The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?

ROGER J. GOEBEL*

I. Introduction

Since the mid-1970s, the European Union (EU) or, more precisely, its core element, the European Community (EC), has recognized and protected more liberal rights for lawyers to engage in interstate practice than the United States. In the last twenty-five years, a combination of legislation and case law of the EC Court of Justice has steadily expanded

*Roger J. Goebel is Professor and Director of the Center on European Union Law, Fordham University School of Law. The author would like to express his appreciation for the assistance of his research assistant, Eric Siddall.

1. The European Union is a regional inter-governmental political system comprised of fifteen European countries (customarily called Member States)—Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. The European Union was created by the Treaty on European Union (TEU), often called the Treaty of Maastricht after the city in which it was signed on February 7, 1992. TREATY ON EUROPEAN UNION, Feb. 7, 1992, O.J. (C224) 1 (1992), [1992] 1 C.M.L.R. 719 (1992). The TEU entered into force on November 1, 1993.

2. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Feb. 7, 1992, O.J. (C224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC TREATY]. The European Community is a regional inter-government political and legal system comprised of the Member States. See supra note 1. The European Community is at the core of the European Union and comprises virtually all of European Union activities. The European Community has its own institutional structure—the Commission, Council, European Parliament, Court of Justice and European Central Bank—with binding legislative and judicial powers in a wide variety of fields. Although not a state, the European Community is an internationally recognized legal entity created by a partial transfer of sovereignty from the Member States. The European Community’s initial name was the European Economic Community when it was created by the Treaty of Rome on March 25, 1957. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11. The EC Treaty has been substantially amended, notably by the Treaty on European Union, see supra note 1, and the recent Treaty of Amsterdam, signed on October 2, 1997, and effective May 1, 1999. Treaty of Amsterdam, Oct. 2, 1997, O.J. (C 340) 1 (1999). The Treaty of Amsterdam renumbered the articles of the European Community Treaty as of May 1, 1999. Both the new and the initial numbering of the treaty articles will be indicated in this article.

3. The Court of Justice has appellate and other types of jurisdiction set out in the EC TREATY, supra note 2, arts. 226-45 (renumbered from the former arts. 169-88 by the Treaty of Amsterdam, supra note 2). Its judgments interpreting the EC Treaty and legislative or other legal acts are legally binding on all Member State governments and courts. The Court of Justice thus effectively has the status of a supreme court in EC legal matters.
the recognized level of interstate legal practice rights. Multistate legal practice is now a reality within the European Union. Lawyers and law firms from any EU state are able to represent clients on a continuous basis throughout the European Union, practice in almost all commercial law fields in any EU country, and form multinational law firms with offices as desired in any EU commercial center. In short, lawyers are able to carry on freely modern international legal practice throughout most of Europe.

This picture is in sharp contrast with the much more limited legal rules governing interstate law practice within the United States. The rules of admission to the bar and rights of practice, including any tolerance of interstate practice, are set by the states. These state rules have traditionally been founded upon a dual concern for effective representation of clients, a type of consumer protection interest, and for the efficient administration of court litigation, a civil and criminal justice interest. Arguably, however, rules ostensibly set and enforced with these concerns in some instances mask a desire to protect the local legal profession against interstate competition. Although the United States Supreme Court has to some degree limited state rules in order to protect lawyers’ rights under the Privileges and Immunities Clause of the Constitution, the Court has in large measure accorded great discretion to the states in setting professional qualification standards and delineating the right of legal practice.

The purpose of this article is, first of all, informational in character. In Part II, the article will describe the rules in the European Union that govern lawyers’ rights to practice on a temporary or occasional basis in countries other than their home state, analyzing the 1977 Directive on Lawyers’ Freedom to Provide Services and related case law. These rules are based upon the European Community Treaty articulation of the basic right to carry out transborder professional services. In Part III, the article will again fulfill an informational role in describing the much more limited character of temporary interstate legal practice rights within the United States. Initially, the article will describe the limited degree to which state regulation of the practice of law has been governed by federal constitutional principles. Then, the article will discuss the limitations that state courts place upon out-of-state lawyers who attempt to appear in court proceedings or engage in temporary interstate transactional


5. Besides the Member States listed in note 1, the legislation and court doctrines described in this article will become binding in Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, the Slovak Republic, and Slovenia when as presently expected they join the European Community sometime after 2003. The legislation will probably also be adopted by Iceland and Norway pursuant to obligations under their treaties with the European Community.


7. The EC Treaty, supra note 2, initially described the freedom to provide services in arts. 59–66 (re-numbered by the Treaty of Amsterdam as arts. 49–55 since May 1, 1999). See infra text accompanying notes 12–16. Incidentally, the custom in the European Community is to refer to transborder legal services, while in the United States we tend to refer to interstate legal practice.
practice, criticizing some of the leading precedents. Part IV represents an attempt to provide a comparative analysis, commencing with a review of the interests of clients, courts and societies. The article will conclude by suggesting that the time has come for a reexamination of present state rules by state authorities and courts to permit greater liberalization to some degree along the lines of the European Union model.

It should be noted at the outset that the legislation and case law in the European Union not only recognizes the right of lawyers to carry out interstate legal practice on a temporary basis but also the right of EU lawyers and law firms to set up permanent offices in Member States other than those in which their initial legal practice capacity has been recognized. This type of legal practice right is authorized under the European Community Treaty provisions on freedom of professional establishment. The Court of Justice has greatly facilitated this development through its liberal case law, most recently in the famous 1995 Gebhard judgment.

The recent 1998 Directive on a lawyer's right to conduct legal practice on a permanent basis in any Member State has radically expanded legal practice rights in this regard. The earlier 1989 Directive on recognition of higher education diplomas also facilitated the ability of lawyers and law students to become fully admitted to practice rights in any EU state.

These liberal EU rules sharply contrast with the United States' far more restrictive state rules governing admission to the bar, together with some states' limited recognition of prior admission in other states, and some states' rules permitting limited practice rights for foreign legal consultants. Space considerations prevent any discussion of the topic of permanent interstate legal practice rights, which must be deferred to a later article. The liberality of the European Union's recognition of rights of permanent interstate legal practice does however definitely enhance the strength of the argument that this article will make in favor of more liberal treatment of temporary interstate legal practice in the United States.

II. Providing Temporary Interstate Legal Services in the European Union

A. THE TREATY BASIS FOR THE RIGHT TO PROVIDE TEMPORARY INTERSTATE LEGAL SERVICES WITHIN THE EUROPEAN UNION

The starting point in any presentation of European Community law is the text of the relevant European Community Treaty articles. Fortunately for lawyers and other professionals, the EC Treaty contains a chapter dealing with the right to provide both commercial and professional services throughout the European Union.

The basic EC Treaty Article 49 provides for the abolition of "restrictions on freedom to provide services within the Community" whenever the provider of the service is estab-

8. The EC Treaty, supra note 2, initially described the right of establishment in arts. 52-58 (renumbered as arts. 43-48 since May 1, 1999).
10. European Parliament and Council Directive 98/5 facilitates the practice of the profession of lawyers on a permanent basis in a Member State other than the state in which the qualification was obtained. 1998 O.J. (L 77) 36.
12. EC Treaty, supra note 2, art. 49 (was numbered as art. 59 until May 1, 1999, when the Treaty of Amsterdam went into force).
lished in a Member State different from the state of the recipient of the service. Article 50 supplements this by specifying that professional services are covered as well as commercial and industrial services. Article 50 further states that persons providing services cannot be discriminated against on the basis of their nationality whenever the service provider is "temporarily" pursuing activities in a host state. Article 52 enables Community legislation to achieve the goal of freedom to provide services throughout the Community. Article 55 authorizes Member States to restrict the providing of transborder services on the grounds of "public policy, public security or public health," but this exception has rarely been used by the Member States. This detailed coverage of the right to provide interstate services set forth in the EC Treaty is in contrast to the absence of any specific mention of the topic in the U.S. Constitution, as we shall see in Part III. A.

Prior to 1974, the prevailing view at the EC Commission and the Council of Ministers was that the EC Treaty provisions according the freedom to provide professional services and the related right of professional establishment required legislative action before they could be effective. In 1974, the Court of Justice rejected this view and instead held that individuals could immediately rely on these treaty-based rights in national court proceedings.

A landmark judgment, Van Binsbergen, involved the question of whether a Dutch lawyer authorized to handle matters before a Dutch social security administrative body could continue to do so after moving to Belgium. The Dutch authorities maintained that only a Dutch resident should be permitted to conduct this type of legal representation. A Dutch administrative tribunal asked the Court of Justice whether EC Treaty articles 49 and 50

---

13. Id. art. 50 (was numbered as art. 60 until May 1, 1999).
14. Id. para. 2.
15. Id. art. 52 (was formerly numbered art. 63 until May 1, 1999).
16. Id. art. 55 (was formerly numbered art. 66 until May 1, 1999), incorporating by cross-reference these limitations in art. 46.
17. The Commission, comprised of 20 members or commissioners designated for five-year terms by the Member States, is the central administrative body of the European Community. The Commission's role is described in EC TREATY, supra note 2, arts. 211-19 (numbered as arts. 155-63 before May 1, 1999). Among its other powers, the Commission has the right of legislative initiative, i.e., essentially the sole power to initiate Community legislation with a first draft. See, e.g., EC TREATY, supra note 2, art. 251 (formerly numbered as art. 189b).
18. Although commonly called the Council of Ministers, this body's official title since November 1, 1993, has been the Council of the European Union. The Council consists of representatives of Member States at the level of cabinet ministers and meets most often as the so-called General Council in the composition of Ministers of Foreign Affairs. The Council's present role is described in EC TREATY, supra note 2, arts. 202-10 (numbered as arts. 145-54 before May 1, 1999). Until July 1, 1987, the Council had the sole power to enact Community legislation; since then, it shares legislative power with the European Parliament.
19. The first judgment to this effect was Case 2/74, Reyners v. Belgium, 1974 E.C.R. 631, [1974] C.M.L.R. 305 (1974), which held that a Member State could not require its lawyers to be citizens, because this would violate the EC Treaty's guarantee of a right of professional establishment.
21. Under EC TREATY, supra note 2, art. 234 (numbered as art. 177 before May 1, 1999), any Member State court or tribunal may refer questions concerning the treaty or Community legislative or legal acts to the Court of Justice whenever an answer is relevant in a national court proceeding. The Court of Justice reply is not only binding on the court referring the question, but it is also an authoritative interpretation of Community law for all other courts or tribunals.
(numbered as articles 59 and 60 in 1974) could have direct legal effect in a national court proceeding, providing immediate rights to individuals.  

The Court of Justice's response enunciated the doctrine that articles 49 and 50 do have direct legal effect so that nationals of any Member State can rely upon them to carry out professional (in this case legal) services across the frontiers in any other Member State. Recognition of this EC Treaty-based right in a national court proceeding did not have to await any Community legislation, although such legislation could facilitate the exercise of the right. Moreover, the court established the principle that a Member State must not discriminate against nationals of another state, nor apply its own nondiscriminatory rules regulating a profession unless the rules are "justified by the general good." Finally, the court concluded that no "general good" interest justified barring a nonresident lawyer from providing legal representation in an administrative proceeding although Dutch rules on "professional ethics, supervision and liability" might govern the nonresident lawyer's conduct in the proceeding. (American lawyers will immediately see the analogy to the United States Supreme Court's conclusion in the 1985 Piper case that New Hampshire could not bar an otherwise qualified Vermont lawyer from interstate practice in New Hampshire solely because she was a nonresident, but that New Hampshire could require her to follow its legal ethics rules.) Van Binsbergen is a leading precedent. The court doctrine that freedom to provide services under the EC Treaty not only prevents discrimination based on nationality, but also bars the application of state rules unless they are objectively "justified by the general interest," has been applied in many subsequent judgments, not only for professional services but also commercial and financial services. This court doctrine has greatly influenced the text of European Community legislation in the services field.

---

22. The doctrine of direct legal effect of EC Treaty articles is of fundamental importance in making Community law effective. The doctrine essentially states that certain treaty articles, or sections thereof, are sufficiently precise, absolute and unconditional in their articulation of rights that these rights can be given immediate effect by Member State courts. There is no need to wait for Community legislation to give legal effect to the treaty-based rights. The direct legal effect doctrine was first enunciated in a landmark judgment, Case 26/62, Van Gend en Loos v. Nederlandse Administratie Der Belastingen, 1963 E.C.R. 1, [1963] C.M.L.R. 105 (1963).


24. Id.

25. Id. at 1309.

26. Id.


28. Two important recent cases applied the court's doctrine that national laws and regulations can limit the interstate providing of commercial and financial services, or the right of establishment in commercial and financial sectors, only if the national rules are objectively "justified by the general good": Case C-384/93, Alpine Investments BV v. Minister van Financiën, 1995 E.C.R. 1-1141 [1995] 2 C.M.L.R. 209 (1995) (Dutch rule prohibiting unsolicited interstate telephone marketing of commodities futures is justified by an "imperative reason [. . .] of public interest . . .") and Case C-101/94, Commission v. Italy, 1996 E.C.R. 1-2691 [1996] 3 C.M.L.R. 754 (1996) (Italian stock exchange rule requiring brokers to be Italian residents or corporations not "justified by the general interest . . .").

B. The Impact of the 1977 Lawyers' Services Directive

For our purposes, the most important impact of Van Binsbergen came through its influence upon the Council Directive on lawyers' freedom to provide services (Lawyers' Services Directive), adopted on March 22, 1977. This directive constitutes the legal framework that governs the rights of lawyers to provide interstate services on a temporary or occasional basis throughout all the Member States of the European Union and merits careful examination.

The Lawyers' Services Directive first defines the class of legal professionals entitled to perform services throughout the European Community. In article 1, the Lawyers' Services Directive lists country by country the regulated legal profession that customarily provides courtroom services, such as the avocat in France, the Rechtsanwalt in Germany, and the avvocato in Italy. For the United Kingdom and Ireland, the list includes not only barristers, who plead before higher courts, but also solicitors, who can plead before some lower courts, but who chiefly provide general corporate and commercial services.

It is noteworthy that the Lawyers' Services Directive does not define the nature of the legal services that a lawyer may perform in a host state. Article 1(1) does expressly permit host states to “reserve to prescribed categories of lawyers the preparation of formal documents...” in the administration of decedents' estates or the transfer of real estate interests. By implication, this would indicate that lawyers from the listed classes may perform any other legal services in the host state, whether courtroom or administrative agency practice, or corporate or commercial counseling, or the negotiation or drafting of agreements and other legal transactions. Presumably, article 1(1) permits Member States to reserve estate administration and real estate title transfers to “prescribed categories of lawyers...” because in most civil law states these activities are the monopoly of a separate legal profession, known as notaries (in France, the notaire, in Germany, the Notar, etc.). Note that article 1(2) does not include notaries in the list of lawyers entitled to provide cross-border services.

Article 3 of the Lawyers' Services Directive states an important rule: in performing the cross-border services, the lawyer must use his or her home title. This article was clearly intended both to prevent inadvertent confusion with a host state professional, as well as to prevent any foreign lawyer's attempt to deceive clients by passing himself or herself off as a local lawyer.

Article 5 sets a limit on cross-border practice in "legal proceedings" (this is not a defined term, but it presumably refers to civil and criminal litigation before courts). The host state may require the foreign lawyer to be formally introduced to the presiding judge and the president of the local bar and "to work in conjunction with a lawyer who practices before the judicial authority in question and who would, where necessary, be answerable to that..."

31. Lawyers' Services Directive, supra note 6, art. 1(1).
32. Id.
33. The directive's list of types of lawyers also does not include the former French legal professional, the conseil juridique, the German Rechtsberater or Rechtsbeistand, and some other groups of legal professionals in other countries. See Goebel, supra note 4, at 577.
authority. By implication from article 5, a lawyer providing any other form of cross-border services—assistance in negotiation; drafting of commercial, financial or other documents; counseling on legal or tax matters; or representation before an administrative agency or in a private arbitration proceeding—does not need to be associated with a host state lawyer.

Under article 6, if the host state does not permit its domestic house counsel to engage in "activities relating to . . . legal proceedings," the host state can likewise exclude foreign house counsel from such litigation activities. Practice within the European Union varies with regard to the status of house counsel. For example, in the United Kingdom, house counsel may be solicitors and in Germany they may be Rechtsanwalts, entitled to appear in court on behalf of their employers, but in France they cannot be avocats and hence cannot appear in court.

Article 4 of the Lawyers' Services Directive sets out a complicated formula to determine the rules of conduct applicable to the lawyer providing services. Article 4(2) states that if the services involve legal proceedings or proceedings before public authorities, the rules of professional conduct of the host state are to be observed but "without prejudice" to those of the home state of the foreign lawyer. For all other legal services (e.g., standard commercial or corporate practice), the rules of the home state are to apply, albeit "without prejudice" to the application of several important host state rules, notably those on "professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity." However, these latter home state rules only apply if they meet an objective necessity standard: "their observance [must be] objectively justified to ensure, in that State, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility."

Manifestly, it is not always clear when the home state or the host state rules (or perhaps both states' rules) govern a lawyer's interstate legal practice. Accordingly, it is quite desirable that the Lawyers' Services Directive's provisions on applicable professional rules have been supplemented by a private initiative of the Council of the Bars and Law Societies of the European Community (CCBE), a coordinating group for all the national bar associations. The CCBE adopted, on October 28, 1988, the Code of Conduct for Lawyers in the European Community, which has since been enacted into the rules of each national bar association. Professor Laurel Terry has provided an excellent analysis of the Code of Conduct for Lawyers, contrasting its provisions with the professional rules in the United States. This Code of Conduct for Lawyers was recently amended on November 28, 1998,

34. Lawyers' Services Directive, supra note 6, art. 5.
35. Id. art 6.
36. Id. art 4.
37. Id. art 4(2).
38. Id. art. 4.
39. For a discussion of the complexity and uncertainty of the text in article 4, see Speeding, supra note 30, at 187-90.
to provide somewhat more comprehensive and detailed rules\textsuperscript{42} that are currently being adopted by each national bar association.

The Code of Conduct for Lawyers in the European Union (Code) is too complicated for any detailed description here, but essentially it provides a series of harmonized rules of professional conduct in some areas and a choice between conflicting rules of ethics in other areas, thus eliminating many potential areas of conflict between home and host state rules in interstate legal practice. The starting point of the Code is that lawyers owe legal and moral obligations to the client, the courts, the legal profession, fellow lawyers, and to the public at large. Specifying its field of application, the Code states in article 1.5 that its rules are intended to cover all cross-border activities of lawyers regardless of whether the lawyer is physically present in the host state.\textsuperscript{43}

The Code of Conduct for Lawyers in the European Union sets forth a number of minimum harmonized rules of conduct, concerning, for example, the independence of the lawyer, the protection of client confidentiality, the segregation of and proper accounting for client funds, and the avoidance of conflicts of interest. Of particular interest in interstate legal practice is the Code's section 3.1.3 on lawyers' competence that forbids the handling of a matter for which the lawyer is not competent.\textsuperscript{44} Obviously, this means that a lawyer should not attempt to provide advice or assist in transactions in a host state without the requisite knowledge of the host state law that governs or is relevant to the advice or transactions. Of considerable practical importance in interstate practice is the obligation in the Code's section 3.9 to carry adequate professional indemnity insurance, which is normally supposed to be home state insurance that covers any interstate legal practice or, if that is not available, supplemental insurance in the host state.\textsuperscript{45} Following the traditional approach in Europe, the Code's section 3.3 generally prohibits contingent fees.\textsuperscript{46}

In some instances the Code of Conduct for Lawyers in the European Union sets rules for a choice of professional ethics rules. In accord with the Lawyers' Services Directive, the host state rules govern a lawyer's appearance before a court or tribunal, but the Code adds to this any appearance before arbitral bodies. The Code's section 2.6 states that a lawyer is bound by any host state rules on advertising and publicity, and Code section 2.5 declares that a lawyer permanently established in a host state must abide by the latter's rules on incompatible occupations (e.g., not being able to serve as a member of a corporation's board of directors).\textsuperscript{47} In contrast, by virtue of Code section 3.4, normally the home state rules on fees should govern.\textsuperscript{48}

C. RECENT COURT OF JUSTICE CASE LAW

The 1977 Lawyers' Services Directive has been the subject of several Court of Justice judgments. In the first important judgment, the Commission brought an action against

\textsuperscript{42} CODE OF CONDUCT FOR LAWYERS IN THE EUROPEAN UNION (1998). The Code was adopted at Lyons on November 28, 1998. The Code of Conduct will also apply to lawyers in Iceland, Liechtenstein, and Norway. These countries are linked to the European Union in what is called the European Economic Area.

\textsuperscript{43} Id. § 1.5.

\textsuperscript{44} Id. § 3.1.3.

\textsuperscript{45} Id. § 3.9.

\textsuperscript{46} Id. § 3.3.

\textsuperscript{47} Id. §§ 2.5, 2.6.

\textsuperscript{48} Id. § 3.4.
Germany for violation of its obligations under the EC Treaty on the grounds that the German rules did not properly follow the language of the directive. When Germany introduced its national rules to apply the terms of the directive, Germany required the foreign lawyer to collaborate with a German lawyer when providing services in litigation or in certain administrative proceedings. The rules then gave the German lawyer the primary role of the authorized representative of the client and the defending counsel in the proceeding. Moreover, the local German lawyer had to be present at all times during the court or administrative proceedings.

The Court of Justice ruled that the above-described German requirements were excessive and not necessary when a foreign lawyer seeks to act in legal proceedings "in conjunction with . . ." a host state lawyer as required by the directive. The court specifically held that article 5 of the 1977 directive, which refers to local lawyers as being "answerable" to the host state court, did not imply that the local lawyer became the primary authorized representative of the client or the defending counsel, or that he or she must take the leading role in drafting pleadings or in making oral arguments, or even necessarily be continuously present during the court proceedings. Rather, the court held that the foreign lawyer providing interstate legal services and the local lawyer should decide upon their respective roles in a "form of cooperation appropriate to their client's instructions."

The Court of Justice also rejected the German contention that foreign lawyers acting without the full cooperation of host state counsel might have an insufficient knowledge of the rules of substantive and procedural law. The court referred to the need to have an adequate knowledge of German law as "part of the responsibility of the lawyer providing services vis-à-vis his client, who is free to entrust his interests to a lawyer of his choice."

This is a particularly interesting point because it seemingly implies that a host state may not compel a foreign lawyer engaged in standard commercial practice to be associated with a home state lawyer when the foreign lawyer provides an opinion on host state law or drafts a document governed by the host state law. Thus, this may occur even if, as in Germany, the national law grants a monopoly on counseling on domestic law to local lawyers.

Accordingly, in Commission v. Germany, the Court of Justice facilitated interstate legal practice by its liberal interpretation of the application of the Lawyers' Services Directive in the context of courtroom litigation and, by implication, in the context of interstate corporate and commercial practice.

49. Under art. 226 of the EC Treaty (numbered as art. 169 before May 1, 1999), the Commission may sue a Member State before the Court of Justice for an alleged infringement of its obligations under the EC Treaty or under any Community legislative act or decision. See EC Treaty, supra note 2.


52. Id. at 1160-63.

53. Id. at 1161.

54. Id. at 1162.

55. See Rolf Waegenbaur, Free Movement in the Professions: The New EEC Proposal on Professional Qualifications, 23 Common Mkt. L. Rev. 91, 96 (1986) (contending that the Lawyers' Services Directive enables a foreign lawyer to advise clients on the host state law as well as home state law or Community law). Philippa Watson in a note on Klopp, 22 Common Mkt. L. Rev. 736, 750 (1985), came to the same conclusion. Foreign lawyers who provide advice on complex issues of host state law without consulting an expert host state lawyer may, of course, run the risk of malpractice liability in case of error.
On two occasions the Court of Justice has interpreted the scope of a Member State's definition of a legal monopoly, that is, acts properly reserved to lawyers. Both judgments involved German rules. In *Reiseburo Brode*, the court held that the German rules restricting to lawyers the collection of debts in court proceedings could be deemed to serve an objective general good interest because the rules "protect creditors or safeguard the sound administration of justice..." Accordingly, a French debt-collection enterprise was blocked from carrying on its activities in Germany. The judgment is rather deferential to the German point of view. Most EU states do not restrict debt collection to lawyers, and the Commission considered the German rule to be unjustified. This judgment may be contrasted with *Sager v. Dennemeyer*. In *Sager*, the court held that a German law requiring that only German lawyers or patent agents handle routine patent renewals was disproportionate to the general good interest served. In accordance with that judgment, a UK patent agent company could properly provide such services in Germany.

The most important recent judgment applying the Lawyers' Services Directive was *Gebhard v. Milan Bar Council*, decided in December, 1995. Gebhard, a qualified German Rechtsanwalt with a part-time practice and office in Stuttgart, took up residence in Milan in 1978, living with his family and paying taxes there. Gebhard initially collaborated with an Italian avvocato firm, but in 1989 he opened his own office in Milan. Gebhard's practice chiefly consisted of representing German and Austrian clients in Italy with the aid of Italian avvocatos. However, he retained his status as "collaborator" in a Stuttgart firm and about a third of his practice involved the representation of Italian clients in Germany and Austria.

In 1989, the Milan Bar Association began disciplinary proceedings against Gebhard because of his permanent practice in Italy, using the title of "avvocato," without being qualified as an Italian lawyer. When in 1992 the Milan Bar Council sanctioned him by totally prohibiting his practice for six months, Gebhard appealed to the National Bar Council, claiming his practice in Italy was justified under the 1977 Lawyers' Services Directive. To resolve this issue, the National Bar Council asked the Court of Justice whether a 1982 Italian law had properly implemented the Lawyers' Services Directive and what criteria should be used in determining the extent to which a foreign lawyer may practice in Italy under the terms of the directive.

Not surprisingly, the court concluded that Gebhard's permanent residence in Italy and his legal practice "on a stable and continuous basis..." in Milan took him out of the category of a temporary interstate transborder service provider. The court dictated that his rights were to be appraised under the EC Treaty's establishment provisions that, incidentally, the Court also interpreted in a very liberal manner.

---

57. Id. at 6539.
59. Id.
61. Although the court naturally declared that the host state could regulate the activities of a permanently established lawyer, the court applied the *Van Binsbergen* doctrine that the host state rules must be justified in the general interest and not go beyond what is necessary to achieve the interest. Case C-551/94, Gebhard, 1995 E.C.R. at & 37. The court's opinion has influenced the text of the recent 1998 Directive facilitating the practice of law on a permanent basis in a host state. Council Directive 98/5, supra note 10.
The Court of Justice did, however, provide useful guidance in determining the dividing line between service-providing and establishment, helping future courts determine how far lawyers can go in providing interstate services on a temporary or occasional basis without becoming established in a host state. Largely following the analysis of Advocate General Leger, the court held the temporary nature of the activities in question has to be determined in light not only of the duration of the provision of the service, but also of its "regularity, periodicity and continuity." The fact that Treaty article 50 (formerly article 60) refers to the "temporary" providing of services does not mean that the provider of services is barred from the use of some form of infrastructure in the host Member State (including an office, chambers or consulting rooms) insofar as such infrastructure is necessary for the purposes of performing the temporary services in question.

In an earlier commercial services case, *Rush Portuguesa*, the court held that a Portuguese construction firm working on railroad construction in France should be considered as carrying out interstate transborder services "temporarily" even though the railroad construction project might take many months to complete. Accordingly, the Portuguese construction firm did not have to comply with French labor law as it would otherwise be required to do if the firm were found to be established in France.

Consequently, an analysis of the court's doctrinal conclusions in *Gebhard* and *Rush Portuguesa* indicates that lawyers and law firms will have considerable leeway in carrying out temporary and occasional law practice on an interstate basis within the European Union. Thus, a lawyer should normally be considered to provide transborder services and not be permanently established even if he or she works in another EU Member State for a number of weeks or even months on a specific project (e.g., a complex acquisition, real estate financing, or arbitration). A law firm is presumably engaged in temporary interstate services even if lawyers are frequently sent to another EU state to engage in legal practice for short or even moderately long periods of time (such as appearing in arbitrations in London or Paris, or in banking transactions in Frankfurt, or in dealings with EU officials in Brussels). A law firm might even maintain a permanent office with non-legal staff, such as administrators, secretaries, or lobbyists, to serve as support in carrying out interstate legal services.

Thus, *Gebhard* expands the perimeters of the liberal right to provide temporary interstate legal services set out in the Lawyers' Services Directive. Essentially, based upon the rules set out in the directive and the court's doctrinal development of the right to provide interstate services under EC Treaty articles 49 and 50, lawyers and law firms from any EU state can provide occasional, but not continuous, transborder interstate commercial and corporate legal services easily and freely throughout the territory of the European Union. Also, they can occasionally represent clients in host state litigation, subject to the directive's obligations that they be associated with qualified host state lawyers and that they satisfy objectively justified host state professional rules of conduct.

---

62. Advocate General Philippe Leger's opinion is in Case C-55/94, *Gebhard*, 1995 E.C.R. at 4168. In the Court of Justice, an advocate general has equal status to a judge. An advocate general's role is to provide a thorough legal analysis of the issues in a case before the court deliberates to reach its own judgment. For an excellent description of the important role of advocates general and their influence on court judgments, see Nial Fennelly, *Reflections of an Irish Advocate General*, 5 *Irish J. Eur. L.* 5 (1996).


64. Id. at 4195.


SPRING 2000
II. U.S. Rules Regulating Temporary Interstate Legal Services

A. STATE REGULATION OF THE PRACTICE OF LAW WITHIN THE FEDERAL CONSTITUTIONAL SYSTEM

In contrast to the explicit provisions in the EC Treaty setting forth the freedom to provide interstate professional services and the related right of establishment, the United States Constitution contains no express statement of such rights. Curiously, article IV of the Articles of Confederation did have a rather precise statement of these rights: "the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof ..."66

The U.S. Constitution did not carry over the Articles of Confederation text although the Privileges and Immunities Clause is believed to have been intended to cover the rights described in article IV of the Articles. Article IV, section 2 of the Constitution declares: "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."67 This has, of course, been supplemented by the Fourteenth Amendment, section 1, which states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ."68

Whether interstate legal or other professional practice rights have a constitutional basis has usually been determined by an application of the two Privileges and Immunities clauses or occasionally (or alternatively) through application of the Dormant Interstate Commerce clause. Obviously, lawyers’ interstate practice rights in the U.S. constitutional system are less precise and more difficult to substantiate than those in the European Union.

In the United States, rules governing the practice of law are almost entirely state measures, sometimes legislative, more often in the form of court rules.69 In Leis v. Flynt70 (discussed infra in Part III. B.), a per curiam United States Supreme Court opinion declared that "the licensing and regulation of lawyers has been left exclusively to the States . . ."71 Professor Geoffrey Hazard, a leading expert on professional ethics, has accurately described this as "a simple result of our nation’s history [sic] Regulation of the legal profession . . . remain[s] with the states as a matter of tradition and by default [of federal regulation]."72 Professor Charles Wolfram’s treatise on professional ethics pithily describes the American legal profession as being "balkanized by the geographical limits of state lines."73 Although Congress may have the power to regulate interstate aspects of the practice of law on a nationwide basis under the Interstate Commerce Clause of our Constitution, it has never attempted to do so. Some commentators have recently urged the creation of a national bar

66. THE ARTICLES OF CONFEDERATION AND PERPETUAL UNION OF 1777, art. 4.
68. U.S. CONST. amend. XIV, § 1.
69. Erica Moeser, The Future of Bar Admissions and the State Judiciary, 72 NOTRE DAME L. REV. 1169 (1997). In 1997, Ms. Moeser was the President of the National Conference of Bar Examiners.
71. Id. at 442.
72. Geoffrey C. Hazard, Jr., State Supreme Court Regulatory Authority over the Legal Profession, 72 NOTRE DAME L. REV. 1177 (1997). Professor Hazard has recently retired from his post as Executive Director of the American Law Institute (ALI).
73. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 865 (1986).
under some system of federal minimum rules, but this is presently quite unlikely. The American Bar Association does not even have the subject under active review. Further, state bar associations would almost certainly vigorously oppose any form of a national bar.

State regulation of legal practice is, however, subject to constitutionally-imposed limits. In a leading nineteenth century case, *Dent v. West Virginia,* the United States Supreme Court upheld a state law requiring a license to practice medicine against a challenge under the Due Process Clause of the Fourteenth Amendment because the professional license system was necessary "for the protection of society." The Court did note that the license should be based upon reasonable educational qualifications and an examination, which should be applied in a non-arbitrary manner. These principles also undoubtedly govern the state regulation of law practice. In *Schware v. Board of Bar Examiners,* the Court declared that, pursuant to the Due Process and Equal Protection Clauses, "officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet . . . [the bar] standards, or when their action is invidiously discriminatory."

The use of the article IV Privileges and Immunities of Citizens Clause to protect the interstate providing of business and commercial services became well-established in the nineteenth century. In the famous 1823 case, *Corfield v. Coryell,* Justice Washington proclaimed that the clause covered a variety of fundamental rights, including "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits or otherwise . . ." In its 1870 judgment, *Ward v. Maryland,* the United States Supreme Court unanimously relied upon the Privileges and Immunities Clause in striking down a state statute imposing a heavy license fee on out-of-state persons selling goods within the state. Justice Clifford held that the clause "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business . . ." More recently, in the 1948 judgment, *Toomer v. Witsell,* the Court followed *Ward* in holding that non-resident fishermen could not be charged a $2,500 shrimp boat fee when residents were charged only $25. Chief Justice Vinson spe-

---


75. 129 U.S. 114 (1889).

76. Id. at 122.

77. *Schware v. Board of Bar Examiners of N.M.*, 353 U.S. 232 (1957). Justice Black held that the New Mexico bar could not exclude an applicant with well-attested current moral fitness credentials merely because he had been a member of the Communist party and arrested prior to World War II.

78. 79 U.S. 418 (1870). Accord *Blake v. McClung*, 172 U.S. 239 (1898) (explaining that the Privileges and Immunities Clause prevents Tennessee from giving its residents a preference over nonresidents in liquidation of a Tennessee corporation).


80. Id. at 551. Note the inclusion of "professional pursuits." Id. Justice Washington’s seminal views are not diminished by his ultimate holding that oyster beds in New Jersey waters were the common property of New Jersey residents so that out-of-state fisherman could be barred from oyster fishing there.

81. 79 U.S. 418 (1870). *Acord* Blake v. McClung, 172 U.S. 239 (1898) (explaining that the Privileges and Immunities Clause prevents Tennessee from giving its residents a preference over nonresidents in liquidation of a Tennessee corporation).

82. *Ward v. Maryland*, 79 U.S. at 432-33. Justice Bradley concurred in order to argue that Maryland also violated the Dormant Commerce Clause. In *Welton v. Missouri*, 91 U.S. 275 (1875), a state law requiring a license for peddlers of goods produced outside the state was held to violate the Dormant Commerce Clause.

83. 334 U.S. 385 (1948) (Frankfurter, Jackson and Rutledge, J., concurring, contending that the state law violated the Dormant Commerce Clause).
specifically declared that "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." The Court did, however, expressly hold that the application of the Privileges and Immunities Clause was not absolute and that a state may treat non-residents disparately from residents when there is a valid reason for doing so. Likewise, in *Hicklin v. Orbeck*, the Court unanimously held that an Alaskan statute giving a hiring preference to residents for employment connected with development of Alaskan oil and gas resources violated the Privileges and Immunities Clause. Justice Brennan held that Alaska's legitimate concern for unemployed Eskimo and Indian residents could not justify the sweeping preference for Alaskan residents.

The first modern important interstate legal services case was the 1985 landmark judgment, *New Hampshire v. Piper*. In *Piper*, the United States Supreme Court held through Justice Powell that the Privileges and Immunities of Citizens Clause in article IV of the Constitution was "intended to create a national economic union" and grant the rights described in the Articles of Confederation language quoted previously. Justice Powell then held that the Privileges and Immunities Clause covered lawyers as well as businessmen because "the practice of law is important to the national economy" and lawyers provide an important "noncommercial role" in the "vindication of federal rights." Applying these principles, Justice Powell concluded that New Hampshire could not require a lawyer to be resident within the state, observing that "the opportunity to practice law should be considered a 'fundamental right,'" and that state rules must not constitute economic protectionism. Although he accepted *Toomer*’s exception permitting state discrimination against non-residents if justified by an independent substantial reason, Justice Powell concluded that no independent substantial reason existed in this case. Powell specifically rejected New Hampshire's arguments that a non-resident lawyer would be less familiar with local rules and procedures or more apt to behave unethically. The Court did, however, recognize that a non-resident lawyer must comply with the state's ethical rules and be subject to the state supreme court's disciplinary rules. The sole dissenter, Justice Rehnquist, contended that a state had a substantial interest in requiring its lawyers to be residents because they would then be more conversant with local concerns in adjudicating cases.

---

84. *Id.* at 396.
85. *Id.* The Court found no valid reason for the discriminatory license fee, specifically rejecting any claim that nonresidents did any greater harm to shrimp conservation than did residents. *Id.*
86. 437 U.S. 518 (1978). Justice Brennan suggested the Alaskan law might also violate the Dormant Commerce Clause, noting the "mutually reinforcing relationship" between the two clauses and "their shared vision of federalism." *Id.* at 531-32.
88. *Id.* at 280.
89. *Id.* at 279. Justice Powell noted that Charles Pinckney, who drafted the Privileges and Immunities Clause, affirmed that it originated in Article IV of the Articles of Confederation. *Id.* at 279 n.7.
90. *Id.* at 281.
91. *Id.*
94. *Id.* at 292-93.
In a later case, *Virginia v. Friedman*, the United States Supreme Court struck down a residence requirement imposed on out-of-state lawyers seeking admission to the Virginia bar on motion based on prior practice, without taking a bar examination. Justice Kennedy devoted most of his attention to Virginia's claim of a substantial state interest, notably that only attorneys admitted on motion who were residents would have a sufficient interest in obtaining and maintaining familiarity with Virginia law. As in *Piper*, the Court rejected that argument as unpersuasive, suggesting that Virginia had the less burdensome alternative of requiring continuing legal education courses. However, Justice Kennedy noted the Virginia rule obliging lawyers admitted on motion to engage in full-time legal practice within the state without making any suggestion that such a full-time practice obligation was invalid. Chief Justice Rehnquist and Justice Scalia dissented, believing that Virginia's independent state interest arguments were persuasive.

Finally, in *Barnard v. Thorstenn*, the Court held 6-3 that the Federal District Court for the Virgin Islands could not impose a one-year residence requirement before admission to its bar. While the relative geographic isolation of the Virgin Islands, accessible for non-resident lawyers only by airline, clearly presented a stronger justification for a residence requirement, Justice Kennedy's majority opinion stressed that non-resident lawyers could not be assumed to fail to familiarize themselves with local law and could make arrangements with local lawyers to handle urgent court hearings. Chief Justice Rehnquist's dissent argued that the Virgin Islands' unusual situation could justify a residence requirement.

It is important to note that practice before federal courts is regulated independently of any state rules. The federal district and circuit courts set their own standards for attorneys' appearance in litigation in their courtrooms, usually admitting lawyers who are already authorized in any state court. Thus, in *Murphy v. Egan*, a federal district court in Pennsylvania admitted to practice before the district court a lawyer who was qualified in California, but whom Pennsylvania had refused to admit to its bar. There also exists a *de facto* bar of lawyers specializing in specific areas of federal law—e.g., in patents, trademarks, copyright, tax, social security, securities regulation, and banking. Federal agencies set their own standards for lawyers appearing before them in administrative proceedings. In general, a lawyer may engage in the practice of these federal law specialties before administrative agencies or before federal courts without being admitted to the bar of the state in which the agency or federal court is located. However, a lawyer who is only admitted to practice

---

96. Id. at 68-69. Justice Kennedy noted that Friedman worked full-time as a house counsel in Virginia, even though she resided in Maryland.
97. Id. at 69-70.
98. Id. at 70-71.
100. Id. at 553-56.
101. Id. at 559-60.
104. See, e.g., Sperry v. Florida, 373 U.S. 379 (1963) (holding that Florida cannot prevent a patent agent from practicing patent law out of a Florida office; patent law practice does not constitute the unauthorized practice of Florida law). *See also* Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1966) *en banc* (holding

SPRING 2000
before a federal district court, but not in the state in which the district court is located, cannot practice state law even if some federal issues are mixed with state law issues.\(^\text{105}\)

In summary, the United States Supreme Court has solidly established the principle that lawyers can claim the benefit of the Privileges and Immunities Clause in some circumstances when engaging in interstate legal practice. To date, the cases in the United States Supreme Court have all involved the right of non-resident lawyers to be admitted to a state bar. Although in \textit{Piper} and \textit{Friedman} the non-resident lawyer intended to practice principally or exclusively within the state where admitted, it appears in \textit{Barnard} that non-resident lawyers would have the right to be admitted to a bar (if otherwise qualified) even if not principally practicing there. As yet, the Supreme Court has not had occasion to consider whether the Privileges and Immunities Clause grants any right to non-resident lawyers to provide occasional legal services of a transactional character in a state where they are not admitted to the bar. This topic will be discussed \textit{infra} Part B.

### B. Temporary Interstate Legal Practice in the United States

Lawyers sometimes seek to appear in courtroom litigation in a state other than that in which they are admitted. In that event, they are usually permitted to do so by the local court in a procedure called \textit{pro hac vice} admission. This procedure dates to colonial times and exists in all states.\(^\text{106}\) Although the decision whether or not to permit the out-of-state lawyer to appear in litigation is discretionary, courts will usually grant admission if the client so desires and the lawyer is in good standing. Appellate courts will, on occasion, strike down unnecessary or unreasonable limits placed by trial courts on \textit{pro hac vice} appearances.\(^\text{107}\) \textit{Pro hac vice} counsel are particularly desirable when the client has a long-standing relationship with the out-of-state lawyer or when the latter is a renowned trial lawyer with particular expertise in the subject matter of the trial (e.g., securities rules, criminal conspiracy, or mass torts).

The principal operational restraint upon \textit{pro hac vice} appearances stems from the requirement in many states that the out-of-state counsel be associated with a local lawyer.\(^\text{108}\) The purpose of requiring local counsel to be involved is to ensure knowledge of and compliance with local court procedure, which is certainly a valid concern for competent legal representation of the client.\(^\text{109}\) Difficulties may arise, however, in allocating responsibilities between the associated counsel. In any event, this approach significantly increases the cost to

---

\(^{105}\) See Ginsburg v. Kovrak, 139 A.2d 889 (Pa. 1958). Although enjoined from practicing state law, a lawyer admitted to practice before a federal court has a right to continue to practice before that court. Kennedy v. Bar Ass'n, 561 A.2d 200 (Md. 1989).


\(^{108}\) E.g., \textit{In re Smith}, 272 S.E.2d 834 (N.C. 1981); Duncan v. St. Romain, 569 So. 2d 687 (Miss. 1990).

\(^{109}\) Competent legal representation covers not only knowledge of local laws and procedures, but also "local conditions, personalities, customs and prejudices." Brakel & Loh, \textit{supra} note 106, at 705.
the client. In such a case, if the client is unable to afford the out-of-state counsel, the client's right to counsel is not deemed to be violated.110

The only significant constitutional examination of the status of *pro hac vice* admission came in *Leis v. Flynt*.111 *Hustler* magazine and its publisher, Larry Flynt, were prosecuted in Ohio for the dissemination of material harmful to minors.112 When they sought to be represented by two New York attorneys, specialists in criminal defense and obscenity law, the Ohio trial court denied the attorneys *pro hac vice* status.113 Because their out-of-state attorneys appeared to have been denied *pro hac vice* admission without good reason, Flynt and *Hustler* obtained an injunction in a federal district court against their prosecution. However, on appeal the United States Supreme Court in a *per curiam* opinion held that federal courts had no power to review any alleged deficiency in a state court's failure to permit a *pro hac vice* appearance because *pro hac vice* appearances were strictly within a state's discretion and were not subject to any constitutional standards.114 The opinion observed that "no right of federal origin ... permits [out-of-state] ... lawyers to appear in state courts without meeting that State's bar admission requirements."115

Justice Stevens dissented, joined by Justices Brennan and Marshall, contending that lawyers enjoyed a Fourteenth Amendment Due Process right to appear *pro hac vice*.116 Justice Stevens stressed the high mobility and interstate character of modern legal practice and the value provided to clients when they can use the services *pro hac vice* of out-of-state expert litigators, often in specialized fields of practice.117

Far more important in temporary interstate legal practice than occasional *pro hac vice* court appearances is the involvement of lawyers in out-of-state contracts, transactions or arbitrations. Commentators have frequently observed that modern commercial operations and the increased mobility of both clients and lawyers make temporary interstate legal practice of a transactional nature both functionally desirable and also increasingly commonplace.118 They have also stressed the increased involvement of lawyers in federal regulatory practice and in dealing with federal issues, as well as the trend toward uniform or parallel rules in state law, due to uniform acts and the influence of the Restatements of Law.

---

110. In *Ford v. Israel*, 701 F.2d 689 (7th Cir. 1983), the court held that the client's right to counsel was not violated because the client was still represented by a Wisconsin public defense lawyer.
112. *Id. at 438*.
113. *Id. at 441*.
114. *Id. at 442*.
115. *Id. at 443*.
116. *Id. at 445*.
117. *Id. at 448–51*. Justice Stevens cited Daniel Webster, Clarence Darrow, Charles Evans Hughes, John Davis and Thurgood Marshall as examples of great litigators who frequently appeared *pro hac vice*. *Id. at 450*.
Interstate transactional legal practice may occur in a variety of modes. At one extreme, a lawyer may draft contracts or other instruments for use in another state or provide opinions based on the law of another state without ever leaving the state in which he or she is admitted to practice. At the other extreme, lawyers may attempt to engage in transactional practice in a state where they are not admitted while residing there, perhaps serving on an in-house counsel staff or while working in some form of association with a local law firm. In between are the instances in which a lawyer travels occasionally, for relatively short periods of time, to other states in order to assist in negotiations, drafting contracts or other instruments, or providing legal advice. Sometimes, of course, the lawyer may spend a substantial period of time in another state, even several weeks or months in a protracted matter.

All U.S. states forbid the unauthorized practice of law. Even in recent years in a modern legal practice context, there have been a number of state supreme court judgments holding that non-resident lawyers who engage in temporary or occasional interstate legal practice of a transactional character are engaging in the unauthorized practice of law. These judgments have resulted in injunctive relief against any further such practice within the state in which the practice occurred or in court orders prohibiting the collection of fees from the clients in the matter.

The American Bar Association's 1983 Model Rules of Professional Conduct (MRPC), adopted by the large majority of states, declares in Rule 5.5(a) that "[a] lawyer shall not . . . practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction . . . " The ABA's earlier 1969 Model Code of Professional Responsibility (CPR), still in effect in New York and a minority of states, contains essentially the same rule in Disciplinary Rule 3-101(B). However, the CPR added a comment concerning "the demands of business and the mobility of our society . . . " in Ethical Consideration 3-9, declaring that "the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice . . . " Although the MRPC Comment to Rule 5.5 contains no similar language, it does assert that the purpose of the rule is to protect "the public against rendition of legal services by unqualified persons," which would appear to leave room for consideration whether an out-of-state attorney should be considered an "unqualified person" in various contexts.

Professor Charles Wolfram, a leading authority on professional ethics, has vigorously argued in a valuable analytical article that, on the whole, "professional discipline for out-of-state unauthorized practice is minimal . . . " and that there has been "a fair amount of

119. For a review of the nature of unauthorized practice of law restrictions, which sometimes include contempt of court or criminal penalties, see Needham, supra note 118, at 458-62; Reynolds, supra note 118, at 70-72.
121. The most recent prominent example is Birbrower, Montalbano, Condon & Frank v. Superior Court, 949 P.2d 1 (Cal. 1998). For earlier instances, see McRae v. Sawyer, 473 So. 2d 1006 (Ala. 1985) and Spivak v. Sachs, 211 N.E.2d 329 (N.Y. 1965).
124. Id. EC 3-9.
125. Id.
126. MRPC Rule 5.5 cmt.
127. Wolfram, supra note 103, at 686.
pointless rigor in applying the prohibition against unlicensed local law practice. . . .”128 He urges courts to be more sympathetic “to the needs of the national economy and its inevitable interstate implications,”129 permitting interstate transactional practice on a much more liberal basis.

The American Law Institute's recently approved Restatement of the Law Governing Lawyers (Restatement), upon which Professor Wolfram served as reporter, takes the position that a lawyer may engage in such out-of-state transactional practice so long as “the lawyer's activities in the matter arise out of or are otherwise reasonably related to the lawyer's practice. . . .”130 Although there is no clearly prevailing legislative or case law support for this relatively new standard, its policy rationale is that “the need to provide effective and efficient legal services to persons and businesses with interstate legal concerns requires that jurisdictions not erect unnecessary barriers to interstate law practice.”131 The ALI view certainly does, in large measure, reflect the realities of modern commercial life and the consequent need for liberalization of rules governing temporary interstate transactional practice. Nonetheless, a number of significant precedents suggest that temporary interstate legal practice is presently subject to very substantial risks and restraints.

The Restatement does appear to be both pragmatically sensible and on reasonably solid ground in adopting the view that all interstate transactional legal practice conducted from a lawyer's home state office, through the use of the telephone, correspondence, or electronic communication, is “clearly permissible.”132 In support of this view is El Gemayel v. Seaman, in which the New York Court of Appeals held that a Lebanese lawyer who assisted New York residents in a child custody proceeding and provided most of his services in Lebanon, telephoning the clients in New York to report on progress, was not engaged in the unauthorized practice of law.133 In Condon v. McHenry, a California Court of Appeals held that a Colorado attorney, representing a Colorado resident who was co-executor in a California probate proceeding, was not engaged in the unauthorized practice of law when he drafted documents in Colorado and provided advice by telephone.134 The court also considered that the out-of-state attorney could properly advise on California law (subject to the risks of malpractice).135 This view has been endorsed by the Restatement of the Law Governing Lawyers, which declares that “[t]here is no per se ban against [an out-of-state] lawyer giving a formal opinion based in whole or part on the law of another jurisdiction.”136 Unfortunately, some doubt has been cast on the Restatement view, as well as some aspects of the Condon judgment, by the recent California Supreme Court decision in Birbrower,137 discussed below.

128. Id. at 694.
129. Id. at 708.
132. Id. cmt. b.
133. Id. cmt. e.
136. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 3(3) cmt. e.
137. See Birbrower, Montalbano, Condon & Frank v. Superior Court, 949 P.2d 1 (Cal. 1998). In the appeal of the Condon judgment, the California Supreme Court ordered a rehearing in the light of its Birbrower opinion.

SPRING 2000
At the other extreme from interstate services provided by telephone or correspondence is any attempt by an out-of-state attorney who has become resident in a state to practice the law of that state without being admitted to its bar. This is usually considered the unauthorized practice of law. In Perlah v. SEI Corp., a New York attorney, resident in Connecticut, provided corporate transactional assistance to a client for several weeks prior to his admission to the Connecticut bar. The court held that the attorney could not recover fees for these services, which constituted the unauthorized practice of law. Similarly, in Chandris v. Yanakakis, the Florida Supreme Court concluded that a retired Massachusetts attorney and professor of maritime law, resident in Florida, could not provide services to an injured sailor in tort litigation against his employer under the federal Jones Act because such pre-litigation advice constituted the unauthorized practice of law in Florida. The majority opinion refused to accept that the lawyer's advice on a federal maritime law issue could be treated as a so-called federal law practice exception to the unauthorized practice of law.

Moreover, in a recent 1998 Ohio Supreme Court per curiam judgment, Cleveland Bar Association v. Misch, the court held that an Illinois attorney residing in Ohio engaged in unauthorized legal practice when he acted not merely as a business consultant but as a legal consultant to a local law firm by providing legal assistance directly to clients. The Illinois attorney had drafted buy-sell agreements and financing arrangements, negotiated with creditors and labor unions, and provided assistance in Ohio tax law. Similarly, a New York federal district court held that a Maryland lawyer, also licensed to appear before the U.S. Court of Federal Claims and the Court of Appeals for the Federal Circuit, could not recover fees for his services in a federal contract action, including appearances before both those courts, because the lawyer's sole law office was in New York in association with a New York lawyer.

In contrast to these rather stringent judgments, there are some cases where residents have been permitted to practice law even though not admitted to practice within the state. Thus, the Restatement of the Law Governing Lawyers urges that lawyers working as house counsel be allowed to engage in transactional practice for their employer even if not admitted to the bar in the state where they are employed and residing. Some state rules or practices

---

64 Cal. Rptr. 2d at 789. The Court of Appeals still permitted the Colorado attorney to recover his fees but emphasized that his services were considered to be provided to the Colorado co-executor. Estate of Condon v. McHenry, 76 Cal. Rptr. 2d 922 (Cal. Ct. App. 1998). See infra text accompanying notes 169-73.


139. Perlah, 612 A.2d at 856.

140. 668 So. 2d 180 (Fla. 1995). The dissenting judges argued that the retired Massachusetts attorney was clearly expert in maritime law and should have been permitted to give pre-litigation advice, noting that the attorney had never claimed to be admitted in Florida. Id. at 186.


142. 695 N.E.2d 244 (Ohio 1998).

143. Servidone Const. Corp. v. St. Paul Fire & Marine Ins. Co., 911 F. Supp. 560 (N.D.N.Y. 1995). While the court accepted that a nonresident out-of-state lawyer could provide advice on a federal claim, provided that the advice is given in conjunction with a New York lawyer, the court concluded that a Maryland lawyer's permanent practice within an office in New York constituted unauthorized practice and made his retainer fee agreement void on public policy grounds. Id. (citing Spivak v. Sachs, 211 N.E.2d 329 (N.Y. 1965), as the controlling precedent).
clearly tolerate such legal practice by house counsel.\footnote{144} Also, the Tenth Circuit has held that a law professor resident in Colorado, but only admitted to practice in Illinois, could provide counsel to local attorneys in a bankruptcy litigation without being deemed to be engaged in the unauthorized practice of law in Colorado.\footnote{149} Similarly, the Maryland Court of Appeals held that a North Carolina attorney acting "of counsel" to a Maryland law firm for a three-year period did not engage in the unauthorized practice of law, even though he drafted pleadings and briefs and supervised associates and paralegals, because he never directly advised the Maryland firm's clients.\footnote{146} The court noted that the lawyer "of counsel" gave advice only to the firm, in a manner analogous to the role of a house counsel providing services only to the employing corporation.\footnote{147}

Unfortunately, the extent to which a lawyer may travel occasionally, even for short periods, to other states to provide legal services of a transactional character (e.g., to assist in negotiations, draft contracts or legal instruments, provide legal counsel, assist in arbitrations, review corporate documents, or assist in an acquisition or merger) has to be considered very much in a gray area of uncertainty. That such interstate legal transactional practice is common and usually tolerated is evident.\footnote{148} There exists, however, a risk that it may be the subject of sanctions by the bar or the courts of the state where the practice physically occurs. Three prominent cases demonstrate this risk.

In \textit{Spivak v. Sachs}, the New York Court of Appeals held that a California attorney who spent two weeks in New York providing counsel to a New York resident upon a Connecticut divorce proceeding was engaged in the unauthorized practice of law.\footnote{149} The court accordingly held that the attorney could not recover legal fees or travel expenses from the client.\footnote{150} The legal services included review of a draft settlement, consideration of New York as a preferable divorce venue, and advice on selection of a New York lawyer for the litigation. The client had specifically requested the California attorney to come to New York and agreed to pay his fees and expenses. The attorney clearly disclaimed any ability to provide anything other than advice in conjunction with the client's current counsel. Although three dissenting judges felt that this conduct constituted an "isolated situation" that didn't rise to the level of practice of New York law,\footnote{151} Chief Judge Desmond held that it represented

\footnotesize{\textit{\textsuperscript{144} See Restatement (Third) of the Law Governing Lawyers, § 3(3), cmt. f. The Reporter's Note indicates that Florida, Idaho, and Missouri expressly follow this approach. Id. See also Needham, supra note 118, at 485 (listing nine states that follow the Restatement). Daly, supra note 118, at 729–30, cites empirical evidence that suggests that house counsel are rarely limited by unauthorized practice of law rules, noting that "disciplinary proceedings are virtually nonexistent; inhospitable opinions by state bar association ethics committees are few and far between." Id. at 729.\textit{\textsuperscript{145} See Dietrich Corp. v. King Resources Co., 596 F.2d 422 (10th Cir. 1979). Accord Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1966).\textit{\textsuperscript{146} In re the Application of R.G.S., 541 A.2d 977 (Md. 1988). A peculiarity of the case was that the lawyer, a former law professor, was applying for admission in Maryland on motion so that he had to satisfy Maryland's requirement of legal practice for five of the prior seven years. The Court of Appeals majority felt that his "of counsel" work constituted legal practice, but not unauthorized legal practice. The dissent considered his failure to advise clients directly meant that his activities were not legal practice at all. Id.\textit{\textsuperscript{147}}\textit{\textsuperscript{148} See Wolfram, supra note 103, at 668–71; Daly, supra note 118, at 725–31.\textit{\textsuperscript{149} Spivak v. Sachs, 211 N.E.2d 329 (N.Y. 1965).\textit{\textsuperscript{150} Id.\textit{\textsuperscript{151} Id. at 331. The dissenting judges adopted the majority opinion in the Appellate Division that took this view. See Spivak v. Sachs, 21 N.Y. A.D. 2d 348 (1964).\textit{}}}}
unauthorized practice of law.\textsuperscript{152} His opinion stressed that the New York policy protected "citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work [even if they are] . . . lawyers from other jurisdictions."\textsuperscript{153} \textit{Spivak v. Sachs} is presumably still good law in New York.\textsuperscript{154}

Several courts in other jurisdictions have come to similar conclusions.\textsuperscript{155} For example, in \textit{Ranta v. McCarney},\textsuperscript{156} a Minnesota attorney specialized in tax advice could not recover fees for assistance to a North Dakota resident in the sale of the latter's business in North Dakota. The North Dakota Supreme Court held that the concept of legal practice encompassed legal advice and drafting of instruments as much as it did court appearances.\textsuperscript{157} The court declined to recognize any exception for advice on federal tax matters.\textsuperscript{158} A sharp dissent argued for recognition of a federal tax advice exception, bluntly stating that "[t]he only protection effected by the holding in this case is the protection of the economic interests of the attorneys of this state . . ."\textsuperscript{159}

The most recent major judgment restricting interstate transactional legal practice is \textit{Birbrower, Montalbano, Condon & Frank v. Superior Court},\textsuperscript{160} a 1998 decision of the California Supreme Court. In 1992–93, Birbrower, a New York law firm, performed legal services for a California corporation, ESQ Business Services. This corporation was owned by the Sandhu family who had been Birbrower clients since 1986, largely for New York matters. ESQ had a software development and marketing contract dispute with Tandem, another California corporation. The contract, which apparently had been drafted by Birbrower, was governed by California law. Two Birbrower attorneys traveled several times to California to perform legal services, notably negotiating with Tandem representatives and preparing and filing a complaint for arbitration in San Francisco. After the ESQ–Tandem dispute was settled, Birbrower sued for over one million dollars in legal fees.\textsuperscript{161}

Judge Chin's opinion for six judges of the California Supreme Court held that the Birbrower firm's services in California constituted the unauthorized practice of law and consequently barred the collection of legal fees (except for such portion of fees as represented compensation for corporate case research performed in New York).\textsuperscript{162} Ruling out "[m]ere fortuitous or attenuated contacts...", the court's test was "whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations."\textsuperscript{163} The court declined to rec-

\textsuperscript{152} Id.
\textsuperscript{153} \textit{Spivak}, 211 N.E.2d at 331.
\textsuperscript{155} See, e.g., \textit{McRae v. Sawyer}, 473 So. 2d 1006 (Ala. 1995) (holding a Mississippi lawyer could not recover fees for legal service to Alabama residents rendered in a personal injury litigation in Alabama); \textit{Lazoff v. Shore Heights Ltd.}, 362 N.E.2d 1047 (Ill. 1977) (holding a Wisconsin lawyer who was an expert in real estate transactions could not recover fees for aid in negotiations for the sale of real estate in Illinois); \textit{Taft v. Amsel}, 180 A.2d 756 (Conn. Super. Ct. 1962) (holding a New York attorney who specialized in transportation law could not recover fees for legal services in the creation of a national transportation company in Connecticut).
\textsuperscript{156} 391 N.W.2d 161 (N.D. 1986).
\textsuperscript{157} Id.
\textsuperscript{158} Id. at 163–64.
\textsuperscript{159} Id. at 166.
\textsuperscript{160} \textit{Birbrower, Montalbano, Condon & Frank v. Superior Court}, 949 P.2d 1 (Cal. 1998).
\textsuperscript{161} Id. at 3–4.
\textsuperscript{162} Id. at 7.
\textsuperscript{163} Id. at 5.
ognize an exception for legal services incidental to private arbitration64 (although that aspect of the holding has been effectively nullified by the California state legislature’s adoption of a law in July 1999 specifically authorizing the appearance of out-of-state attorneys in private arbitrations).65 The court also refused to accept an estoppel rationale that would permit recovery of fees when a client engages a lawyer with full knowledge that the lawyer is not admitted in the state where the services are to be rendered.66 Although recognizing the need to “accommodate the multistate nature of law practice . . . ,” Judge Chin ruled Birbrower’s activities were too extensive to escape treatment as unauthorized practice.67

The California Supreme Court also observed that a lawyer “not physically present” can still engage in unauthorized practice “by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means,” although it added that such practice using technological communications did not automatically constitute unauthorized practice—a fact review would be necessary.68 When Condon v. McHenry, discussed above,69 was appealed, the California Supreme Court ordered that it be reconsidered in the light of Birbrower. In its reconsidered Condon opinion, the Court of Appeals emphasized that the Colorado co-executor’s choice of the Colorado law firm to provide services in a California probate proceeding was reasonable, because the Colorado firm had drafted the will and prepared the estate planning documents for the decedent.70 The Court of Appeals held that because the Colorado law firm’s services for the Colorado co-executor were almost entirely performed in Colorado, the case could be distinguished from Birbrower.71 The Court concluded that “California has no interest in disciplining an out-of-state lawyer practicing law on behalf of a client residing in the lawyer’s home state.”72 Moreover, the Court of Appeals repeated its view that the Colorado law firm’s communications by telephone, fax, or mail with California beneficiaries did not represent the practice of law in California.73

Although the Restatement of the Law Governing Lawyers characterizes Spivak and Birbrower as “unduly restrictive” and does not follow their policy view,74 the two decisions, together with Ranta and a number of others reaching the same result, demonstrate that there can be a serious risk in providing temporary interstate legal services.

164. Id. at 7. Justice Kennard’s dissent essentially argues for excepting services in a private arbitration from the unauthorized practice of law. Id. at 12.
165. See CALIFORNIA RULES OF COURT, Rule 983.4: Out-of-state Attorney Arbitration Counsel (West 1999). The out-of-state attorney must be in good standing and admitted to practice before the bar in any U.S. court and approved by the arbitrator(s) or the arbitral forum. See id.
166. Birbrower, 949 P.2d at 11; Accord Ranta v. McCarney, 391 N.W.2d 161, 164 (N.D. 1986). But see Freeling v. Tucker, 289 P. 85 (Idaho 1935) holding an Oklahoma attorney was permitted to recover fees for services in an Idaho probate proceeding because he fully disclosed his lack of a local license.
168. Id. at 5–6. This aspect of the judgment, probably technically dicta, was sharply criticized by Professor Wolfram as setting “the legal field back a quarter of a century . . .” quoted in Debra Baker, Lawyer, Go Home, A.B.A. J. May 1998 at 22.
171. See id.
172. Id. at 927. The court observed that only 10 of the firm’s 316 billable hours represented the time spent by one of its lawyers while physically providing services in California. Id.
173. Id. at 928. Moreover, the court also maintained its view that out-of-state attorneys could advise their clients on California law when in their home jurisdiction. Id.
174. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, Reporter’s Note cmt. e.
Fortunately, there are some judgments that take a more liberal view. In *Appel v. Reiner*, a New Jersey Supreme Court decision held that a New York attorney who provided services to a New Jersey resident in the extension of credit and compromise of claims held by New York and New Jersey creditors was not engaged in the unauthorized practice of New Jersey law. The court noted the difficulty in disentangling the New York and New Jersey elements, and the fact that a New York creditor was owed more than half of the debt involved. The New Jersey Supreme Court has also authorized the award of fees to a New York lawyer selected by an executor to handle most of the legal work for the estate of a New Jersey decedent. In *In re Waring’s Estate*, the court emphasized that the New York firm had previously served as the decedent’s legal counsel and prepared the will, that the work largely involved federal tax issues, and that New Jersey issues were handled by consultation with a New Jersey lawyer. Notably, the court declared that:

“[m]ultistate relationships are a common part of today’s society and are to be dealt with in commonsense fashion. While the members of the general public are entitled to full protection against unlawful practitioners, their freedom of choice in the selection of their own counsel is to be highly regarded and not burdened by ‘technical restrictions which have no reasonable justification.’”

A 1998 judgment of the Hawaii Supreme Court, *Fought & Company, Inc. v. Steel Engineering and Erection, Inc.*, also took a more liberal view in authorizing the payment of fees to an Oregon law firm acting as general counsel to a client involved in litigation against the state of Hawaii arising out of the construction of an airport in Hawaii. Hawaii lawyers directly handled the litigation, but the Oregon firm assisted them with legal research and in the preparation of briefs. The Oregon firm did not make a *pro hac vice* appearance but it essentially supervised the conduct of the litigation on behalf of the client. Noting “the transformation of our economy from a local to a global one . . .,” the Hawaii Supreme Court specifically rejected the approach of *Birbrower* in this context. The court emphasized the necessity for cooperation between local firms and out-of-state firms that customarily handled a client’s affairs, stating notably: “a commercial entity that serves interstate and/or international markets is likely to receive more effective and efficient representation when its general counsel, who . . . is familiar with the details of its operations, supervises the work of local counsel in each of the various jurisdictions in which it does business.”

There is some support for excluding certain fields of practice from state unauthorized practice prohibitions. Thus, in *Williams v. John B. Quinn Construction Corp.*, a New York federal district court held that a New Jersey law firm could properly provide legal assistance in a private arbitration proceeding, essentially on the rationale that the services provided in an arbitration in New York are not considered the practice of New York law. In 1964, a California court held that an Illinois attorney could properly assist a California client in a federal bankruptcy proceeding because federal bankruptcy rules are not part of California law.

---

175. 204 A.2d 146 (N.J. 1964).
177. Id. at 197 (citing for comparison New Jersey State Bar Ass’n v. Northern N.J. Mtge. Associates, 161 A.2d 257, 261 (N.J. 1960)).
179. Id. at 497.
180. Id.
In contrast, a bankruptcy court in Connecticut held that a New York lawyer could not claim a federal law exception for his services concerning bankruptcy law in Connecticut because he provided the services from a permanent Connecticut office, instead of occasionally providing services in specific bankruptcy court appearances.\textsuperscript{183}

The only attempt to use the Privileges and Immunities Clause in the context of temporary interstate legal services came in \textit{Spanos v. Skouras Theaters Corp.},\textsuperscript{184} a Second Circuit \textit{en banc} opinion written by Judge Friendly, one of the leading jurists of his generation. Spanos, a prominent California lawyer specializing in the antitrust rules governing the motion picture industry, was invited by Skouras Theaters to come to New York to assist in a major motion picture antitrust action in federal court. During 1953–58, he assisted New York counsel in the proceedings, residing for long periods in New York, without being admitted \textit{pro hac vice}. Spanos's suit for fees was dismissed by a Second Circuit panel in an opinion by Chief Judge Lumbard, who applied the \textit{Spivak v. Sachs} broad interpretation of what constituted the practice of law in New York and concluded that Spanos's services constituted unauthorized practice of law.\textsuperscript{185}

In the 7–2 \textit{en banc} reversal of the panel, Judge Friendly's legal analysis was founded on the Privileges and Immunities Clause but focused on clients' rights rather than lawyers' rights. "[U]nder the privileges and immunities clause of the Constitution no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state."\textsuperscript{186} He stressed that in "an age of increased specialization and high mobility of the bar . . ." a client should be able to obtain the services of "a lawyer licensed . . . [in any] state who is thought best fitted for the task . . ." Judge Friendly did, however, limit this perceived client right to the assistance of out-of-state attorneys who "work in association with a local lawyer on a federal claim or defense," rejecting the New York City Bar Association's \textit{amicus} view that the out-of-state lawyer could represent the client independently in connection with a federal action.\textsuperscript{187} The holding in \textit{Spanos} has, however, been undercut by \textit{Norfolk & Western Railway}, where the United States Supreme Court summarily affirmed a district court ruling that Missouri lawyers who specialized in Federal Employers' Liability Act matters could nonetheless be denied admission \textit{pro hac vice} in proceedings related to the federal act in Illinois state courts.\textsuperscript{188}

Finally, an unusual application of the Dormant Commerce Clause occurred in \textit{National Revenue Corp. v. Violet}.\textsuperscript{190} The First Circuit, in an opinion by Judge Aldridge, concluded

\begin{enumerate}
\item \textsuperscript{182} Cowen v. Calabrese, 41 Cal. Rptr. 441 (Cal. Dist. Ct. App. 1964).
\item \textsuperscript{183} \textit{In re Peterson}, 163 B.R. 665 (Bankr. D. Conn. 1994); accord, Attorney Grievance Com’n of Maryland v. Harris-Smith, 737 A.2d 567 (Md. 1999).
\item \textsuperscript{184} 364 F.2d 161 (2d Cir. 1966).
\item \textsuperscript{185} \textit{Id}. at 164–65.
\item \textsuperscript{186} \textit{Id}. at 170.
\item \textsuperscript{187} \textit{Id}. at 171. Note that in \textit{Servidone Constr. Corp. v. St. Paul Fire & Marine Ins. Co.}, 922 F. Supp. 560 (N.D.N.Y. 1995), discussed in note 143 \textit{supra}, the district court emphasized that the out-of-state lawyer must provide legal advice or assistance in association with a licensed local lawyer, following the dictum in \textit{Spanos}.
\item \textsuperscript{188} \textit{Norfolk & Western Ry. Co. v. Beatty}, 400 F. Supp. 234 (S.D. Ill. 1975), \textit{aff’d without opinion}, 423 U.S. 1009 (1975). The \textit{per curiam} opinion in \textit{Leis v. Flynt}, 439 U.S. 438, 442 n.4 (1979), declares that \textit{Spanos} was "limited, if not rejected entirely," by \textit{Norfolk & Western}, but that seems to be a rather sweeping appraisal of the implications of \textit{Norfolk & Western} without any analysis of the merits of Judge Friendly's reasoning.
\item \textsuperscript{190} 807 F.2d 285 (1st Cir. 1986).
\end{enumerate}
that the Rhode Island statute that defined debt collection as the practice of law, thus limiting it to Rhode Island lawyers, constituted an excessive and unjustified burden on interstate commerce. The court noted that no other state restricted debt collection to members of its bar. (The opinion contrasts with the Court of Justice's conclusion that Germany could restrict debt collection to German lawyers in *Reisebüro Brode*,191 discussed *supra* in Part II. C.) The court's analysis raises the interesting possibility that states' reservation of certain types of legal services to their attorneys might be challenged on Dormant Commerce Clause grounds.

As previously observed, the recently approved Restatement of the Law Governing Lawyers attempts to provide a broader rule justifying temporary interstate legal practice that would permit out-of-state lawyers to act whenever the lawyer's activities in the matter "arise out of or are otherwise reasonably relate[d] to the lawyer's practice . . . " in his or her home state.192 With regard to transactional matters, the Restatement advances the view that an out-of-state lawyer should be able to provide legal assistance when physically present in a state where he or she is not admitted if one or more of several factors are satisfied.

The Restatement considers that one factor justifying interstate transactional practice by an out-of-state lawyer is the status of the client, namely, if the client "is a regular client of the lawyer or, if a new client, is from the lawyer's home state . . . or contacted the lawyer there."193 Other factors relate to the nature of the services: if "significant aspects of the lawyer's activities are conducted in the lawyer's home state" or involve the home state law, or if a "multistate transaction has other significant connections with the home state," or if "the legal issues involved are primarily either multistate or federal in nature."194 The Restatement also considers that, although sometimes desirable, association with an in-state lawyer should not be required because this may cause substantial expense and burdens for a client.195

The Restatement's fact-oriented approach has great pragmatic appeal and represents a common sense approach. By emphasizing several substantive contact tests—the level of closeness in the link between the client and the out-of-state lawyer, the extent of value provided by the out-of-state lawyer in view of the nature of the legal activity concerned, and the differing degree to which home state or host state legal issues are involved—the Restatement enables courts to focus on several different factors that might, or might not, justify the temporary interstate practice by out-of-state lawyers. The Restatement is also supported by sound policy considerations when it suggests that out-of-state lawyers may justifiably provide occasional interstate legal services when federal law or multistate law issues either predominate or are substantial in character. Given the high regard courts traditionally accord to restatements, the approach of the Restatement of the Law Governing Lawyers may influence future case law quite significantly.

Nonetheless, the picture of present court doctrine is not a bright one for temporary interstate legal practice. The *pro bac vice* appearance of out-of-state lawyers in courtroom litigation is totally within the discretion of local courts. Although *pro bac vice* appearance is certainly common, the United States Supreme Court in *Leis v. Flynt* rejected any effort to

---

191. See *supra* text accompanying note 56.
192. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 3(3), at cmt. e.
193. Id.
194. Id.
195. Id.
impose constitutional standards on state court discretion, despite Justice Stevens' strong dissent. Although the more recent *Piper* line of Supreme Court judgments has forcefully introduced the Privileges and Immunities Clause as a protection for out-of-state lawyers' rights to admission to a state bar when they are non-residents, it would be hazardous to infer from the constitutional rule governing in that different context that the vitality of *Leis* as a precedent has been significantly undermined.

The status of temporary interstate transactional practice outside of a courtroom is more complicated. The summary of the case law presented above tends to show that interstate legal practice conducted by modern means of communication (e.g., mail, telephone, fax, and computer) is fairly well justified and permitted, despite the unfavorable dicta in *Birbrower*. Less clear-cut is the right of a lawyer to provide opinions, give advice upon, or draft documents or contracts governed by the law of a state in which he or she is not admitted—certainly this is a common practice, but the right to do so is not free from doubt. There is some support for permitting out-of-state lawyers' activities on an occasional basis when federal law issues are predominately concerned, but other precedents reject any so-called federal exception or narrowly limit it to specific services relating to appearances before a federal court.

The ability of lawyers to provide legal assistance to clients, even at the latters' request, while physically present in a state where they are not admitted to practice must be considered to be subject to considerable risk. Leading precedents—*Birbrower*, *Spivak*, and *Ranta*—quite decisively characterize this as unauthorized practice of law whenever the physical presence of the out-of-state lawyer is more than extremely brief and minimal. The application of constitutional standards, notably the principles of the Privilege and Immunities Clause and the Dormant Commerce Clause, has thus far only occurred in *Spanos* (whose precedential value is uncertain) and *Violet*, whose impact is limited.

One bright spot in this rather somber picture is the possibility of action by state legislatures or state supreme courts to modify the rules governing the practice of law. Thus, Michigan amended its rules in 1996 to permit temporary interstate transactional legal practice. The Michigan Judicature Code section on Unauthorized Practice of Law provides: "[t]his section does not apply to a person who is duly licensed and authorized to practice law in another state while temporarily in this state and engaged in a particular matter." Reaching the same result in a different manner, the District of Columbia Rules of Court were recently amended to define the jurisdictional scope of its Unauthorized Practice of Law Rule to be "conduct in, or conduct from an office or location within, the District of Columbia, where the person’s presence in the District of Columbia is not of incidental or occasional duration." In 1997, the Supreme Court of Virginia amended its rules to permit legal services by out-of-state lawyers, provided that the out-of-state lawyer is "admitted to practice and in good standing in any state . . . ," the client is informed that the attorney is not admitted in Virginia, and the legal services are rendered "on an occasional basis only and incidental to representation of a client whom the attorney represents elsewhere."

Bar committee reports strongly influenced the modifications in the rules in all three jurisdictions.

197. MICH. COMP. LAWS ANN. 600.916 (West 1999).
199. VA. SUP. CT. PRACTICE OF LAW, Part 6 (1), C.
The influence of the modern fact-oriented approach of the Restatement of the Law Governing Lawyers or the adoption of the Michigan, Virginia, or District of Columbia Court Rules as models in other states may liberalize the rules to be applied to temporary interstate legal practice, but that remains to be seen. The present U.S. scene thus contrasts sharply with that in the European Union presented in section II.

IV. Comparative Comments and Reflections on the U.S. Rules

A. Consideration of the Relevant Interests

At the outset, before commencing any comparisons, it is helpful to try to identify the legal and societal interests that ought to be considered in determining the appropriate limits of interstate legal practice. The two most salient are manifestly the effective representation of clients, a type of consumer protection interest, and the efficient conduct of court litigation, a civil and criminal justice interest. However, there are other interests that should also be considered. In their current casebook on legal ethics, Professors Hazard, Koniak and Cramton describe the interests usually cited to justify local legal practice rules in the United States as: “the harmful effects on local consumers of the provision of allegedly incompetent or unethical services by out-of-state practitioners; the relative ignorance of local substantive law and procedure on the part of out-of-state practitioners; and the difficulty of applying local disciplinary machinery to out-of-state lawyers.”

To take the consumer interest first, clients need to be served competently, efficiently, vigorously, and ethically by their lawyers. All of these factors should be considered when clients are served by lawyers outside of the lawyers’ state of qualification. In addition, the client’s freedom of choice of his or her preferred counsel is also a value of great weight. In the previously cited view of the New Jersey Supreme Court: “[w]hile the members of the general public are entitled to full protection against unlawful practitioners, their freedom of choice in the selection of their own counsel is to be highly regarded and not burdened by ‘technical restrictions which have no reasonable justification.’” It can plausibly be posited that if an out-of-state lawyer is fully capable of meeting all of the client service criteria mentioned above, a prima facie case is made for permitting the out-of-state lawyer to serve the client. On the other hand, if the out-of-state lawyer can only partially fulfill these criteria, then local lawyers should at least be associated in representing the client and, in some instances, may be justified in sole representation of the client. Professor Needham has rightly observed that the collaboration of a local lawyer often provides the client with “an extra person thinking through the issues and an extra source for recovery if malpractice occurs.”

However, the greater economic cost resulting from the need to remunerate a

201. In re Estate of Waring, 221 A.2d 193, 197 (N.J. 1966). Moreover, as Professor Needham has well said: “[a] client’s preference of counsel can be especially strong when an out-of-state lawyer has been representing the client in other matters and they have developed a strong working relationship.” Needham, supra note 118, at 476.
local lawyer for time devoted to gaining familiarity with a client's affairs, and the lowered efficiency in representation due to that unfamiliarity, are both factors pointing in the direction of permitting the out-of-state lawyer to assist the client.203

When considering the out-of-state lawyer's ability to represent a client competently and efficiently in any state, the nature of the substantive legal issues involved in the representation is manifestly critical. If the out-of-state lawyer is an expert in one or more specialized fields covering the legal services concerned (e.g., acquisitions, antitrust, entertainment law, securities, or taxation), a strong case is made for permitting the out-of-state lawyer to act for the client solely or in conjunction with a local counsel. Commentators frequently observe that legal practice has increasingly become specialized throughout the United States204 and the European Union. Professor Mary Daly has well observed that the increased specialization in legal matters "drives . . . [clients] to hire national experts whose offices may be far from the clients' actual place of business or headquarters."205

The argument that out-of-state lawyers are usually able to represent a client competently in any state is reinforced when the area of law is substantially federal in character in the United States206 or is essentially based upon the law of the European Community in the European Union. If the legal issues involved in the interstate legal service are essentially federal in nature, then there is no need to employ an in-state lawyer to achieve competence in the service to the client. When relatively uniform laws or rules exist in several states (e.g., in a Uniform Commercial Code or uniform law context in the United States,207 or where legislation has harmonized a field of substantive law in the European Union), there is also frequently little or no need to employ an in-state lawyer, because out-of-state lawyers are usually equally capable of providing competent legal services in an interstate matter involving the uniform rules. If, in contrast, relatively idiosyncratic local substantive rules are concerned (e.g., in domestic relations law, trusts and estates, or state tax law), then a strong case is made for requiring collaboration between local and out-of-state lawyers, or perhaps even restricting the practice to local lawyers.

When considering the out-of-state lawyer's ability to represent a client ethically, one concern is obviously the lawyer's past ethical record in his or her state of admission. More often, however, the chief concern is the lawyer's knowledge of and likely capacity to follow the ethical rules of the jurisdiction where the legal services are rendered. This latter concern is substantially alleviated whenever there exists a close similarity in ethical rules between the relevant jurisdictions, as is definitely the case in the United States, where all states follow either the Model Rules of Professional Conduct or the Code of Professional Responsibility (in its original or amended form). This concern is somewhat reduced in the European Union where the CCBE's Code of Conduct for Lawyers has introduced a system of partial harmonization of key ethical standards and a choice of rule approach for others. Nonethe-
less, in both the United States and the European Union, there remains a certain level of legitimate concern that out-of-state counsel properly follow relevant ethical rules of the host jurisdiction (presuming that they are objectively justified, which has not always been the case in the United States or the European Union), especially in courtroom litigation. Linked to this is a legitimate interest in being certain that a delinquent lawyer will be subject to an effective disciplinary control. Moreover, it should not be forgotten that adversaries of clients, in either a litigation or a transaction context, are also intended to be the beneficiaries of proper ethical behavior of an out-of-state lawyer.

In the context of courtroom litigation, host state interests are decidedly stronger than in transactional practice. The host state courts are the guardians of the proper administration of justice in a litigation, whether criminal or civil. Not only is the adequate knowledge of court procedural law a critical factor in competent representation of a client, but also an awareness of the customs prevailing in any local trial practice may be essential to enable the adequate representation of a client. The concern for proper compliance with ethical rules and for effective disciplinary sanctions is also heightened in a litigation context. All of these factors suggest a strong case for requiring at least the participation of local lawyers in courtroom practice. On the other hand, the efficient representation of the client may point in the direction of permitting out-of-state lawyers to litigate when they are well acquainted with the client's business affairs or with the contract or transaction that is the subject of the litigation, or when they are experts in the subject matter involved in the litigation (e.g., in antitrust, securities, mass torts, or acquisition-related litigation). Highly skilled out-of-state trial lawyers will often have the capacity to provide a client with more effective and vigorous service than local lawyers are able to provide.

Societal concerns also come into play. On the one hand, it is apparent that the demands of a modern integrated economy within the United States and within the European Union strongly press in favor of greater legal integration and the more efficient providing of legal services throughout the entire market area. Concerns for the economic interests of a local bar should not lead to disguised protectionism. Professor Wolfram has well observed that there is a "distinct possibility that [local practice] ... rules are motivated by the local bar's desire to be protected against out-of-state competition." Moreover, a chauvinist regard for traditional ways of conducting local legal practice must not seriously limit the modern need for effective legal practice across the entire market area. Enhancing the ability of lawyers and law firms to conduct interstate legal practice may better serve the needs of modern enterprises and reduce efficiency costs in the legal market. On the other hand, there are legitimate societal concerns for the protection of public interests in sensitive sectors or for the protection of the unsophisticated or economically disadvantaged. For example, states have a legitimate interest in preserving a legal framework for healthy domestic relationships and family units, in protecting title to real estate, and in

208. See id.
209. Justice Stevens' dissenting argument to this effect in Leis v. Flynt, 439 U.S. 438 (1979) is extremely persuasive, even if one does not agree that it justifies the application of the Privileges and Immunities Clause in the context of pro hac vice appearances.
ensuring the safe and efficient regulation and transmission of property in the field of trusts and wills. Adequately safeguarding these interests may dictate the restriction of some areas of legal practice to local lawyers. Also, the state has a special interest in protecting weaker members of society from over-reaching and sometimes unethical practices of lawyers. For example, minority language communities may need particular protection from out-of-state lawyers who speak their language but are neither fully competent nor ethical in providing legal services.

Finally, there is also a societal interest, particularly felt by courts and bar associations, in maintaining public confidence in lawyers and in protecting their professional reputation for competence, honesty, and ethical behavior. There is certainly the risk that this interest may degenerate into a persistent adherence to traditional modes of practice, whether or not suited to modern social conditions, or may serve as a cloak for economic protectionism of the local bar. Nonetheless, there exists a proper core to the interest that may legitimately come into play in regulating interstate legal services.

Having reflected on the interests that are at stake, let us turn next to the subject of interstate courtroom litigation before finally considering interstate transactional practice.

B. COMPARATIVE COMMENTS CONCERNING INTERSTATE PRACTICE IN LITIGATION

As set forth in section II, the European Community rules start from an express treaty right to provide interstate or transborder services, enunciated in articles 49 and 50 and liberally interpreted by the Court of Justice in Van Binsbergen, Gebhard, and other judgments. The 1977 Lawyers' Services Directive sets out in detail the rules governing the right of lawyers qualified in one Member State to engage in courtroom or administrative litigation in any other state.

This very liberal starting point is limited to some degree. The Lawyers' Services Directive places two substantive conditions on the exercise of the right: (1) article 5 of the Directive permits a host state to require the out-of-state lawyer "to work in conjunction" with a local lawyer, who is answerable to the local court or tribunal; and (2) article 4(2) requires the out-of-state lawyer to abide by the rules of professional conduct of the host state.211 In Commission v. Germany, the Court of Justice construed the first condition narrowly, enabling the out-of-state lawyer to take the leading role in the litigation and recognizing the client's right to determine the respective roles played by the out-of-state and local lawyer.212 The directive's requirement that the out-of-state lawyer follow the host state professional rules is also nuanced by the Court of Justice's insistence since Van Binsbergen that the state ethical rules be objectively justified.

Case law has provided two further principles. With regard to any host state concern that the out-of-state lawyer might have an insufficient knowledge of local substantive or procedural law, the Court of Justice in Commission v. Germany stated that the client's right to choose his or her counsel meant that the client should decide whether the out-of-state lawyer has sufficient competence in the local law.213 Further, in Gebhard, the court rather liberally interpreted the nature of "temporary" service providing, even permitting the out-

211. Lawyers' Services Directive, supra note 6, art. 4(2), 5.
213. Id.
of-state lawyer or law firm to make use of an office or other infrastructure in the host state, so long as the interstate services are occasional rather than permanent.\footnote{214}{Case C-55194, Gebhard v. Consiglio dell'Ordine degli Avvocati di Milano, 1995 E.C.R. I-4165, [1996] 1 C.M.L.R. 603 (1990).}

In contrast, U.S. states have a long-standing custom permitting out-of-state lawyers to appear in court litigation \textit{pro hac vice}, but the courts have total discretion in deciding when the out-of-state lawyer may appear—there exists no recognized right of an out-of-state lawyer to litigate or of a client to choose counsel freely from outside the state. Although higher state courts do police the discretion of trial courts, the United States Supreme Court in \textit{Leis v. Flynt} adopted the view that no constitutional review of state court discretion was possible.\footnote{215}{439 U.S. 438 (1979).}

Whether the European Union or the United States approach is preferable represents a value judgment that obviously depends on an analysis of the essential interests involved. Looking first at the interests of the client, the EU position is clearly superior. It recognizes the client's right to freely choose his or her counsel, a matter of particular importance for large enterprises that are apt to be involved in litigation in many states.\footnote{216}{See Needham, supra note 118, at 476.}
The determination of whether the out-of-state lawyer is competent seems better left to the client who can appraise the value brought by out-of-state experts in a particular type of litigation as opposed to the value provided by local lawyers familiar with local court practices. Justice Stevens' dissent in \textit{Leis v. Flynt} well notes that "[a] client may want a particular lawyer for a particular kind of case, and a lawyer may want to take the case because of the skill required."\footnote{217}{Leis v. Flynt, 439 U.S. 438, 451 (1979).}
The legitimate concern that out-of-state lawyers must behave ethically is satisfied by subjecting them to the host state rules, as is clearly stated both in article 4 of the Lawyers' Services Directive and in Rule 8.5 of the Model Rules of Professional Conduct.\footnote{218}{\textit{Cf.} Wolfram, supra note 103, at 704 n.125.}

As noted before, the interest of courts in the sound and efficient administration of justice in litigation is certainly a strong one. Here, the European Union rules permit states to require that local lawyers collaborate in the litigation as a means of reassuring the local court that its rules and procedures will be properly followed. The principle of client choice enables the client to decide which lawyer takes the lead in the litigation. The EU approach appears to satisfy the natural concern for the sound and efficient handling of litigation. The U.S. \textit{pro hac vice} approach obviously protects the courts' interest in assuring that litigators know local court procedures, but may nonetheless be criticized for its failure to respect a client's right to choose counsel freely.

If there appear to be valid reasons for considering that the United States ought to recognize \textit{pro hac vice} appearances as a right that clients and/or out-of-state counsel should enjoy, rather than a privilege subject to a court's discretion, what can be done to bring this about? Unfortunately, unless and until \textit{Leis v. Flynt} is overturned or substantially narrowed, not much can be done. Congressional legislation is out of the question—Congress's legislative power under the Commerce Clause to deal with a subject so closely related to state courts is quite dubious\footnote{219}{\textit{Cf.} Wolfram, supra note 103, at 704 n.125.} and political realities rule any such law out. A state uniform act would also appear to be unlikely.
The only possible amelioration would come from the reversal of \textit{Leis v. Flynt} and the application of the Privileges and Immunities Clause to the field of \textit{pro hac vice} appearances, making analogous use of the doctrines expressed in the \textit{Piper} line of cases. In particular, in analyzing whether or not state rules limiting \textit{pro hac vice} appearances serve an independent substantial interest, one might draw on Justice Kennedy's analysis in \textit{Barnard v. Thorsten} to the effect that nonresident lawyers could be expected to familiarize themselves with local laws and to associate themselves with local lawyers as needed.\footnote{220} Judge Friendly's analysis in \textit{Spanos} merits serious consideration, for he laid stress on the client's right to choose counsel under the Privileges and Immunities Clause, rather than analyzing the out-of-state lawyer's right to practice in terms of the clause.\footnote{221} This might be a more fruitful starting point. Finally, in terms of legal policy, Justice Stevens' dissent in \textit{Leis} emphasizing the high value provided to clients by out-of-state experts in complex or specialized fields of practice would seem to have gained in force in the last twenty years.

\section*{C. Comparisons and Reflections Concerning Temporary Interstate Transactional Practice}

Starting with the right to perform interstate professional services specified in EC Treaty articles 49 and 50, liberally interpreted by the Court of Justice in \textit{Van Binsbergen} and \textit{Gebhard}, the European Union permits lawyers to carry out interstate transactional legal practice with only few limitations.

The 1977 Lawyers' Services Directive provides the essential framework. All lawyers fully qualified in their home state may provide any form of legal services of a contractual or transactional character throughout the European Union, with the sole exception being practice involving "the preparation of formal documents . . ." in the transfer of real estate interests or the administration of decedents' estates.\footnote{222} The out-of-state lawyer must use his or her home state title and is usually only subject to his or her home state ethical rules, although the directive provides that some important host state rules may also apply, if objectively justified (e.g., rules concerning the safeguard of professional secrecy and the avoidance of conflicts of interest, and rules governing lawyers' publicity). The priority given to the home state ethical rules probably reflects the view that the home state disciplinary authorities are better suited to handle ethical issues arising out of interstate transactional practice and perhaps also that the host state's interest in having its ethical rules apply in transactional practice (other than the more important ones listed) is much less substantial than in a courtroom setting. In any event, the Code of Conduct for Lawyers in the European Union has harmonized some essential ethical rules and provides a choice between conflicting rules in other areas.

An important point is that the directive does not require any collaboration with local lawyers in transactional practice, in contrast with the enunciation of such a collaboration obligation for courtroom and administrative litigation. Moreover, the prevailing view since the Court of Justice's review of German rules in \textit{Commission v. Germany} is that the out-of-state lawyer may freely advise on local law if the client chooses to have the lawyer do so.

\footnotesize{\begin{itemize}
\item \footnote{220} 489 U.S. 456 (1989).
\item \footnote{221} See \textit{Spanos v. Skouras Theatres Corp.}, 364 F.2d 161 (2d Cir. 1966)
\item \footnote{222} Lawyers' Services Directive, \textit{supra} note 6, art. 1.
\end{itemize}}

\textit{SPRING 2000}
Finally, the temporal extent of interstate service providing has been quite liberally construed by the Court of Justice in *Gebbard* and *Rush Portuguesa*. It is clear that out-of-state lawyers may be physically present in the host state for significant periods of time, presumably weeks or months, when engaged in a particular legal transaction that requires such a lengthy presence (e.g., a commercial arbitration, an acquisition, complex financing arrangements, or joint venture negotiations). The out-of-state lawyers may even maintain an office or infrastructure staffed by administrative or secretarial personnel if necessary to facilitate occasional transborder legal practice. Examples of this might be the use of an office in Brussels when out-of-state lawyers must visit often in order to deal with European Union officials, or in Paris if the out-of-state lawyers are engaged in a lengthy International Chamber of Commerce arbitration.

In contrast, in the United States, despite the fact that modern interstate transactional practice is increasingly important and common, there exists no solid doctrinal view permitting such practice. Although interstate legal practice of a transactional character is relatively unlikely to be considered the unauthorized practice of law when conducted by modern modes of communication (mail, telephone, fax, or computer), whenever out-of-state lawyers are physically present in a state to engage in transactional practice there exists a significant risk that they may be considered to be engaged in the unauthorized practice of law in that state.

The modern fact-oriented approach of the Restatement of the Law Governing Lawyers, based in part on some precedents, may liberalize the current rules, but this remains to be seen. There has also been little effort to date to apply the constitutional principles of the Privileges and Immunities Clause and the Dormant Commerce Clause to this field.

Given this sharp contrast between the United States and the European Union, how should the two different approaches be evaluated? Certainly from the point of view of promoting the societal interest in achieving economic efficiency in the marketplace, the liberalization of interstate legal services in the European Union is vastly preferable to the fragmentation produced by much of the United States' case law. The EU approach obviously facilitates the operations of commercial enterprises, both large and small, which can utilize their customary counsel throughout their markets, whenever the lawyers are deemed by the client to be competent. The ability to use the same qualified counsel, particularly when parallel transactions are undertaken in a number of states, undoubtedly represents a considerable cost-saving and a substantial enhancement of efficiency for modern clients. As Professor Wolfram has observed, "the driving notion is client need...the client would be better served by legal services provided by familiar, regular counsel or counsel particularly skilled in dealing with a particular specialty." Manifestly, this approach also favors the development of large multi-city and interstate law firms capable of providing a wider range of expertise to the largest multinational clients. Although such a development poses a certain risk that smaller local firms may not be able to compete in trying to provide services to large multinational enterprises, the legal field is far more fragmented than the accounting field. We are certainly some distance from a time when large law firms become so dominant in any market that the societal interest in pluralistic legal service providing is jeopardized.

However, the societal interest in achieving economic efficiency in legal services is certainly not the principal interest courts consider. That is apparent in many U.S. cases where the dissent often cites this interest, while the majority emphasizes the protection of clients or the assurance of state ethical standards.

Turning then to the interests of the client, the client's need for competent service is presumably the paramount concern. Yet here, on examination, the leading U.S. precedents restricting interstate legal practice appear extremely dubious. This is particularly so when the added interest of client free choice in the selection of an attorney is considered. Thus, in Spivak, the client not only chose the out-of-state counsel because of her respect for his expertise, she urged him to come to New York to provide her with his services (rather than incurring the necessary expense to consult the attorney in California).224 In Birbrower, although the immediate client was a California corporation, the ultimate client was the New York-based family that owned the corporation and had used the Birbrower firm for years.225 Moreover, the firm was an expert in the contractual field involved and apparently well-qualified to carry out an arbitration. The California Supreme Court's emphasis on the need to reserve legal practice within California to California lawyers seems decidedly misplaced when the substantive issues involve software licensing and arbitration, neither of which represent peculiarly Californian fields. Indeed, it is noteworthy that the California legislature has now opened the field of private arbitrations to out-of-state lawyers, thus effectively nullifying that aspect of Birbrower. In Ranta, the principal legal services apparently concerned federal tax issues, not at all a matter of local substantive law, and the out-of-state lawyer specialized in federal tax practice (although admittedly part of the North Dakota Court's judgment rested on the out-of-state lawyer's regular practice from an office in North Dakota).226

With regard to the client concern for ethical representation by out-of-state legal counsel, none of the leading precedents restricting interstate legal services cite any ethical lapse in the out-of-state lawyer's activities. Moreover, in no leading precedent does the out-of-state lawyer appear to have made a false representation to the client that he or she was admitted in the local jurisdiction. The United States Supreme Court's holding in Piper that there is no reason to believe that a nonresident lawyer would engage in unethical behavior any more than a local lawyer would do so would appear to apply in the circumstance of temporary interstate transactional practice as well. Finally, Rule 8.5 of the Model Rules of Professional Conduct unequivocally places the responsibility for disciplinary review of possible unethical conduct upon the home state of the lawyer engaged in interstate transactional practice.227 The Comment to Rule 8.5 contends that it is desirable to make a lawyer's conduct subject to only one set of rules, those of the home state.228

228. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 cmt. (1993).
What the precedents restricting interstate transactional practice appear to come down to is a concern that the out-of-state lawyer's lack of training or knowledge in the local substantive law might harm the client at some point, even if there is no evidence that it did so in the particular case. This concern is decidedly speculative.\textsuperscript{229} Moreover, the risk of malpractice litigation, which is certainly increasingly common, would appear to adequately police any lack of competence of the out-of-state lawyer with regard to local substantive law. A court's justifiable pride in the competence of its local bar should not lead it to conclude that out-of-state lawyers cannot have a sufficient competence in most modern corporate or commercial practice and provide professionally adequate legal services on an occasional basis within the state.

On reflection, the European Union's liberal approach in freely permitting transborder transactional legal services, except in real estate title transfers or decedent estate administration, appears to better satisfy the interests of clients and society at large. What, then, might be done to move the U.S. rules in that direction?

Since the current U.S. limitations on interstate transactional legal practice are almost entirely based on leading precedents, the most obvious effort should be to modify the doctrinal rules prevailing in some states. Here the impact of the pragmatic fact-oriented tests advanced by the recent Restatement of the Law Governing Lawyers can be most beneficial. Academic commentary urging courts to take a more liberal approach may also help.

Probably the greatest impact upon both courts and local bar groups could be attained through an American Bar Association initiative for greater recognition of lawyers' right to practice on an interstate basis, and for greater acceptance of a client's right to choose freely out-of-state lawyers when they can better serve the client's interests. An ABA study that reviews both the case law and the Restatement view, and analyzes the policy interests at stake in our modern society, would also be helpful. Its influence would be substantially increased if the ABA annual meeting would ultimately adopt a statement in favor of enhanced interstate transactional legal practice.

The adoption of one or more approaches recognizing specified exceptions to rules on the unauthorized practice of law could also usefully liberalize temporary interstate legal practice. First, the right of out-of-state lawyers to litigate before federal courts and administrative agencies, which presently is generally accepted by state courts as an exception to the unauthorized practice of law, could be expanded to encompass a broader right to engage in transactional practice whenever federal issues are solely concerned or predominate. Thus, a right to provide legal advice, issue opinions, prepare documents and contracts, and negotiate transactions might be recognized in the fields of federal antitrust, copyright, patents and trademarks, federal securities, federal taxation, and other practice areas that are largely controlled by federal rules. While it is true that sometimes clients' activities in these fields also raise issues under state law, the lawyers specializing in the federal law field are often likewise competent (or can readily gain competence) in the related substantive state law fields, so that clients can be safely and efficiently served by the same lawyers. Often, in fact, lawyers specializing in the federal field are more likely to be competent in the related state field (e.g., antitrust or securities) than are resident state lawyers who do not work in these fields. Even when that is not the case, an out-of-state lawyer might be permitted to work on federal law issues in cooperation with local lawyers who deal with the related state issues.

\textsuperscript{229} Professor Needham has sensibly observed that at least "the assumption that an out-of-state lawyer is not qualified should be recast as a rebuttable presumption." Needham, supra note 118, at 468.

VOL. 34, NO. 1
Secondly, an exception permitting out-of-state house counsel to work for their employer in all transactional and contractual matters throughout the United States would seem easily justifiable. The operational efficiency of this approach is obvious. Often when the employer frequently engages in a specific type of legal transaction (e.g., acquisitions, distribution arrangements, franchises, leases, loans, and sales), the house counsel is far more of an expert in that type of transaction than local lawyers. House counsel can and usually do obtain advice or assistance from local lawyers when local substantive law issues are significant and not easily resolved. The management personnel of the house counsel's employer are well placed to ensure that the house counsel will have the necessary competence or obtain it.

Third, an exception might be recognized when out-of-state lawyers come into a state to engage in a private arbitration proceeding. The leading arbitration bodies set their own procedures, with which arbitration law specialists are quite familiar. The arbitration clause in a contract frequently has a choice of law clause designating the substantive law of a jurisdiction other than the state that is the site of arbitration. Even when the substantive law of the state that is the site of the arbitration governs the arbitration, there are solid policy reasons for permitting clients to freely choose their customary counsel, who often represented the client in the transaction that gave rise to the arbitration, or to choose a law firm specializing in arbitration practice. In-state counsel can always provide advice or be associated with the out-of-state lawyers if the substantive state law issues warrant this.

In a variety of contexts, it would be helpful to recognize a client's freedom to choose his or her preferred lawyer. If a client desires to be represented by both out-of-state lawyers and local counsel in a particular transaction and determines which should take the leading role, it is hard to see any state interest that would objectively justify the conclusion that the out-of-state lawyer is engaged in the unauthorized practice of law. The Hawaii Supreme Court has rightly observed that such cooperation between a client's customary out-of-state counsel and the in-state counsel is functionally efficient and desirable.230 Even if a client desires to be represented solely by an out-of-state lawyer in a transaction, are not the client's interests in competent, effective, and ethical service sufficiently protected by malpractice litigation or by ethics procedures rather than by the use of the unauthorized practice of law doctrine? Despite the rejection of this view in Birbrower and Ranta, it would appear both more sensible and more equitable to follow earlier case law that obliged clients who deliberately selected out-of-state lawyers to pay reasonable fees for their services,231 instead of giving the clients a windfall through use of the unauthorized practice of law doctrine.

Furthermore, renewed analysis under the Privileges and Immunities Clause and the Dormant Commerce Clause would be helpful. In particular, it would be useful to start from the analysis of the client's right as a citizen to secure the legal service that he or she prefers, as was advocated by Judge Friendly in Spanos. A part of the United States Supreme Court's analysis of the justification for the right of nonresident lawyers to practice as members of a state bar as set out in Justice Powell's opinion in Piper and Justice Kennedy's opinion in Barnard might well carry over to the context of occasional interstate transactional practice. One might argue, for example, that there is no reason a priori to assume that otherwise competent and ethical out-of-state counsel will fail to familiarize themselves with local substantive law where relevant or will fail to obtain the aid of local counsel where necessary.

especially when malpractice rules protect the client. One might likewise contend that a state's total prohibition of occasional transactional practice by out-of-state lawyers, especially when the use of local counsel would create substantial added costs to the client, represents economic protectionism of the local bar. Dormant Commerce Clause principles might also be invoked to weigh the added value provided to the interstate conduct of business by competent lawyers engaged in modern interstate legal practice.

Finally, efforts might be undertaken on the legislative front. The American Bar Association and other organized bar groups might urge the states to adopt legislation or state supreme courts to adopt rules permitting out-of-state lawyers to provide occasional services in transactional practice, using as models the Michigan statute, or the District of Columbia or Virginia court rules. They might even press for the adoption of a uniform law. Legislative action is perhaps less likely to be successful, because legislative agendas are always crowded, and because lobbying to protect local bar interests is always apt to represent a strong disincentive to legislation or a change in supreme court rules. However, the effort to adopt legislation enabling out-of-state lawyers to provide occasional interstate legal services may prove successful in some states.

V. Conclusion

This article initially described the liberalization within the last twenty-five years of the rules governing interstate legal practice on a temporary or occasional basis in the European Union. Qualified lawyers from any Member State are now able to provide all legal services of a transactional nature in any other European Union state (except if the host state restricts practice in the transfer of real estate interests or in the administration of decedents' estates), while subject to the home state ethical rules in the execution of the transactional services. Qualified lawyers from any Member State may also litigate in courts in any other state, subject to the host state ethical rules, and in association with a local lawyer if the host state so requires. It is important to note that this high degree of liberalization has occurred without any evidence of significant functional problems or risks to clients and without any serious opposition from national bar associations—despite differences in substantive laws and procedural rules far greater among the Member States than they are among the states of the United States.

The article also served an informational purpose in presenting a detailed, up-to-date picture of the limitations placed upon interstate legal practice in the United States. While the pro hac vice appearance of out-of-state lawyers in litigation is common, the state courts retain total discretion in deciding when an out-of-state lawyer may so appear. With regard to transactional practice, the stringent application of the unauthorized practice of law rules in many states, including the prominent jurisdictions of California and New York, places out-of-state lawyers at the risk of disciplinary sanctions or the inability to collect fees from clients. Despite some precedents favorable to interstate transactional practice and the more pragmatic approach to interstate legal practice rules advocated by the recently approved Restatement of the Law Governing Lawyers, the overall picture is one in which in the words of Professor Wolfram: "by and large local lawyers have been able to take advantage of the opportunity presented by federalism to place high walls around their own preserve."232

232. WOLFRAM, supra note 210, at 865.

VOL. 34, NO. 1
The final part of the article attempted to review the interest of clients in obtaining competent and ethical legal representation, the interest of courts in the effective conduct of courtroom proceedings, and the interest of society in promoting modern, efficient interstate commerce. The article contends that the liberal approach to interstate legal practice in the European Union promotes all three interests better than the more restrictive rules in the United States.

The article accordingly concludes by urging that state courts be influenced by the pragmatic views of the Restatement of the Law Governing Lawyers (whose acceptance would significantly enhance the amount of authorized interstate legal practice), and that state legislatures and supreme courts adopt new rules permitting occasional interstate legal practice on the model of those recently approved in Michigan, Virginia, and the District of Columbia. The article further argues that state courts should recognize a number of specific fields of exception to the unauthorized practice of law rules, and that both *Leis v. Flynt* and precedents limiting transactional interstate practice should be reexamined and perhaps reversed through a modern application of the Privileges and Immunity and the Dormant Interstate Commerce Clause.

As we move into a new century, it would seem high time to breach some of the walls protecting state legal practice in the United States and to adopt more liberal rules more in consonance with modern commercial and legal realities, perhaps along the lines of those now prevailing in the European Union.