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## A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It

Stephen Gillers

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## Articles

# A Profession, If You Can Keep It:<sup>1</sup> How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It

STEPHEN GILLERS\*

*Technology is changing the way we do business. It has made cross-border trade in goods and services easy. Capital is finding ways to profit from the law business. Lawyers strive to serve clients wherever they need help, including outside their jurisdiction of admission. These changes not only affect how American law firms work, they challenge our system for licensing and regulating lawyers. The traditional geocentric model for regulating the bar, based on physical place of practice, is unstable today because lawyers can practice physically in many places and (virtually) in every place, yet no place in particular.*

*The next twenty years are likely to see greater transformation in how the American (and world) legal professions are organized and ply their services than was true for any comparable period in history. We have two choices. We can try to impede these forces in order to preserve a familiar and comfortable world that seems to be slipping away. Or we can decide that today's rules should adapt to accommodate and direct the forces at bay in order to preserve the values of the American bar, which include the efficient delivery of services at reasonable cost. This Article endorses the second goal and describes how we might seek to achieve it.*

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\* Elihu Root Professor of Law, New York University School of Law. This Article benefits immeasurably from my work on the American Bar Association's Commission on Ethics 20/20, the ideas of my colleagues there and the staff of the ABA's Center for Professional Responsibility, and the testimony of the witnesses before the Commission. I am grateful to ABA President Carolyn Lamm for appointing me to the Commission in 2009 and to Jamie Gorelick and Michael Traynor for their wise leadership of it. The Commission will begin to submit its recommendations to the ABA's House of Delegates for approval at the Association's annual meeting in August 2012. I have benefitted from discussing the ideas here with Barbara S. Gillers, who teaches legal ethics at NYU and Columbia Law Schools. I also thank Carolyn F. Stoner, NYU J.D. Class of 2013, for her excellent research help. Last, I am grateful to the D'Agostino/Greenberg Fund for assistance that allowed me to spend time on this Article. Of course, I alone am responsible for the content of the Article.

1. James McHenry, a Maryland delegate to the Constitutional Convention, recorded the following exchange with Benjamin Franklin at the close of the Convention: "A lady asked Dr. Franklin, 'Well Doctor what have we got, a republic or a monarchy?' 'A republic,' replied the Doctor, 'if you can keep it.'" *Papers of Dr. James McHenry on the Federal Convention of 1787*, 11 AM. HIST. REV. 595, 618 (1906); see *Respectfully Quoted: A Dictionary of Quotations*, BARTLEBY.COM, <http://www.bartleby.com/73/1593.html> (last visited Mar. 17, 2012). When McHenry's notes were included in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 app. A, 85 (Max Farrand ed., 1911), a footnote stated that the date this anecdote was written is uncertain.

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“It’s a new world, Golde.”

—Tevye, *Fiddler on the Roof*

#### INTRODUCTION: THE END OF LAWYERS (OR SOMETHING)?

To quote Mark Twain on hearing news of his death, recent titles announcing the “End of Lawyers,” or the “Death of Big Law,” or the “Vanishing of the American Lawyer” may be “grossly exaggerated.”<sup>2</sup> I do not begrudge the authors of these works<sup>3</sup> for using metaphors of

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2. In 1897, Twain was living in London where a cousin, Dr. Jim Clemens, fell ill. The newspapers, believing Twain was near death, sent reporters to investigate. Twain made his remark when the correspondent for the *Evening Sun* told him that his death had been reported in New York, and asked what he should cable in reply. MARK TWAIN, MARK TWAIN IN ERUPTION: HITHERTO UNPUBLISHED PAGES ABOUT MEN AND EVENTS 252–53 (Bernard De Voto ed., 3d ed. 1940). According to one source, he said: “Just say the report of my death has been grossly exaggerated.” 2 ALBERT BIGELOW PAINE, MARK TWAIN: A BIOGRAPHY 1039 (1st ed. 1912).

3. The works implicitly referenced here are: THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER (2010); RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL

demise to describe the state of the legal profession. Provocative titles attract curious readers. They are especially helpful on a subject as unexciting outside the profession as is this one. And they are only titles after all, not analysis. What's more, they only exaggerate. The symptoms tell us that even if the patient is not comatose, it's running a high fever—walking pneumonia, perhaps.

It is nothing new that the American bar changes from one generation to the next, even within generations. Lawyers in 1910 would be surprised by the world of American law practice circa 1950, astonished if a time machine landed them in 1980, and aghast at the profession of 2012. Law students graduating from American law schools today will, I predict, see greater upheaval in how the bar is regulated and who may profit from the law industry than any generation before them. I speak not of the content or processes of the law—though I might—but of the nature of practice, how lawyers are organized, and the product delivered and therefore the inevitable changes to regulation. But change is constant. What else is new?

Much is new, I think, even if it will not work the upheavals that these works predict. Developments external to law practice and the insular world of lawyer regulation will change the way we practice and will marginalize the effectiveness of regulation unless that also changes. “Disruptive” is a helpful word to describe these external developments.<sup>4</sup> I do not think the disruptive externalities portend anything like the death or end of law, but instead, only a need for *reformulation* (with the accent on “reform”). We err if we forget how adaptable the bar is in fashioning new strategies to sell its product and how imaginative it can be when the market and other forces create a need for its knowledge, often anticipating (if not creating) needs long before clients reach for the phone.<sup>5</sup> I am not worried about the profession, which will not die, recede, or seriously weaken. It will just reorganize, find new products, find new ways to deliver old products, and locate new clients. It is already doing these things. My purpose is to examine how professional regulation must adjust to the disruptive externalities; that is, how it must adjust or slide toward irrelevance.

Courts are the dominant institutional regulator of the bar, supplemented (when judges allow) by legislation and agency rules.<sup>6</sup>

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SERVICES (2008); and Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 3.

4. I borrow the phrase “disruptive externalities” from Susskind’s phrase “disruptive technologies,” technologies being one of the externalities addressed here. See SUSSKIND, *supra* note 3, at 99–100.

5. Consider the creation of the trust, which divides legal and beneficial ownership of property. See, e.g., Kent Schenkel, *Trust Law and the Title-Split: A Beneficial Perspective*, 78 UMKC L. REV. 181, 181–83 (2009).

6. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 8–10 (9th ed. 2012).

Behind the courts are lawyers, who are, depending on the jurisdiction, more or less influential in the rulemaking process, but overall, more rather than less influential.<sup>7</sup> Then, once a rule is debated and adopted, all that is left is enforcement. Those with power have decided the issue and that is the end of that.

This is true in a formal sense, but false otherwise. Even a rule that may appear wise at adoption can become unrealistic, inefficient, or toothless as the world changes but the rule does not.<sup>8</sup> And some rules are not wise on adoption but are, rather, comfort rules, or often not rules at all but suggestions. They have nostalgic appeal, invoking an image of how we believe the bar should be, how in our memories or mythology it once was, and how in our aspirations it should remain.<sup>9</sup> What is happening now is that forces outside the institutions of rulemaking and the objectives of the rulemakers are changing (or promising to change) the way lawyers behave. The changes in behavior may make a lot of sense, which is why they are happening.<sup>10</sup> But the rules do not always change to accommodate the new behavior. Partly this is a phenomenon common to much rulemaking. The world changes, the rules and law play catch up. If a rule lags too far behind, it becomes ceremonial. We wheel it out to punish the unfortunate transgressor whom we manage to catch, unaware of the hundreds or thousands of others doing the same. The rules will change, I have no doubt of that—but slowly. I am not writing for next month or next year.<sup>11</sup> I hope I am doing what academics, with no constituents to please except perhaps each other, should do: that is, to imagine reforms before it is politically feasible to adopt them.

Much has been written about the constitutionality of rules regulating who may practice law and where.<sup>12</sup> Some of the harsher exclusionary rules have been struck down under one or another constitutional provision. These have concerned the clash between state unauthorized practice rules and federal law,<sup>13</sup> rules excluding out-of-state

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7. *Id.* at 9–10.

8. Consider, for example, the rule on fee splitting, which went through several iterations from restrictive to liberal, eventually coming to reflect what lawyers were doing anyway. *Id.* at 208–09.

9. So-called “aspirational rules” are in this category. The Ethical Considerations in the ABA’s Model Code of Professional Responsibility are one example: “The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive.” MODEL CODE OF PROF’L RESPONSIBILITY Preamble and Preliminary Statement (1980). Aspirational rules encourage a level of conduct but do not purport to bind anyone.

10. Cross-border practice may be the most dramatic example. *See infra* text accompanying notes 16–31.

11. And needless perhaps to add, since my prescriptions are for the long haul, nothing I say is meant to suggest that whatever slower pace the ABA Commission on Ethics 20/20 or the ABA House of Delegates now elects therefore falls short.

12. *See, e.g.*, Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135 (2004).

13. *See, e.g.*, *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 400–01 (1963) (holding that state

residents from a jurisdiction's bar,<sup>14</sup> and rules allowing a state's residents to gain easier bar admission than could out-of-state residents.<sup>15</sup> Perhaps we have reached the end of the line, at least for the immediate term, for whatever the Constitution has to say on the topic. Perhaps not. My focus, however, is policy, not law. What makes sense for the new world described here? How can we best move willingly from the nineteenth-century ideology of regulation to the twenty-first century's reality of practice while embracing the American bar's traditional values?

### I. AN ILLUSION OF CONTROL IS NOT GOOD IN LAWYER REGULATION

There could hardly be a better example of the disjuncture between rule and behavior than what has come to be known as multijurisdictional practice, which is another way of saying that in working for clients lawyers travel outside the jurisdiction that licenses them. Looked at one way, as courts sometimes have, traveling lawyers are not lawyers when they cross a state or a national border.<sup>16</sup> Every so often, a lawyer would get into a dispute with a client, who would then refuse to pay the lawyer, claiming that the lawyer was practicing law where she was not authorized to do so. ("Where" is a key word, as we shall see.) This was a rare occurrence, but when it happened, a court might agree with the client.<sup>17</sup> The quality of the lawyer's work was irrelevant.<sup>18</sup> The courts purported to enforce a public policy in denying a fee.<sup>19</sup> The client's knowledge of the

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power to regulate the bar was subordinate under the Supremacy Clause to federal law allowing lay representation in the U.S. patent office); *Nat'l Revenue Corp. v. Violet*, 807 F.2d 285, 290 (1st Cir. 1986) (concluding that state law limiting debt collection to licensed lawyers violated the Commerce Clause of the Constitution).

14. *Supreme Court v. Piper*, 470 U.S. 274, 288-89 (1984) (ruling that New Hampshire could not prevent a Vermont citizen from gaining admission to its bar after taking its state bar examination); see *In re Griffiths*, 413 U.S. 717, 718 (1973) (holding that Connecticut could not limit bar admission to U.S. citizens).

15. *Supreme Court v. Friedman*, 487 U.S. 59, 59 (1988) (ruling that the state could not limit admission by motion to state residents).

16. See, e.g., *In re Jackman*, 761 A.2d 1103, 1103-04 (N.J. 2000) (delaying consideration of admission to the New Jersey bar of a Massachusetts lawyer who practiced law for seven years in New Jersey without authorization).

17. See, e.g., *Ranta v. McCarney*, 391 N.W.2d 161, 166 (N.D. 1986) (holding that a Minnesota lawyer could not recover fees for federal tax advice given to a North Dakota client while the lawyer was in North Dakota, but could recover fees for such advice given while the lawyer was in Minnesota). The lawyer in *Ranta* had a more extensive North Dakota practice than the single client whose work was the subject of the case. The court cited his "long-term unauthorized practice in this State, his involvement with many other area clients, and his opening a branch office in Bismarck." *Id.* at 165. However, the court's holding did not rest on this factor.

18. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 8 (Cal. 1998). In this case, the client had sued for malpractice and the law firm counterclaimed for its fee. Without deciding the malpractice claim, the court denied the fee for work performed by New York lawyers "in" California. See *infra* text accompanying notes 22-24.

19. *Birbrower*, 949 P.2d at 11.

lawyer's jurisdictional limitations was also irrelevant because clients could not consent to a violation of public policy.<sup>20</sup> Despite these rare decisions, there is no evidence that lawyers stopped getting in planes, trains, and cars to cross state and national borders. One time in a million (or in a very large number) a lawyer might get caught and lose all or part of her fee.<sup>21</sup> We have lived with the discrepancy between the way people actually behaved—because it made sense to behave that way and because it was efficient, beneficial, and respected the autonomy of lawyers and clients—and the occasional victim of ambiguous unauthorized practice rules. Odds were high that you would not be one of those victims.

And then came a victim whose plight garnered broad attention and galvanized the bar to update its rules. In *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, the California Supreme Court denied a New York law firm any fee for work its lawyers did for a California company on an impending California arbitration (which never occurred) when the work was performed physically in California (the lawyers traveled there three times for a few days each time) and when the work was done physically in New York but “virtually” in California by email, fax, or phone.<sup>22</sup> The court described the lawyer's work “in” California as “extensive,” citing the trips, the fact that the client was a California company, and the fact that the arbitration would occur in the state under California law.<sup>23</sup> (“In” is also a key word in the world of unauthorized practice.) The court did not say whether any single factor was decisive or identify their relative weights, making planning nearly impossible. But the court also said that the very same work, even the lawyers' advice on California law, could be compensated if done while the lawyers were physically in New York and not “virtually” in California.<sup>24</sup>

The *Birbrower* decision, by focusing on the physical or virtual location of the lawyers, was so misguided, and so unclear in explaining when the nexus with California was great enough for the work to be deemed “in” California and therefore the unauthorized practice of law, that it had to be quickly undone. Lawyers were spurred into action because here was a living casualty of a dated idea and even more so because other lawyers could easily see themselves in the same predicament. The California Supreme Court had elsewhere been

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20. *Id.*

21. Indeed, it is in fee disputes that the rule is mainly enforced. Absent egregious behavior, disciplinary authorities have not been much interested in fencing out transient lawyers. For examples of egregious cases, see Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 683–85 (2002).

22. *Birbrower*, 949 P.2d at 2–4. I analyzed this opinion and the reaction to it in Gillers, *supra* note 21.

23. In addition, the lawyer's fee agreement with the client was governed by California law. *Birbrower*, 949 P.2d at 2.

24. *Id.* at 5–6.



enlightened about modern practice<sup>25</sup>—and if it could happen there, it could happen anywhere.

In the ensuing years, even California courts read *Birbrower* narrowly, as did other courts. Some courts declined to extend it or rejected it.<sup>26</sup> The Ninth Circuit used the phrase “judicial Luddites” in rejecting the *Birbrower* understanding of “modern law practice.”<sup>27</sup> Prodded by the legislature, a California Supreme Court committee set about rewriting the rules on cross-border practice to recognize what had been true for decades—what lawyers assumed the rules already allowed and what no rule was going to stop because cross-border work reflected the judgments of reasonable clients and lawyers about what was in their interest to do.<sup>28</sup> So the state’s rules were forced to catch up.<sup>29</sup> The ABA did the same with its rules.<sup>30</sup> Without *Birbrower*, we might still be living with the wide gulf

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25. See, e.g., *Gen. Dynamics Corp. v. Superior Court*, 32 Cal Rptr. 2d 1, 3–4 (Ct. App. 1994) (recognizing an employed lawyer’s right to sue a corporate client for retaliatory discharge).

26. *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 820–21 (9th Cir. 2009) (recognizing the economic realities of modern law practice); *Estate of Condon*, 76 Cal. Rptr. 2d 922, 927–29 (Ct. App. 1998) (declining to extend *Birbrower*, the court wrote, “In the real world of 1998 we do not live or do business in isolation within strict geopolitical boundaries. Social interaction and the conduct of business transcends state and national boundaries; it is truly global.”).

27. The *Winterrowd* court explained:

Even at a time when the largest law firms in the United States were composed of not many more than one hundred lawyers, Judge Friendly observed that we live in an “age of increased specialization and high mobility of the bar.” *Spanos v. Skouras*, 364 F.2d 161, 170 (2d Cir. 1966). But in 1966, there were no personal computers, no Internet, no Blackberries, no teleconferencing, no emails, and the only person who had a two-way wrist radio was cartoon character Dick Tracy. Today, largely because of the benefits of modern technology, hundreds of U.S.-based law firms are composed of many hundreds, or even thousands, of lawyers and support personnel contemporaneously doing business in many states and throughout the world. Lawyers throughout the United States regularly participate in teleconferences and group email sessions with other lawyers in other states, and lawyers and paralegals from one or more firms participate in massive discovery projects arising out of a single case concerning papers and data located in several states. In many such instances, only a small fraction of the lawyers involved in a case are members of the bar of the state where the presiding court sits. Current law does not compel us to be judicial Luddites, and we may properly accommodate many of the realities of modern law practice, while still securing to federal courts the ability to control and discipline those who practice before them.

556 F.3d at 819–20. Another holding of *Birbrower*—that an appearance in arbitration is the practice of law within the meaning of the unauthorized practice rules—also has been rejected. See *infra* text accompanying notes 125–130.

28. ABA, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 2–3 (2002), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/intro\\_cover.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/intro_cover.authcheckdam.pdf).

29. CAL. R. CT. 9.43–9.48.

30. The ABA amended its Model Rules of Professional Conduct to create “safe harbors” for cross-border practice in MODEL RULES OF PROF’L CONDUCT R. 5.5 (2011). As of 2011, forty-five U.S. jurisdictions have adopted this rule in substantially similar or identical form. ABA, STATE IMPLEMENTATION OF ABA MODEL RULE 5.5 (2011), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick\\_guide\\_5\\_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf).

between rule and reality.<sup>31</sup>

The old rules depended on the illusion (even self-deception) that rules rule, full stop. They operated from the complacent assumption that behavior will conform to rules. The new California and ABA rules were adopted to conform rules to behavior. The lesson from this experience is that lawyers in their bar groups and judges in their chambers cannot write rules that stray far from the rational choices of lawyers and clients and expect obedience to what they demand.

There is a lesson behind this lesson, which will be the main theme of this Article. Once upon a time, lawyers worked at a desk. The desk was in a place (a state) and the government of that state (via the courts granting a license) validated the lawyer's presence at that desk in that state. Without validation there was no lawyer and no desk. The license stopped at the border of the state. Geography as an organizing principle for regulation worked well enough until the final quarter of the twentieth century. Its benefits were apparent: If lawyers stayed put, if their clients came from the state that licensed them, if their firms had one office, if physical travel to other places was the exception, and virtual travel limited to telephone and telex, then defining the license by the geographical boundary of the state that granted it made sense; or at least it didn't create inconvenience and widespread disobedience. The licensing regime was not driven by a wish to keep other lawyers out because those lawyers worked at their own desks in their own states and also stayed put. In a sense, each jurisdiction was a cocoon. The salutary purpose of licensing was (and still is) to ensure the competence and integrity of home-state lawyers. However, even in this simpler time, some states erected formidable barriers to discourage lawyers from relocating. Among those barriers were durational residency requirements. These baldly anticompetitive rules, which prevented a relocating lawyer from gaining admission to a state's bar, whether on motion or by examination, until she had resided in the state for a set period of time, were eventually struck down.<sup>32</sup>

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31. New York still lives with that gulf. As I know from my service on it, the commission that proposed the amendments to the Model Rules to allow cross-border practice worried that small states, especially small states near big cities (like New Hampshire and New Jersey), would reject the rules for fear that big-state lawyers would cherry pick the best matters that would otherwise go to lawyers in the small states. Presumptively, predatory New York lawyers were prominent in this worry. As it turns out, New York rejected the new rules. One participant in the meeting with the New York judges who made this decision told me that one judge who opposed the rules asked rhetorically how he could defend letting a lawyer from Vermont take business from a lawyer in New York.

32. See, e.g., *Keenan v. Bd. of Law Exam'rs*, 317 F. Supp. 1350, 1351 (D.C.N.C. 1970) (holding that one-year residence requirement to take the state bar violates the constitutional right to travel). A modern vestige of such barriers is the requirement that lawyers from one jurisdiction, no matter how experienced, take the bar examination in a jurisdiction to which they relocate. Thirteen American states impose this requirement. Others permit motion admission. See NAT'L CONFERENCE OF BAR EXAMINERS & ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR

Geography, or place, remains the governing principle as a formal matter—it still animates many of the rules regulating lawyers—but at the expense of a widening gap between those rules and the conduct of the bar. Three forces have undermined the idea of a licensing authority coterminous with a jurisdiction's physical border. First, technology does not recognize borders. Second, physical travel is easy if not always pleasant. Third, clients' needs increasingly cross borders as they also take advantage of technology and easier travel. These changes, which will only become more prominent, mean that we require a new (or additional) governing principle beyond geography.

We should not have needed *Birbrower* to spur us to revise our rules on cross-border practice. The inadequacy of physical place as an organizing principle was long apparent. We should have seen that the conduct the old California rules were held to prohibit (and that similar rules elsewhere could then have been held to prohibit) did not pose a risk to the public or clients that justified the state's closed door policy and its impediment to rational economic activity. We should have revised those misguided rules earlier, as we partly did thereafter, to sensibly reconcile the competing interests, which is the purpose of regulation in the first place. We should do the same today for other rules to take account of expanding technology and the cross-border needs of clients, while preserving the good things that regulation offers. What exactly are those good things? We need to know in order to identify what we do next.

## II. WHAT DO WE GET FOR ALL OF OUR LAWYER REGULATION?

Dense and detailed though the world of lawyer regulation is, the rules fall into two neat categories: Rules that determine who can be a lawyer and rules that determine how lawyers may, must, or must not behave.

### A. WHO CAN BE A LAWYER?

There are three rules in this category: One rule specifies an educational requirement,<sup>33</sup> a second describes an examination requirement,<sup>34</sup> and a third has a character requirement.<sup>35</sup> A person who wants to practice law in a place must satisfy all three rules unless excused.<sup>36</sup> What constitutes the practice of law, as opposed to the practice

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ADMISSION REQUIREMENTS 2011, at 35 (2011), available at [http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/20110201\\_Comp\\_Guide.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/publications/20110201_Comp_Guide.authcheckdam.pdf).

33. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 22, §§ 520.3–520.6 (2011).

34. *Id.* §§ 520.8–520.9.

35. *Id.* § 520.12.

36. Many states also have rules allowing lawyers to gain admission to the bar on motion, without taking an examination, if the lawyers have practiced for a defined period of time. See, e.g., *id.* § 520.10.

of something else that may resemble law or that a person who is not a lawyer may do along with lawyers, is a different debate. Efforts have been made to define the practice of law. They have not been satisfying.<sup>37</sup>

### I. Education

In American history there was a time that no education, at least no formal education, was required for law practice.<sup>38</sup> One could hang out a shingle, possibly after a law office apprenticeship. That remains true in some jurisdictions.<sup>39</sup> In reality, however, new lawyers will have gone to law school for three years, after four years of college, and for most jurisdictions that law school will be approved by the American Bar Association.<sup>40</sup> Today, the rules of most courts require graduation from an ABA-approved law school, though with exceptions.<sup>41</sup>

What does this requirement get us? It ensures that new lawyers have reached an age of presumptive maturity because they will have had seven years of postsecondary education. More important, it means that new lawyers will have had a rigorous and demanding intellectual experience—a benefit of the ABA's *Standards and Rules of Procedure for Approval of*

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37. See, e.g., TEX. GOV'T CODE ANN. § 81.101 (West 2011), which provides in part:

(a) In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

(b) The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.

38. Perlman, *supra* note 12, at 145.

39. California, for example, permits a person to qualify to take the bar through study in a judge's chambers or a law office for four years. CAL. STATE BAR R. 4.26 provides:

General applicants for the California Bar Examination must

(A) have received a juris doctor (J.D.) or bachelor of laws (LL.B) degree from a law school approved by the American Bar Association or accredited by the Committee; or

(B) demonstrate that in accordance with these rules and the requirements of Business & Professions Code §6060(e)(2) they have

(1) studied law diligently and in good faith for at least four years in a law school registered with the Committee; in a law office; in a judge's chambers; or by some combination of these methods; or

(2) met the requirements of these rules for legal education in a foreign state or country; and

(C) have passed or established exemption from the First-Year Law Students' Examination.

40. See the detailed information collected by the ABA Section of Legal Education and Admission to the Bar at *Legal Education Statistics from ABA-Approved Law Schools*, ABA, [http://www.americanbar.org/groups/legal\\_education/resources/statistics.html](http://www.americanbar.org/groups/legal_education/resources/statistics.html) (last visited Mar. 17, 2012).

41. A few jurisdictions, including California and Massachusetts, permit graduates of law schools that are not approved by the ABA to take their bar examinations. See, e.g., CAL. STATE BAR R. 4.27; MASS. SUP. JUDICIAL CT. R. 3:01, § 3.1.3.

*Law Schools*<sup>42</sup>—focused on legal rules and legal reasoning. They will have learned the particular way that lawyers think. But beyond styles of thought, they also will have learned the law: the basic law taught in required courses<sup>43</sup> and the law of any other subjects they may elect to take, among which will often be courses that once were required.<sup>44</sup>

## 2. *The Bar Examination*

The bar examination is meant to complement the educational requirement. We can question its purpose. At one time, and still to some extent, it tested the applicant's knowledge of the law of the particular place from which she wished to get a license to practice law.<sup>45</sup> The examination requirement necessarily implies that a state cannot confidently defer to the fact of graduation from a law school, even an ABA-approved law school, to conclude that all applicants have the intellect and knowledge required for law practice in the jurisdiction.<sup>46</sup>

42. ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, 2011–2012 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2012) [hereinafter ABA STANDARDS].

43. While the identity of the required courses will vary by school, the core curriculum remains generally unchanged: contracts, torts, property, criminal law, constitutional law, and civil procedure. The ABA's *Standards and Rules of Procedure for Approval of Law Schools* are modest in their description of the required content of a legal education. Standard 302(a), *id.* at 20, states the content requirement:

- (a) A law school shall require that each student receive substantial instruction in:
  - (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
  - (2) legal analysis and reasoning, legal research, problem solving, and oral communication;
  - (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
  - (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
  - (5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.

44. For example, although corporations and evidence are not required classes, in my law school, a large majority of students take each.

45. For example, the first day of the Missouri bar examination consists of a combination of the Multistate Essay Examination prepared by the National Conference of Bar Examiners and essay questions prepared by the Missouri Board of Law Examiners. Rule 8.08 of the Rules Governing Admission to the Bar in Missouri provides:

The essay questions may cover all or some of the following subject matters: agency and partnership, corporations and limited liability companies (LLCs), conflicts of law, estates, family law, federal civil procedure, trusts and future interests, sales, commercial paper, secured transactions, constitutional law, contracts, criminal law and procedure, evidence, real property, torts, administrative law, remedies, and Missouri civil procedure.

Mo. SUP. CT. R. 8.08. All essay questions must be answered according to Missouri law. *Id.*

46. This is an inescapable inference from the fact that states require *both* graduation from law school *and* bar examination passage. *See, e.g.*, FLA. BAR R. 1.15.1 (“The primary purpose of the bar examination is to ensure that all who are admitted to The Florida Bar have demonstrated minimum technical competence.”). Florida also requires graduation from an ABA-approved law school. FLA.

The number of graduates the examination excludes, even after multiple tries, is comparatively small.<sup>47</sup> We might also question whether how one performs on a multiday examination under significant pressure predicts how she will perform in the rather different milieu of law practice. We might assume that success in a law school—at least measured by the fact of graduation—is a better predictor. Or if not, if a state fears that law schools might set the graduation bar too low, a higher measure of law school success (a certain grade point average, for example) might be used to obviate further testing for those who meet it. Perhaps this would not work, however, because standards may vary across schools, which might actually then compete to graduate the greatest number of students exempt from the examination and thereby raise the yield for the entering classes.

The second assumption behind the bar examination is that it is necessary to test the applicant's knowledge of the law of the jurisdiction from which she seeks a license.<sup>48</sup> Applicants go to law school nationwide but seek a law license in a particular place. That place may wish to assure itself, before it allows the applicant to have local clients, that she knows the law of the place. This can lead to minute questions about the law of the place, such as: the number of witnesses required for a will and who they must not be; the grounds for divorce and annulment; the scope of the statement against interest hearsay exception; the exceptions to the lawyer's duty of confidentiality; when the statute of limitations is tolled in a medical malpractice case; whether a deed has to be acknowledged and how; and the difference between first and second degree manslaughter.<sup>49</sup> Put aside the fact that the answers to all such questions can be found quickly when the need for them arises. Put aside the fact that these questions test the applicant's memory, which will be quickly

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BOARD OF BAR EXAMINERS, <http://www.floridabarexam.org/> (last visited Mar. 17, 2012).

47. Nationwide, in 2010 eighty-one percent of graduates of ABA-approved schools passed the bar examination the first time and forty-one percent of repeaters passed. *2010 First-Time Exam Takers and Repeaters from ABA-Approved Law Schools*, BAR EXAMINER, Mar. 2011, at 19.

48. This is apparent in the Missouri rule specifying that essay questions on the Missouri bar examination, even those on the Multistate Essay Examination, must be answered under Missouri law. *See* Mo. SUP. CT. R. 8.08. Missouri was the first state to adopt the uniform bar examination, but that adoption will not prevent it from testing on state law. Other states that have adopted the Multistate Essay Examination do not use it to test state law but rather use the "general principles" in the model answers developed by the National Conference of Bar Examiners, the creator of the Multistate Essay Examination. These jurisdictions may also test local law in separate essays. *See, e.g.,* ALA. BAR. R. VI.

49. These questions are all hypothetical, but they describe the kind of microlocal law inquiry a test taker might expect to encounter. For example, the California State Bar website identifies the following subjects on which applicants should prepare to be tested: the effect of the death of a married person on their community and quasi-community property; the provisions of the probate code dealing with simultaneous death; and "[t]hose provisions of Article 9 concerning Fixtures." *Scope of the California Bar Examination: General Bar Examination and Attorneys' Examination*, STATE BAR OF CAL. COMM. OF BAR EXAMINERS/OFFICE OF ADMISSIONS, <http://admissions.calbar.ca.gov/LinkClick.aspx?fileticket=VQF73Jr-8iE%3d&tabid=245> (last visited Mar. 17, 2012).

emptied when the test is over.<sup>50</sup> Put aside the fact that lawyers then in practice in the testing state will rarely know the answers to these questions without research, unless they concentrate in the particular area of law. And put aside the fact that many applicants may never again need to know the answers to most or all of these questions because they will practice, for example, antitrust law or intellectual property law.

The necessary premise behind testing local law knowledge is that the local law is *sufficiently* different from the law elsewhere such that an examination is needed to ensure that the applicant knows it, if only for the days of the examination. For if the law of the place is not so different (and if memory for small bits of information is a questionable indicator of competence to practice law), then the justification for the bar examination is a generic one—that is, to test the applicant’s legal reasoning, her ability to interpret rules and to apply them to particular facts, and her knowledge of the constitutional limitations on government power.

While an applicant should be expected to know that there is a difference between manslaughter and murder and the nature of that difference, it should give us no assurance of competence that the applicant has managed, with the benefit of an intense, two month, fact-stuffing bar preparation class, to remember the precise elements of second degree manslaughter in the testing jurisdiction. The advent of multistate bar examinations that are not state law specific,<sup>51</sup> and the incipient interest in a single uniform bar examination,<sup>52</sup> may reflect increasing state recognition that testing temporary memory of the minutiae of local law is not a useful predictor of competence. Or it may

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50. A California lawyer told me that her bar review class helped students recall all state felonies with an acronym, each letter of which identified a different felony. Now, thirty years later, she still recalled part of it, Mr. and Mrs. Lamb, though not what each letter signified.

51. The various multistate examinations and the state adoptions can be found at the website for the National Conference of Bar Examiners. See *Multistate Tests*, NAT’L CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/multistate-tests> (last visited Mar. 17, 2012); *NCBE Testing Services*, NAT’L CONFERENCE OF BAR EXAMINERS (Dec. 27, 2011), [http://www.ncbex.org/assets/media\\_files/Multistate-Tests/2011NCBETesting-Services-including-UBE-jurisdictions122711.pdf](http://www.ncbex.org/assets/media_files/Multistate-Tests/2011NCBETesting-Services-including-UBE-jurisdictions122711.pdf).

52. The ABA reported on January 28, 2010:

A recent resurgence of interest in a potential national uniform bar exam has sparked debate in the legal community among practitioners, jurists, law students, and bar examiners.

As many as 32 states are reportedly considering changing their existing exam requirements to a uniform national examination.

Tiffany M. Williams, *Examining the Feasibility of a National Uniform Bar Exam*, ABA LITIG. NEWS (Jan. 28, 2010), [http://www.abanet.org/litigation/litigationnews/top\\_stories/national-bar-exam.html](http://www.abanet.org/litigation/litigationnews/top_stories/national-bar-exam.html).

A uniform bar examination would not *necessarily* eliminate testing in local law. A state would be free to supplement its examination with a local law test. See *Essays on a Uniform Bar Examination*, BAR EXAMINER, Feb. 2009, at 6 (discussing this question). The Bar Examiner is published by the National Conference of Bar Examiners, which has developed the uniform bar examination. See *The Uniform Bar Examination*, NAT’L CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/multistate-tests/ube/> (last visited Mar. 17, 2012).

instead (or also) reflect a preference for the administrative convenience and financial savings of assigning the development and scoring of bar examinations to an outside organization.

Claims that the bar examination is required to ensure that a law school has done its job to the state's satisfaction and that the applicant knows the law of the place from which she seeks a license are challenged by the way many states treat relocating lawyers. A lawyer who has practiced in one place may wish to move to another. A salutary rule in many places permits motion admission, which will grant a license without the need to take the jurisdiction's bar examination if the applicant has practiced law elsewhere for a designated number of years.<sup>53</sup> But in some states even seasoned lawyers must take the bar examination (or an abbreviated version of it) alongside new graduates.<sup>54</sup> That includes lawyers who have successfully practiced elsewhere, who have letters commending their legal skill, and who work in an area of federal law and have little interest in the law of the place to which they move. A suspicious person might wonder whether the examination requirement is intended to dissuade entry, just as durational residency requirements once did.<sup>55</sup> The examination is not here needed to ensure that the applicant's law school did not graduate a dud. Differences in the law of the new place from the law of the old place can be the only defensible justification for the requirement and that justification dissolves if the law is not (so) different, if the differences are irrelevant to the migrating lawyer's practice, if the state does not test local law on its examination, or if the differences can be quickly ascertained. ("I practice securities law. Why do I have to memorize the elements of assault? And if I ever do need to know them, I'll open a book.").

### 3. Character Committees

The final hurdle to bar admission is the character committee. These committees have a troubling history. At one time, they excluded applicants for reasons having nothing to do with what can reasonably be called character, let alone a rational prediction of an applicant's behavior if admitted. Bias probably explains some decisions.<sup>56</sup> Committees also excluded applicants who were in intimate relationships but not married.<sup>57</sup>

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53. For states with such rules and the variations among them, see ABA, *ADMISSION BY MOTION RULES* (Dec. 9, 2009).

54. According to the ABA, eleven states do not recognize admission on motion for lawyers who have been admitted to practice in another U.S. jurisdiction. *Id.*

55. See *supra* text accompanying note 32.

56. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 94-101 (1976).

57. *Cord v. Gibb*, 254 S.E.2d 71, 73 (Va. 1979) (rejecting the lower court's decision to deny admission to the bar to a woman living with a man to whom she was not married).



They excluded gay men and lesbians.<sup>58</sup> They assumed the power to exclude applicants based on disloyalty to the U.S. and state constitutions,<sup>59</sup> or based on personality disorders.<sup>60</sup> Sometimes these disorders were associated with particular ethnic or religious groups.<sup>61</sup>

Today, character committees might better be called conduct committees. What they try to determine is whether conduct in the life of the applicant predicts that she will act dishonorably as a lawyer: that is, will break the rules that govern law practice and thereby harm clients and the justice system. Committees have been criticized even when their investigations are so limited.<sup>62</sup> Are these predictions reliable? Are they reliable enough to justify exclusion or delay in admission? What can we say about future behavior from the fact that an applicant shoplifted a sweater while in college, or shared a controlled substance with friends, or failed to pay a dozen parking tickets, or cheated on a metaphysics exam, or even a law school evidence exam, and got an F? On the other hand, if the conduct is disreputable enough, if it reveals disregard of the law or breach of trust for self-advantage, who should bear the risk that the prediction will be wrong? A strong argument can be made that the state should not be required to give a seal of approval to an applicant who, for example, has betrayed others or who broke the law for personal gain, and who if admitted will hang the state's license on her office wall to induce trust from clients.

The new world I will describe, with its disruptive externalities, envisions a role for character committees, the same circumscribed role as today. Whatever the justification for these committees—and I think they are justified if their focus is narrow—the disruptive externalities do not displace them. Indeed, a state to which a practicing lawyer relocates has a heightened claim to a character (or conduct) inquiry because the lawyer admitted elsewhere will have had more time to misbehave, including in practice, compared to the new graduate. A jurisdiction may wish to weigh the fact that a relocating lawyer has been disciplined or found

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58. State *ex rel.* Fla. Bar v. Kimball, 96 So. 2d 825, 825 (Fla. 1957).

59. Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 156–57 (1971). An applicant to the New York bar was required to “take an oath that he will support the Constitutions of the United States and of the State of New York.” *Id.* at 157. Although the plaintiffs could cite no case in which “any applicant has ever been unjustifiably denied permission to practice law” under this requirement, they claimed that “New York’s system by its very existence works a ‘chilling effect’ upon the free exercise of the rights of speech and association of students who must anticipate having to meet its requirements.” *Id.* at 158–59.

60. See generally Clark v. Va. Bd. of Bar Exam’rs, 880 F. Supp. 430 (E.D. Va. 1995) (canvassing the history of these inquiries).

61. AUERBACH, *supra* note 56, at 99–101.

62. See generally Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985).

civily liable for a breach of fiduciary duty even if the underlying conduct has not led to the loss or even suspension of her license.

#### B. THE RULES GOVERNING LAWYERS

So far, I have identified rules that control entry into a jurisdiction's legal profession. Separate and exponentially more complicated sources govern the conduct of the admitted lawyer. These include cases that define legal malpractice and breach of duty as a fiduciary (which a lawyer is<sup>63</sup>), ethical or professional conduct rules under various names, and legislation and case law that control how law is practiced. These rules fall into two categories, one of which most concerns me. The first category describes the lawyer's relationship to specific others: their clients and former clients, courts and other tribunals, opposing lawyers and clients, other third persons, and (modestly) the jurisdiction's justice system.<sup>64</sup> The rules in the second category, the focus here, address how the law marketplace is organized and how it sells its product. They answer such questions as who may trade in legal services *in* the jurisdiction; what the word "in" means in an age of virtual communication;<sup>65</sup> when law practice is unauthorized;<sup>66</sup> how a law office may and may not be organized;<sup>67</sup> and who may profit from, own, and manage a law firm.<sup>68</sup> In short, these rules define the legal marketplace by tightly controlling the organization and operation of the supply side—the producers of the service and who may earn money from it.

The rules in this second category, like those in the first, are justified by the need to ensure competence and honesty. To some extent they do so, although often less directly, by purporting to diminish the risk of improper influence from lay interests and the risk of error by persons not trained in the law of the jurisdiction. They may do these things by closing, so far as possible, a jurisdiction's law business to lawyers from outside the jurisdiction's borders and to nonlawyers from anywhere. The closure is not airtight, but serious enough to create impediments to cross-

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63. *In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994).

64. In this category are, for example, rules on confidentiality, *e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6 (2010); rules on conflicts of interest, *e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7–.12 (2010); and rules on duty to tribunals, *e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.1–.4 (2010).

65. The word "in" challenged the *Birbrower* court, which recognized that its holding would depend directly on the elasticity of that preposition. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 5–6 (Cal. 1998).

66. *See, e.g.*, *Prof'l Adjustors, Inc. v. Tandon*, 433 N.E.2d 779, 783 (Ind. 1982) (invalidating a legislative scheme that created licensed insurance adjustors because the work they were authorized to do for individuals with claims against insurance carriers entailed interpretation of contracts and negotiation deemed the practice of law).

67. Law firms may be partnerships, limited liability partnerships, or professional corporations. *See, e.g.*, RESTATEMENT OF LAW GOVERNING LAWYERS § 9 cmt. b (2000).

68. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2010), in force in every jurisdiction but Washington, D.C. forbids nonlawyers from having an ownership interest in or managing a law firm.

border practice and nonlawyer competition. Failure to evaluate whether these barriers are needed, whether they should be as high as they are, and whether their goals may be achieved without the same level of exclusion invites benign civil disobedience—that is, lawyers, firms, clients, and others behave in ways that they reasonably see as efficient and rational even if (sometimes vaguely) forbidden. As in *Birbrower*, one lawyer in ten thousand may be unlucky enough to face sanction for transgressing these rules, but as in *Birbrower*, that will not stop much of the behavior. People act according to what they assume sensible rules should allow and therefore (they assume) do allow. In good faith, they may conclude incorrectly that their conduct is permitted. The *Birbrower* lawyers likely believed that they were operating on the safe side of any unauthorized practice line. That there was even an issue may never have occurred to them. I believe that most American lawyers would have agreed that the conduct was proper and certainly did not constitute the “extensive” practice of law “in” California, including virtually from New York.<sup>69</sup> That widespread agreement is what made the decision so shocking and set in motion an effort to upend it.<sup>70</sup>

Of course, the rules in this second category have long created barriers to out-of-state lawyers, but they were not so inconvenient until recently. What has changed is the perception that today, because of technology and client needs indifferent to borders, the second category’s rules dramatically impede the efficient delivery of legal services by lawyers without a countervailing benefit.<sup>71</sup> The disruptive and extralegal externalities described in Part IV below encourage that perception. (By “extralegal” I mean only that they are external to the rulemaking universe, not that they are unlawful.) Separately, the second category’s rules also impede—indeed categorically forbid—participation in the ownership or management of law firms by persons who are not lawyers anywhere<sup>72</sup>—in other words, nonlawyers, which is the name lawyers give

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69. *Birbrower*, 949 P.2d at 7.

70. See *supra* text accompanying notes 24–31.

71. See, e.g., *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 556 F.3d 815, 819–20 (9th Cir. 2009).

72. MODEL RULES OF PROF’L CONDUCT R. 5.4 (2010). Only Washington, D.C. has exceptions to this exclusion. D.C. RULES OF PROF’L CONDUCT R. 5.4(b) (2007) provides:

A lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

- (1) The partnership or organization has as its sole purpose providing legal services to clients;
- (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
- (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1;
- (4) The foregoing conditions are set forth in writing.

to the rest of the world. And this exclusion also affects the market for legal advice and therefore its cost. But here, too, disruptive externalities are challenging these exclusionary rules or, in any event, are making them much harder to enforce.

While I appreciate the value of “end is near” tropes in book titles, I do not join the chorus nor characterize as terminal the effect on the legal profession of technology and the growth in cross-border commerce. My purpose is different. We do not need to define the level of threat to recognize that there are threats (or, if you will, opportunities). The question I ask is how the regulatory framework should be altered to accommodate the forces of change while protecting what is precious in the lawyers’ world, our core values and especially the assurance of our clients’ trust. My thesis is that these forces cannot be stopped, though they can be slowed and they can be pushed underground. Rules refusing to recognize the conduct these forces encourage may lead to sanctions against the occasional lawyer or nonlawyer who is snared in the high beam of a regulator’s patrol car. But many others will speed along on back roads undetected. That is not healthy for the law or the nation.

### III. DISRUPTIVE EXTERNALITIES

By disruptive externalities I mean real-world developments that exert pressure on the traditional regulatory model. Some developments may be outside the traditional power of the regulator’s authority or impossible to police effectively. One example is computer programs that dispense legal advice to consumers.<sup>73</sup> Two other examples of conduct that defy effective regulation are virtual cross-border advice<sup>74</sup> and legal process outsourcing (“LPO”).<sup>75</sup> Alternatively, a development may be compliant with existing regulations, or even promoted by them, but inspire unanticipated changes. An example is the incipient move toward a uniform bar examination,<sup>76</sup> which may make it difficult to resist movement toward a national, or at least a multistate, law license. Yet other examples are the increasing move toward uniformity in legal rules across U.S. jurisdictions, with differences modest and easy to discover; the fact that federal law, which is the same everywhere, is pervasive; and the fact that U.S. law and the law of many nations is available to anyone, anywhere, with a computer terminal and a subscription to Lexis or Westlaw.

These developments and others can be sliced, diced, and recombined in various ways. Whatever the organization, however, the

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73. See *infra* text accompanying notes 118–124.

74. See *infra* text accompanying notes 102–110.

75. See *infra* text accompanying notes 131–142.

76. See *supra* text accompanying notes 48–52.

lesson, I contend, is the same: The nineteenth- and twentieth-century regulatory models will buckle under the weight of the twenty-first century's innovations. Buckle, not collapse, but still no longer fully serviceable. Comparison to print media helps explain some of the disruption. What print media—newspapers and magazines—sell is information (fact and opinion) and little else. The effect of technology on the media's business model is by now well known, although solutions remain elusive.<sup>77</sup> How can the media generate the required revenue from subscriptions and advertisements when a consumer no longer needs to buy a hard-copy publication and when online competition is offering commodity news (in other words, news everyone has, like what the President said yesterday) or “news” that exploits the labors of others?<sup>78</sup>

Like the print media, a lawyer sells information, though she sells other services as well, including performance skills (in litigation and negotiation). But many legal services consist solely of an explanation of what the law is, often followed by the application of legal rules to the client's particular circumstances, which may include creation of a document. Documents are information tailored to a particular need and may demand little or no legal judgment or customizing, depending on the complexity of the client's objective. The same delivery system—the Internet—that is disrupting the news media has changed and will continue to change the way legal services are marketed. Indeed, when we look at the disruptive externalities in combination, which I presently do, it can seem near to delusional to think that the geocentric model for regulating lawyers and legal services, or justifications for that model that rely on differences in the laws across U.S. jurisdictions, can continue as is.

#### A. LAWYERS WITHOUT BORDERS

##### 1. *Virtual Presence, Part One*

A simple story that reveals the fading of place as a basis for lawyer regulation concerns a lawyer named Cedar P. Carlton.<sup>79</sup> This story may turn out to be one of those otherwise unremarkable, indeed entirely forgettable, decisions that signifies the need to revamp the regulatory model precisely because of its ordinariness.

Ms. Carlton worked for a Washington, D.C. law firm. She was a member of the D.C. bar and the bar of the District Court for the District

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77. See, e.g., Russell Baker, *Goodbye to Newspapers?*, N.Y. REV. BOOKS, Aug. 16, 2007; Michael Massing, *The End of News?*, N.Y. REV. BOOKS, Dec. 1, 2005; David Carr, *The Fall and Rise of Media*, N.Y. TIMES (Nov. 29, 2009), <http://www.nytimes.com/2009/11/30/business/media/30carr.html>.

78. That vehicle, the aggregator, is now ubiquitous. Prominent examples include *The Huffington Post* and *Slate*.

79. *In re Carlton*, 708 F. Supp. 2d 524 (D. Md. 2010).

of Maryland.<sup>80</sup> In 2008 she applied to renew her district court membership.<sup>81</sup> Her application revealed that she lived in Cambridge, Massachusetts, and did most of her work “from home or from an office space in Boston.”<sup>82</sup> She was not a member of the Massachusetts bar.<sup>83</sup> The district court’s local rule required that lawyers admitted to its bar “must be, and continuously remain, a member in good standing of the highest court of any state (or the District of Columbia) *in which the attorney maintains his or her principal law office*, or the Court of Appeals of Maryland.”<sup>84</sup> The district court asked Ms. Carlton to advise “how her office in Washington, D.C. can be her principal office if she is spending the majority of her time in Massachusetts either at home or in an office”<sup>85</sup>—a fair question.

Ms. Carlton’s response, in essence, was that her office was not where she lived or worked but where she virtually practiced.<sup>86</sup> Her mail was sent to Washington, D.C. and forwarded to Cambridge.<sup>87</sup> Her clients called her on a D.C. phone number.<sup>88</sup> Hard-copy communications, including pleadings, were mailed from D.C. Electronic communications could be sent from anywhere including Cambridge.<sup>89</sup> She did not hold herself out as a lawyer in Massachusetts and had no clients there.<sup>90</sup> So far as the world was concerned, she was professionally invisible in Massachusetts.<sup>91</sup>

The court recognized the new world. It approved her application, writing:

In recent years, the concept of a “principal law office” has evolved somewhat as a result of significant advances in technology which provide an attorney with the flexibility to carry out a variety of activities at different locations and under varying circumstances. The term does not necessarily mean continuous physical presence but, at a minimum, it requires some physical presence sufficient to assure accountability of the attorney to clients and the court. Under the circumstances described by Ms. Carlton, there can be no question that for purposes of malpractice insurance coverage, tax obligations and client security trust fund obligations, her office is the office of her employer. In addition, the address utilized in pleadings, correspondence

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80. *Id.* at 525.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* (quoting Dist. Md. R. 701.1(a)).

85. *Id.* (quoting Judge Peter J. Messitte, Chair of the Disciplinary and Admissions Committee of the Washington, D.C. Bar).

86. *Id.* at 525–26.

87. *Id.* at 526.

88. *Id.*

89. *Id.*

90. *Id.* at 525.

91. *Id.*

with clients, letterhead and other matters is also the address of her employer, which maintains a substantial physical presence in Washington, D.C. When meetings with clients are required, Ms. Carlton does meet with them in Washington, D.C. Her client files, accounting records and other business records, library and communication facilities such as telephone and fax service are all located in Washington, D.C. although, by virtue of advances in technology, she is able to access them remotely from Cambridge, Massachusetts.<sup>92</sup>

The court tried to distinguish Ms. Carlton's situation from that of a lawyer whose presence in a jurisdiction was "a mere 'mail drop.'"<sup>93</sup> It would not allow so slim a nexus because a mail drop would not "assure accountability of the lawyer to the court and to clients . . . . Where the principal law office is not located where the attorney is a member of the bar, essential public oversight of the attorney's practice is diminished."<sup>94</sup>

I appreciate that the court did not want to go out too far on a limb, but the line between a mail drop and Ms. Carlton's situation is not self-evident. Indeed, the term "mail drop" has no precise meaning. Nor is it clear why a mail drop (however defined) impedes oversight. Probably thousands of lawyers move yearly from one state to another, leaving not even a mail drop behind, while maintaining bar membership in both the old and new places. Or a lawyer who once would have opted for a mail drop can now approximate Ms. Carlton's situation in Washington, D.C., yet rarely appear there. As with Ms. Carlton, the world will think that professionally she is in a place that she is not.

In any event, this ruling reveals a thoroughly modern view and we might expect more of the same. Ms. Carlton could practice D.C. or Maryland law from anyplace so long as she maintained a modest physical connection to Washington. If she could practice from anyplace (including, as the court realized, by "telecommut[ing]"<sup>95</sup>), how can place remain as a principal basis for regulation?

## 2. *Virtual Presence, Part Two*

Perhaps you wonder about Massachusetts's interest in all this. The federal court in Maryland may be content, but Ms. Carlton is practicing law while physically in Massachusetts. Similarly, Richard Granat lives full time in Florida, where he is not admitted. As the ABA Journal described his work in its "Legal Rebels" series:

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92. *Id.* at 526–27.

93. *Id.* at 527.

94. *Id.*

95. *Id.*

Granat works out of his house in Palm Beach Gardens, Fla. The floor in his home office serves as a filing system, and he uses three computers simultaneously—a Macintosh desktop to watch Twitter feeds and stock quotes, a PC for actual work and a MacBook Air to walk around with when the desk chair bothers his back.

Fifteen employees, who also work remotely, help Granat run his different businesses.

. . . .

One [of Granat's websites], MDFamilyLawyer.com, offers family law forms bundled at a fixed price with legal advice to residents in Maryland and Washington, D.C., where Granat is licensed. Users answer a set of questions—how many children they have, their separation date, whether they own property—generating a form for court filings. Contested cases are referred elsewhere.

Granat spends about 30 minutes daily with that site, and it earns him about \$100,000 a year. The site focuses on simple matters; he estimates that only about 10 percent of the users require forms with customized language.

Another site, DirectLaw, licenses Granat's technology to small firms and solo practitioners. Once the site gets 50 users, he plans to create a community for them—to exchange ideas and “let them complain about me.”<sup>96</sup>

In response to the possibility that the Florida Bar would deem him to be practicing in the state, Granat replied:

I only serve Maryland residents which I check when they register for my web site. Moreover, I have an official Maryland law firm address in Owings Mills, Maryland and a Maryland phone number which calls forward to my Florida number. Our web servers are actually located in Maryland. I attend bar events in Maryland and participate in CLE events in Maryland.

I have no “business contacts” in Florida related to the delivery of legal services, and have no relationship as a lawyer to Florida's citizens. Obviously I never serve Florida residents, as my web site makes clear.

I am subject to Maryland disciplinary rules of course, which don't on [their] face state that I have to live in Maryland, or in fact even maintain an office in Maryland which I do. I maintain a malpractice policy through a Maryland insurer.

So who should care where I live, as long as Maryland's citizens are protected from the potential or actual malpractice. . . .

In the age of the Internet, the idea that a state bar would exercise jurisdiction of a lawyer who resides in its state, but practices elsewhere and doesn't offer its services to the state residents, is in my opinion an over reaching which won't stand a judicial test. This is a case that I would be happy to defend.<sup>97</sup>

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96. Stephanie Francis Ward, *Richard Granat: Internet Obsessive*, ABA J. LEGAL REBELS (Aug. 24, 2009, 3:19 PM), [http://www.abajournal.com/legalrebels/article/internet\\_obsessive](http://www.abajournal.com/legalrebels/article/internet_obsessive).

97. Richard Granat, Comment to *Living in FL, Practice in MD and DC, \$100M p/a for 30*



As would I. But under the nineteenth-century regulatory model, it is not the law you practice, it is where you practice law.<sup>98</sup> Granat is in Florida physically but his practice is in Maryland virtually. Should that free him from the constraints of Florida regulation? Of course. But once we say as much, we have to rethink regulation based on physical place.<sup>99</sup>

### 3. *Virtual Law Offices*

A laptop with an Internet connection allows us to “talk” to colleagues, clients, and adversaries as though we were in the office next door or a building across town. And it accommodates international calls for next to nothing using Skype or other voice-over-Internet services.<sup>100</sup> Lawyers have remarked to me that even when in their office, they

*Minutes Per Day*, LEGAL ETHICS FORUM (Aug. 28, 2009, 9:26 AM), <http://www.legalethicsforum.com/blog/2009/08/living-in-fl-practice-in-md-and-dc-100m-pa-for-30-minutes-per-day.html#comments>.

98. Not in these precise words, but in effect, that was the basis for denying a lawyer a \$4 million fee in *Servidone Construction Corp. v. St. Paul Fire & Marine Insurance Co.*, 911 F. Supp. 560, 571, 576 (N.D.N.Y. 1995) (denying a fee in a matter to a lawyer who practiced from an office in New York, where he was not admitted, notwithstanding that the matter was before federal courts outside New York, where he was admitted).

99. *But see* Gould v. Fla. Bar, 259 F. App'x 208, 210 (11th Cir. 2007). A New York lawyer living in Florida wanted to counsel persons in Florida, who might be residents of Florida, New York, or elsewhere, but on New York law only. The court upheld the bar's argument that the work would be unlawful:

We first address Gould's challenge to the regulation of his proposed advertisement for the provision of legal services relating to New York legal matters from his Florida office. Gould complains that he has a credible fear of prosecution for publishing the following advertisement:

NEW YORK LEGAL MATTERS ONLY  
M. RONALD GOULD LICENSED NEW YORK  
ATTORNEY 1201 BRICKELL AVENUE, STE. 630  
MIAMI, FLORIDA 33131  
FREE PHONE CONSULTATION 305 865 2962

The Florida Bar responds that the proposed advertisement concerns unlawful activity.

We agree with the Florida Bar. Under Florida law, it is unlawful for “[a]ny person not licensed or otherwise authorized to practice law in [Florida]” to practice law within the State of Florida. Fla. Stat. § 454.23 (2004). Gould, who is not admitted to the Florida Bar, does not have the authority to practice New York law in Florida. . . . Because the proposed advertisement concerns unlawful activity, the Florida Bar is entitled to regulate the advertisement.

*Id.* What is the difference between what Gould wished to do and what Granat does? Only the presumed physical location of the client and the fact that Granat's work is, in a sense, invisible in Florida, whereas Gould wished to advertise his services there. I say “presumed physical location” because so far as Granat can know, a person using his Maryland or D.C. law website may be doing so while spending the winter in Florida. But Granat is meeting his client in cyberspace, not Florida space. When we begin to make these distinctions, it should be apparent that the traditional model of regulation is flirting with a journey to Wonderland.

100. Voice-over-Internet services like Skype allow a user to call from one computer to another, or from a computer to a landline phone or cell phone. *See Support*, SKYPE, <http://support.skype.com/en-us> (last visited Mar. 17, 2012).

communicate with colleagues down the hall or a floor above via email, not in person. The same is true in my law school. As video conferencing becomes seamless and crisper, any lingering sense that meetings should occur in physical space will be seen as sentimental. All but long and important meetings will rapidly succumb to convenience and cost. I predict that jury trials will remain live and in person, but many trials to judges and arguments will be held in virtual courtrooms. Why not?<sup>101</sup>

Here, we may return to the two lawyers whose practices started the investigation of the place of anyplace: Cedar Carlton and Richard Granat.<sup>102</sup> Each had a physical office bigger than a mail drop, which the Maryland federal district court said it would not tolerate, though it did not define the term. But what need is there for an office at all, even a mail drop, except to get mail? Why can't a practice take place in virtual reality only? Of course, some practices will not lend themselves, at least not easily, to an entirely virtual existence. Examples are large corporate deals that require conference rooms and day-long meetings, and complex civil litigation with depositions and document discovery by the carload. But many practices should be able to fit in a virtual world. Meetings if necessary can occur in physical space—a coffee shop, a hotel lobby or conference room, or even a park, but often meetings will not be necessary or desirable. A lawyer can do her work at home or at a bar association library table. The only addresses on her card will be for her website and email and the only number will be for her cell phone.

As it happens, state bar ethics committees in two neighboring states confronted the question of a virtual law office (“VLO”) in 2010 and disagreed. Two New Jersey court committees disapproved of a virtual office on the grounds that a lawyer needs a physical office in the state to

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101. Discussion of “virtual courtrooms” has been underway for more than a decade. Michigan has created “cyber courts” as courts of record. MICH. COMP. LAWS ANN. § 600.8001 (2011) (making these courts available with consent in commercial cases and subject to other conditions); see Fredric I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's—and Tomorrow's—High-Technology Courtrooms*, 50 S.C. L. Rev. 799 (1999). We cannot, of course, know what rules will govern the virtual courtroom of the future, nor the kinds of matters for which they may be available. We can be confident, however, that technology increasingly will make them possible. The prospect that lawyers will on occasion choose a virtual courtroom for the argument of a motion or an appeal is unremarkable. Lawyers today submit motions and appeals without any argument, as anyone who has ever sat through a calendar call knows firsthand. Factors that will influence a lawyer's decision will include the perceived benefit from physical presence, if any; the quality of the technology; distance to the courthouse; cost in legal fees for the time spent in travel; and client preference. Cost to the state and inconvenience of travel may cause multimember appellate courts to mandate virtual arguments in categories of matters, say an interlocutory appeal on a nondispositive procedural motion in a state intermediate appellate court where the judges' chambers are hundreds of miles apart. I exclude jury trials as a likely candidate for the virtual courtroom, both civil and criminal, because jurors expect to be in a physical place (and customarily deliberate in one) and to have the lawyers and witnesses there as well, an expectation I doubt we will want to deny, especially in criminal cases where the verdict will affect freedom.

102. See *supra* Parts III.A.1, III.A.2.

satisfy a court rule requiring a “bona fide office.”<sup>103</sup> Although no lawyer need be continually at the site, a “responsible person . . . to answer questions posed by the court, clients or adversaries” must be present.<sup>104</sup> Except for brief periods when the lawyer and a “responsible person” are absent, a receptionist who is not an employee of the lawyer will not suffice, not even if the receptionist can easily redirect calls to the lawyer’s cell phone.<sup>105</sup> How do we explain this insistence on physical location? What difference does it make whether the “responsible person” is at a desk in an office in a building on a street or is instead available from anywhere by phone, with in-person meetings arranged as required? The value we want to protect is availability, not availability in a defined physical place.

By contrast, a Pennsylvania State Bar ethics opinion fully supported the use of a VLO.<sup>106</sup> A lawyer with a VLO need not have a physical address anywhere and may use a post office box for mail, the opinion said.<sup>107</sup> Like lawyers in real space, she must be able to confirm the identity of clients and others.<sup>108</sup> A virtual law firm may consist of more than one attorney, each working from an undisclosed address, even their homes.<sup>109</sup> And perhaps most interesting, the lawyers need not even be working *in* Pennsylvania.<sup>110</sup> Whether a Pennsylvania lawyer working in another state, although serving only Pennsylvania clients virtually, runs afoul of the other state’s unauthorized practice rules is not an issue the committee addressed. Could Massachusetts or Florida stop Cedar Carlton or Richard Granat? It is doubtful, but why would they even wish to try?

#### 4. *Online Legal Research*

At one time, lawyers needed books, the number and kind depending on the nature of their practice. Books required space and could be transported easily only in small numbers. The books anchored the lawyers to a physical place. Technology has erased physical place as the repository of legal information. It has eliminated the corporality of the sources of law and made quaint the place that once housed them—the law library. Unlike the effect of technology on the place of lawyers, here its effect is on the place of the information lawyers need to work. Who today depends on the law library for research? Our law libraries are now digital, so the law of nearly anywhere is available nearly anywhere. It is

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103. N.J. Advisory Comm. on Prof’l Ethics & Comm. on Attorney Adver., Joint Op. 718/41 (2010).

104. *Id.* (quoting N.J. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1:21-1(a)).

105. *Id.*

106. Pa. Bar Ass’n Comm. on Legal Ethics & Prof’l Responsibility, Formal Op. 2010-200 (2010).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

only a matter of time before the law library, as we have known it for centuries, disappears. The few that remain will be more in the nature of museums, containing books, manuscripts, and archives that for economic, historical, or legal reasons have not been digitized.

The change in the source of legal information means lawyers now take their law libraries with them. Thousands of pages of information can be transported in a laptop (or accessed on a computer anywhere) equipped with a fast Internet connection and a Westlaw or Lexis password. The hard copy that anchored us to place is history, and with it so is one of the few obstacles to the practice of law from anywhere.

Though the effect may be less dramatic than for other developments, technology further undermines reliance on physical place by allowing us to access on that same laptop, via a flash drive, a virtual private network, or a “cloud,” any documents we may need to do our work, including drafts of contracts and briefs. We can access our office files from ten thousand miles away. There is no practical limit on volume.

## B. LAW WITHOUT LAWYERS

### 1. Computer Programs

In 1965, Norman Dacey wrote a book called *How to Avoid Probate*.<sup>111</sup> New York lawyers tried to stop its sale.<sup>112</sup> They claimed that through the book Dacey, who was not a lawyer, was practicing law.<sup>113</sup> The book might have been seen as a threat to the bar’s income because it coached readers on how to organize their assets so that on death their property passed to their heirs without going through probate court, which would require paying a lawyer.<sup>114</sup> After some uncertainty, the state high court rejected the effort to ban Dacey’s book.<sup>115</sup> There was the little matter of the First Amendment.<sup>116</sup> Similar efforts to prevent the sale of forms that consumers could use to represent themselves, often in divorce, were also unsuccessful unless the seller made the mistake of helping the buyer fill out the form, no matter how elemental the help, at which point the activity became law practice and unlawful in some states.<sup>117</sup> It was not the bar’s finest hour.

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111. NORMAN F. DACEY, *HOW TO AVOID PROBATE!* (1st ed. 1965).

112. *N.Y. Cnty. Lawyers’ Ass’n v. Dacey*, 283 N.Y.S.2d 984, 987–88 (App. Div. 1967).

113. *Id.* at 988–89.

114. DACEY, *supra* note 111, at 10–12.

115. The lower appellate court, over dissent, ruled against Dacey, but the state’s high court reversed. *N.Y. Cnty. Lawyers’ Ass’n*, 283 N.Y.S.2d at 987–88, *rev’d* 234 N.E.2d 459 (N.Y. 1967).

116. The dissent in the lower court cited the First Amendment, and the Court of Appeals’ opinion reversing the decision was based on this dissent. *N.Y. Cnty. Lawyers’ Ass’n v. Dacey*, 234 N.E.2d 459, 459 (N.Y. 1967).

117. *Fla. Bar v. Brumbaugh*, 355 So. 2d 1186, 1193 (Fla. 1978); *Or. State Bar v. Gilchrist*, 538 P.2d 913, 916 (Or. 1975).

All that became an historical curiosity with the arrival of the computer. A computer, after all, with seemingly limitless memory and capacity for interaction with a live user (formerly called “a client”), can be programmed to do what lawyers do, at least for routine tasks—ask questions, follow-up questions, and so on, eventually delivering a document if desired. Dacey sold one book, but a program in a “cloud” can contain a vast library and accommodate many factual variations and jurisdictional differences. The monetary stakes are potentially quite high, which may explain the effort of some Texas lawyers to seek to stop the sale of a program called Quicken Family Lawyer.<sup>118</sup> The district court issued a preliminary injunction,<sup>119</sup> but the case became moot during the pendency of the appeal, when the Texas legislature amended the state’s unauthorized practice law to allow Quicken’s business.<sup>120</sup>

A computer can do what Norman Dacey could not even dream of doing: answer questions and produce legal documents tailored to a user’s particular needs under the law of any jurisdiction. Like a tax preparation program, a law program can respond to a consumer’s selections with simple questions, the answers to which determine the next question. It can do this for estate plans, divorce documents, separation agreements, contracts for the sale of a home, and simple bankruptcies. It can generate forms to incorporate a small business, to apply for not-for-profit status, to create a partnership, to register a trademark or copyright, and to change a name. It can help a user write a persuasive demand letter in a dispute with a business, with citations to applicable law. In short, computer programs can offer products that are part of many lawyers’ inventory of routine services, and will be more effective than traditional services to the extent that the programs encompass a manageable universe of options—especially if they are form driven, requiring a “fill in the blanks” orientation, rather than judgment.

Self-help of this nature is not advisable for all clients. It may be especially unwise if the matter is complex. But that is not the question. It is available to those who elect it.<sup>121</sup> Predictions that a program will miss subtleties, while often so, will not prevent their availability, especially for the routine services that contain few or no subtleties. People who feel comfortable taking a chance will do so. The state can (and should) require cautions and warnings, as Texas does,<sup>122</sup> but it cannot stop the

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118. *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. CIV.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 2, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999). The plaintiff was composed of six lawyers and three laypersons. *Id.* at \*1.

119. *Id.*

120. *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956, 956 (5th Cir. 1999).

121. Apart from proprietary software, a person seeking a simple form, like a power of attorney or a medical proxy, could use a Google search to find a specific jurisdiction’s valid version of the form. The attraction of interactive software is enhanced if the user needs guidance in filling in the blanks.

122. *Unauthorized Practice of Law Comm.*, 179 F.3d at 956.

business. The simple fact is that some legal services can be mass-produced, standardized, and commodified. Lawyers have long known this. As a young lawyer, I was once asked to represent the buyer of a cooperative apartment. I fretted over the level of sophistication required until an older lawyer told me that the necessary “fill in the blanks” forms were available for a few dollars at the stationery store. Other tasks were required, too, but the standard forms greatly simplified the work.

Now, unlike Dacey, presumably the worker bees who write the programs *are* lawyers (though not lawyers in every user’s jurisdiction). So it is not strictly true to say that this situation reflects the sale of law without lawyers, but the lawyers are so far in the background that a comparison to the traditional model of the lawyer-client relationship is unhelpful. So long as the lawyers who write or contribute to the writing of the law-giving programs do not personally advise the people using them (we won’t call them clients), directly or through subordinates, the program cannot be banned any more than the bar could ban Dacey’s book. I emphasize that the state does have a legitimate interest in protecting the consumer against sloppy or ignorant work, and offer suggestions of how it might do that,<sup>123</sup> but that interest will not allow a categorical ban.<sup>124</sup>

## 2. *Nonlegal Services*

California’s *Birbrower* decision addressed the conduct of New York lawyers who came to the state in anticipation of an arbitration. The majority in a 6–1 opinion found that the New York lawyers sacrificed their fees for work done physically or (from New York) virtually in California because their “extensive” presence “in” the state violated its unauthorized practice law.<sup>125</sup> The dissenting judge agreed with the majority’s conclusion that the lawyers’ presence in California was “extensive.”<sup>126</sup> However, she did not view the lawyer’s work—preparing for an arbitration—as the practice of law.<sup>127</sup> For this conclusion, she had authority from a federal district court in New York.<sup>128</sup> Since *Birbrower*, at least two other courts, one state and one federal, have likewise

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123. See *infra* text accompanying notes 213–216.

124. In a variation on this theme, computer programs are replacing human labor in law firms. While there is still a law firm in the picture, the software does the work that lawyers once did, but faster and cheaper. John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. TIMES, Mar. 4, 2011, at A1 (describing software that reviews documents using a “sociological approach [that] adds an inferential layer of analysis, mimicking the deductive powers of a human Sherlock Holmes”).

125. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 7 (Cal. 1998).

126. *Id.* at 18.

127. *Id.* at 16 (Kennard, J., dissenting).

128. *Id.* at 18 (citing *Williamson v. John D. Quinn Const. Corp.*, 537 F. Supp. 613, 616 (S.D.N.Y. 1982)).

concluded that representation of a party in a pending or impending arbitration is not the practice of law, even when (as was true in these three cases) the work is done by a lawyer.<sup>129</sup>

The view that a lawyer advocating in arbitration is not practicing law draws strength from the conceded fact that an arbitrator need not be a lawyer, not even if the agreement to arbitrate specifies that the law of a particular jurisdiction will govern the dispute.<sup>130</sup> If the “judge” need not be a lawyer, why should the advocates have to be lawyers? And if the advocates do not have to be lawyers, shouldn’t it follow that even if they are lawyers, their work complies with unauthorized practice rules? It would be passing strange if a nonlawyer may advocate in an arbitration but a lawyer admitted in another state may not. So if the dissenting *Birbrower* judge and the three courts that agree with her are correct, a forum in which law is applied and legal rights are determined can operate without lawyers or with lawyers who are not subject to the jurisdiction’s rules on unauthorized practice.

### 3. *Legal Process Outsourcing*

Legal process outsourcing (“LPO”) is both a new and an old phenomenon.<sup>131</sup> It is old because, at bottom, it is simply the delegation of some part of a law firm’s legal or support work to another person or entity outside the firm. A large photocopying job sent to Kinko’s might be called LPO. So could an independent contractor hired to investigate an incident or to maintain and ensure security for a law firm’s voicemail, email, and computer systems.<sup>132</sup> We do not seem to use the LPO term when a firm affiliates with another law firm, either as local counsel or because of its particular expertise. Perhaps this is because the word “process” does not fit. So one defining quality of LPO might be whether the outside organization is a law firm in its own right or only an

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129. *Prudential Equity Grp., LLC v. Ajamie*, 538 F. Supp. 2d 605, 607–08 (S.D.N.Y. 2008); *Colmar, Ltd. v. Fremantlemedia N. Am., Inc.*, 801 N.E.2d 1017, 1022 (Ill. App. Ct. 2003); see *In re Town of Little Compton*, No. 2011-101-M.P., 2012 WL 424385 (R.I. Feb. 9, 2012) (holding that a nonlawyer had not engaged in unauthorized law practice by representing a union at a labor arbitration).

130. Donna M. Bates, *A Consumer’s Dream or Pandora’s Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 *FORDHAM INT’L L.J.* 823, 857 n.132 (2004).

131. The subject has attracted wide attention. *E.g.*, Heather Timmons, *Due Diligence from Afar*, *N.Y. TIMES*, Aug. 5, 2010, at B1; *Passage to India: The Growth of Legal Outsourcing*, *ECONOMIST*, June 28, 2010, at 69. The number of organizations offering outsourcing services is large in the United States and abroad, numbering 140 at the end of 2009. Timmons, *supra*. Revenue is predicted “to grow to \$440 million” in 2010, “up 38 percent from 2008, and should surpass \$1 billion by 2014,” according to Valuenotes, an Indian consultancy. *Id.* While the bar attempts to identify the precautions required of a lawyer who employs an LPO on behalf of clients, see, for example, ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 451 (2008), there seems to be no plausible claim that outsourcing is categorically forbidden.

132. See, *e.g.*, ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 398 (1995) (allowing a firm to give outside service providers access to the firm’s database).

organization whose work supports the work that a law firm is doing for the ultimate client.

But what if the LPO entity is not a law firm but the work requires or benefits from some discretion and legal training? What if it is work that law firms (or corporate law offices) have traditionally performed for a client in-house, perhaps using paralegals or new associates? Before it became feasible and economical to send LPO work abroad, the closest that U.S. firms came (and still come) to domestic outsourcing of law-related work was the use of contract lawyers, who may be supplied by a temporary employment agency.<sup>133</sup> These were lawyers whom the firm might not hire as full-time employees or who did not want a full-time job (for example, a person who is a new parent, easing into retirement, or writing a screenplay). Contracting with them on a project basis avoided expanding permanent staff and could make the project cheaper, which appealed to the client. The firm, meanwhile, could still mark up the cost and earn a profit on their time just as it profited from associate time.<sup>134</sup> The challenging question that once surrounded contract or temporary lawyers concerned conflicts: Do the same imputation rules that apply to traditional firm lawyers also apply to temporary lawyers, who move from firm to firm, possibly monthly? If so, the temporary lawyer industry could be seriously curtailed, though not shut down. As it happens, after some uncertainty, the answer has been no, as hereafter explained.<sup>135</sup>

Should foreign outsourcing be any different from domestic outsourcing? True, the work travels across an international border, whereas the contract lawyer may work on the firm's premises or in a domestic venue leased just for them. Should that matter? Surely the fact that money that once went into the pockets of U.S. lawyers and work that earned markup profits for partners of U.S. firms are diverted abroad does not raise *ethical* issues.<sup>136</sup> The point for now is that the profession has not fussed as much over the dangers of and proper constraints on

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133. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 356 (1988).

134. *Id.*

135. See *infra* text accompanying notes 143–146.

136. The ABA and the New York City Bar Association agree that if the outsource charge is passed to the client as a disbursement, there can be no markup, but the firm can bill for its actual costs and reasonable overhead, if any. There are not likely to be overhead costs if the work is done abroad. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 451 (2008); N.Y.C. Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 3 (2006). The ABA opinion, however, seems to envision that the firm may earn a profit on the outsourced work if the charge is not presented as a disbursement. This is not likely to be consequential. Clients that require and agree to outsourcing are probably looking to save money and will insist that the charges be presented without addition, except for the oversight work of the firm. What is quite clear is that outsourcing redirects a substantial income stream from traditional law firms to service providers elsewhere. See, e.g., Stephanie Francis Ward, *Leah Cooper: Passage to India*, ABA J. LEGAL REBELS (Oct. 13, 2009, 9:00 AM), [http://www.abajournal.com/legalrebels/article/leah\\_cooper](http://www.abajournal.com/legalrebels/article/leah_cooper) (reporting that between May and October 2009, outsourcing had saved the Rio Tinto Group "more than \$4 million in legal fees").



domestic outsourcing as it has over foreign outsourcing, as evidenced by articles and bar opinions.<sup>137</sup>

Today, it appears likely, although we are still in the formative period, that foreign outsourcing will survive ethical hurdles that may yet be put before it. Indeed, no serious claim has been leveled that outsourcing, whether domestic or foreign, is inherently unethical. The focus has been on *how* it is done.<sup>138</sup> Insofar as outsourcing remains a matter of professional attention, it will be in part because the outsourced tasks are becoming more sophisticated and therefore more threatening to the domestic legal market and because of growth in the industry. Instead of reading documents on a screen to decide if they fall within one of two or three defined categories and must be produced in discovery—an early outsourced service—we may be moving toward what might be called knowledge outsourcing. The LPO entity abroad is doing work closer to the core lawyering tasks of domestic lawyers, thereby greatly expanding the potential for lost work and income, at least for some legal specialties and more prominently for younger lawyers. The trend can only increase. Labor costs can be much lower abroad where there are legally trained (or trainable) people capable of doing increasingly sophisticated work.<sup>139</sup> Many may have studied in United States or other common-law schools and some may be members of a U.S. bar.<sup>140</sup>

In outsourcing, there remains a U.S. lawyer between the client and the workers abroad—presumably reviewing and accepting responsibility for the work. But outsourcing also entails law without lawyers. What we recognize as a legal service—a description that will become increasingly accurate as the outsourced work becomes more specialized—will be

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137. See *supra* note 136; see also ABA Comm. on Ethics 20/20, *Sample Bibliography*, ABA, [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/ethics\\_2020/outsourcing\\_bibliography\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/outsourcing_bibliography_authcheckdam.pdf) (last visited Mar. 17, 2012).

138. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 451 (2008). Opinions like this one address protection of client confidences, the duty of competence and diligence in selecting the outsource provider, conflicts of interest, aiding unauthorized law practice, and how the cost may be passed on to the client.

139. The size and growth of the industry is illustrated in the submissions to the ABA Commission on Ethics 20/20. See ABA Comm. on Ethics 20/20, *Legal Process Outsourcing Comments & Summaries*, ABA, [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/ethics\\_2020/outsourcing\\_comments\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/outsourcing_comments_authcheckdam.pdf) (last visited Mar. 17, 2012). Pangea3, one of the largest companies in the industry and owned by Thomson Reuters, offers legal research, contract drafting and revision, and e-discovery review, among other services. *Solutions*, PANGA3, <http://www.pangea3.com/legal-outsourcing-services.html> (last visited Mar. 17, 2012).

140. In 2010, 4596 foreign educated lawyers took the New York bar examination. A total of 5761 such lawyers took an American bar examination. *Persons Taking and Passing the 2010 Bar Examination by Source of Legal Education*, BAR EXAMINER, Mar. 2011, at 10, 11 [hereinafter *2010 Statistics*]. Because of the bar admission requirements in New York and elsewhere, the great majority of these applicants have an American J.D. or LL.M., a degree from a common-law school, or both. For conditions for foreign-educated lawyers to take the New York and California bar examinations, see *infra* text accompanying notes 235–253.

performed by workers who are not admitted to a U.S. bar or any bar; or, if some are lawyers somewhere, the organization they work for may not be a law firm. The U.S. lawyer intermediary cannot review all of their work, otherwise the outsourcing would save no money and might as well be done by a lawyer at home.

Foreign LPO is not merely an interesting development made possible by the ease of sending documents abroad instantly (and perhaps having the work done during America's night). It is a big business.<sup>141</sup> But it eliminates local jobs. Money that clients of U.S. firms save is money U.S. lawyers do not earn. Lawyers have now joined other providers of goods and services in seeing their work done more cheaply abroad. Like computers, televisions, and cars, law is a product produced elsewhere and exported to the United States (if only as "parts" of the final product). If the ability is there and the price differential remains large, the amount and sophistication of the redirected work will continue to grow.

Recently, we have seen examples of domestic outsourcing of legal work to an entity that is not a law firm but that hires lawyers to handle the work.<sup>142</sup> This reversal of work back to the United States may have been encouraged by creation of excess legal talent in a contracting market for firm lawyers. A domestic LPO may have the further advantage of a staff of admitted American lawyers and whatever comfort to clients that keeping the work in-country affords. It is too soon to say whether the reverse trend will continue if law firm hiring returns to earlier levels or if the cost differences are large.

### C. LAW WITHOUT LAW FIRMS

#### 1. *Nonconventional Firms*

Just as a labyrinth of rules governs who can be a lawyer "in" a place, another set of rules defines the practice settings in which lawyers may work. Three settings dominate: private law offices, counsel offices of private for-profit and nonprofit organizations, and government. (Public interest law firms will fall within the second category.) But a fourth player may be on the horizon, fostered by other developments discussed here, especially technology.

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141. See *supra* note 131.

142. See Heather Timmons, *Where Lawyers Find Work*, N.Y. TIMES, June 3, 2011, at B1. Pillsbury Winthrop has chosen to keep its outsourcing not only in the U.S. but also in-house. *Law Firm Service Center in Nashville Could Employ 150*, TENNESSEAN (Oct. 18, 2011), [http://www.nashvillechamber.com/Homepage/NewsEvents/News/11-10-18/Law\\_firm\\_service\\_center\\_in\\_Nashville\\_could\\_employ\\_150.aspx](http://www.nashvillechamber.com/Homepage/NewsEvents/News/11-10-18/Law_firm_service_center_in_Nashville_could_employ_150.aspx). The firm reported that the internal service center "will provide back-office services such as information technology, finance, client intake, word processing and other non-legal professional services for [the firm's] 14 offices worldwide." *Id.*

As introduced in the outsourcing discussion above,<sup>143</sup> in the 1980s, bar ethics committees were asked to address the growing phenomenon of temporary lawyers, now sometimes called contract lawyers. These were individuals admitted to the bar and hired to work on discrete matters for a limited period of time. A firm may have a large antitrust case and need many lawyers to sift through documents, but when the case or the discovery has ended, the lawyers will no longer be needed. The firm does not want to increase permanent staff. Of course, such an arrangement presents no problem whether the lawyers are hired temporarily or retained as independent contractors. However, because these lawyers often work through employment agencies that receive payment, one question was whether the agency's fee would violate the rule against splitting a legal fee with a nonlawyer. A law firm might sometimes pay the agency the full amount due the lawyer for each week of work, and the agency would then subtract its fee and send the lawyer the balance. Bar groups concluded that the arrangement did not violate the rule against splitting fees with nonlawyers.<sup>144</sup>

The more challenging question concerned conflicts of interest. If a temporary lawyer has worked at a law firm representing party A in the matter of A v. B, could she then work for the law firm that represented party B, even if she is hired to work on a completely unrelated matter involving different parties? At the time (and still), a significant number of U.S. jurisdictions did not recognize screening of lateral lawyers to avoid imputation of conflicts or did (and do) so only in limited circumstances.<sup>145</sup> So if our lawyer had been a permanent employee of the firm representing party A and then moved to the firm representing party B, the rules in these jurisdictions would impute the lawyer's conflict to the second firm's lawyers, who could not then continue to represent party B without informed client consent. That in turn meant that the lawyer might not get an offer from the second firm as long as the A v. B matter was pending. While such a disability might be inconvenient for permanent employees, if applied to temporary lawyers, whose professional lives are characterized by frequent migration between firms, it would seriously limit their capacity to work and the business of the agencies that supplied them. Eventually, bar ethics committees concluded that the lateral temporary lawyer could be screened even if the lateral permanent employee could not be screened.<sup>146</sup>

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143. See *supra* text accompanying notes 133–135.

144. See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 356, at 47 (1988); N.Y.C. Bar Ass'n Comm. on Prof'l & Judicial Ethics, Formal Op. 2 (1989).

145. As of 2011, the rules of twenty-four U.S. jurisdictions recognized screening of lateral lawyers moving from private practice to avoid conflict imputation at least in some circumstances. ABA, LATERAL LAWYER SCREENING STATUS (Jan. 11, 2011).

146. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 356, at 41 (1988).

It could have ended there. But then an associate at a large New York firm realized that the doctrinal authority for temporary lawyers and the agencies that furnish them could also support assembly of *teams* of specialists, not merely individual lawyers to perform low discretionary work.<sup>147</sup> That associate created a company called Axiom, where such teams are available to work on particular assignments requiring greater skill and knowledge than generally required of contract lawyers. The teams can disband when their assignments end. Team members might then recombine, possibly with other lawyers, for a new assignment and so on. Each project can attract its own team depending on availability and expertise. Formally, each of the assembled lawyers is an Axiom employee working for a client on a temporary or contract basis. Members of the team do not have a formal relationship with each other. They do not comprise a law firm. But in reality, they will be chosen for their complementary skills. The work they do is more sophisticated than was true in the early days of temporary lawyer agencies and still true for many contract lawyers today.

The rules governing lawyers say that only lawyers may have an equity interest or management authority in for-profit firms.<sup>148</sup> The prohibition is justified on a questionable but durable assumption. If powerful nonlawyers in law firms are positioned to influence the compensation and status of firm lawyers, they may cause the lawyers to violate ethical obligations if they believe that doing so will enhance the finances of the firm and therefore their own. Unlike lawyers, the nonlawyers are not governed by legal ethics rules, do not have to worry about professional discipline, and might be quite willing to violate duties to clients, courts, or others in order to enrich themselves, or so it has been explained. This danger is seen as so great that it has been deemed necessary to categorically ban nonlawyers from any financial interest in law firms no matter what steps might be taken to ensure good conduct.<sup>149</sup>

Axiom owes its existence to these early bar association opinions on temporary lawyers.<sup>150</sup> It is not a law firm and would not dare call itself a law firm, although it is often described as such in press stories, some of

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147. The following information about Axiom and its origins is drawn from my conversations on August 17, 2011, and October 28, 2011, with Mark Harris, one of its founders. For a description of Axiom's work and how it describes itself, see the company's website. AXIOM LAW, [www.axiomlaw.com](http://www.axiomlaw.com) (last visited Mar. 17, 2012).

148. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2010).

149. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 10 cmt. b (2000). How this exclusion squares with the fact that nonlawyers are trusted to behave in other important areas of life, including on corporate boards and heads of powerful organizations, is hard to explain. It is equally hard to understand how, in light of this policy, we can tolerate lawyers working in-house for corporate clients where the lawyer's job and her conditions of employment are at the mercy of the company's control persons.

150. See *supra* text accompanying note 147.

which are reproduced on its website.<sup>151</sup> One advantage of not being a law firm is that Axiom can be owned and managed by nonlawyers. That means it can raise money in the capital markets, which law firms cannot do.<sup>152</sup> To an outsider, Axiom looks like a law firm, and it does not seek to dispel that impression. Its website, despite avoidance of the term “law firm” in its own voice, conveys the impression that it is a law firm, including by reproducing news stories so labeling it.<sup>153</sup> So it has the best of two worlds. It manages to present itself as a law firm—now with a staff of 700 in eleven offices globally—while also enjoying the capital formation options available to for-profit enterprises. And by virtue of the temporary agency ethics opinions, its lawyers are able to form and disband teams unencumbered by the conflict rules that can hamper movement of traditional lawyers.<sup>154</sup> Nor is Axiom beholden to a jurisdiction’s rules on lawyer advertising, although its lawyers are.<sup>155</sup>

The doctrinal underpinnings for Axiom’s business model likely would not have been sufficient to sustain it at its present size were it not for technology and the insignificance of place that technology makes possible. That is, in the pre-Internet era, Axiom lawyers might have needed temporarily to relocate physically to do a job efficiently, creating unauthorized practice risks. For some, that need likely would have precluded the arrangement or been personally disruptive. While that could still be so for some projects, technology means that a “temporary” or project-based law firm need not exist in physical space.

It is too soon to know if Axiom itself will survive or grow. But the business model has appeal.<sup>156</sup> It offers “money people” a way to invest in the law industry. For lawyers, work via Axiom is not necessarily a full time job. This can be attractive to lawyers who need or want flexible schedules because of other work (or creative endeavors) or demands on

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151. See, e.g., Steven T. Taylor, *Tomorrow: A Sneak Preview: For These Firms the Future Is Now*, L. PRACTICE, Jan.–Feb. 2010, at 38 (“In 2000 Harris and an entrepreneur friend, Alec Guettel, co-founded Axiom Law—a very different *law firm* with a very different business model.” (emphasis added)).

152. MODEL RULES OF PROFESSIONAL CONDUCT R. 5.4 (2010).

153. See *supra* note 151.

154. See *supra* text accompanying note 147.

155. See MODEL RULES OF PROF'L CONDUCT R. 7.1–7.5 (2010).

156. Other startups also have identified ways to bring investor capital to the legal services market. See, e.g., Jonathan O'Connell, *Outside GC Joins Rush to Offer Discount Legal Services in Washington*, WASH. POST (May 22, 2011), [http://www.washingtonpost.com/business/capitalbusiness/outside-gc-joins-rush-to-offer-discount-legal-services-in-washington/2011/05/19/AF4MWF9G\\_story.html](http://www.washingtonpost.com/business/capitalbusiness/outside-gc-joins-rush-to-offer-discount-legal-services-in-washington/2011/05/19/AF4MWF9G_story.html); Jonathan O'Connell, *New Washington Law Firm Looks to Break the Billable-Hour Mold*, WASH. POST, (May 8, 2011), [http://www.washingtonpost.com/business/capitalbusiness/new-washington-law-firm-looks-to-break-the-billable-hour-mold/2011/05/05/AFY14sRG\\_story.html](http://www.washingtonpost.com/business/capitalbusiness/new-washington-law-firm-looks-to-break-the-billable-hour-mold/2011/05/05/AFY14sRG_story.html) (reporting on Clearspire Law, PLLC). One challenge to this model is that the availability of work depends on the volume and type of assignments to the company. A law firm may carry lawyers whose skills are not in high demand at the moment, but companies like Axiom pay for actual work, which means the work has to be there.

their time (for instance, caring for children) or because they are semiretired or between jobs.

## 2. *Reverse Publishers*

In 1994, a young lawyer named Dov Seidman formed Legal Research Network (today called LRN),<sup>157</sup> which offered a way for clients to save money on legal research. Not only would outsourcing the research to LRN be cheaper than paying law firm rates, but the work might then be shared with other paying clients, reducing the cost to each.<sup>158</sup>

Say a client wants a memorandum on one of the following subjects in multiple jurisdictions: Can an employer choose to exclude smokers and enforce the ban with testing? What are the limits on expiration of gift certificates? What are the federal and state laws concerning the sale of leads collected on a website? These are generic questions but focused on specific conduct. A client can ask a law firm to do the research, pay for it, and own it. That indeed was the traditional method. Put aside whether the firm can resell the same research to another client (and at what price). If the question is not too specialized, it is certainly possible that another company will pose it to a different law firm and then pay for the same research. Alternatively, another company might not be willing to commission the work elsewhere but would be happy to pay for a copy of the original memorandum at a reduced cost. And the first client might be willing to allow that if it meant a lower price and if the work was stripped of confidential information.

At one time, LRN's website identified each of the research topics just discussed as the subject of an actual client memorandum. The company no longer appears to offer legal research services—and the website no longer contains these examples—but other companies do the same work and also identify sharing as a way to reduce cost.<sup>159</sup> Think of this as reverse publishing. While a traditional publisher will print a

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157. LRN, <http://www.lrn.com> (last visited Mar. 17, 2012). Today, LRN's website offers ethics and compliance training for companies. *How We Help Organizations: Building Culture from the Ground Up*, LRN, <http://www.lrn.com/how-we-help-organizations/lrn-communication-education> (last visited Mar. 17, 2012).

158. D.M. Osborne, *Should You Be Afraid of This Man?*, AM. LAWYER, June 1995, at 111. This article, a profile of Seidman and his then-fledgling company, also describes its plan for "repackaging research and selling it in what Seidman terms the aftermarket. Thus future sales of memos—or portions of memos—can make up for the loss leaders of today." *Id.*

159. Legal Research Center offers to sell "existing multijurisdictional surveys in our growing library." *Multijurisdictional Surveys*, LEGAL RES. CENTER, <http://www.legalresearch.com/services-and-products/research-and-writing/multijurisdictional-surveys.aspx> (last visited Mar. 17, 2012). National Legal Research Group, Inc., offers "legal research white papers" for purchase. *Purchase Legal Research White Papers*, NAT'L LEGAL RES. GROUP, <http://www.nlrg.com/legal-content/legal-whitepapers-for-purchase/> (last visited Mar. 17, 2012). One paper, which costs \$50, is entitled *Employer and Law Firm Website Liability*, NAT'L LEGAL RES. GROUP, <http://www.nlrg.com/legal-content/employer-and-law-firm-website-liability/> (last visited Mar. 17, 2012).

number of books and hope for enough buyers to pay production costs and a profit, reverse publishers do the opposite. The first client to authorize the work may be willing to let the reverse publisher promote its resale (without revealing the identity of the client) on an as-ordered basis. The charge to the client likely will be lower than if it requested the same research from a traditional law firm for its exclusive use, both because the research costs can be lower and because the reverse publisher may be able to amortize that cost among other prospective buyers. (It will have to estimate how many those may be.) When an order comes in, a reverse publisher can ask an expert to do the research on a freelance basis, or it can use its own staff. For this to work, the questions cannot be too specialized. The reverse publisher can keep the memorandum on file for years and update it as needed in response to new requests. It can even encourage additional buyers and print copies to order.

Now, a reverse publisher need not be a law firm. But when it answers questions like those cited here, it is selling legal knowledge as conventionally understood. It can avoid the rigors of unauthorized practice rules if it does not apply the fruits of its research to the particular facts confronting the client.<sup>160</sup> The memorandum, though made to order, is like a book—a very specialized book—but not law practice. Law firms and corporate legal departments may use these research companies to save money. And because a reverse publisher is not a law firm, it can seek lay investors and have nonlawyer managers.

And yet we cannot ignore the fact that this nonlaw firm has created a supply chain that provides legal advice. The authors of the research memoranda are unlikely to be lawyers in the jurisdiction in which the ultimate clients reside. They are selling their legal skills to an entity in the form of a product and the firm then sells that product in the form of a memorandum to clients, most likely through the clients' lawyers. If the authors sold the same memorandum to the ultimate recipient directly, they would risk a charge of unauthorized law practice.<sup>161</sup> But because of the intermediaries between the creator and final user of the work, and because the memoranda answer generic (but nonetheless focused) questions, somehow, magically, rules governing lawyers and law practice are not a threat. Care must be taken not to make the question too specific to the situation of the client in order to avoid any claim that the

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160. It also avoids the risk of unauthorized practice of law if it funnels its research through the client's law firm or general counsel's office. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 451 (2008) (noting that a lawyer's supervision of outsourced work will avoid an unauthorized law practice claim).

161. *See* *Crain v. Unauthorized Practice of Law Comm.*, 11 S.W.3d 328, 333 (Tex. App. 1999) ("The practice of law embraces, in general, all advice to clients and all action taken for them in matters connected with the law.").

intermediary is practicing law (or that the researchers are in law practice with nonlawyers). But a reverse publisher has the same interest. If the question is too specific it will be of interest to only one buyer and the economies of scale that inspire this business and make it efficient and profitable will be lost.

If an organization can be a back-office legal research arm of an in-house corporate law department or a law firm, and I can see no rule that prevents it, then legal research can also be outsourced abroad. We can imagine a new generation of LPO organizations.<sup>162</sup> There is no need for the entity or the researchers to be in the United States or for the researchers to be U.S. lawyers. The researchers need not be lawyers at all if the market will accept them. This is certainly true if the organization is working through a lawyer intermediary who at least nominally is supervising (taking responsibility for) the work; and it is probably true—at least if the assignment is general enough—even if the organization is working directly for the ultimate user. If the researcher is located abroad, there is little or nothing a U.S. court can do to stop her in any event although it might have jurisdiction over the company for which she works. The market will identify whether it has confidence in the quality of the work, which encourages legal research organizations, whether domestic or foreign, to use credentialed researchers.<sup>163</sup>

### 3. *Multidisciplinary Practice*

In the space where lawyers and nonlawyers may do the same things, lawyers have the option of taking their work out of a law firm and relocating it in a different setting. Tax lawyers have long been willing, if the incentives are strong, to take their skills to accounting firms.<sup>164</sup> These

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162. And indeed, LPOs have moved into the field of legal research. *See supra* text accompanying notes 138–139; *see also Legal Research and Drafting*, INTEGREON, (Jan. 23, 2012), <http://www.integreon.com/solutions/legal-solutions/legal-research-drafting.html>. Integreon, an LPO, offers legal research services, describing the work this way:

Working with Integreon's onshore or offshore lawyers, you can accelerate legal research and even reduce costs up to 50% by using offshore resources. By integrating a dedicated Integreon legal research team into your corporate legal department or as an extension of your firm, you benefit from a truly global legal talent pool spread across four continents.

Our onshore research specialists have a range of domain experience and excellent online research skills. Our dedicated teams of offshore lawyers have work experience at law firms, in corporate legal departments, or in private practice in India, the Philippines, the U.S., and the U.K.

163. It bespeaks the fluid nature of the new categories of entities that deliver legal services that legal research companies can be viewed as nonlaw firms selling law or as LPOs providing research aid to an ultimate client through their lawyers. What puts some of these companies closer to the first category is the fact that the memoranda are written by lawyers and the fact that the memoranda need be absorbed into the work product of the lawyer who requests it but can themselves be an end product.

164. *See* Randall S. Thomas et al., *Megafirms*, 80 N.C. L. REV. 115, 171–79 (2001).



transplanted lawyers cannot hold themselves out as doing legal work—although they can truthfully identify their credentials, including their law degree and even bar membership<sup>165</sup>—and cannot represent clients in work that only lawyers can do (because lawyers cannot sell legal services via for-profit vehicles that are not law firms<sup>166</sup>), but their legal training may provide a competitive advantage and support hourly rates equal to or greater than what they might have charged in law practice.<sup>167</sup>

What has worked in tax practice should work elsewhere. Take, for example, multidisciplinary practice. The ABA rejected a multidisciplinary practice proposal that would have allowed lawyers to invite nonlawyers to join law firms and offer its clients services in addition to legal services.<sup>168</sup> But nothing stops lawyers from joining entities that are not law firms and partnering with nonlawyers, so long as the service they offer is not within the lawyers' monopoly. One candidate for realignment may be compliance work.<sup>169</sup> This service looks a lot like law and may skirt closely to the lawyers' realm—after all, compliance with what?—but it is apparently sufficiently distinct to avoid claims of unauthorized practice.<sup>170</sup> Perhaps that is because defining a rule's requirements (which *is* legal work) is not the same as implementing the requirement (which is compliance).

Withal, whether it is the tax practitioner or some new hybrid service (part law, part not), the client is getting the benefit of a lawyer's training and judgment even if she does not call herself a lawyer and even if her organization is not a law firm. Not to be overlooked, however, is the fact that the work that flows to the organization might otherwise have gone to a traditional law firm.

#### D. THE LAW OF ANYPLACE

This Subpart differs from the earlier discussions of lawyers without borders.<sup>171</sup> That discussion posited that the physical location of the lawyer has receded (not disappeared) as a useful basis for regulation. Here I

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165. See *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 139 (1994) (holding that a lawyer has a First Amendment right to refer in her advertising to her certification as a financial planner and public accountant).

166. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 5.4 (2010) (forbidding lawyers to join in a partnership or practice in a professional corporation that practices law if a nonlawyer is a partner or has an ownership interest in the corporation).

167. Lawyers who are not in law practice are not subject to the limitations the ethics rules impose on legal fees. See MODEL RULES OF PROF'L CONDUCT R. 1.5 (2010).

168. See Paul D. Paton, *Multidisciplinary Practice Redux: Globalization, Core Values, and Reviving the MDP Debate in America*, 78 *FORDHAM L. REV.* 2193, 2203 (2010).

169. See Tanina Rostain, *The Emergence of "Law Consultants"*, 75 *FORDHAM L. REV.* 1397, 1397–1400 (2006).

170. See *id.* at 1407–11.

171. See *supra* text accompanying notes 79–110.

propose that the governing law also has receded as a useful basis for regulation. The two predicates—law and place—are distinct. The lawyer may be in a virtual place, which means the lawyer can be anywhere physically. Separately, the law that informs the lawyer's work may have no connection to the place where the lawyer is. Of course, law, like place, remains a factor in lawyer regulation. A lawyer has to be some place, and the law of a place (though not the place the lawyer is), must be an ingredient in the legal service to which the lawyer's work contributes. The premise, however, is that what the law is, like where the lawyer's place is, has declining utility to the goals of regulation, including licensure.

Three interrelated developments have diminished the importance of home-state law in the inventory of many lawyers and have thereby contributed to the fading of the law of a place, along with the fading of place itself, as a useful and effective organizing principle for regulation of the bar. These developments are: (1) increasing homogeneity and accessibility of law, (2) increasing lawyer specialization, and (3) the long-standing ability of contracting parties to choose what law will govern their agreement, the identity and nature of the tribunal that will resolve any disputes under it, and the location of that tribunal. To appreciate the import of these factors, we have to go back some decades.

Recall that before the present day (and still), we allowed lawyers from anywhere to try a case anywhere through the vehicle of *pro hac vice* admission.<sup>172</sup> Not all courts were equally inviting<sup>173</sup>—with some state courts, and most federal courts especially, generally willing to admit lawyers *pro hac vice*<sup>174</sup>—but over time *pro hac vice* admission became increasingly available as a matter of grace if not as a matter of right. Admission for the trial of a case is an early example of cross-border practice authority. Under the ABA Model Rule on *Pro Hac Vice* Admission, a *pro hac vice* applicant must satisfy certain criteria, including familiarity with local court rules, and may need a home-state minder, a local lawyer willing to accept responsibility for and to join in the work of the applicant.<sup>175</sup> It was no impediment that the issues before the host tribunal did not arise under the law of the lawyer's home state. Whatever the governing law, which need not be the host-state law, the lawyer would need to know it, just as she would need to know local

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172. See MODEL RULE ON PRO HAC VICE ADMISSION (2002). Every American state and the District of Columbia has a *pro hac vice* rule, which vary in liberality. See ABA, PRO HAC VICE ADMISSION RULES (2011).

173. See *Leis v. Flynt*, 439 U.S. 438, 438 (1978) (upholding Ohio's refusal to admit New York lawyers to defend a criminal case in Ohio).

174. See *Fuller v. Diesslin*, 868 F.2d 604, 605 (3d Cir. 1989). In criminal cases, some courts have ruled that a defendant has a constitutional right to employ an out-of-state lawyer. See *United States v. Garrett*, 179 F.3d 1143, 1147 (9th Cir. 1999).

175. See MODEL RULE ON PRO HAC VICE ADMISSION (2002).

procedure. The pro hac vice regime treats the lawyer's trial skills and the client's interest in counsel of choice as deserving great respect with little need formally to test the lawyer's knowledge of substantive law or procedural law of the host jurisdiction. After all, even in the lawyer's home state, a case may turn on the law of another jurisdiction and yet no one doubted the right of an admitted lawyer to try a case in her home state. The host-state litigation could be quite significant—a serious, even a capital, felony. Public interest also favors the practice.<sup>176</sup> The nation has looked to the availability of out-of-state lawyers as an antidote to local hostility to a cause or party, as was true during the civil rights era of the 1960s.<sup>177</sup>

Pro hac vice admission means we have long had a high comfort level with a lawyer's cross-border practice in host-state forums and with non-home-state law. But it was limited to trial work and appeals (and work ancillary to a pending court proceeding) and presumed the presence of an adversary, usually a local lawyer as co-counsel, and a judge, all of whom could guard against a guest lawyer's misbehavior or ignorance.

Initially pushing the boundaries of this comfort level were out-of-state lawyers who entered a host jurisdiction in connection with work for which no pro hac vice authority was available. That work included all transactional work and work in anticipation of litigation not yet pending (and which might never be filed in the host state or anywhere), work in connection with litigation pending elsewhere, work of lawyers who were assisting a lawyer admitted pro hac vice, and (as in *Birbrower*) work in connection with arbitration or other noncourt tribunals that lacked the power to grant pro hac vice status. In each instance, an out-of-state lawyer is in a host state, acting as a lawyer, in connection with work where the governing law may be host-state law, home-state law, or the law of a third place. So we have temporary presence for a matter but without judicial approval. For a long time, this temporary cross-border practice lacked any official status beyond the occasional court opinion seeking to define its limits in a particular setting.<sup>178</sup> ABA Model Rule of Professional Conduct 5.5, adopted in some form in many jurisdictions, has now recognized what had been happening anyway and, in a national

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176. See *Flynt*, 439 U.S. at 450 (Stevens, J., dissenting) (identifying times in American history that the availability of out-of-state lawyers has served important values). After Hurricane Katrina hit New Orleans, the ABA adopted a model rule that enables out-of-state lawyers to come to the site of a disaster to help with legal needs pro bono without running afoul of unauthorized practice rules. The rule also allows lawyers whose practices have been disrupted by the disaster to enter other states to continue their practices during the pendency of the disaster. See MODEL COURT RULE ON PROVISION OF LEGAL SERVS. FOLLOWING DETERMINATION OF MAJOR DISASTER (2007).

177. See *Sobol v. Perez*, 289 F. Supp. 392, 395 (E.D. La. 1968).

178. See *El Gemayel v. Seaman*, 533 N.E.2d 245, 249 (N.Y. 1988) (exemplifying a court's effort to define the scope of extraterritorial practice).

economy, would continue to happen beyond the power of any state to impede it.<sup>179</sup> The question is whether Rule 5.5 is too restrictive.

Restriction of practice to locally admitted lawyers makes most sense when the licensing jurisdiction can plausibly differentiate its law from the law elsewhere. A purpose of licensing is to ensure competence in the law of the place. If the law were the same nationwide, as federal law is, then competence one place should be transferable to all places. But if a jurisdiction's law is special, it can claim that competence elsewhere proves little or nothing. Knowing the rules for estate planning or the statute of frauds in State A doesn't mean you know these things in State B (although, of course, you could look it up).

That claim has diminishing weight today for interlocking reasons that subordinate the importance of knowledge of local law as a basis for regulation. Federal courts will admit lawyers who are not lawyers in the states in which they sit.<sup>180</sup> That in turn raises the fascinating, but so far mainly theoretical, question: Can a state prevent an unadmitted lawyer from opening an office—an announced physical presence—in the state if her practice is limited to work in a local federal court in which she is admitted, at least when the federal court has adopted a rule permitting it? A negative answer, perhaps based on the Supremacy Clause or other constitutional provision, will put a big dent in state authority physically to exclude lawyers not licensed by the state. The little existing authority on this point suggests the answer is that a state may be powerless to prevent the conduct if federal courts wish to allow it.<sup>181</sup>

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179. The rule permits temporary practice in a “host” state under four circumstances:

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
- (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
- (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
- (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

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

180. *See, e.g.*, N. DIST. ILL. R. 83.10 (“An applicant for admission to the bar of this Court must be a member in good standing of the bar of the highest court of any state of the United States or of the District of Columbia.”).

181. *See, e.g.*, *Surrick v. Killion*, 449 F.3d 520, 533 (3rd Cir. 2006) (holding that a Pennsylvania lawyer suspended by state courts could continue to maintain an office in the state for the purpose of practicing in federal court, where he was not suspended); *In re Desilets*, 291 F.3d 925, 931 (6th Cir.

Beyond uniform federal law is the perception that in many areas, the laws of the states are increasingly alike. While the trend may be near impossible to measure with precision, causes of the convergence may lie in uniform state law efforts, the influence of American Legal Institute's Restatements, and the fact that electronic research has given advocates and judges easy access to decisions of all U.S. jurisdictions. True, some local variations resist the tendency toward homogenization. These may include land transfers, local tax law, and family law. Procedural law and rules of evidence may also vary, but less than one might think given the influence of the federal rules of procedure and the federal rules of evidence.<sup>182</sup> In any event, the importance of procedural and evidentiary differences has already been fully discounted by acceptance of *pro hac vice* admission to try a case. Trials are where procedure and evidence rules do their work. Further, variations in local law are easily located through electronic research. Even where a jurisdiction can claim that its rule on a topic is unusual—say, when an anticipatory breach of contract will excuse performance or the implied obligations of a commercial lessor to provide a particular service—the difference can be easily discovered, especially by a lawyer who concentrates in that area of law. The fact that technology, as earlier discussed, makes the law of nearly any place available anywhere without need for a brick and mortar law library, enhances the ability of a specialist to quickly identify jurisdictional variations in the law of her specialty.

Specialization in legal fields is a complement to the movement toward conformity of law. It should be self-evident that a UCC expert in Ohio will know more about the UCC in Indiana than will the products liability expert in Indiana, who in turn will know more about products liability in Ohio than will the Ohio criminal defense lawyer. That is to say, each lawyer will be better able to get up to speed on (be competent in) the law in the other jurisdiction in her area of specialization than will the home-state lawyer with a different specialty. Specialists know what variations to look for, if any. I'm a dilettante in most legal fields but I know a lot about one field—the law and rules governing the legal profession. It is, I hope, not arrogance to think that I, a New York lawyer,

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2002) (holding that an attorney who was admitted to a federal district court in Michigan but not the state bar and who had an office in Michigan was not engaged in the unauthorized practice of law in Michigan and was entitled to fees from the Michigan bankruptcy court).

182. DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* 24 (2009) (“[M]ore than forty states have adopted state codes that are nearly identical—in language and numbering—to the Federal Rules.”); Jay Tidmarsh, *Procedure, Substance, and Erie*, 64 *VAND. L. REV.* 877, 922 n.181 (2011) (“[A]fter the enactment of the Federal Rules of Civil Procedure, many state courts adopted the Federal Rules nearly *in toto*, and the basic vision of the Federal Rules—liberal pleading, broad discovery, generous joinder, and so on—has exercised an influence even on those states that did not adopt the Rules.”).

am better able to advise a law firm in Virginia on issues in my field than are most Virginia lawyers, just as many Virginia lawyers are better able than am I to advise New Yorkers in other areas of New York law. Specialization overcompensates for deviations in local law. Of course, there are Virginia lawyers who are also expert in my field of concentration. A Virginia lawyer need not reach out to a New Yorker, but that will not always be true. A client in a small community may be unable to find a lawyer with a particular specialty in his city and may desire to consult one in a neighboring state. Or a Richmond law firm may not want a local lawyer to know too much about its business. Once, a lawyer's specialty was defined by the law of the state of admission—that is to say, by geography. You were a New York lawyer or a Texas lawyer and your specialty was New York or Texas law, or some part of it. My claim is that today specialization is increasingly defined by expertise in areas of law and that this development is marginalizing the utility of political and geographical boundaries as the exclusive or even the dominant basis for defining competence.

Beyond homogenization of local law and the leveling influence of specialization, a third factor diminishing the importance of knowledge of a particular jurisdiction's law as a basis for regulation is the nearly unlimited power of contracting parties to decide what law, if any, will govern their disputes and in what forum and at what location those disputes will be heard.<sup>183</sup> If the dispute will be heard in a noncourt tribunal, as with arbitration, the parties can say nothing about the governing law, designate a particular jurisdiction's law, authorize the arbitrator to choose the law, or even direct the arbitrator to rule as she deems fair,<sup>184</sup> which is about as far from our understanding of what law is as one can get without flipping a coin. An American company headquartered in Seattle and a German company headquartered in Frankfurt may contract for a project in China with disputes heard in arbitration in Singapore under the law of New York or general legal principles.

#### E. THE SUM OF THE PARTS

We can have law without either lawyers or law firms. On our laptops or in a "cloud," we can carry a vast law library and any documents we may require for our work. Even without a laptop, we can access the same material from anywhere in the world with an Internet connection and easily available programs. We can communicate from anyplace with anyone, anywhere, in text, video, or voice. Our physical location can be

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<sup>183</sup> 2 MARTIN DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* §§ 30:1–30:6 (2010).

<sup>184</sup> *Id.* §§ 30:1–30:2; *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 17 (Cal. 1998) (Kennard, J., dissenting).

hidden from, or in any event not revealed to, anyone, including courts, clients, adversaries, and regulators. Within modest limits we can agree to resolve disputes anywhere, before anyone we choose, under any law we select or no specified law. The law anywhere is growing closer to the law everywhere else, and federal law, increasingly prominent, is the same everywhere. The federal government and federal courts can override local control of law practice. Specialized knowledge will often define the borders of a lawyer's competence with greater assurance than will the geographical borders of his licensing jurisdiction. Lawyers who represent parties in arbitration are not, in the view of at least three courts, practicing law even though the arbitrator may be charged to apply the law of a particular place and her ruling will finally determine the legal rights of the parties. These things are true and, in ways we cannot fully predict, will become more pronounced in the years ahead as information technology becomes still more sophisticated, as national and international borders recede as impediments to commerce, and as geographical discrepancies in the cost of legal services and legal support services encourage the growth of new categories and sources of law workers and new businesses to house them. The traditional model of lawyer regulation cannot expect to police this new world. It can pretend to do so, and on rare occasions it will discover a miscreant and punish her as an example to others and thereby reaffirm its power and legitimacy in its own eyes. But it will become less effective than Prohibition-era law enforcement. Its power is ebbing. What, then, should enlightened regulators do, not because they legally must but because they should?

In answering that question, one argument must be immediately repudiated: that if we do anything that recognizes these changes, we afford a patina of legitimacy at the expense of the American legal profession's core values: confidentiality, loyalty, candor, and diligence. Not only is that claim false, I argue that the opposite is true. Doing nothing threatens these values because by ignoring the accelerating changes at play, we fail to regulate against the abuses these changes may bring, just as any economic activity is capable of causing both good and ill. To put it another way, the cry we must heed is not for less regulation of the profession, but rather for new regulation of the burgeoning ways that legal services are sold. That these changes bring with them new forms of competition with established distribution channels and the lawyers who populate them, and that they undoubtedly will lead to financial disappointment and professional dislocation for many lawyers while empowering others and offering possible benefits to clients in the form of lower costs and greater efficiency, seems indisputable. It is not a trend, I submit, that we can vote down. Indeed, insofar as the changes make legal services more accessible and affordable while protecting core values, our social responsibility requires us to welcome them. But if the

illusion that we can stop the changes leads to inaction, we do threaten the very core values we claim to protect.

#### IV. WHAT SHOULD WE DO? ELEVEN RECOMMENDATIONS FOR CHANGE (WITH QUALIFICATIONS)

Any proposals must address this question: Who will be allowed to participate in the law business, in what capacity, from where, and with what protections for clients, the justice system, and the profession's core values? The eleven recommendations that follow are offered as a way to start a conversation. None is inflexible.

##### A. CREATE A SINGLE BAR EXAMINATION WITH SEPARATE STATE SCORING<sup>185</sup>

Similarities in much of the law of U.S. jurisdictions make separate state bar examinations presumptively unnecessary. Indeed, for the reasons discussed,<sup>186</sup> it is far less important to identify knowledge of particular legal rules, or variations on them, among jurisdictions, than a knowledge of the legal concepts generally and demonstrated ability to work through legal and factual problems in a way we understand as “doing law” or “thinking like a lawyer.” Such knowledge can be tested without requiring the applicant to know any state's particular position on an issue. It is important to be able to identify issues latent in a fact pattern and to research their resolution under the law of the jurisdiction whose law applies (as well as to identify which jurisdiction's law applies). It tells us nothing useful about an applicant's qualification for the bar that she has (temporarily) memorized the particular way the testing jurisdiction has resolved one or another issue.

This proposal comes with three qualifications. First, different jurisdictions may wish to set different passing scores for the single bar examination I support. We know today that different states have different bar passage rates<sup>187</sup> and employ different scoring for multistate examinations now in use.<sup>188</sup> State A may want to set the admission bar higher than does State B. Below I will recommend national motion admission—a procedure that will allow a lawyer admitted in any U.S. jurisdiction to relocate her practice to another U.S. jurisdiction. However, I will recommend limitations on motion admission. We do not want to encourage applicants to take the examination in a state with a lower passing score on a uniform examination and then to seek immediately to convert their passage into admission in a state with the

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<sup>185</sup> Whether the examination is called a uniform bar examination or a national bar examination or something else is unimportant. The National Organization of Bar Counsel has chosen “uniform” apparently because it is more readily accepted.

<sup>186</sup> See *supra* text accompanying notes 45–55.

<sup>187</sup> See NAT'L CONFERENCE OF BAR EXAMINERS, 2009 STATISTICS (2010).

<sup>188</sup> *Id.*



higher score they failed to achieve. That would undermine the legitimate policy of the second state.

The second qualification on this proposal is to entertain the possibility that a state may have good reasons to test some aspects of its local law and wish to supplement the national bar examination by testing local law knowledge. Frankly, I doubt that any state, save perhaps Louisiana,<sup>189</sup> could justify a supplementary examination and I would be skeptical of any such claim. But I leave open the possibility. While a supplemental local law examination for new lawyers may be justified, I argue below that one would not be defensible for lawyers practicing for a stated period of time elsewhere and who wish to relocate.<sup>190</sup>

Last, every jurisdiction would have the right to conduct a character investigation of any applicant, whether a new lawyer or a relocating one.

#### B. PERMIT LAWYERS TO PHYSICALLY RELOCATE THEIR PRACTICE FROM ONE JURISDICTION TO ANOTHER WITHOUT RETAKING THE BAR EXAMINATION

Lawyers who have been in active practice for a period of years should be able to relocate their practices to any other U.S. jurisdiction without need to take a bar examination. This is now the rule in all but eleven U.S. jurisdictions.<sup>191</sup> The ABA Model Motion Admission Rule envisions a requirement of five years of active practice in the previous seven years.<sup>192</sup> A requirement of three of the last seven years would accommodate the demands of parenthood, for example, without threatening the goals of the rules. But whatever the temporal requirement, I urge the nationalization of this avenue of admission, as has occurred in Canada<sup>193</sup> and among nations in the European Union.<sup>194</sup> Lawyers who do not satisfy the temporal requirement should be permitted to relocate without taking a further bar examination if their score on the uniform bar examination is equal to or greater than the passing score for entering lawyers in the jurisdiction to which they wish to relocate. There would seem to be a strong constitutional claim to be able to do so.<sup>195</sup>

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189. Louisiana is “the only U.S. jurisdiction with a predominantly civil law tradition.” Gerald Korngold, *Globalizing Conservation Easements: Private Law Approaches for International Environmental Protection*, 28 WIS. INT’L L.J. 585, 620 (2011) (discussing the Louisiana Civil Code).

190. See *infra* text accompanying notes 191–196.

191. See *supra* note 54.

192. The ABA rule also permits tacking experience and has a generous definition of full time practice. See ABA Comm’n on Ethics 20/20, *Model Rule on Admission by Motion*, ABA, <http://www.americanbar.org/content/dam/aba/migrated/ethics2020/aomissuepaper.authcheckdam.pdf> (last visited Mar. 17, 2012).

193. See FED’N OF LAW SOCIETIES OF CAN., NATIONAL MOBILITY AGREEMENT (2002), available at [http://www.lawsociety.bc.ca/docs/becoming/mobility\\_agreement\\_aug02\[1\].pdf](http://www.lawsociety.bc.ca/docs/becoming/mobility_agreement_aug02[1].pdf).

194. The EU rule applies across nations with different legal systems, not merely within a single nation. See Christine R. Davis, *Approaching Reform: The Future of Multijurisdictional Practice in Today’s Legal Profession*, 29 FLA. ST. U. L. REV. 1339, 1357–59 (2002).

195. See Perlman, *supra* note 12, at 159.

A further examination of the relocating lawyer would be defensible in two circumstances: if the lawyer's scores on the uniform examination were lower than the new jurisdiction then demanded of new applicants, *unless* the lawyer satisfies the temporal requirements; or in the unlikely event that the new jurisdiction can justify supplementing the uniform examination with one testing local law for all applicants, as described earlier.<sup>196</sup>

C. PERMIT A LAWYER ADMITTED IN ANY U.S. JURISDICTION TO PRACTICE VIRTUALLY IN ANY OTHER JURISDICTION WITHIN THE SCOPE OF HER COMPETENCE

A dramatic consequence of the Internet is that law firms (like other businesses) can as a practical matter sell their services nationwide without leaving home. Virtual presence can be as or nearly as intrusive on a host jurisdiction as physical presence, which is to say that, from afar, a lawyer in any state can have a vibrant practice in any other state for certain kinds of work. Lawyers in cities near or on the border with an adjacent state are especially positioned to practice this way because if the need arises to consult with their clients in person, they can travel to the client or (if especially cautious) ask the client to come to them. Kansas City, Kansas, and Kansas City, Missouri, are prime examples. Others include Philadelphia, Boston, New York, Memphis, Portland, Omaha, Chicago, Fargo, and Washington, D.C. Where the need for in-person consultation is absent or limited, a lawyer's virtual practice can be national. Advertising on the Internet, which is cheap and ubiquitous, facilitates this business model for lawyers who can credibly claim a particular expertise that will appeal to clients elsewhere. Nor can we expect easily to be able to enforce rules forbidding attorney-client relationships in cyberspace. This is consensual activity often impelled by rational considerations on both sides. Unless lawyer and client have a falling out and the client wants to assert a claim of unauthorized practice to gain leverage in a fee dispute, the practice will defy detection. The Internet invites a market defined by reputation, price, and competence, not geography. A virtual market also undercuts the ability of states to use physical location as the basis for control.

I suggest that lawyers should be allowed to form attorney-client relationships on the Internet, subject to qualifications.<sup>197</sup> First, by entering a jurisdiction virtually, including through representation or solicitation of the jurisdiction's residents, a lawyer will subject herself to the disciplinary and judicial authority of the jurisdiction for claims arising

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196. *See supra* text accompanying notes 53–55.

197. It is easier to accept this proposal once we have accepted the recommendation for generous motion admission described above. *See supra* notes 191–96.

out of the lawyer's virtual presence there.<sup>198</sup> She may be deemed to have appointed an appropriate state officer as her agent for service of process. Second, the lawyer's home state should commit itself to accept any factual findings, legal (or ethical) conclusions, and sanctions imposed by the host state's disciplinary authorities, subject only to the usual limitations on full faith and credit owed judicial judgments of a sister state.<sup>199</sup> In this way, a lawyer cannot misbehave, confident that she can avoid a home-state sanction for her conduct. Third, any lawyer entering a host jurisdiction virtually must identify her jurisdictional limitations ("member of the bar of State A only") and the name and address of the regulatory authority in her home state to which complaints can be directed.

Finally, most challenging is the situation where the virtual presence is not casual and episodic but rather continuous and substantial, whether or not by design. I have in mind the possibility that a lawyer in State A will seek to expand her practice to attract clients in neighboring State B through advertising and solicitations aimed specifically at them. Or without intending it, a State A lawyer's virtual practice may become significantly populated with State B clients. Virtual presence can, past a point, be the functional equivalent of physical presence. We should not allow a lawyer physically to open a law practice in State B without formal admission of some kind.<sup>200</sup> When the lawyer's virtual practice in State B can be said, whether by design or happenstance, to equal physical presence, we should also require admission.<sup>201</sup> Of course, like much in law, the question will turn on degree.

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198. This is already anticipated in MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 4 (2010) and in MODEL RULES OF PROF'L CONDUCT R. 8.5(a). I address solicitation and advertising *infra* text accompanying notes 202–204.

199. The current ABA recommendation envisions something close to this regime, but has exceptions that should be narrowed. *See* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R.22 (2002). The host state cannot, of course, suspend or disbar the lawyer, but it can find that the same conduct would warrant either sanction if the lawyer were admitted in the host state, and such a finding should be recognized in the home state. The concern that out-of-state lawyers might meet harsher sanctions than in-state lawyers, a surmise at best, can be addressed in a defense to home-state enforcement.

200. It can be full admission by motion or after passing required examinations, or it can be admission through state B's in-house counsel rule. An in-house counsel rule allows an out-of-state lawyer to practice law from an office location within a state without having to gain admission to the state's bar, but limits the lawyer to work for her organizational employer and its affiliated companies and does not entitle the lawyer to appear in court. *See, e.g.*, N.Y. Ct. APP R. 522.1–522.7.

201. A lawyer who could gain permanent admission in State B through motion admission might prefer not to do so to avoid bar dues or State B's (possibly more demanding) CLE requirements. State B might also require lawyers admitted to its bar to have an office in the state, as some states already require, *see infra* text accompanying note 205, and the lawyer may not wish to open a second office. I suggest below that an office requirement as a condition of motion admission has little value. *See infra* text accompanying note 205.

D. TO ACCOMMODATE CROSS-BORDER LEGAL ADVERTISING, CREATE A UNIFORM RULE IDENTIFYING MINIMUM STANDARDS AND DISCLOSURE REQUIREMENTS

The advertising rules in U.S. jurisdictions are greatly dissimilar.<sup>202</sup> The need for uniformity in advertising rules is underscored by the national reach of legal ads, especially but not only on the Internet. It is neither practical nor necessary to require legal ads to conform to all state variations. The answer may be different for a solicitation targeted at specific potential clients. State rules can require that solicitations of state residents respect the state's solicitation rules, thereby treating out-of-state and in-state lawyers equally. So a rule that imposes a waiting period before contact with a prospective client with a personal injury claim would apply to all lawyers.<sup>203</sup> But advertisements, on the other hand, are not targeted, they are generic.

A uniform rule for cross-border legal advertisements should require, in addition to appropriate disclaimers and a prohibition against false or misleading statements, that such advertisements contain the name and contact information of the lawyer or firm responsible for the advertisement, the name and location of the advertiser's regulatory authority, and the jurisdictional limitations of the advertiser, if an individual. If the advertiser is a law firm, its ad should identify the jurisdictions in which its lawyers are admitted.<sup>204</sup> If states are unable to agree on a uniform rule, then the rule should be that an advertisement satisfies the rules in any jurisdiction if it satisfies the rules in the jurisdiction in which the advertising lawyer or firm practices.

E. PERMIT MOTION ADMISSION WITHOUT REQUIRING AN OFFICE OR MINIMUM PRACTICE IN THE NEW JURISDICTION

Today, a state may condition the privilege of motion admission (and the ability to bypass the bar examination) on a requirement that the lawyer have an office in the state or the expectation that she will spend a certain amount of time representing clients in the state.<sup>205</sup> It is doubtful that states scrupulously monitor their admitted lawyers to ensure that they continue to meet any office or practice requirements. Even assuming that states have power to impose a practice or office requirement

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202. For variations in Rules 7.1 through 7.3, see the annotations to these rules in STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 418–56 (2011).

203. Fla. Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995).

204. I draw here on MODEL RULES OF PROF'L CONDUCT R. 7.1 (2010).

205. Scariano v. Justices of Supreme Court, 38 F.3d 920, 922 (7th Cir. 1995); Goldfarb v. Supreme Court, 766 F.2d 859, 865 (4th Cir. 1985). *But see* Schoenefeld v. New York, No. 1:09–CV–00504, 2011 WL 3957282, at \*12 (N.D.N.Y. Sept. 7, 2011) (holding that under the Privileges and Immunities Clause, the state could not require a nonresident New York lawyer to have an office in New York when the state did not require the same of New York residents).

as a condition of admission or continued admission, doing so makes little sense today. The fear that lawyers will collect bar admissions like trophies if they are liberated from practice and office requirements is unrealistic. They will have to pay bar or court dues in every state in which they are admitted and may be subject to other requirements, such as continuing legal education (“CLE”) requirements different or more demanding than those in their home jurisdictions, contributions to a client protection fund, and availability for court appointments. An office or practice requirement is an impediment to bar admission without corresponding benefit to the state. Lawyers are most likely to seek motion admission in neighboring states because they can realistically hope to serve clients from those states. Their offices may be closer to those clients than are those of lawyers in distant parts of the neighboring state. A northern New Jersey lawyer, for example, may wish to satisfy the New York motion admission rule. She is closer to New York City than are many lawyers located in New York State.

#### F. REQUIRE LAWYERS TO HAVE MALPRACTICE INSURANCE

Requiring malpractice insurance should be simple, but the resistance is likely to be intense, which is itself odd—if not disingenuous—if easier national practice proposals are opposed on the ground that they subject clients to incompetent out-of-state lawyers. Only Oregon now mandates malpractice insurance.<sup>206</sup> Few if any rules could protect clients as effectively as a rule requiring malpractice insurance, which at least would ensure payment of malpractice judgments up to the limit of the lawyer’s policy and compliance with the preventive measures that insurance carriers require. One objection likely will be that the cost of mandatory malpractice insurance will be passed on to clients but, if true, this also means that those lawyers who do not now have such insurance enjoy a market advantage. Their clients may not even know about the lack of insurance and most states do not require lawyers to tell them.<sup>207</sup>

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206. Only Oregon mandates legal malpractice insurance, administered through the state bar. See Elizabeth Chambliss & David Wilkins, *Promoting Effective Ethical Infrastructure in Large Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 710 & n.106 (2002).

207. According to the ABA, seven states require notice of malpractice coverage, if any, directly to clients, and eighteen states require lawyers to record this information on their annual registration statement. Of course, it will be the rare client who looks for the registration statement. ABA STANDING COMM. ON CLIENT PROTECTION, STATE IMPLEMENTATION OF ABA MODEL COURT RULE ON INSURANCE DISCLOSURE (2011), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/professional\\_responsibility/malprac\\_disc\\_chart.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/professional_responsibility/malprac_disc_chart.authcheckdam.pdf).

G. CREATE A PRESUMPTION THAT UNLESS LAWYER AND CLIENT AGREE OTHERWISE, THE CONFLICT RULES OF THE JURISDICTION IN WHICH THE CLIENT RESIDES (OR DOES BUSINESS) GOVERN THE CLIENT'S RELATIONSHIP WITH COUNSEL

Model Rule 8.5 is the choice-of-law provision and purports to tell us which jurisdiction's ethical rules govern in the event that a matter concerns more than one jurisdiction and their rules are inconsistent on a particular issue.<sup>208</sup> The choice-of-rule question can and does arise today regardless of the lawyer's home jurisdiction, even if it is the same as the client's.<sup>209</sup> This is because a matter may require work in two or more jurisdictions. A jurisdiction's rules are meant to govern the behavior of lawyers who practice in it, whether they belong to its bar or are present temporarily.<sup>210</sup>

Because my proposals likely will increase the frequency with which a client and lawyer reside and work in different places, I support a weak presumption that the client's home-state conflict rules govern the lawyer's conduct (unless the matter is in litigation, where the tribunal's rules will always govern, although the tribunal may itself face the need to elect from competing rules). I limit this presumption to conflict rules, whose purpose is protection of clients. There would be no presumption when a rule is meant to protect third parties because then the jurisdiction in which the lawyer provides services will have an interest in the governing rule. Duties to a tribunal and duties to correct false statements in negotiation are examples of situations that implicate the interests of third parties.<sup>211</sup>

I am encouraged to propose this weak presumption because the lawyer and client can choose to replace it with the client's informed consent.<sup>212</sup> Rule 8.5(b) can go only so far in enabling the parties to predict

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208. MODEL RULES OF PROF'L CONDUCT R. 8.5(b) (2010) provides:

Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
- (2) for any other conduct, the rules of the jurisdiction in which the lawyer's *conduct occurred*, or, if the *predominant effect* of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

(emphasis added).

209. *Id.*

210. Model Rule of Professional Conduct 8.5(a) gives a jurisdiction disciplinary authority over lawyers who are not admitted to its bar. Rule 8.5(b) guides the choice of rule. Rule 5.5(c) permits temporary practice in a jurisdiction in which the lawyer is not admitted.

211. MODEL RULES OF PROF'L CONDUCT R. 3.3-4.1 (2010).

212. Model Rules 1.7(b), 1.9(a), and 1.10(d) allow informed consent to displace their provisions,

which jurisdiction's rules will govern particular conduct in a representation in the event of a dispute. Unavoidably, the rule states a standard, not a bright line. The consent provisions of the conflict rules permit lawyer and client to reduce the uncertainty that a standard necessarily creates.

I suggest further that the parties should be able to substitute not merely one rule for another, but all of the conflict rules of another jurisdiction by name. For example, they should be able to say that "Rules 1.7, 1.9, and 1.10 of the Illinois Rules of Professional Conduct will govern this matter." The value of doing this is even greater predictability and less uncertainty. They are importing not only the text of the Illinois rules but also the case law's interpretation of them. Of course, any such agreement must have the client's informed consent, confirmed in writing as Model Rules 1.7, 1.9, and 1.10 now require to displace their provisions. Further, the designated jurisdiction should have a connection to the representation. That connection can be that the jurisdiction is where a substantial amount of work is reasonably expected to occur or that, drawing on the test in Model Rule 8.5(b), it is where the "predominant effect" of the representation is likely to be. The designated jurisdiction will often, therefore, be one that a lawyer reasonably could have identified under Rule 8.5(b) if she were later confronted with different rules from two or more jurisdictions whose rules might apply.

#### H. REQUIRE INTERNET PROVIDERS OF LEGAL PRODUCTS TO INCLUDE APPROPRIATE DISCLOSURES AND DISCLAIMERS PROMINENTLY THROUGHOUT THEIR WEBSITES, PROMOTIONAL MATERIALS, AND ADVERTISING

When the Texas legislature amended its unauthorized practice law in response to the court decision<sup>213</sup> finding that Quicken Family Lawyer violated the unauthorized practice law, it specified that the "computer software, or similar products" that it was exempting from the law's reach had to "clearly and conspicuously state that the products are not a substitute for the advice of an attorney."<sup>214</sup> I recommend that, in addition to this disclaimer, these websites must contain the following:

- If any lawyers have participated in the creation of the program or its contents, their names, business addresses, and bar status and bar numbers must be posted on the website;
- If no lawyers participated in the content or creation of the program, that must be stated;

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with two exceptions. A law firm cannot represent competing claims in the same matter before a tribunal. *Id.* R. 1.7(b)(3). Nor may the parties consent to a representation that is "prohibited by law." *Id.* R. 1.7(b)(2).

213. *See supra* text accompanying note 120.

214. TEX. GOV'T CODE ANN. § 81.101(c) (West 2011).

- The program must say that the organization selling the product is not a law firm and that the ethical duties lawyers have to clients might not apply to the transaction between the buyer and seller of the product; and
- The organization should be required to file with an appropriate agency wherever it offers its services or products the location of its principal place of business and the names and addresses of its senior officers, with the fact and location of this filing revealed on the organization's website.

The goal here is twofold: First, to make the provenance of the product clear to the consumer so that there is no ambiguity about the nature of the organization with which she is dealing, and second, to provide the consumer with the identities of those who may have responsibility for the product in the event the consumer believes she may have a claim. This is especially important for the lawyers behind the product, whose identities might otherwise be difficult to discover. Requiring the lawyers to put their names on the product—to accept responsibility for it—encourages a level of care that might otherwise be lost.

I would not allow the seller to disclaim or limit liability as a condition of the purchase. This position is consistent with ethics rules that forbid lawyers to bargain with a client for exemptions from prospective malpractice liability unless the client is independently represented in the matter.<sup>215</sup> Users of programs that dispense legal documents will not, of course, be independently represented.<sup>216</sup> Publishers of books containing legal advice do sometimes include a disclaimer of accuracy (“every effort has been made”), but online services offering legal documents should not enjoy the same option. Unlike a book buyer, who knows he is but one of many equally positioned buyers, the Internet customer is encouraged to believe that the document created by the program is tailored to his particular goals, which are identified by his responses to a series of focused questions.

#### I. PERMIT NONLAWYERS TO HAVE EQUITY INTERESTS AND MANAGEMENT AUTHORITY IN FOR-PROFIT<sup>217</sup> LAW FIRMS

Nonlawyers may manage and participate in law firm income in many ways. Today, for example, a law firm may include a nonlawyer in the firm's “compensation or retirement plan even though the plan is

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215. MODEL RULES OF PROF'L CONDUCT R. 1.8(h) (2010).

216. I realize that some users of these services may be lawyers who wish to generate documents for their own clients. In representing their clients, with a client's informed consent, an agreement limiting the seller's liability will satisfy Rule 1.8(h). *Id.*

217. Under current rules and constitutional doctrine, nonlawyers may manage nonprofit organizations that offer legal services. *Id.* R. 5.4 (2010); see NAACP v. Button, 371 U.S. 415, 428–29 (1963).



based *in whole* or in part on a profit-sharing arrangement.”<sup>218</sup> This would seem to allow compensation tied entirely to the firm’s net profits as determined at year’s end. Not allowed is compensation tied to fees in particular matters. Nonlawyers may be managers of a law firm so long as they are not partners<sup>219</sup> and do not have “the right to direct or control the professional judgment of a lawyer.”<sup>220</sup>

Allowing nonlawyers to share in legal fees other than through a compensation plan based on profit sharing, or to be partners in law firms, or to have an ownership or directorial interest in a professional corporation or association would require significant rule changes. The changes could take one of several shapes. One change would allow nonlawyer partners<sup>221</sup> but add a cap on their percentage interest and impose certain other requirements discussed next. A second change would allow the same but without limit on their equity participation so long as the entity solely practices law. The latter has been the rule in the District of Columbia, the only U.S. jurisdiction to permit nonlawyer partners and owners, since 1991.<sup>222</sup> It has caused no problems according to D.C. Bar counsel.<sup>223</sup> A more dramatic change would allow a business organization to own a law firm. Wal-Mart could place one in its stores alongside other service providers, like pharmacists and opticians. An even greater change would allow law firms to go public and sell shares on a stock exchange, as is now permitted in Australia.<sup>224</sup>

An important distinction is needed here. What I propose, and what the Washington, D.C. rules allow, is to permit nonlawyers who are actively engaged in a law firm’s work to participate in ownership of the firm. But the firm must be a law firm, which means it is a single-disciplinary, not a multidisciplinary, entity. In 2000, the ABA emphatically rejected a proposal to permit lawyers and nonlawyers to combine in

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218. MODEL RULES OF PROF’L CONDUCT R. 5.4(a)(3) (2010) (emphasis added).

219. *Id.* R. 5.4(b).

220. *Id.* R. 5.4(d)(3).

221. I will use the term “partners” to refer to all arrangements in which nonlawyers have an ownership interest in a for-profit law firm, including in professional corporations and associations.

222. See D.C. RULES OF PROF’L CONDUCT R. 5.4 (2007), which permits a nonlawyer (without limit on number) to have a “financial interest” in a law firm if the nonlawyer “performs professional services which assist the [firm] in providing legal services to clients”—that is, is not a passive investor—so long as the nonlawyer agrees to “abide by [the D.C.] Rules of Professional Conduct” and the lawyers in the firm “undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1.” Rule 5.1 describes the responsibility of firm partners to supervise the firm’s lawyers. *Id.* R. 5.1.

223. Joan C. Rogers, *Trio of Federal Suits Challenge Ethics Rule That Stops Private Equity Investment in Firms*, 27 LAW. MAN. PROF. CONDUCT 382, 383 (2011). This may be, however, because few firms have taken advantage of the authority because of problems that would arise for their lawyers in other jurisdictions.

224. Ted Schneyer, *On Further Reflection: How “Professional Self-Regulation” Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 628 (2011).

organizations that offer both legal and other services. The rejected proposal provided that lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services (multidisciplinary practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services. “Nonlawyer professionals” means members of recognized professions or other disciplines that are governed by ethical standards.<sup>225</sup>

Instead, the ABA adopted the following resolution:

[E]ach jurisdiction is urged to revise its law governing lawyers to implement the following principles and preserve the core values of the legal profession:

. . . .

6. Jurisdictions should retain and enforce laws that generally bar the practice of law by entities other than law firms.

7. The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession.<sup>226</sup>

8. The law governing lawyers, that prohibits lawyers from sharing legal fees with nonlawyers and from directly or indirectly transferring to nonlawyers ownership or control over entities practicing law, should not be revised.<sup>227</sup>

In 2000, therefore, the ABA not only opposed multidisciplinary practice, it went further and opposed nonlawyer ownership in law firms that offer legal services only—that is, that were not multidisciplinary—and also opposed sharing legal fees between lawyers and nonlawyers. Allowing nonlawyers to participate in the legal industry in either of these ways was seen as posing an unacceptable threat to the core values of the

225. DC BAR, *Report & Recommendation of the District of Columbia Bar Special Committee on Multidisciplinary Practice*, [http://www.dcbbar.org/inside\\_the\\_bar/structure/reports/special\\_committee\\_on\\_multidisciplinary\\_practice/background.cfm](http://www.dcbbar.org/inside_the_bar/structure/reports/special_committee_on_multidisciplinary_practice/background.cfm) (last visited Mar. 17, 2012); see John Eligon, *Selling Pieces of Law Firms*, N.Y. TIMES, Oct. 29, 2011, at B1.

226. The ABA defined the core values as follows:

- (a) the lawyer’s duty of undivided loyalty to the client;
- (b) the lawyer’s duty competently to exercise independent legal judgment for the benefit of the client;
- (c) the lawyer’s duty to hold client confidences inviolate;
- (d) the lawyer’s duty to avoid conflicts of interest with the client; and
- (e) the lawyer’s duty to help maintain a single profession of law with responsibilities as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.
- (f) The lawyer’s duty to promote access to justice.

*MDP Recommendation—Center for Professional Responsibility*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/commission\\_multidisciplinary\\_practice/mdprecom1of.html](http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mdprecom1of.html) (last visited Mar. 17, 2012).

227. *Id.*

profession. That perception did not depend on evidence; Washington, D.C.'s experience with its version of Model Rule 5.4 was not influential.<sup>228</sup> The prediction of harm was intuitive. The risk was deemed too great to take a chance. It is doubtful whether any empirical evidence could have made a difference.<sup>229</sup>

Allowing nonlawyers to become partners (or have equity interests) in law firms has obvious benefits. It will make it easier for a firm to attract talented professionals who wish to have a vote in the management and share in the profits of their businesses on a par with lawyers and for whom status as an employee, even a well-compensated one, is deemed inadequate recognition of their talents. With other accomplished professionals on board, a firm can more easily provide services ancillary to legal services (called "law-related services"), as Model Rule 5.7 permits—for example, a financial advisor can contribute to the work of a firm that offers estate planning advice, an environmental scientist or architect can aid the law clients of a construction law firm, a licensed investigator can prove valuable to a criminal defense firm, and a doctor or nurse may benefit a medical malpractice firm. But even granting these advantages, what can be done to ensure that the presence of nonlawyers as owners and managers does not threaten the core values of the profession that the ABA identified in 2000? What can give us comfort that the nonlawyers will not lead lawyers astray?

Many might argue that no comfort is necessary because the premise—that the nonlawyers will seek to undermine the core values and that lawyers will either succumb or stand quietly by—is wrong, even insulting, to all concerned. Lawyers have no right to assume, they may argue, that the presence of others poses a threat to legal clients. Lawyers have no basis to claim moral superiority as a categorical matter. As it happens, we do not have to take sides in this contest, let alone empirically test the competing arguments, assuming that it would even be possible to do so. We should be able to reduce the risk of nonlawyer imposition sufficiently to enable us modestly to allow others into the legal services market.

As of March 2009, England and Wales have allowed what are called Legal Disciplinary Practices ("LDPs"). Solicitors, barristers, notaries, conveyancers, and others, including certain foreign lawyers and nonlawyers, may combine in an LDP. Nonlawyers must be found "suitable" by the Solicitors Regulation Authority, which can also withdraw approval.<sup>230</sup> Nonlawyer ownership of a firm is capped at twenty-five

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228. *See supra* text accompanying note 222.

229. Later reporting on Arthur Andersen's participation in the collapse of Enron could be seen to vindicate that worry. *See, e.g.,* Reed Abelson & Jonathan D. Glater, *Who's Keeping the Accountants Accountable?*, N.Y. TIMES, Jan. 15, 2002, at C1.

230. SOLICITOR'S REGULATION AUTH. RECOGNIZED BODIES REG. 5 (2010) (U.K.).

percent. An LDP can practice only law. Passive investors are not allowed.<sup>231</sup> By 2012, the U.K. anticipates that it will go further and allow what has come to be known as Alternate Business Structures (“ABS”).<sup>232</sup> An ABS may have passive investors (sometimes called Tesco law in the expectation that retailers will create law firms to provide routine services to consumers). Shares in an ABS can be publicly traded. An ABS can offer multidisciplinary services, not just legal services. Once the ABS structure is approved, there will be no further need for a separate LDP category.<sup>233</sup>

I do not recommend that regulation of the American bar copy the U.K. innovations unchanged (or at this stage perhaps we should say the U.K. experiment). But I do think that the LDP structure in the U.K. coupled with the safeguards in the Washington, D.C. version of Model Rule 5.4 have something to teach us about how to reduce the risk that nonlawyer managers or owners of law firms will tempt (or order) lawyers to misbehave. Risk can be adequately eliminated, insofar as risk can ever be eliminated, if:

- Nonlawyer participation is limited as in the U.K. to twenty-five percent;
- The law firm limits its services to legal and law-related services;
- An appropriate regulatory body is authorized to approve nonlawyer owners as suitable to participate in the law industry (much as character committees approve new lawyers);
- The regulatory body can also remove this approval for misconduct (the equivalent of disbarment);
- The nonlawyer owners commit themselves to compliance with the jurisdiction’s ethical rules for lawyers and take a mandatory course in those rules, refreshed periodically just as states may require lawyers to have CLE credits in legal ethics annually;
- The lawyer owners take responsibility to supervise this compliance;
- The legal and ethical rules governing the profession of the nonlawyer owners do not require or forbid conduct contrary to the commandments of the law and ethics governing lawyers; and
- Nonlawyers cannot direct the work of lawyers.

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231. SOLICITOR’S REGULATION AUTH. CODE OF CONDUCT R. 12.01 (2007) (U.K.); *see also* Legal Services Act, 2007, c. 29 (U.K.).

232. Sofia Lind, *Alternative Business Structure Launched Under U.K. Legal Services Act*, LEGAL WEEK (Oct. 7, 2011), <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202518170381>.

233. Movement toward authority for ABS is continuing, but the timetable is dependent on various approvals. The best way to stay abreast of developments is at the website of the Solicitors Regulation Authority. These two pages, with internal hyperlinks, will be helpful. *FAQs: Legal Services Act and ABSs*, SOLICITORS REGULATION AUTH., <http://www.sra.org.uk/sra/legal-services-act/faqs/ABS-faqs.page> (last visited Mar. 17, 2012); *Alternative Business Structures*, SOLICITORS REGULATION AUTH., <http://www.sra.org.uk/solicitors/freedom-in-practice/alternative-business-structures.page> (last visited Mar. 17, 2012). The latter page envisioned ABS authority by the end of 2011.

This is not to say that these precautions are an insurance policy or warranty against bad behavior, but neither do we enjoy equivalent assurances today from the bar. Whoever populates the business of law, there will never be guarantees.<sup>234</sup>

J. EASE TEMPORARY AND PERMANENT ADMISSION TO PRACTICE IN THE UNITED STATES FOR APPLICANTS WITH FOREIGN LAW DEGREES

U.S. jurisdictions vary greatly in their willingness to allow foreign-trained law graduates, including lawyers admitted abroad, to work in the United States either temporarily or permanently, and if permanently, in the scope of the authority allowed them. Efforts should be made to harmonize the rules and liberalize them.

I. *Current Rules: Regular Admission of Foreign Lawyers and Law Graduates*

I consider first rules in New York and California, which are far and away the most generous in permitting foreign-trained lawyers and law graduates to sit for their bar examinations. I then look at a few other states.

The New York Court of Appeals rule on allowing foreign-educated lawyers to take the New York bar examination is section 520.6.<sup>235</sup> It is compactly worded and next to impossible to unravel. It recognizes three categories for admission. Only those applicants falling within the first category qualify to take the New York bar without further graduate law study.

The first category encompasses graduates of law schools in countries whose jurisprudence is “based upon the principles of English Common Law.”<sup>236</sup> These graduates may take the New York State bar examination if the “period of law study” meets the same “durational” requirements imposed on U.S. law graduates, and if the “program and course of study” is “the substantial equivalent” of what is required by an “approved” U.S. law school.<sup>237</sup> So a graduate of Oxford who studied law for as long as New York State requires for a U.S. law student, and whose curriculum is the “substantial equivalent” of what is required in the United States, may take the bar examination without more. She need not be a member of

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234. Advances in information technology to some extent make moot the ABA’s decision about whether to continue to fence others out. “The question used to be: ‘Will the ABA change Rule 5.4?’” University of Illinois Law Professor Larry Ribstein asked rhetorically as reported in the ABA Journal. “The question now is, ‘Who cares?’” was his reply. Barbara Rose, *Law, the Investment*, ABA J., Sept. 1, 2010, at 44.

235. N.Y. CT. APP. R. 520.6 (2012). The description here is to Rule 520.6 as amended on April 27, 2011, which becomes effective as of the July 2013 bar examination.

236. *Id.*

237. *Id.*

any bar or ever have visited the United States or taken classes at a U.S. law school.

If the applicant does not meet the durational requirement for U.S. law study but has “at least two years of substantially equivalent education,” meaning in a common-law school, or if the applicant meets the durational requirement for U.S. law study but does not have a “substantially equivalent education,” then she may take the New York bar examination if she earns an LL.M. degree.<sup>238</sup> But if the candidate lacks both the durational and the substantive requirements, the additional study will not compensate. The additional study must occur in the United States.<sup>239</sup>

The final category encompasses those law graduates who are already admitted to practice in a country “whose jurisprudence is based upon principles of English Common Law” and whose “admission was based upon a program of study in a law school and/or law office.”<sup>240</sup> The differences between this category and the prior categories are the recognition of law office study and the requirement of admission to the bar of a common-law country. If, then, the applicant’s study is “durationally equivalent” under New York’s rules for U.S. law graduates, but not “substantially equivalent” to the course of study in a U.S. law school, she can compensate for the lack of the substantial equivalence through the same further study set forth for category two, with the same conditions and limitations.<sup>241</sup> The legislative history for category three explains that it is meant specifically to benefit solicitors in the U.K. whose legal education includes both classroom study and an “articled clerkship.”<sup>242</sup>

For the first two routes to admission, the respective rule requires that the candidate’s school have been “recognized by the competent accrediting agency of the government of such other country, or of a political subdivision thereof” during the candidate’s course of study.<sup>243</sup> In 2010, 77% of applicants to the New York bar who were graduates of an

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238. *Id.* R. 520.6(b)(1)(ii).

239. The LL.M. must include twenty-four credit hours. Two of those credits must be in the history, rules, values, instructions, responsibilities, and goals of the American legal profession (in other words, a legal ethics course); two must be in legal research, analysis, and writing; two must be in a course “designed to introduce students to distinctive aspects and/or fundamental principles of United States law,” such as civil procedure or constitutional law; and six other credits must be in subjects on the New York bar examination. Some of these requirements can be combined. *Id.* R. 520.6(b)(3)(iv)–(vi).

240. *Id.* R. 520.6(b)(2).

241. *Id.*

242. The legislative history of the rule is helpfully explained by its drafters. See Howard A. Levine & Hope B. Engel, *New York’s Revised Attorney Admission Rules: Still Rigorous but More “User Friendly,”* BAR EXAMINER, Aug. 1998, at 42. Howard Levine was then a judge on the New York Court of Appeals. *Id.* at 43.

243. N.Y. Ct. App. R. 5.26(b).

ABA-approved law school passed the examination.<sup>244</sup> The passing rate for foreign law graduates was 34%.<sup>245</sup> New York had 4596 foreign law graduate applicants.<sup>246</sup>

California's rules also are permissive but not in the same way. So it is possible that an applicant may qualify to take the examination in California but not New York, or vice versa. A graduate of a foreign law school may qualify to take the California bar if she has an additional year of study in a U.S. law school (leading to an LL.M. degree requiring at least twenty credits or on completion of twenty credits even without a degree).<sup>247</sup> The applicant's undergraduate degree must either satisfy the educational requirements for admission to the bar in the country in which the school is located or the undergraduate education must be "substantially equivalent" to the requirements for a J.D. degree from an ABA-accredited school or a school accredited by the California State Bar's Committee of Bar Examiners.<sup>248</sup> The subsequent U.S. law school study need not occur in the United States but must include at least four courses tested on the California bar examination, and one of those courses must be a professional responsibility course that covers sections of the California Rules of Professional Conduct and sections of the California Business and Professions Code.<sup>249</sup>

California's rules are especially generous if the applicant is a member of a bar anywhere in the world and regardless of education. That applicant may take the state bar examination with no further educational requirement.<sup>250</sup> In 2010, 60% of applicants to the California bar who were graduates of an ABA-approved law school passed the examination.<sup>251</sup> The passing rate for foreign law graduates was 13%.<sup>252</sup> The state had 724 foreign law graduate applicants, the second largest of any U.S. jurisdiction.<sup>253</sup>

Other U.S. jurisdictions get a trickle of foreign-educated applicants and vary in their requirements for admission. Here are the requirements and passage rates of those with at least 15 applicants in 2010.

*Tennessee:* The applicant must have graduated from a law school "recognized and approved by the competent accrediting agency" of a

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244. 2010 *Statistics*, *supra* note 140, at 11.

245. *Id.*

246. *Id.*

247. STATE BAR OF CAL., GUIDELINES FOR IMPLEMENTATION OF CHAPTER 2, RULE 4.30 OF THE ADMISSIONS RULES, Guideline 1.2(A)–(B) (2009).

248. *Id.* Guideline 1.1(A)–(B).

249. *Id.* Guideline 1.2(A)–(B).

250. CAL. STATE BAR R. 4.30(B).

251. 2010 *Statistics*, *supra* note 140, at 10.

252. *Id.*

253. *Id.*

country;<sup>254</sup> must “satisfy the Board that his or her undergraduate education and legal education were substantially equivalent to the requirements” for U.S. law graduates;<sup>255</sup> and must complete twenty-four credits “in residence at a law school approved by the [ABA] or [have] successfully earned one-third of the credits necessary to graduate from a law school approved by the Board.”<sup>256</sup> In 2010, 79% of graduates from ABA-accredited law schools passed the Tennessee bar examination.<sup>257</sup> Of the 123 foreign-educated students who took the examination, 28% passed.<sup>258</sup>

*District of Columbia:* Graduates of non-ABA law schools must complete twenty-six semester hours of study in an ABA law school in subjects tested on the D.C. bar examination.<sup>259</sup> In 2010, 47% of graduates from ABA-accredited law schools passed the D.C. bar examination.<sup>260</sup> Of the 76 foreign-educated students who took the examination, 18% passed.<sup>261</sup>

*Louisiana:* An applicant’s legal education must be “equivalent to that of the legal education offered in the United States . . . by a law school accredited by the [ABA]. The [ABA’s] standards . . . shall be relevant to any equivalency determination.”<sup>262</sup> The applicant must also complete “a minimum of fourteen semester hours of credit, or the equivalent, in professional law subjects from an American law school” but not more than four credits can be in any one subject. In 2010, 62% of graduates from ABA-accredited law schools passed the Louisiana bar examination.<sup>263</sup> Of the 40 foreign-educated students who took the examination, 15% passed.<sup>264</sup>

*Illinois:* Applicants must have practiced law five out of the previous seven years. The board must determine that the

quality of the applicant’s preliminary, college and legal education is acceptable based on [among other things] the jurisprudence of the country . . . the curriculum of the law schools attended and the course of studies pursued . . . accreditation of the law schools attended . . . by competent accrediting authorities in the foreign country . . . [and] post-graduate studies and degrees earned [abroad and in the US] . . . .<sup>265</sup>

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254. TENN. SUP. CT. R. 7, art. 7.

255. *Id.*

256. *Id.*

257. 2010 *Statistics*, *supra* note 140, at 11.

258. *Id.*

259. D.C. CIR. R. 46(b)(4).

260. 2010 *Statistics*, *supra* note 140, at 11.

261. *Id.*

262. LA. SUP. CT. R. XVII, § 6(B).

263. 2010 *Statistics*, *supra* note 140, at 11.

264. *Id.*

265. ILL. SUP. CT. R. 715.



In 2010, 84% of graduates from an ABA-accredited law school passed the Illinois bar examination.<sup>266</sup> Of the 24 foreign-educated students who took the examination, 17% passed.<sup>267</sup>

*Texas:* Applicants must have completed three years of study at a foreign law school “accredited in the jurisdiction where it exists” leading to the equivalent of a J.D. degree.<sup>268</sup> The applicant must also have been engaged in active practice for five out of the previous seven years and either have an LL.M. from an ABA-accredited school or “demonstrat[e] to the Board that the law of such foreign nation is sufficiently comparable to the law of Texas that, in the judgment of the Board, it enables the foreign attorney to become a competent attorney in Texas without additional formal legal education.”<sup>269</sup> If the applicant’s practice is only three out of five years, she must both make this demonstration and have an LL.M. from an ABA-accredited school.<sup>270</sup> In 2010, 76% of graduates from an ABA-accredited law school passed the Texas bar examination.<sup>271</sup> Of the 15 foreign-educated students who took the examination, 33% passed.<sup>272</sup>

*Massachusetts:* Foreign law graduates may qualify to take the state bar examination with “a prior determination of their education from the Board of Bar Examiners.”<sup>273</sup> In 2010, 85% of graduates from an ABA-accredited law school passed the Massachusetts bar examination.<sup>274</sup> Of the 22 foreign-educated students who took the examination, 50% passed.<sup>275</sup>

## 2. *Current Rules: Other Forms of Authorized Presence for Foreign Lawyers*

The patchwork of rules that enable foreign lawyers to work in the United States without traditional bar admission defies easy description. One of the three most important rules is the Foreign Legal Consultant (“FLC”) rule, which allows lawyers admitted in other countries to practice permanently in the United States but does not permit them to advise on U.S. law.<sup>276</sup> They may be partners in U.S. law firms.<sup>277</sup> An FLC

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266. 2010 *Statistics*, *supra* note 140, at 11.

267. *Id.*

268. TEX. BD. OF LAW EXAM’RS R. XIII(b).

269. *Id.*

270. *Id.*

271. 2010 *Statistics*, *supra* note 140, at 11.

272. *Id.*

273. MASS. BD. OF BAR EXAM’RS R. VI.1.

274. 2010 *Statistics*, *supra* note 140, at 11.

275. *Id.*

276. MODEL RULES FOR THE LICENSING AND PRACTICE OF FOREIGN LEGAL CONSULTANTS § 9 (2010). Not everyone admitted abroad is a “lawyer” for purposes of the FLC rule. The model FLC rule defines a “lawyer” as an individual who is, and for at least five years has been, a member in good

rule, based on the ABA model rule, has been adopted in thirty-one states.<sup>278</sup>

Less prominent are house counsel rules that include foreign lawyers. A house counsel admission rule offers a separate admission category for lawyers who are employed by their (usually corporate or organizational) client and who will represent only that client or its organizational affiliates.<sup>279</sup> The house counsel rule enables a lawyer transferred to a new state to practice in the new state without having to get admitted to its bar, either by examination or, if recognized, on motion. The authority to practice in the new state ends if and when the lawyer leaves her job, unless she takes a qualifying new one. House counsel rules have been adopted in thirty-four states and are generally based on a model ABA rule.<sup>280</sup> However, the ABA model rule and the house counsel rule in most states that have adopted one require that the lawyer be admitted to a U.S. jurisdiction's bar.<sup>281</sup> Only six states include foreign-admitted lawyers in their house-counsel rule.<sup>282</sup>

The third rule that allows foreign lawyers to enter the United States is the counterpart to the multijurisdictional practice ("MJP") rule for domestic lawyers who temporarily cross state borders in connection with their work.<sup>283</sup> The ABA adopted such a rule at the same time that it adopted the MJP rule in the Model Rules, but it adopted the foreign MJP rule as a proposed court rule, not as an amendment to the Model Rules.<sup>284</sup> Perhaps for this reason, when states adopted the MJP rules for domestic lawyers through amendment of Model Rule 5.5, the recommendation for foreign lawyer MJP was not before them. Only seven states have extended their MJP rules to foreign lawyers.<sup>285</sup>

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standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority. *Id.* § 1.

277. *Id.* § 5(b)(i)(B).

278. ABA, FOREIGN LEGAL CONSULTANT RULES (2010).

279. ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT TO THE HOUSE OF DELEGATES (2006).

280. *Id.*; ABA, IN-HOUSE CORPORATE COUNSEL REGISTRATION RULES (2011), available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/in\\_house\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/in_house_rules.authcheckdam.pdf).

281. *Id.*

282. *Id.*

283. ABA COMM'N ON MULTIJURISDICTIONAL PRACTICE, REPORT 201J (2002), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201j.authcheckdam.pdf>. The scope of practice of the MJP rule for foreign lawyers differs slightly to make it clear that their orbit of temporary practice in the United States must be more closely tied to their home jurisdiction. See Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 714 (2002).

284. Report 201J, *supra* note 283.

285. LAUREL TERRY, SUMMARY OF STATE ACTION ON ABA MJP RECOMMENDATIONS 8 & 9 (2011).

### 3. *Recommended Uniform Changes*

The same changes in information technology and the same global trends that are diminishing the importance of state borders in the regulation of lawyers are affecting international borders. That has long been clear in the European Union, where movement of lawyers among nations, permanently and temporarily, is now permitted with minor qualifications, despite the fact that the migrating lawyers come from different countries with different legal traditions.<sup>286</sup> American rules have been generous to foreign lawyers. The FLC rule, which has been broadly adopted, allows foreign lawyers to come here permanently and advise on the law of any non-U.S. jurisdiction,<sup>287</sup> thereby also benefiting foreign nationals in the United States who need such advice and Americans who do so as well.

Adding foreign lawyers to the in-house counsel rule would be a sensible liberalization. An in-house counsel rule that permitted foreign lawyers to work for their organizational employer at a U.S.-based office differs from the FLC rule in two ways. First, an in-house counsel rule allows the lawyer to advise only her employer and its organizational affiliates, whereas the FLC rule allows the lawyer to advise anyone. Neither permits court appearances unless the lawyer can gain pro hac vice status. But the in-house counsel rule would allow the lawyer to advise her employer on the law of any jurisdiction, including the United States, whereas the FLC rule limits advice to non-U.S. law. This expansion of authority makes great sense. Some foreign lawyers may be expert in areas of U.S. law just as some U.S. lawyers are expert in some aspect of foreign law.

Second, expansion of the in-house rule to include foreign lawyers would change only geography. A foreign lawyer is free to give advice on U.S. law to her employer in her home country. The United States cannot prevent other nations from allowing their lawyers to advise on U.S. law at home just as American lawyers, if competent, can advise on a foreign nation's law at home. A change in the rule would simply allow a foreign in-house lawyer to advise her employer on the same U.S. law in the United States. Nor is a stricter rule necessary to protect the company from incompetence. Companies that are large enough to transfer (say) a Spanish lawyer to an office in the United States should be sophisticated enough to make intelligent decisions about the source of advice they receive. Further, they are likely to have U.S. lawyers in the United States available to advise on U.S. law when necessary. In the states that do allow foreign in-house lawyer admission, no problems have been reported.

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<sup>286</sup> See Davis, *supra* note 194, at 1357–58.

<sup>287</sup> See *supra* notes 276–78 and accompanying text.

The model pro hac vice rule should also be expanded to allow judges, in their discretion, to admit foreign lawyers to co-counsel with a local lawyer during litigation. The safeguards here are several and the advantages clear. The trial judge would have discretion to grant or deny a foreign lawyer's pro hac vice admission application, just as she can do now with domestic applications.<sup>288</sup> The model rule requires that a local lawyer participate in the matter and be responsible for the lawyer admitted pro hac vice.<sup>289</sup> The pro hac vice application must be made on notice to the adverse party, which can object if it believes its interests are compromised.<sup>290</sup> The advantage of permitting pro hac vice admission of foreign lawyers is that doing so respects the decision of the litigant to choose the counsel who will represent her. In our adversary system, that choice has a high value, although of course it must sometimes yield to other interests.<sup>291</sup> Representation by a foreign lawyer along with the local lawyer is likely to occur most often when there is a foreign law dimension to the litigation and the foreign lawyer can assist local co-counsel best by full participation. Beyond foreign law, the foreign lawyer may be more familiar with the client and the foreign context that forms part of the dispute. In the states that do allow foreign lawyer pro hac vice admission, there has been no report of a problem, although we do not know how often the authority is invoked.<sup>292</sup>

Aside from expansion of the in-house and pro hac vice rules, the third area ripe for reform is the body of rules governing foreign law graduate admission to the bar of a U.S. jurisdiction. As shown above,<sup>293</sup> states vary significantly in their willingness to let foreign-educated law graduates (who may or may not be admitted to a bar) take their bar examinations, with New York and California the most generous, although they are generous in different ways. The question is complicated by the following issues:

- Applicants may come from civil- or common-law schools;
- In most of the world, law is an undergraduate program;
- Applicants will not have been required to study the professional conduct rules governing American lawyers, as the ABA requires for approval of domestic law schools;<sup>294</sup>

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288. The application requires the lawyer to reveal information about herself, including whether she has been disciplined in any jurisdiction in which she is admitted. MODEL RULE ON PRO HAC VICE ADMISSION (2002).

289. *Id.*

290. *Id.*

291. *Wheat v. United States*, 486 U.S. 153, 163–64 (1988) (disqualifying the defendant's chosen counsel to avoid a possible conflict of interest).

292. In a recent high-profile case, a Canadian lawyer joined in the defense of Conrad Black, former CEO of Hollinger International. Bryan Burrough, *The Convictions of Conrad Black*, VANITY FAIR, Oct. 2011, at 252.

293. See *supra* text accompanying notes 236–275.

294. ABA STANDARDS, *supra* note 42, at 20.

- The quality of an applicant's legal education will be difficult to ascertain, especially if the foreign nation in which it occurred does not have a credible (or any) process to approve law schools;
- Applicants likely will not have been exposed to the basic structure of the American legal system;
- The civil-law applicant likely will not have been exposed to common-law reasoning or to traditionally required courses like torts, civil procedure, and contracts;
- The bar passage rates in states that do admit foreign law graduates are low, in some states abysmally low, which may deter a decision to invest time and money in reform; and
- Many foreign law graduates may not ever have visited, let alone lived in, the United States. Some observers view absence of experience with American culture, including legal culture, gained by living in the United States and attending a U.S. law school, as a critical deficiency.<sup>295</sup>

The complexity of this issue encourages caution. Any decision to open admission to foreign law school graduates, with or without graduate law study in the United States, should be modest and should depend on each graduate's legal education and experience. Moving slowly means that the distinctions we make may appear arbitrary. But it will be easier to expand the authority later, if warranted, than to contract it. The ABA's Section of Legal Education and Admissions to the Bar has been studying this issue and is considering a model court rule on the admission of foreign-educated law graduates.<sup>296</sup>

I add a word about reciprocity. Should liberalizing the rules on foreign lawyer practice in the United States be conditioned on the reciprocal treatment of American lawyers by the countries from which the foreign lawyers come? Nations vary in their tolerance for foreign lawyer presence, and even those that allow it may severely limit how they practice.<sup>297</sup> Whether any liberalization of the American rules should have

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295. This view explains the New York Court of Appeals' requirement that those foreign applicants who must earn graduate law degrees from a U.S. law school in order to qualify to take the state examination study physically in the United States. A degree earned abroad, from the same school with the same requirements, is not acceptable. N.Y. Ct. App. R. 520.6(b)(3)(v).

296. See ABA Section of Legal Educ. & Admission to the Bar, *Report*, ABA, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/20110420\\_model\\_rule\\_and\\_criteria\\_foreign\\_lawyers.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/20110420_model_rule_and_criteria_foreign_lawyers.authcheckdam.pdf) (last visited Mar. 17, 2012).

297. India has one of the most exclusionary approaches but may be relenting. In February 2012, the Chennai High Court held that foreign law firms could advise on foreign law in India on a temporary basis and could represent clients in arbitrations based in India. *India's High Court Lets Foreign Firms Visit*, LAW. WKLY., <http://www.lawyersweekly.com.au/news/indias-high-court-lets-foreign-firms-visit> (last visited Mar. 17, 2012). Canada has one of the most inviting approaches. Four of the "largest and fastest-growing national economies"—Brazil, Russia, India, and China—have "some of the most restrictive policies toward foreign lawyers." Anna Stolley Persky, *The New World: Despite Globalization of the Economy, Lawyers Are Finding New Barriers to Practicing on Foreign Soil*, ABA J., Nov. 1, 2011, at 34.

a reciprocity clause is beyond the focus of this Article. Reciprocity is about trade barriers, their wisdom, and effect.

#### K. INCREASE THE LIKELIHOOD OF COMPETENT REPRESENTATION

How do we now assure quality? We do so *ex ante* with educational requirements and a bar examination.<sup>298</sup> Thereafter, we subject lawyers to civil law liability for malpractice or breach of fiduciary duty. Civil law claims compensate for actionable conduct causing harm. They operate retroactively, not preventively. But their existence should also encourage lawyers to take care in order to avoid liability in the first place. A relatively new device to foster competence is continuing legal education. But the CLE hurdle is often quite low and easily satisfied. Yet another vehicle meant to signal special competence is certifications in a specialty.<sup>299</sup>

How might we better assure competent work? Several ways are apparent, although a few will meet strong resistance. First, the CLE requirement can be more demanding: no self-reporting by a lawyer who has read an article or listened to a tape while driving. Attendance at least two full days a year at a live CLE event can be mandated. Second, states can raise their bar passage scores.<sup>300</sup> To the extent that bar examinations test skills, legal reasoning, judgment, and general knowledge, not the minutiae of a state's practice, higher passing scores should improve the quality of the bar. Third, we can revisit the idea of specialization, and heighten the requirements, so that lawyers skilled in an area of practice can offer a credible additional credential. The heightened requirements can include additional coursework, practice experience, and a further examination.

#### CONCLUSION

Institutions and government will sometimes change rules to facilitate or encourage behavior deemed beneficial. More often, perhaps, they react to changes when and as appropriate. Reaction often will be the wiser course, so as to prevent precipitous action. What is not wise is intransigence when the gap between socially beneficial conduct and the rules that constrict the conduct grows large. We have entered such a period for the rules governing the legal marketplace, and it is in large part a product of changing technology and the cross-border activity of

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298. *See supra* text accompanying notes 33–55.

299. *See, e.g.*, FLA. BAR R. 4-7.2(c)(6) (identifying several specialist certifications that a lawyer may advertise).

300. *Hoover v. Ronwin*, 466 U.S. 558, 560, 574 (1984) (finding that the Arizona Supreme Court Committee on Examinations and Admissions' act of setting a passing score for the state's bar examination was state action and not governed by antitrust law).

lawyers and clients. Reasonable people will disagree on when and how the profession and the courts should react to this gap. But doing nothing is not an option. I hope my recommendations will advance the conversation about how the profession should respond.