the past twenty years. A swift succession of technological advances has multiplied the competitive opportunities for small businesses; to quote journalist and author Thomas Friedman, innovations from fiber optics to the internet have “flattened the world.”¹ Markets that were once the exclusive province of cash-rich, publicly traded, multinational corporations are now open to almost all businesses without regard to the size or location of the enterprise. The “Mom and Pop” store located on the town square of a rural municipality can, with a minimal investment, offer its goods worldwide. As a result, the competition among businesses for clients and customers has never been fiercer. In order to thrive, sellers must offer their wares in a form and with the functionality demanded by consumers.² To borrow another Friedman analogy, for the purchasing power of the modern consumer the internet is a steroid, and today’s customer is flexing his muscles.³

Providers of goods and services across almost all industries have been forced to adapt quickly to the marketplace of the new millennium. The legal profession is no different; for lawyers to offer the best possible representation to their small business clients, they must have the tools to deal with the realities of modern transactions. A small software company in Nashville can easily have strategic alliances with venture capitalists in San Francisco, programmers and call centers in India, an advertising firm in London, and a distributor in Louisville. The business next door may import a product from Turkey and use distribution centers in Toronto, Baltimore, and Seattle to bring that item to points across North America. A lawyer based in Nashville representing either of those companies will work with colleagues across the country and the world to establish the legal framework under

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1. THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* 48 (2005).

2. *Id.* at 340.

3. *See id.* at 161.

which such cooperative commercial enterprises will operate. The laws of Tennessee will obviously not be the only ones in play. However, under the current regulatory system for lawyers, any effort to render advice or provide services in a jurisdiction in which the attorney is not licensed is an invitation for trouble.⁴ Should the software client really be compelled to hire counsel in Tennessee, California, Bangalore, England, and Kentucky?

Commentators have been discussing the ramifications of multijurisdictional practice on clients, lawyers, and the legal profession for years. While several broad solutions for issues raised by interstate representation have been circulated among academics and interest groups, as a practical matter little has changed. Moreover, the legal community seems to continue to assume that regional or national representation remains the exclusive province of the largest firms even though today's marketplace grants small firms and sole practitioners many of the same opportunities to offer services across state boundaries. In fact, for those lawyers who represent corporations or assist in transactions, interstate and international practice is increasingly becoming the norm. Clients need counsel unrestricted by state lines. Lawyers need the authority to properly serve these clients and the guidance to do so within generally accepted ethical parameters.

This article explores a key question for the future of the legal profession: does a paradigm in which each individual state has exclusive control over the practice of law within its borders work in the marketplace of Friedman's "flat world"? Or in today's global economy does state micromanagement of the legal profession so inure to the detriment of lawyers and clients that some form of national licensing is necessary? This article reaches the conclusion that to effectively provide legal services to business clients, lawyers must be given the flexibility to operate outside of the boundaries of their licensing states without fear of running afoul of ethical restrictions or statutes prohibiting the unauthorized practice of law. The goal of any licensing regime should be to promote access to efficient and competent representation. While federal control over attorney certification is not a practical solution, the best approach is a form of state-issued law

4. The only current means for a lawyer to obtain authorization to practice in another state are (i) taking its bar exam, (ii) admission through reciprocity, (iii) admission through provisions similar to American Bar Association Model Rule 5.5 or 8.5, (iv) statutory admission as in house counsel in some jurisdictions, (v) admission *pro hac vice*, or (vi) admission to federal practice. See Pamela A. McManus, *Have Law License; Will Travel*, 15 GEO. J. LEGAL ETHICS 527, 532-35 (2002); MODEL RULES OF PROF'L CONDUCT R. 8.5 (2008).

license that permits qualified attorneys to practice in any jurisdiction in the United States.

I. A NEW TWIST ON AN OLD ISSUE

The debate over the propriety of multijurisdictional practice goes to the core of that quintessential American political issue: how should power be distributed between the federal and state governments?⁵ Until recently, constitutional law, political ideology, and practical economics dictated that the licensing and oversight of attorneys be the exclusive prerogative of the individual states.⁶ Recognizing the inherent sovereignty of the nation's constituent jurisdictions, the Constitution specifically granted the states control over matters not reserved for the federal government.⁷ Thus, in the absence of a constitutional mandate to the contrary, it was a state's prerogative to decide who could serve as its judges and jurists without federal interference. A states' rights framework was also sound economics. Who was better qualified to choose the individuals responsible for interpreting and enforcing state laws than the citizens of that state?⁸

In theory and practice, the nationalization of certain functions of government has always been necessary for both the survival of the United States as a sovereign polity and the well-being of its political subdivisions.⁹ For example, the Federalists, led by Alexander Hamilton, recognized that the concentration of some power in a national authority was good policy.¹⁰ By way of proof, Hamilton endorsed unilaterally applied, stringently protectionist economic policies, including trade restraints, to more rapidly increase America's commercial strength and keep the fledgling nation from being overly dependent on

5. See, e.g., Edward J. Clearly, *Crossing State Lines: Multijurisdictional Practice*, BENCH AND BAR OF MINNESOTA (Oct. 2000), available at http://mnbar.org/benchandbar/2000/oct00/multijurisdictional_prof-resp.htm (noting that federal legislation that encroaches upon state regulatory rights has recently been struck down by the United States Supreme Court).

6. *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (licensing of attorneys is the exclusive province of each state and the District of Columbia).

7. U.S. CONST. amend. X.

8. Conversely, the federal judiciary was created under the purview of a national constitution and remains subject to federal regulation and oversight. U.S. CONST. art. III.

9. Edward M. Earle, *Adam Smith, Alexander Hamilton, Friedrich List: The Economic Foundations of Military Power*, in *THE MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE* 217, 247 (Peter Paret ed., 1986).

10. *Id.* at 232.

European economies.¹¹ The rights to print money and wage war were also vested exclusively in the federal government.¹² This made economic sense: North Carolina itself would lack the resources to wage war on or negotiate workable commercial treaties with the likes of Great Britain or France. The states could accomplish much more in the international marketplace through collaboration even though this required ceding certain rights to a central authority.¹³

Issues surrounding the division of power between the state and federal governments are generally resolved in light of economic realities. In today's economy, practical considerations dictate that, at least with respect to the licensing and oversight of legal professionals, the balance must shift away from the states' rights position and toward the Hamiltonian approach. Vesting complete control of the practice of law to the individual states inures to the detriment of both lawyer and client. The adverse impact of the system is felt particularly in the areas of corporate and transactional law. Because clients are seeking vendors and customers all over the country and the world, their attorneys must have the flexibility to address issues beyond jurisdictional borders.

II. PROBLEMS FOR BOTH ATTORNEYS AND CLIENTS

The general goal of state licensing authorities is the protection of the interests of the jurisdiction's citizens. With respect to oversight of attorneys, professional responsibility boards are designed to protect consumers of legal services from those lacking the competency and scruples to effectively and honestly represent their clients.¹⁴ Regulation comes in the form of state rules of professional conduct prohibiting the unauthorized practice of law and dictating both required and prohibited conduct of licensed lawyers.¹⁵ While some policing of the legal profession is clearly necessary, oversight comes with an opportu-

11. *Id.* at 234.

12. U.S. CONST. art. I, § 10, cl. 1.

13. The states' authority over the licensing and oversight of lawyers has never been absolute. It is subject to the Privileges and Immunities Clause of the United States Constitution, which allows individuals from one state to "ply their trade" in another. U.S. CONST. art. IV, § 2. Accordingly, the United States Supreme Court has struck down residency restrictions on legal practice. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 288 (1985).

14. McManus, *supra* note 4, at 528.

15. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 5.5 (2008), available at http://www.abanet.org/cpr/mrpc/mrpc_toc.html; N.C. RULES OF PROF'L CONDUCT R. 5.5 (2008), available at <http://www.ncbar.com/rules/rules.asp>; S.C. RULES OF PROF'L CONDUCT R. 5.5, available at <http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=407.0&subRuleID=RULE%205%2E5&ruleType=APP>.

nity cost for the client. For businesses and entrepreneurs, increased regulation often translates into decreased transactional efficiency. Under the system in place today, these clients are forced to hire multiple attorneys to represent them in the same matter because the current oversight scheme does not sufficiently account for multijurisdictional relationships. The costs to the client in terms of time and money can be exorbitant. Regulation that is economically deleterious to the people and entities it is designed to protect should not be sustained.

Ethics rules must also provide critical guidance to lawyers in terms of what constitutes permissible conduct. Under the current scheme, providing services to clients with interests in multiple jurisdictions can be patently dangerous for an attorney.¹⁶ Ethical rules vary from state to state; some jurisdictions apply the American Bar Association's Model Code of Professional Conduct, others use the more recent Model Rules of Professional Conduct, and still more have implemented differing mixtures of the two.¹⁷ This raises several issues for attorneys who represent businesses across state lines. When does representation become multijurisdictional? Does a phone call or an e-mail to a client or witness in another state constitute the unauthorized practice of law? Which state—the lawyer's licensing state, the one in which services are performed, or the jurisdiction having its laws construed or in which legal issues have arisen—has enforcement authority over the lawyer, and which jurisdiction's ethical provisions are applicable? In the event of a discrepancy between states' rules of professional conduct, to which should counsel adhere? A lawyer is generally subject to the disciplinary rules of the licensing state regardless of the location in which alleged misconduct took place.¹⁸ Nonetheless, a lawyer may also be prosecuted under a foreign jurisdiction's statutes prohibiting the unauthorized practice of law.¹⁹

16. See, e.g., *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 12-13 (Cal. 1998) (holding void client's contractual obligation to pay law firm a million dollars in fees when New York law firm with no attorneys licensed in California represented a California corporation in a matter in California).

17. Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 341 (1995).

18. Susanna Felleman, *Ethical Dilemmas and the Multistate Lawyer: A Proposed Amendment to the Choice-of-Law Rule in the Model Rules of Professional Conduct*, 95 COLUM. L. REV. 1500 (1995).

19. See, e.g., ORE. R. STAT. § 9.990 (2007) (making practice of law by any person not a member of the Oregon bar a criminal offense); TENN. CODE ANN. § 23-3-103 (1994) (making practice of law by an out-of-state attorney a misdemeanor unless the attorney associates local counsel); WISC. STAT. ANN. § 757.30 (West 2001) (making practice of law by any person not licensed in Wisconsin a criminal offense).

In sum, both clients and attorneys are stuck in an untenable situation.²⁰ Clients need services that require their attorneys to learn and use foreign laws and to interact and cooperate with extrajudicial actors. However, in order to adequately represent their clients, lawyers must take potentially extraordinary risks, the nature and extent of which may not be appreciated.²¹

III. BABY STEPS

This dilemma has not gone completely unnoticed. In 1993, the American Bar Association (ABA) modified Rule 8.5 of the Model Rules of Professional Conduct to address choice of law issues in the enforcement of ethical provisions.²² Nine years later, the ABA Committee on Multijurisdictional Practice issued recommendations with respect to lawyers practicing in multiple states.²³ It called for the continuation of the state-by-state licensing system in the absence of a workable proposal for a nationalized protocol.²⁴ At the same time, it changed Rule 5.5 of the Model Rules of Professional Conduct to allow litigators to act in jurisdictions in which they were not licensed if they rendered services on a non-systematic and non-continuous basis, associated local counsel, and were authorized or anticipated being authorized to appear before a tribunal in the foreign jurisdiction.²⁵ A similar provision was made for lawyers involved in alternative dispute resolution.²⁶ For transactional attorneys, the proposed rule permitted them to work in

20. An attorney's liberty interests may even be at stake, as most states make the unauthorized practice of law a criminal offense. See e.g., Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution*, 39 WILLAMETTE L. REV. 795, 806-07 (2003).

21. The client is also adversely affected by the balkanized ethical framework. For example, a client may be less likely to reveal critical information if he is unsure as to which legal standards apply. See *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981) (explaining that a client will not disclose incriminating facts to counsel unless the client can be sure that the information will be kept confidential); see also Steven Bradford, *Conflict of Laws and the Attorney-Client Privilege: A Territorial Solution*, 52 U. PITT. L. REV. 909, 943 (1991).

22. MODEL RULES OF PROF'L CONDUCT R. 8.5 (2008).

23. On August 12, 2002, the ABA House of Delegates adopted all of the recommendations of the Commission on Multijurisdictional Practice. See COMM'N ON MULTIJURISDICTIONAL PRACTICE, AM. BAR ASS'N, REPORT 201B (2002), available at <http://www.abanet.org/cpr/mjp/home.html> (follow Report 201B hyperlink).

24. COMM'N ON MULTIJURISDICTIONAL PRACTICE, AM. BAR ASS'N, CLIENT REPRESENTATION IN THE 21ST CENTURY 15-16 (2002), available at http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf.

25. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2008).

26. *Id.* at R. 5.5(c).

foreign jurisdictions in areas of the law in which that lawyer practiced in his home state.²⁷ An additional modification for in-house counsel was also included.²⁸

The ABA also recommended further revising the rules governing choice of laws to give the host state more regulatory control over visiting attorneys.²⁹ Under the new disciplinary regime, a lawyer practicing in a foreign jurisdiction was required to comply with the regulations of that state and was subject to disciplinary action there.³⁰ The focus shifted away from the location in which counsel was licensed and to the place where services were rendered.

State bar associations also struggled with the rapidly increasing prevalence of multijurisdictional practice.³¹ For example, in 2001, the State Bar of Georgia commissioned a study that was “intended to bring into focus the interstate and international realities of practicing law today and to suggest how, if at all, the Georgia Rules of Professional Conduct and other regulations that govern the bar need to change to adapt to those realities.”³² Based on its findings, the State Bar’s Committee on Multijurisdictional Practice called for the adoption of the ABA’s recommendations listed above.³³ Amended rules, including the committee’s proposals, were codified by order of the Georgia Supreme Court dated June 8, 2004.³⁴ A number of other states also adopted the ABA’s proposed modifications.³⁵

While a step in the right direction, these modifications to the rules governing the practice of law fall short of serving the best interests of either the bar or the business clients that many lawyers serve. Instead of promoting transactional efficiency, they codify many of the practices—particularly requiring the association of local counsel—that

27. *Id.*

28. *Id.* at R. 5.5(d).

29. *Id.* at R. 8.5.

30. *Id.*; MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 6 (2007).

31. With the exception of Kansas, every state has, at the very least, created a committee to study the American Bar Association’s (ABA) recommendations on multijurisdictional practice. See State Implementation of ABA Model Rule 5.5 (Sept. 29, 2008), http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf.

32. COMM. ON MULTIJURISDICTIONAL PRACTICE, STATE BAR OF GA., FINAL REPORT 2 (2003), available at <http://www.gabar.org/public/pdf/MJPFinalReport.pdf>.

33. *Id.*

34. SUPREME COURT OF GA., AMENDMENT TO RULES AND REGULATIONS FOR THE ORG. AND GOV’T OF THE STATE BAR OF GA. (June 8, 2004), available at www.gasupreme.us/amended_rules/6_8_2004_order.php.

35. See State Implementation of ABA MJP Policies (Sept. 29, 2008), <http://www.abanet.org/cpr/mjp/recommendations.pdf>.

unnecessarily increase the cost of representation. As a result, they still fail to address pressing needs of both counsel and client.

IV. THE PROBLEM OF NATIONAL LICENSING

One suggested solution to the issues raised by multijurisdictional practice is to federalize law licensing. The European Union has successfully implemented a continental regime that allows a lawyer from one constituent country to practice in another upon registration in the foreign jurisdiction.³⁶ Advocates of nationalization argue that Congress can introduce a uniform set of professional guidelines that would standardize attorney regulation.³⁷ By removing inconsistencies among individual state rules, a lawyer would be free to provide services nationwide.³⁸ Choice of laws issues would be rendered moot.³⁹ Federalization also offers the added benefit of nationalizing the definition of what constitutes the practice of law.⁴⁰

In theory, the implementation of a national law license would solve many of the problems currently facing practitioners. In practice, a federal regime may simply replace one set of inefficiencies with another, and, potentially, an even more disruptive set. First, Congress would have to enact legislation codifying the applicable rules of professional conduct. Given that the efficacy of both the Model Rules and the Model Code has been routinely questioned, simply deciding the constituent rules of professional conduct would be a very long, contentious process.⁴¹ Once the new ethical code is adopted, the establishment of the precedents required for resolving any inconsistencies in language and interpretation would take decades. As a result, the same uncertainty with respect to acceptable conduct that pervades multijurisdictional practice today would affect every lawyer in every state for the foreseeable future.

Furthermore, congressional intervention would necessarily entail the politicization of lawyer regulation. Many actors would be more interested in pursuing specific policy objectives than focusing on the

36. Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 INT'L LAW. 307 (2007). Whether or not the European system would ever be used as a model for an American reform effort is unclear, particularly in light of strong anti-Europeanism from some quarters in the United States. See, e.g., MARK STEYN, *AMERICA ALONE: THE END OF THE WORLD AS WE KNOW IT* 153-76 (2008).

37. Zacharias, *supra* note 17, at 391.

38. *Id.* at 382.

39. *Id.* at 353.

40. *Id.* at 356.

41. *Id.* at 339.

broader goal of maintaining the integrity of the attorney-client relationship.⁴²

Some hybrid forms of national licensing have been suggested but none seem feasible in practice. The creation of a federal ethical code for enforcement by the states is impractical on several bases.⁴³ Even assuming that Congress could constitutionally delegate the enforcement of its legislation to the individual states, the likelihood of uniform application of the rules across all of the jurisdictions, a prerequisite to achieving functional consistency, is minimal.⁴⁴ Federalization of select ethics provisions was proposed unsuccessfully in Congress in 1983; however, a piecemeal approach to governing attorney conduct would likely result in subsuming the broader goals of the ethics rules in favor of the micromanagement of certain issues.⁴⁵ Finally, the promulgation of a code of ethics for federal practice, with the hope that the states would gradually replace their individual rules with those adopted by the federal courts, would also be of dubious efficacy.⁴⁶ The concept of a “federal bar” has been circulating among commentators since at least 1938—the ABA itself called for a uniform system of admission to federal courts in 1972—but it has never come close to implementation.⁴⁷ Even if every state had the exact same provisions, discrepancies in enforcement would remain a key problem for practitioners.⁴⁸

V. PRACTICAL SOLUTIONS FOR A REAL PROBLEM

ABA Model Rule 5.5 represents an important step toward establishing a framework for regulating multistate practice. However, while it tries to balance the competing interests of public protection from the unauthorized practice of law with the rights of clients to choose their own attorneys, the rule fails to account for the client’s interest in access to legal services at a minimal cost. It codifies an unnecessarily intru-

42. See Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision, and the Pursuit of the Dollar*, 66 S. CAL. L. REV. 985, 1006-11 (1993).

43. Zacarias, *supra* note 17, at 387.

44. *Id.* at 376.

45. *Id.* at 375.

46. *Id.*

47. *Id.* at 404.

48. Expectations with respect to the qualifications and trustworthiness of foreign attorneys vary from state to state. This is most evident in the wide range of standards adopted for admission to practice *pro hac vice* in local courts. See Clint Eubanks, Student Commentary, *Can I Conduct this Case in Another State? A Survey of State Pro Hac Vice Admission*, 28 J. LEGAL PROF. 145, 145-46 (2003).

sive protocol that substantially raises the legal fees associated with multijurisdictional practice and does little to promote transactional efficiency.

For one, the modified rules continue to require out-of-state counsel to associate local counsel. Rules mandating the formal affiliation of local counsel are not new.⁴⁹ However, the purported benefits of working with a lawyer licensed by the host state are minimal. The presence of local counsel can facilitate communication between the tribunal and the parties, though with modern technology maintaining an open dialogue between the court and the litigants should be relatively easy regardless of their respective locations.⁵⁰ In addition, an attorney from the host state might better understand the court's expectations and idiosyncrasies, assuming that the lawyer has appeared frequently enough before a particular judge, but a thorough review of any applicable local rules and informal communication with local attorneys can educate foreign counsel on the personality of the court.⁵¹ Considering that the expense of associating another lawyer can be cost-prohibitive—keeping an aggrieved party with a legitimate claim from pursuing its remedies or making it adopt a less thorough strategy because of the strain on resources—the arguments supporting the requirement of affiliating local counsel are weak.⁵²

Furthermore, the rules continue to be overly focused on an attorney's knowledge of black letter law. For the business attorney, information application and not rote knowledge is the key to the successful representation of a client. Competent attorneys are not necessarily those who have memorized the most statutes or cases.⁵³ Rather, they are distinguished by their ability to apply the law to the specific circumstances faced by their clients.⁵⁴ In the business world, it is the ability to use the law as a strategic and tactical tool to achieve desirable ends for the client that makes an effective advocate.⁵⁵ However, existing ethical paradigms operate under the assumption that lawyers are per se not competent to represent clients beyond the territorial limits of the licensing jurisdiction. Historically, "[t]he reason for prohibiting the unauthorized practice of the law by laymen is not to aid the

49. See *id.* at 145.

50. See *id.* at 149.

51. See *id.*

52. *Id.*

53. See Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 78-79 (2007).

54. See *id.*

55. *Id.*

legal profession but to safeguard the public from the disastrous results that are bound to flow from the activities of untrained and incompetent individuals.”⁵⁶ Prior to the internet era, attorneys were justifiably presumed to lack the knowledge requisite for providing professional advice outside of those jurisdictions in which the attorneys were licensed. Today, that assumption ignores the reality of the American marketplace; attorneys can easily access statutes, cases, regulations, and treatises from every state. Internet meetings, professional networking websites, chat rooms, and the like are information clearinghouses. Lawyers can become familiar with the relevant jurisprudence in a state in a fraction of the time that it takes to foster a strong, trusting relationship with business clients; an intricate knowledge of the wants and needs of clients is at least as important to competent representation as familiarity with black letter law. Lastly, acquiring sufficient competency to represent clients in multiple jurisdictions is not only feasible but increasingly a job requirement. Clients are unwilling to retain new attorneys in every state in which their interests are found and are demanding that their lawyers be available wherever needed.⁵⁷

It is also noteworthy that the law itself is changing in ways that make multistate practice easier for attorneys. For one, the roles of both federal and international law—as opposed to state law—are becoming increasingly prevalent as transactions more frequently involve actors located across the country and around the globe.⁵⁸ At the same time, variations between the laws of the individual states are becoming less discernable. For example, the adoption of the Uniform Commercial Code has normalized the practice of law in areas such as sales of goods and secured transactions to the extent that the statutory differences between jurisdictions are becoming increasingly insignificant.⁵⁹

The modified rules also underestimate the ability of modern business owners and managers to select capable professionals. In fact, the

56. *In re Baker*, 85 A.2d 505, 511 (N.J. 1951).

57. Even having offices in multiple states may violate the prohibition against entering into a business endeavor with a non-lawyer. For example, Georgia prohibits attorneys licensed there from entering into partnerships with “non-lawyers” without specifying whether an attorney licensed in another state, but not in Georgia, is a “non-lawyer.” If so, a large Atlanta-based firm that has offices in Alabama, staffed with attorneys not licensed to practice in Georgia, would be operating in violation of Georgia’s ethical rules. GA. RULES OF PROF’L CONDUCT R. 5.4(b) (2004).

58. See 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, 287 (2002).

59. *Id.*

current licensing regime assumes that legal consumers are incapable of determining for themselves whether or not an attorney is competent to render necessary services.⁶⁰ Business owners and entrepreneurs may very well be able to identify the exact skills, experience, and knowledge necessary to perform desired tasks.⁶¹ These clients are capable of making reasoned decisions to work with familiar, trusted attorneys that can quickly acclimate to the idiosyncrasies of practice in a foreign jurisdiction. It should be the province of the business owner or entrepreneur, and not the state, to make that determination. In fact, the ability of business clients to effectively select counsel with respect to multistate operations has already been explicitly recognized by those jurisdictions that have enacted special provisions for in-house lawyers.⁶² For instance, Ohio expressly permits attorneys licensed elsewhere to obtain a Certificate of Registration and practice on behalf of non-governmental employers in that state.⁶³ In 2002, the ABA proposed an amendment to Model Rule 5.5 that exempted in-house lawyers from traditional rules prohibiting the unauthorized practice of law.⁶⁴ There is no reason not to expand these permissive rules to cover attorneys who provide the equivalent of in-house services to more than one corporate or business client.⁶⁵

In sum, the laudable goal of safeguarding the client from incompetent lawyers does not require broad prohibitions on extra-jurisdictional

60. Even within the legal services industry, there is a commonly held belief that the client is in need of constant, court-sponsored protection from the unscrupulous or incompetent practitioner. See, e.g., Randall T. Shepard, *On Licensing Lawyers: Why Uniformity is Good and Nationalization is Bad*, 60 N.Y.U. ANN. SURV. AM. L. 453, 459 (2004) ("Communication and enforcement of professional norms would prove difficult as attorneys roam from state to state with no knowledge and little recourse by the local governing bar.").

61. See, e.g., Aaron Larson, *How to Hire an Attorney*, <http://www.expertlaw.com/library/consumer/howtohire.html> (last visited Oct. 04, 2008).

62. See DEL. SUP. CT. R. 55.1, available at <http://www.courts.delaware.gov/Rules/?scr.pdf>.

63. OHIO SUP. CT. R. VI § 3, available at <http://www.sconet.state.oh.us/Rules/govbar/govbar.pdf>; see also WASH. CT. A.P.R. 8, available at http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=APR&ruleid=gaapr08.

64. COMM'N ON MULTIJURISDICTIONAL PRACTICE, *supra* note 23, at 10 (noting that corporate counsel could not practice in a non-licensing jurisdiction if the representation would otherwise require an appearance *pro hac vice*).

65. In light of the ready access to all of the materials necessary to provide legal services across state lines, practice restrictions based on arbitrary jurisdictional boundaries may run afoul of the Commerce Clause. U.S. CONST. art. I, § 8.

practice.⁶⁶ Instead, it mandates the adoption of an ethical protocol that recognizes both the risks presented by foreign, unlicensed attorneys and the benefit to clients of working with a familiar, trusted counselor.⁶⁷

A practical paradigm for regulating multijurisdictional practice begins with abandoning the presumption of incompetency that accompanies the lack of a law license in a given state.⁶⁸ Rather, having graduated from an accredited law school, passed the bar, and obtained a license from and admission to practice in the courts of one jurisdiction, it should be assumed that a lawyer is competent to practice in *any* of the states, at least in certain areas of expertise.⁶⁹ Counsel should be required to become familiar with the applicable law prior to beginning the representation. When ethical questions arise concerning the conduct of an attorney in a given situation, the critical inquiry should concern *that attorney's* conduct under the specific circumstances of the representation. This analysis is the proper measure of whether an attorney was competent to render advice on a foreign jurisdiction's laws.

Furthermore, the state government agencies charged with the licensing and oversight of lawyers should monitor the foreign attorneys representing clients in that jurisdiction. State disciplinary boards are generally charged with policing the legal profession.⁷⁰ When a lawyer is accused of violating an ethical provision, these agencies are respon-

66. Cf. McManus, *supra* note 4, at 534-37 (arguing that regulation of lawyers was instituted in the twentieth century as a means of curbing entry of new lawyers into what was perceived at the time to be a saturated market).

67. The American Corporate Counsel Association (ACCA) has proposed a solution—sometimes called “The Driver’s License Model”—for in-house attorneys who occasionally practice in jurisdictions in which they are not licensed. The lawyer’s home state license would be sufficient to authorize practice in a foreign state and counsel would be subject to its rules and laws of practice (including its disciplinary process). Letter from Susan Hackett, Senior Vice President & Gen. Counsel, Ass’n of Corp. Counsel, to Am. Bar Ass’n (Oct. 10, 2007), <http://www.acc.com/vl/public/ACCPolicyStatement/upload/ACCCCommentLetterReABAModelRuleforRegistrationofInHouse.pdf>.

68. McManus, *supra* note 4, at 528. It is worth noting that the author is also a practicing attorney.

69. This assumption is already made in those instances where foreign lawyers are admitted to practice before the courts of a state *pro hac vice*. In addition, many states offer expedited licensing to out of state lawyers who are authorized to practice in another state and have actively worked as attorneys for a minimum number of years. See Eubanks, *supra* note 48.

70. See, e.g., TENN. SUP. CT. R. 8.

sible for investigating and, as appropriate, prosecuting the attorney.⁷¹ Because most operate under the aegis of the state supreme court, they have wide enforcement powers.⁷² Accordingly, if a foreign attorney violates the host state's code of conduct, the host's disciplinary board would have the authority to take action against that lawyer.

Because the goal of regulation is not to punish attorneys but to make sure that consumers of legal services have access to skilled, capable counsel, the same agency responsible for disciplining lawyers after misconduct can also assist in helping clients use preferred foreign attorneys. For example, the board could publish information deemed indispensable for foreign lawyers practicing in that state, such as special rules of practice and procedure in effect in the jurisdiction. It could also provide access to practitioners licensed in the host state who would be available to consult or work with visiting attorneys on specific issues. The board could offer seminars—in person, on video, or by the internet—designed to familiarize foreign lawyers with the idiosyncrasies of state law. In other words, the board would be proactive in helping prevent costly mistakes instead of simply providing clients with an opportunity to punish attorneys after attorneys have allegedly run afoul of ethical provisions. While visiting attorneys would be encouraged to use these resources—and in fact would be exposed to greater liability if the materials are not used—they would be entirely voluntary. A reasonable fee collected from foreign lawyers would pay for these programs.

State and local bar associations should provide the same resources outlined above for foreign practitioners. Further, the bar should provide materials to apprise visiting lawyers of key differences in state law and create a network of consultants who would be available to answer questions posed by visiting practitioners. A host state should also insist that foreign jurisdictions provide the same resources and support services to its lawyers.

Finally, the legal community as a whole should begin taking the next steps toward codifying and enacting a protocol for licensing that removes unnecessary barriers to multijurisdictional practice. This requires fundamental changes to the existing licensing paradigms and would provide a universal set of norms to which all practitioners would be required to adhere. For example, counsel should be required to disclose to a client, in writing, that counsel is not licensed in the jurisdiction in which services are to be rendered and to explain the

71. *See, e.g., id.* at R. 9.

72. *Id.* at R. 9.

risks inherent in undertaking such representation. Second, the attorney must be licensed and in good standing in at least one jurisdiction with an interest in the subject matter of the representation (for example, a state where at least one party to a transaction resides or has its principal place of business). Third, the onus should be squarely on the lawyer to insure that the lawyer takes all reasonable measures needed to become and remain competent to provide the services for which the lawyer is hired. In the event that an issue of competency is raised before a disciplinary board, it should be incumbent upon the attorney to establish that, in light of the totality of the circumstances, the attorney's efforts to become familiar with the relevant jurisprudence were reasonable. Finally, counsel should be subject to the applicable rules of conduct in the host state to the extent that it has the predominant interest in adjudging the propriety of any act or omission of counsel within its borders. Absent a compelling justification, a sanction meted out by one jurisdiction should have the same effect everywhere else. Thus, if a lawyer is disbarred in Wyoming, the lawyer should effectively lose his or her license to practice in the United States.⁷³

CONCLUSION

Until the 1990s, an attorney's access to the legal authorities of another state was often limited. Such access generally required proximity to a large law library with thousands of volumes of printed material. It would have been monumentally inefficient for an attorney in Pennsylvania wholly unfamiliar with Oregon law to attempt to give advice to a client looking to open a business in the Beaver State. Why should a client pay for a trip to the library and hours of research when an attorney in Oregon could answer the same questions more quickly and cheaply? Furthermore, the barriers to multijurisdictional representation were self-sustaining. Since lawyers did not often practice outside of their licensing state, few of those with access to the necessary information mastered the requisite skills to do so efficiently.

73. COMM'N ON MULTIJURISDICTIONAL PRACTICE, AM. BAR ASS'N, REPORT 201D, at 3 (2002), available at <http://www.abanet.org/cpr/mjp/201d.pdf>. The ABA called for a reciprocal disciplinary scheme that required each state to impose the same sanction as the adjudicatory jurisdiction unless: (1) the attorney was not afforded procedural due process by the adjudicatory jurisdiction, (2) the proof of misconduct was so lacking as to provide the court with a clear conviction that it could not, consistent with its duties, accept the conclusions of the adjudicatory jurisdiction, (3) the discipline would constitute a grave injustice or violate the state's public policy, or (4) the reason for the original proceeding no longer existed. *Id.*

However, over the past twenty years, the amount of information to which attorneys have access has increased exponentially. An attorney can use the internet to instantly summon the statutes, cases, regulations, and rules of any jurisdiction within the United States. The cost is minimal or nonexistent. Now the lawyer in Philadelphia can easily become familiar with the Oregon procedures for incorporating and prepare the necessary documents for the client. The result is beneficial to both the attorney, who can expand the scope of his or her services beyond state lines, and to the client, who can use one lawyer or law firm that he or she trusts to provide a certain set of services.

While the practice of law is changing at breakneck speed, and even as lawyers adapt to new economic realities, the regulatory scheme governing the licensing and certification of lawyers to practice has remained stagnant.⁷⁴ For the most part, regulations governing the unauthorized practice of law were adopted at the turn on the twentieth century when multijurisdictional practice was the exception and not the rule. The ABA and several states have begun to address the effect of modern economic realities on the practice of law, but substantive measures that would benefit both lawyer and client have not been implemented. It is time for that to change.

74. Twenty-two states have exceptions that encompass both in house counsel and corporate counsel; each state has different requirements for meeting its exceptions. ALA. BAR ADMISSION R. IX.; CAL. CT. R. 9.46; COLO. CT. R. 222; CONN. CT. R. § 2-15A; DEL. CT. R. 55.1; D.C. CT. APP. R. 49; FLA. BAR REG. R. 17-1.1; IDAHO B. COMM'N R. 220; IND. R. ADMIS. B. & DISC. ATT'Y R. 6 § 2; IOWA CT. R. 31.16; KAN. SUP. CT. R. 706; KY. SUP. CT. R. 2.111; MICH. BD. LAW EXAM'RS R. 5; MINN. ADMIS. B. R. 9; MO. SUP. CT. R. 8.105; NEV. SUP. CT. R. 49.10; OR. BAR ADMISSION R. 16.05; R.I. SUP. CT. R. 9(b); S.C. APP. CT. R. 405; UTAH R. GOVERNING BAR ADMISSIONS R. 14-720; WASH. A.P.R. 8(f) & WASH. A.P.R. 18. Virginia is the only state that carves out a corporate counsel exception without an accompanying in house exception. VA. SUP. CT. R. 1A:5. At least three states lack both in house and corporate counsel exceptions while nonetheless extending a foreign attorney exception that makes in house and corporate counsel experience relevant. N.C. ADMISSION PRAC. R. .0502; OKLA. STAT. tit. 5, § 1-App. 5- R. 2(b) (2006); TEX. R. GOVERNING BAR ADMISSIONS R. XIII. While Nebraska expressly makes neither an in house exception nor a corporate counsel exception, it does extend an extremely liberal foreign attorneys exception that will often cover both in house counsel and corporate counsel. NEB. REV. STAT. § 7-109 (2006).