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# MULTIJURISDICTIONAL PRACTICE OF LAW: RECENT DEVELOPMENTS IN THE NATIONAL DEBATE

Gary A. Munneke\*

## I. INTRODUCTION

The events surrounding the collapse of Enron Corporation and the charges against accountants and law firms representing Enron illustrate—quite apart from the company's legal problems of corporate fraud, bankruptcy, and criminal obstruction—a classic tableau for examining the multi-jurisdictional practice of law ("MJP").<sup>1</sup> Here, there is a Texas utility company that merged with an out-of-state energy company to form an international energy conglomerate.<sup>2</sup> Enron purchased energy from a variety of providers and resold it to utilities in the business of delivering power to consumers.<sup>3</sup> Enron used its global network to secure rights to energy, the price of which fluctuated with the market, and to pool transaction costs and stabilize prices that utilities and ultimately consumers paid.<sup>4</sup> Because of the volatility of energy prices, Enron also utilized aggressive accounting methods and creative legal transactions to keep the negative impact of certain transactions off the Enron books.<sup>5</sup> Eventually, these methods came to light and led to the charges that ultimately triggered what was at the time the largest corporate bankruptcy in United States history.<sup>6</sup>

Enron may not have touched every jurisdiction in the United States, but before the litigation is over, there will be few places that do not have some

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1. See, e.g., Maureen Milford, *UC Takes Charge of Enron Suit*, NAT'L L.J., Mar. 4, 2002, at A15 (detailing how the University of California, among other business entities, are spearheading the class action suit against Enron).

2. *The Rise and Fall of Enron*, N.Y. TIMES, Nov. 2, 2001, at A24. Although much has been written about the legal and ethical issues related to Enron, there has been very little focus on the multi-jurisdictional nature of the legal issues, the parties, and the lawyers involved in the case. Although few matters are as complex and diverse as Enron, it is by no means unique.

3. *Id.*

4. See *id.*; see also Elizabeth L. Bhar & Mark E. MacDonald, *A Comparative Overview of the Unbundling of Gas Distribution Services in North America—Lessons for Nova Scotia and New Brunswick*, 38 ALBERTA L. REV. 1, 13, 39 (2000).

5. See *The Rise and Fall of Enron*, *supra* note 2; see also Charles W. Wolfram, *Comparative Multi-Disciplinary Practice of Law: Paths Taken and Not Taken*, 52 CASE W. RES. L. REV. 961, 984-85 (2002).

6. See *The Rise and Fall of Enron*, *supra* note 2.

piece of the action.<sup>7</sup> In-house corporate lawyers, government lawyers, and lawyers from private law firms representing sellers and purchasers of energy, corporate and LLP shareholders, regulatory agencies, and a variety of other interests find themselves involved in a complex web of relationships. In this environment, it should be apparent that lawyers cannot practice law and serve their clients exclusively within a single jurisdiction.

They must travel to other jurisdictions, research and advise on the law of multiple jurisdictions, and communicate in a variety of other ways, such as by telephone, e-mail and fax, outside their home jurisdictions. If each lawyer in an Enron transaction could only advise on the law of his or her home state and only when he or she was physically located in the home state, and otherwise hire separate counsel for every part of every transaction that took place in or involved the law of another state, the system would simply implode. If Enron tells us anything, it reminds us that multijurisdictional practice is a reality in our legal system today.

Part II of this Article will explore the development of multijurisdictional practice in the United States and abroad. Part III will discuss the positions taken by various participants in the current debate on multijurisdictional practice. Part IV will examine the actions of the American Bar Association House of Delegates in August 2002 and the implications of those actions for lawyers. Part V will conclude that MJP reform is critical to the future of the legal profession in the United States as a fundamental tool for American business to remain competitive in the globalized marketplace for goods and services.

## II. BACKGROUND

One need not be involved in the Enron case to become involved in MJP. In reality, the typical lawyer crosses jurisdictional boundaries in some way on a regular, sometimes daily basis.<sup>8</sup> Also, under current ethical rules, any

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7. See generally Nancy B. Rapoport, *Multidisciplinary Practice After In re Enron: Should the Debate on MDP Change at All?*, 65 TEX. B.J. 446, 446 (May 2002) (discussing the impact of the *Enron* case on the legal profession).

8. For example, one author stated:

In today's world, examples of the rendering of legal services by a transactional lawyer outside the state of licensure are legion. Multistate law firms are numerous, and frequently a law firm will transfer temporarily a lawyer licensed in one state to an overworked, understaffed office in another state where the lawyer has not been licensed. The lawyer, not licensed locally, obviously will be practicing law. In the modern business world, lawyers in small, single-office firms and even solo practitioners are confronted with rendering legal services outside the state of licensure. Clients' legal problems do not neatly follow state boundary lines. A client residing in Texas may need legal services in drafting a contract with a corporation located in New York. A meeting among the clients and lawyers to hammer out the terms of the contract probably will take place in either Texas or New York - or perhaps at a resort in the Pennsylvania Poconos—and one or the other, or both, of the lawyers will be practicing law out-of-state.

John F. Sutton, Jr., *Ethics and the Multijurisdictional Practice of Law: Unauthorized Practice of Law by Lawyers: A Post-Seminar Reflection on "Ethics and the Multijurisdictional Practice of Law,"* 36 S. TEX. L. REV. 1027, 1032 (1995) (internal citation omitted).

lawyer who does so is subject to discipline under a state version of Model Rule 5.5,<sup>9</sup> criminal prosecution under a state statute pertaining to the unauthorized practice of law ("UPL"),<sup>10</sup> loss of fees, waiver of privilege and other risks.<sup>11</sup> Even if one is not actually charged with UPL, any lawyer who performs legal work outside of his or her state of licensure runs a risk of all these outcomes every time he or she takes on a matter with multi-state nuances.

Lawyers can engage in MJP in a number of different ways. They can, of course, open offices and practice law in a state where they are not licensed. They may hold themselves out as possessing licenses to practice law in a jurisdiction where they are not licensed. These are probably the most egregious forms of MJP. In the former situation, a lawyer who establishes a permanent presence in a state arguably should submit to the licensure and regulation of that state; in the latter situation, a lawyer who misrepresents his or her status as a lawyer arguably engages in conduct involving personal dishonesty prohibited by Model Rule 8.4.<sup>12</sup>

Other forms of MJP involve conduct that is much more common and less invidious. Lawyers who work in-house for corporations or other entities frequently are called upon to do work in a number of jurisdictions; they may even be required to live in different states where the organization conducts operations.<sup>13</sup> These lawyers do not hold themselves out as local prac-

9. See *id.* at 1030; see also MODEL RULES OF PROF'L CONDUCT R. 5.5 (2002) (providing that "[a] lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.").

10. For example, one author stated:

For one, the unauthorized practice of law violates state law regulating the practice of law. These statutory violations are punishable as criminal offenses or as contempt of court. The unauthorized practice of law also violates the rules of professional conduct. Thus, a lawyer may also face disciplinary sanctions. Finally, as in *Birbrower*, a finding of unauthorized practice may preclude recovery of the lawyer's fee.

John J. D'Atto, *The \$ 1 Million Message: Lawyers Risk Fees and More When Representing Out-of-State Clients*, 39 SANTA CLARA L. REV. 447, 447-48 (1999) (internal citations omitted).

11. See *id.*

12. See Model Rule 8.4, which states:

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Model Rules of Prof'l Conduct R. 8.4 (2002).

13. See La Tanya James & Siyeon Lee, *Adapting the Unauthorized Practice of Law Provisions to Modern Legal Practice*, 14 GEO. J. LEGAL ETHICS 1135, 1135 (2001):

Indeed, economic forces have encouraged law firms to go beyond the traditional home office and to open satellite offices in other parts of the United States to serve existing clients and solicit new ones. Between

tioners or compete with local lawyers for business, but rather engage in legal work flowing from their employment as house counsel. The situation is similar for many lawyers employed by the federal government, who may be assigned to work on cases in jurisdictions where they are not licensed. Many areas of federal practice, such as federal taxation and copyrights, are national in nature, so state licensure is not as important as federal expertise.

In the private practice arena, lawyers in modern society regularly follow their clients across jurisdictional borders.<sup>14</sup> The nature of legal problems in today's world is frequently not limited to a single county or state. Clients may have property or business interests in multiple jurisdictions, as well as business relationships with customers, suppliers, and co-venturers in different states. This phenomenon is not limited to businesses, as individuals may have interests in a number of jurisdictions. It is possible for someone to have been born in one state, attended school in another state, married a spouse from a third state, settled in a fourth, obtained employment in a fifth, and vacationed in a sixth. Such a person might easily own property in all six states.

Lawyers themselves may call, e-mail, or fax their clients at home as they travel to other states for work or leisure. It is not uncommon to see laptops at the beach or cell phones at the airport with lawyers handling matters far from their physical location. Law firms may open branch offices that become home to lawyers from an out-of-state office. Lawyers may even spend extended periods in locations outside their home states working on cases. Lawyers may engage in physical, telephone, or virtual conferences with other lawyers who work in other states. Lawyers who represent clients in mass disaster, civil rights, antitrust, and class action suits may find it impossible to operate within a single state.<sup>15</sup>

All the activities described above, even those that are common in law practice today, technically violate current state rules on MJP. All states have some form of the 1983 ABA Model Rule 5.5, which makes it unethical for a lawyer to engage in the practice of law in a jurisdiction where he or she is not licensed.<sup>16</sup> This rule treats all those who are not licensed by a jurisdiction as non-lawyers, notwithstanding the fact that they may be li-

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1978 and 1983, the number of out-of-state branches tripled, and by 1987, the 100 largest law firms "maintained an average of five branch offices." A major factor in this expansion was the firms' desire to fully serve the needs of their clients. The proliferation of branch offices is expected to continue and eventually, the largest law firms are likely to resemble the major accounting firms in structure, management, and governance. Moreover, medium-size law firms are establishing branch offices to promote regional growth; "Even those lawyers who work in firms that maintain offices only in a single state are more likely today to have out-of-state clients, disputes, or transactions due to the pervasive presence of interstate commerce made possible by increases in mobility and communication." (internal citations omitted).

14. See *id.*

15. See *id.*; see also Rhonda Wasserman, *Dueling Class Actions*, 80 B.U.L. REV. 461, 534 (2000) (discussing the inherent interstate nature of class action lawsuits).

16. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (2002); see also MODEL CODE OF PROF'L RESPONSIBILITY DR 3-101 (2002).

censed in other states.<sup>17</sup> Thus, lawyers whose legal work crosses state lines may be subject not only to discipline, but also criminal sanction for violations of state unauthorized practice statutes.<sup>18</sup> Whether or not these lawyers are actually sanctioned, they work under the cloud of possible action by an overzealous prosecutor or manipulative adversary.

Perhaps as important as the risk of sanction to individual lawyers is the systemic effect of the failure to enforce the rules as currently written. If lawyers disregard with impunity rules that appear to limit MJP, and if disciplinary authorities fail to prosecute these lawyers, then confidence in the system of lawyer regulation is undermined by the very fact that the current regime makes liars of us all. What does it say about our commitment to ethical practice when we ignore the very rules created to regulate the practice?

The United States is a jurisdictional mosaic of fifty-three states and territories with fifty-three systems of practice regulation. This system goes back to the beginning of our republic, when the framers of the Constitution reserved for the states control over all matters not specifically delegated to the federal government.<sup>19</sup> Within the judicial branch of government, the courts assumed an inherent power to regulate themselves, including the licensing and discipline of lawyers who practiced in the state.<sup>20</sup>

For most of the nineteenth and a good bit of the twentieth centuries, much of the practice of law was local or state-based practice, and the device of pro hac vice admission was sufficient to accommodate most cross-border practice.<sup>21</sup> Most transactional work was essentially local, and when litigation was necessary, a lawyer could simply apply to the court for permission to appear.<sup>22</sup> The court might require an out-of-state lawyer to obtain local counsel, but at least there was a process.

The last half of the Twentieth Century, however, represented a period of fundamental change in society and in the practice of law.<sup>23</sup> If it could be

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17. See MODEL RULES OF PROF'L CONDUCT R. 5.5.

18. See James & Lee, *supra* note 13, at 1135. The problem with the rule is that the term "practice of law" is so ill defined that it is subject to any number of interpretations, and it is applied differently in different jurisdictions. In 2002, ABA President A.P. Carlton created a new Commission on the Definition of the Practice of Law, whose charge was to develop a clear definition that would achieve broad consensus within the legal profession. Whether such a goal is realistic, or mere windmill tilting, remains to be seen.

19. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

20. Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U.L. REV. 1, 3-4 (1998) ("the ultimate responsibility for the administration of lawyer discipline in most states has moved, at least nominally, from the state bars to the state courts. State courts have become more actively involved in lawyer discipline.")(internal citation omitted).

21. Christine R. Davis, *Approaching Reform: The Future of Multijurisdictional Practice in Today's Legal Profession*, 29 FLA. ST. U.L. REV. 1339, 1351-52 (2002).

22. *Id.* at 1344-45.

23. See Ann L. MacNaughton & Gary A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold?*, 47 LOY. L. REV. 665, 673 (2001) (describing changes in the legal profession over the course of the Twentieth Century); see also Gary A. Munneke, *Legal*

said that a lawyer in 1950 practiced law in much the same way as Abraham Lincoln practiced law in 1850, it should be clear to anyone who has been involved in the legal profession in the years since 1950 that the practice of law would be unrecognizable to some modern-day Rip Van Winkle, who fell asleep in 1952 and awakened in 2002. The transformation of society with the advent of the Information Age has had the effect of transforming the practice of law.<sup>24</sup> The trends precipitated by this transformation continue to impact the legal profession and the way lawyers do business.<sup>25</sup>

The practice of law has become nationalized, even globalized, as products, services, and trade move throughout the world.<sup>26</sup> International practice is not limited to a handful of firms in New York and San Francisco. A lawyer in Lincoln, Nebraska may have clients whose interests or business activities take them to the four corners of the world. Lawyers who cannot operate effectively in this fast-paced international marketplace find themselves at a disadvantage in serving their clients well. Within the United States, the Commerce Clause assures movement of goods and services across state lines,<sup>27</sup> and a national transportation system linking the United States has the effect of uniting the states.

A communications revolution has created the "global village" predicted by Marshall McLuhan in the 1960s, where no one is more than a nanosecond from news and information.<sup>28</sup> People can watch events unfolding in the Middle East or Afghanistan on CNN, while observers in China and Chechnya follow the developments in the Enron scandal. Satellite, microwave, and cable networks link virtually every corner of the earth by telephone, television, facsimile, and the Internet.

Technology has created powerful new tools for managing data, delivering services, and reaching clients across jurisdictional boundaries—a world

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*Skills for a Transforming Profession*, 22 PACE L. REV. 105, 119-20 (2001) (detailing the shifting demographics of the legal profession in the latter half of the Twentieth Century).

24. See MacNaughton & Munneke, *supra* note 23, at 666-69.

25. See *id.* at 670.

26. See Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 VAND. J. TRANSNAT'L L. 931, 932-41 (describing the globalization of law practice).

27. See U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power to regulate interstate and international commerce).

28. See generally Marshall McLuhan, *THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN* (1969); Marshall McLuhan, *UNDERSTANDING MEDIA: THE EXTENSION OF MAN* (1966). McLuhan was a visionary who hypothesized about the transformation of society in an era dominated by electronic media. His concept of the global village postulated that electronic communication allowed everyone in the world instant and simultaneous access to information about events and issues everywhere in the world. This compression of time and access could produce common experiences on a global stage similar to the pre-historical village, in which history, culture, and heritage were shared by all members of the community. McLuhan's observations came long before the era of personal computers, digital wireless telephones, and the Internet. Yet his words ring true in a world where CNN delivers the images of the destruction of the World Trade Center, human rights protests in Tiananmen Square, and Smart Bombs in the Gulf War that reach viewers in the furthest reaches of human habitation, where e-commerce makes goods and services universally available to anyone with a computer and a modem, and where television shows like *Survivor*, *American Idol*, the Super Bowl, the World Cup, and the Academy Awards can be collectively experienced globally.

of e-lawyering.<sup>29</sup> Lawyers can exchange documents and information with clients and other parties, negotiate and collaborate to resolve disputes, file pleadings, and search records, all online.<sup>30</sup> Lawyers can access legal and other electronic databases in order to research legal issues.<sup>31</sup> They can deliver information and advice interactively and in real time to meet their clients' needs or to market their services to new clients.<sup>32</sup>

Demographic changes are not only altering the makeup of the client base, but also moving client interests from one jurisdiction to another.<sup>33</sup> Clients of lawyers and other professionals are demanding a greater say in their representation, including the right to have the lawyer of their choice even if the lawyer is from another state.<sup>34</sup>

As practice has become more complex, specialization has become more commonplace.<sup>35</sup> In 2002, a Texas securities lawyer is better equipped to handle a securities case in New York than a New York licensed family law specialist. Some fields, such as tax and patents, are inherently federal; other practice areas are so complex that general practitioners are simply not able to practice competently.<sup>36</sup> In most areas of law, jurisdictional differences are diminishing. Restatements and uniform state laws, generic legal education, and widespread access to common sources of information all contribute to homogenizing the legal system.<sup>37</sup> The trend is clear that whether by design or not, the legal system in the United States is becoming nationalized and in some areas involving international trade and relations, it is becoming globalized.<sup>38</sup>

Despite the myth that a lawyer who has passed the bar exam is qualified to handle all legal matters, most lawyers can be competent in only a narrow range of substantive areas. Model Rule 1.1, which deals with competence, requires lawyers to exercise the "knowledge, skill, thoroughness and prepa-

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29. See Munneke, *supra* note 23, at 134-35 ("Lawyers already engage in e-lawyering in a variety of ways. They utilize websites to provide information resources to clients, to market their practices, to create referral systems with other lawyers and service providers, to take advantage of on-line practice support tools, and to create interactive delivery systems.") (internal citations omitted).

30. See *id.*

31. In the last twenty years, the market for online legal research has dramatically increased. Today, lawyers can research case law and statutes, download forms, and read scholarly pieces with a computer and a network connection rather than multiple shelves of casebooks, formbooks, and treatises.

32. See Munneke, *supra* note 23, at 134-35.

33. My children live in four different states; my parents and sister live in yet another; none of them live in either the state where I work or the state where I live. Although I own property in five states and one foreign country, I think of myself as a typical American, whose legal interests are not limited to a single jurisdiction and whose legal needs are not bounded by the state of my birth (yet another state where none of us now live). This is very different from the situation of an American farmer in the agrarian Nineteenth Century, who might live out his or her entire life in a single county of the state where he or she was born.

34. See James & Lee, *supra* note 13, at 1148.

35. See Munneke, *supra* note 23, at 119.

36. See Davis, *supra* note 21, at 1354.

37. See, e.g., Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45, 78 (1998).

38. See Munneke, *supra* note 23, at 119-20.



ration reasonably necessary” to handle a matter.<sup>39</sup> The Comments to the Rule make clear that a lawyer may take steps to attain requisite competence to be able to handle the matter,<sup>40</sup> but Rule 1.5 (e)<sup>41</sup> provides for the referral of cases to other lawyers.

In addition to disciplinary rules regarding competence, the specter of malpractice hangs over the heads of lawyers who overreach the bounds of reasonable care.<sup>42</sup> The risk of professional sanction represents a powerful disincentive for lawyers to undertake work they are not competent to handle. Regarding out-of-state lawyers, the practice of taking cases from other jurisdictions where they do not know or cannot learn the rules and procedures of the foreign state may pose a risk of professional error. Yet, for many lawyers, it is possible to engage in competent practice across state lines well within the parameters of Rule 1.1 and the professional standard of care.

Ironically, it is easier for a lawyer in the European Union, the British Commonwealth, the Russian Federation, or the People’s Republic of China to practice outside his or her home political subdivision than it is for a lawyer in the United States to practice law across state lines. In the European Union, a lawyer licensed in any member state is permitted to appear in the courts of any other member state, and transactional matters are hardly regulated at all.<sup>43</sup> In most of the other large countries around the world, a license to practice law is granted on a national basis.<sup>44</sup> Yet, the United State persists in a system devised for the thirteen colonies more than two centuries ago and ill suited for the interconnected global markets of the Twenty-First Century.

39. See MODEL RULES OF PROF’L CONDUCT R. 1.1 (2002) (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

40. See Comment 2 of Model Rule 1.1:

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 2 (2002).

41. See Model Rule 1.5(e):

A division of a fee between lawyers who are not in the same firm may be made only if:

- (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
- (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
- (3) the total fee is reasonable.

MODEL RULES OF PROF’L CONDUCT R. 1.5(e) (2002).

42. See Diane Leigh Babb, *Take Caution When Representing Clients Across State Lines: The Services Provided May Constitute the Unauthorized Practice of Law*, 50 ALA. L. REV. 535, 539 (1999).

43. See Davis, *supra* note 21, at 1358.

44. See *id.*

## III. THE MJP DEBATE

Changes in the legal profession and the outside world collectively contributed to the growing phenomenon of multijurisdictional practice in the United States. It should not be surprising that this trend generated disagreement between defenders of the status quo and advocates for change. In time, these differences triggered a national debate among lawyers, bar associations, and licensing authorities about whether the present mono-jurisdictional practice model should be reformed.

A number of writers criticized these jurisdictional barriers, suggesting that the system of state licensing should be replaced or reformed.<sup>45</sup> The 1999 decision in *Birbrower v. Superior Court of Santa Clara County*,<sup>46</sup> however, proved to be the catalyst that prompted reformers into action. In *Birbrower*, a New York law firm handled an arbitration for a California subsidiary of a New York corporation.<sup>47</sup> The Birbrower firm advised the California client on both New York and California law, and lawyers from the firm traveled to California in conjunction with the representation.<sup>48</sup> At the conclusion of the representation, the Superior Court of Santa Clara County denied the law firm's fee request.<sup>49</sup> On appeal to the Supreme Court of California, the court ruled that Birbrower's conduct amounted to the unauthorized practice of law in California and that the firm could not charge or collect a fee based on its unauthorized practice.<sup>50</sup> The Court did permit the firm to recover on a quantum meruit theory fees for any work that was performed lawfully in New York, which was a hollow victory indeed, since most of the work was done in California.<sup>51</sup>

The *Birbrower* decision led then ABA President, Bill Paul, to convene a national invitational conference at Fordham Law School in March 2000.<sup>52</sup> Attendees included professors, judges, bar examination authorities, disciplinary counsel, bar leaders, corporate counsel, and private practitioners.<sup>53</sup> Some attendees representing the interests of individual states argued for maintaining the status quo and called for retrenchment in the wake of *Bir-*

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45. See, e.g., Davis, *supra* note 22; MacNaughton & Munneke, *supra* note 24; Carol A. Needham, *Negotiating Multistate Transactions: Reflections on Prohibiting the Unauthorized Practice of Law*, 12 ST. LOUIS U. PUB. L. REV. 113 (1993); Carol A. Needham, *The Multijurisdictional Practice of Law and the Corporate Lawyer: New Rules for a New Generation of Legal Practice*, 36 S. TEX. L. REV. 1075 (1995); Charles W. Wolfram, *Sneaking Around the Legal Profession: Interjurisdictional Unauthorized Practice of Law by Transactional Lawyers*, 36 S. TEX. L. REV. 665 (1995); Charles W. Wolfram, "What Needs Fixing?" *Expanding State Jurisdiction to Regulate Out-of-State Lawyers*, 30 HOFSTRA L. REV. 1015 (2002).

46. 949 P.2d 1 (Cal. 1998).

47. *Birbrower*, 949 P.2d at 124.

48. *Id.* at 125.

49. *Id.* at 126.

50. *Id.* at 133.

51. *Id.* at 135.

52. See MacNaughton & Munneke, *supra* note 23, at 684.

53. See, e.g., Bruce Green, *Assisting Clients with Interstate Problems: The Need to Bring the Professional Regulation of Lawyers into the 21st Century* (2000), available at [http://www.abanet.org/cpr/mjp-bruce\\_green\\_report.html](http://www.abanet.org/cpr/mjp-bruce_green_report.html).

*brower*.<sup>54</sup> Other attendees viewed *Birbrower* and other recent developments as a call to arms to reform the antiquated system of state-based licensure and unauthorized practice regulation.<sup>55</sup> Among the most vocal reformers were corporate counsel representatives whose work regularly took them across state lines.<sup>56</sup>

Debate at the conference was lively and spirited. Not surprisingly, conference attendees did not reach consensus on any single solution, although there was general agreement that multijurisdictional practice was a significant problem in need of attention.<sup>57</sup> This consensus is reflected in the white paper document, produced by Professor Bruce Green, which captures the sense of the conference that some kind of reform was necessary.<sup>58</sup>

In August 2000, incoming ABA President, Martha Barnett, created a Commission on Multijurisdictional Practice.<sup>59</sup> The MJP Commission was originally chaired by Harriet Miers, of Dallas, who resigned to join the Bush administration. She was succeeded by Wayne Positan of New Jersey. Over the next year, the Commission held hearings, conducted research, and drafted an Interim Report that was released in November 2001.<sup>60</sup> Following a period of comment, the Commission released a Final Report with recommendations in May 2002.<sup>61</sup> These recommendations were considered and acted upon by the House of Delegates at the 2002 ABA Annual Meeting.<sup>62</sup>

From the time of the Fordham conference to the release of the MJP Commission Final Report, a number of positions and approaches to MJP emerged. The differences in perspective, philosophy and objective demonstrate why it was so difficult for the original Fordham conferees to articulate a consensus.

Some lawyers, including bar licensing authorities, argued for maintaining the status quo.<sup>63</sup> These "no change" adherents claimed that we should not abandon a regulatory approach that has worked for over 200 years without more information.<sup>64</sup> Among those who supported the status quo, there was sentiment supporting more rigorous enforcement of the existing rules.<sup>65</sup> These lawyers believed that the current system does not go far enough and

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54. *See id.*

55. *See id.*

56. *See* Susan Hackett & Ann L. MacNaughton, "When the Walls Come Tumblin' Down, TEX. BAR J. (Mar. 2002).

57. *See* Green, *supra* note 53.

58. *See* Green, *supra* note 53.

59. MacNaughton & Munneke, *supra* note 23, at 684 n.71. This is not to be confused with the Commission on Multidisciplinary Practice ("MDP"), which was voted out of existence by the House of Delegates the summer the MJP Commission was created.

60. *Id.*

61. *Id.*; *see supra* notes 87-93, and accompanying text.

62. MacNaughton & Munneke, *supra* note 23, at 684 n.71.

63. *See* Report of the Akron Bar Association to the ABA Commission on Multijurisdictional Practice, May 2001.

64. *See, e.g.,* N.J. Unauth. Prac. Op. 38 (2002) (holding that a person who is not licensed to practice in New Jersey and assists a New Jersey resident with estate planning engages in the unauthorized practice of law).

65. *See* Sutton, *supra* note 8, at 1032.

urged greater enforcement of state laws barring unauthorized practice of law to keep out non-lawyers and unlicensed lawyers.<sup>66</sup>

Among those who supported liberalizing MJP rules were those who favored some form of Registration ("Green Card") Approach, creating an analogous process to pro hac vice admission for transactional lawyers.<sup>67</sup> This approach merely created another expensive, cumbersome bureaucracy that states did not need and could not afford.

Both the ABA's Ethics 2000 Commission and the MJP Commission Interim Report took a Safe Harbor Approach that would have continued to proscribe all multijurisdictional practice not specifically exempted by the ethics rules.<sup>68</sup> The Safe Harbor Approach would have permitted more multijurisdictional practice without changing the underlying construct that all conduct not specifically permitted is prohibited, and unless a lawyer's activities fell within one of the safe harbors, the lawyer would be at risk of sanction.<sup>69</sup>

An alternative approach offered by the American Corporate Counsel Association (ACCA), the National Organization of Bar Counsel (NOBC), the Association of Professional Responsibility Lawyers (APRL), and the ABA Law Practice Management Section would have permitted limited MJP.<sup>70</sup> This so-called Common Sense Proposal would have allowed temporary MJP, including all the situations covered by the Commission, but lawyers would still be prohibited from establishing a permanent and continuing

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66. See *id.*

67. See Davis, *supra* note 21, at 1361.

68. See Wolfram, "What Needs Fixing?" *Expanding State Jurisdiction to Regulate Out-of-State Lawyers*, *supra* note 45, at 1051.

69. *Id.*

70. See American Corporate Counsel Association, *A Common Sense Proposal for Multijurisdictional Practice* (2002), available at <http://www.acca.com/advocacy/mjp/commonsenseproposal.html> (last visited Mar. 2, 2002) (hereinafter ACCA Common Sense Proposal); see also American Bar Association Commission on Multijurisdictional Practice, *Interim Report Written Responses/Comments MJP Comment Summaries* (2002), available at [http://www.abanet.org/cpr/mjp/comm\\_summ2.html](http://www.abanet.org/cpr/mjp/comm_summ2.html) (last visited Mar. 2, 2002) (detailing the various positions taken by individuals and entities on the MJP issue) (hereinafter ABA Comment Summaries). The text of the ACCA Common Sense Proposal for an amended Rule 5.5 was the following:

(a) Unauthorized Practice of Law. A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;

(2) assist another person in the unauthorized practice of law.

(b) Multijurisdictional Practice of Law. A lawyer not admitted to practice in this jurisdiction, but admitted to practice in another jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may engage in the practice of law in this jurisdiction when:

(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or

(2) other than engaging in conduct governed by paragraph (b)(1):

(i) the lawyer is an employee of a client and acts on the client's behalf or on behalf of the client's organizational affiliates; or

(ii) the lawyer performs services for a client in this jurisdiction on a temporary basis, does not establish a systematic and continuous presence in this jurisdiction for the practice of law, and does not hold out to the public that the lawyer is licensed to practice law in this jurisdiction.

ACCA Common Sense Proposal, *supra* note 70.

presence in a state where they were not licensed, or hold themselves out as possessing a license in a state where they were not licensed.<sup>71</sup> Practically, the Common Sense Approach was slightly more liberal in permitting MJP than the Commission's Safe Harbor Approach, but certainly neither group went as far as recommending unrestricted national practice.<sup>72</sup>

Some commentators supported a free market approach to MJP, arguing that a lawyer licensed in any state should be able to practice law in every state, subject to the disciplinary authority of host states, similar to a driver's license.<sup>73</sup> Others called for a nationalization of the practice of law, replacing state licensing with some form of national regulation.<sup>74</sup> For a number of reasons, including the fact that it would take a Constitutional amendment to make such a change<sup>75</sup> and the substantial influence of state regulatory authorities, these proposals gained more adherents in the abstract than in the real world.

The most radical reformers called for the elimination of all licensing from the legal market; they would have permitted lawyers to operate in a free market for professional services without professional regulation.<sup>76</sup> Those who favored this approach seemed to be saying that the legal profession should not be in the business of regulating itself.<sup>77</sup> In a larger sense, however, such a Keynesian view would place lawyers on the same playing field with other providers of professional services, where they could compete for clients in the marketplace.<sup>78</sup> Without a professional monopoly, lawyers would be forced to compete on the basis of price, quality, marketing acumen, alliances, and other market forces. Despite its intellectual purity, such an approach stood little chance of finding widespread acceptance in a regulatory world dominated by the organized bar.

Of these suggested alternatives, the safe harbor and authorized MJP proposals generated the most support. The MJP Commission, over the course of two years, discovered that the vast majority of those who commu-

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71. See ACCA Common Sense Proposal, *supra* note 70.

72. *Id.*

73. See Davis, *supra* note 21, at 1357-58 (proposing punishment of lawyers under host state's unauthorized practice of law provisions, citing this theory's success in the European Union).

74. See *id.*

75. Because the regulation of lawyers within their jurisdiction is a matter traditionally regulated to the several states, Congress may have trouble in enacting comprehensive legislation to regulate lawyers' interstate activities. See Davis, *supra* note 21, at 1355, stating:

States have always had the exclusive authority to regulate the activity of their lawyers. Consequently, there is no right of federal origin permitting an attorney to practice law in a state without meeting that state's admissions requirements. States exercise their authority with the primary concern of protecting their citizens. Thus, states preclude persons from representing their citizens without proper training. With regard to out-of-state lawyers, states view the proper training as successful completion of their bar exam.

(internal citations omitted).

76. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

77. *Id.*

78. See, generally MacNaughton and Munneke, *supra* note 23.

nicated with it favored some degree of reform for the system.<sup>79</sup> It is therefore not surprising that the Commission's Interim Report took a decidedly middle ground.<sup>80</sup> The Commission recommended the creation of eight safe harbors that would be carved out of the general prohibition against practicing law across state lines.<sup>81</sup>

The Final Report of the MJP Commission, released in May 2002, abandoned the safe harbor approach in favor of a recommendation closer to the Common Sense Proposal.<sup>82</sup> The Commission, however, incorporated language suggested by the ABA's Standing Committee on Ethics and Professional Responsibility, derived from the Restatement of the Law Governing Lawyers.<sup>83</sup> The Standing Committee/Restatement Approach tied authorized MJP to the lawyer's home state practice.<sup>84</sup> Thus, if there is a nexus between

79. See ABA Comment Summaries, *supra* note 70.

80. See American Bar Association, *Interim Report of the Commission on Multijurisdictional Practice* (Nov. 2001), available at [http://www.abanet.org/cpr/mjp-final\\_interim\\_report.pdf](http://www.abanet.org/cpr/mjp-final_interim_report.pdf) (last visited Sept. 16, 2002) (hereinafter MJP Interim Report).

81. *Id.* The MJP Interim Report listed the safe harbors as follows:

- (b) A lawyer admitted in another United States jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law when the lawyer represents a client on a temporary basis in this jurisdiction if the lawyer's services do not create an unreasonable risk to the interests of the lawyer's client, the public, or the courts.
- (c) Services for a client that are within paragraph (b), if performed on a temporary basis by a lawyer admitted and in good standing in another United States jurisdiction, include services that:
  - (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the representation;
  - (2) may be performed by a person who is not a lawyer without a law license or other authorization from a state or local governmental body;
  - (3) are in or reasonably related to a pending or potential proceeding before a tribunal or administrative agency held or to be held in this or another jurisdiction, if the lawyer is authorized by law or court or agency order to appear in such proceeding or reasonably expects to be so authorized;
  - (4) are in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding held or to be held in this or another jurisdiction;
  - (5) are not within paragraph (c)(3) or (c)(4) and:
    - (i) are performed for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice, or
    - (ii) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is admitted to practice; or
  - (6) are governed primarily by federal law, international law, the law of a foreign nation, or the law of a jurisdiction in which the lawyer is admitted to practice.
- (d) A lawyer admitted to practice in another jurisdiction but not in this jurisdiction does not engage in the unauthorized practice of law in this jurisdiction:
  - (1) if the lawyer is an employee of a client and acts on behalf of the client or its commonly owned organizational affiliates except for work for which pro hac vice admission is required; or
  - (2) when the lawyer renders services in this jurisdiction pursuant to other authority granted by federal law or the law or a court rule of this jurisdiction.

*Id.*; see also Nancy J. Moore, *Conference on Legal Ethics: "What Needs Fixing?" Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 943 (2002).

82. See American Bar Association, *Report of the Commission on Multijurisdictional Practice* (Aug. 2002), available at [http://www.abanet.org/cpr/mjp/final\\_mjp\\_prt\\_121702.doc](http://www.abanet.org/cpr/mjp/final_mjp_prt_121702.doc) (last visited Sept. 16, 2002) (hereinafter MJP Final Report).

83. See *id.*

84. See *id.*

the home state practice and the activity in a visiting state, the activity is authorized.<sup>85</sup> The Final Report also adopted the Common Sense Proposal's position on temporary practice, by including language that would prohibit lawyers from establishing a permanent presence in a state or holding themselves out as licensed in a state where they were not licensed.<sup>86</sup> The Commission recommended changes to the Comments to Model Rule 5.5, consistent with the language of the new rule.<sup>87</sup> For the most part, the final report abandoned the safe harbor terminology, and instead described the safe harbors enunciated in the Interim Report as examples of authorized MJP.<sup>88</sup>

Other parts of the Commission's final report included recommendations on a number of related issues. The Commission affirmed support for the principle of state judicial regulation of the practice of law.<sup>89</sup> It called for amendment of Model Rule 8.5 to permit cross-jurisdictional discipline of lawyers.<sup>90</sup> It amended the ABA's Model Rules of Lawyer Disciplinary Enforcement to ensure that state disciplinary procedures are consistent with the objectives of amended Rules 5.5 and 8.5.<sup>91</sup> Finally, it encouraged the use of a National Lawyer Regulatory Database to promote the interstate disci-

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85. *See id.*

86. *See id.*

87. *See* MJP Final Report, *supra* note 82.

88. *See id.* at 201B (proposing changes to Model Rule 5.5). The changed rule is outlined below:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

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

(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.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

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

*Id.*

89. *Id.* at 201A ("RESOLVED, that the American Bar Association affirms its support for the principle of state judicial regulation of the practice of law.").

90. *Id.* at 201C.

91. *Id.*

plinary enforcement mechanisms and urged jurisdictions to adopt the International Standard Lawyer Numbering System.<sup>92</sup> These proposals were calendared for consideration by the ABA House of Delegates at its August 2002 meeting in Washington, D.C.

The Commission and its supporters, who at the time of the Annual Meeting included a coalition of groups that had supported the Common Sense Proposal, argued strongly in favor of reform in the regulation of multijurisdictional practice.<sup>93</sup> These arguments supported the recommendations offered by the Commission, and underscored the importance of MJP reform to the future of the profession.<sup>94</sup>

First, the Commission Report recognized that MJP is widespread.<sup>95</sup> Every practicing lawyer, at some time or another, engages in activities that cross state lines and raise the risk of disciplinary or criminal sanction.<sup>96</sup> This list includes in-house corporate lawyers, private practitioners following their clients' interests, government lawyers, civil rights lawyers, class action lawyers, federal practitioners, Internet lawyers, foreign (non-U.S.) lawyers, litigators (*pro hac vice*), law professors and other national experts, lawyers in firms with branch offices, and ordinary lawyers communicating with their clients from across state lines. Although some lawyers engage in more MJP than others, no one is immune.

The Commission also recognized that everyone who engages in MJP is at risk of professional sanction.<sup>97</sup> If a lawyer crosses a state line to assist a client or engage in legal work outside a state where he or she is licensed, he or she risks being charged with the unauthorized practice of law.<sup>98</sup> If a lawyer cooperates with lawyers from other jurisdictions to serve clients in his or her home state, he or she could be charged with assisting the unauthorized practice of others.<sup>99</sup> When a lawyer works outside his or her home jurisdiction, he or she risks triggering fee disputes, as illustrated by the California case of *Birbrower*.<sup>100</sup> A system that criminalizes the conduct of all members of the profession, reformers claim, can only be seen as bankrupt and in need of reform.

Opponents of MJP reform raised a number of objections to reform, and articulated various reasons for maintaining the status quo or retrenching even further.<sup>101</sup> These detractors represented the view that there is nothing wrong with the status quo, and that changes in the present system will create

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92. See MJP Final Report, *supra* note 82, at 201E.

93. See *supra* notes 71-72, and accompanying text.

94. See *id.*

95. MJP Final Report, *supra* note 82.

96. *Id.*

97. *Id.*

98. See James & Lee, *supra* note 13, at 1150.

99. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (2000) (amended 2002).

100. See generally *Birbrower*, 949 P.2d 1.

101. See *supra*, notes 63-65, and accompanying text.



more problems than they resolve.<sup>102</sup> It is important to understand these arguments in order to discover some rational basis for MJP reform.

The first concern involves states' rights and inherent powers. The Constitution reserves to the individual states the power to establish courts, and courts have the inherent power to determine their rules, including who may be licensed or appear before the courts in its jurisdiction.<sup>103</sup> Yet MJP does not really negate state regulation; in fact, the proposals of both the ABA MJP Commission and the Common Sense Proposal reaffirm state control of the licensing process.<sup>104</sup> States do have an interest in protecting the public from unqualified practitioners; yet in an era of specialization and national fields of practice, the unqualified practitioners are just as likely to be locals as out-of-state lawyers.<sup>105</sup> In fact, clients may look out-of-state for counsel when they do not feel they can get adequate representation within their jurisdiction's bar.

In contrast to the United States, the European Union has made cross-border practice easier for lawyers from member states.<sup>106</sup> The British Commonwealth, Russia, China, and Brazil have recognized the benefits of eliminating the Balkanization that pervades practice in America.<sup>107</sup> When dealing with foreign jurisdictions, one should remember that the concept of what it means to be a lawyer is not necessarily the same as it is in the United States. In the United Kingdom, the distinction between barristers and solicitors has persisted, despite significant changes in the practice of law.<sup>108</sup> In France and many other countries that embrace principles of Roman law, there exists a distinction between *avocats*, who are similar to what Americans think of as lawyers, and *conseils juridiques*, who perform ministerial legal functions. In most of the rest of the world, legal education is provided at the undergraduate level. Despite these differences, the barriers to cross-jurisdictional practice are coming down.<sup>109</sup>

A second concern is that state licensing assures quality control among lawyers and protects clients from incompetent practitioners. Arguably, state licensing authorities have a responsibility to the public to assure that only qualified individuals are licensed to practice law. By this logic, lawyers who engage in MJP have not met the jurisdiction's quality control requirements and should not be allowed to provide services to citizens of the state.

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102. See American Bar Association, *Supplemental Testimony on MJP from Elizabeth Reilly and the Akron Bar Association*, available at [http://www.abanet.org/cpr/mjp-comm\\_akronba2.html](http://www.abanet.org/cpr/mjp-comm_akronba2.html) (last visited Sept. 16, 2002).

103. See U.S. CONST. amend. X.

104. See MJP Final Report, *supra* note 82.

105. As lawyers engage increasingly in limited areas of practice, it is likely that lawyers from different states whose expertise is in the same specialty will be better able to handle matters related to their specialty in either state than lawyers who practice in unrelated fields of law. See generally *Birbrower*, *supra* note 46.

106. See Davis, *supra* note 21, at 1358.

107. See *id.* at 1342.

108. See Wolfram, *supra* note 5, at 979.

109. See Davis, *supra* note 21, at 1340.

Notwithstanding the fact that they may be licensed in a number of other states, or possess stellar credentials, non-admitted lawyers have not been certified as licensed in this state. In short, permitting out-of-state lawyers to visit a jurisdiction in cases where they are competent to handle the work is more likely to enhance the quality of legal services in the state rather than to increase the risk of harm to the public.

Some opponents to MJP reform would prohibit all practice that does not fall under state licensure or pro hac vice rules.<sup>110</sup> They view the problem of MJP as a part of the larger problem of encroachment upon the legitimate practice of law by non-lawyers.<sup>111</sup> For them, MJP, MDP, independent paralegal practice, and other forms of non-lawyer practice are just different examples of the unauthorized practice of law.<sup>112</sup> Yet there is no empirical evidence to support the notion that otherwise qualified out-of-state lawyers inflict any greater harm on clients than local lawyers. Arguably, states can maintain quality control by continuing to enforce pro hac vice admission for litigation, subjecting temporary lawyers, including both litigators and transactional lawyers, to local discipline, giving full faith and credit to visiting state sanctions, and requiring permanent admission to lawyers who establish a permanent and continuing presence in the state.<sup>113</sup> Furthermore, civil actions for legal malpractice, breach of fiduciary duty, misrepresentation, and other theories provide a powerful disincentive for lawyers to undertake matters in any state where they lack the knowledge or skill to perform the work.<sup>114</sup>

A final and more plausible explanation for opposition to MJP is old-fashioned economic protectionism.<sup>115</sup> Local lawyers seek to exclude out-of-state lawyers from the local marketplace for legal services for the same reason that they try to exclude non-lawyers: to impose a monopoly on the delivery of professional services to clients.<sup>116</sup>

In hearings before the MJP Commission in May 2001, representatives of the Akron Bar Association, in testimony, added an interesting twist to the

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110. See Lawrence J. Fox, *Those Who Worry About the Ethics of Negotiation Should Never be Viewed as Just Another Set of Service Providers*, 52 MERCER L. REV. 977, 989 (2001).

111. See *id.*

112. See *id.*

113. See MJP Final Report, *supra* note 82.

114. Not only are clients likely to sue lawyers who fail to meet their professional obligations, malpractice insurance companies increasingly limit coverage to areas of practice where lawyers possess expertise and/or experience. Thus, the risk of harm to out-of-state clients is reduced by such limitations.

115. See Susan Hackett & Ann L. MacNaughton, "When the Walls Come Tumblin' Down," TEX. BAR J. (Mar. 2002).

116. Here, the MDP and MJP debates coincide and again diverge. Economic protectionism and enforcement of the professional monopoly are at the heart of efforts to keep out both out-of-state lawyers and non-lawyers. However, lawyers who have graduated from law school, passed one or more bar exams, and gained experience in the practice of law are less likely to pose a threat to residents of the state who require legal services than non-lawyers; but to the extent that out-of-state lawyers are more qualified than non-lawyers to provide legal services, the out-of-state lawyers are potentially more formidable competitors.

economic argument—the Wal-Mart factor.<sup>117</sup> These lawyers postulated that MJP threatens the integrity of the local bar and the economic viability of local law practices, because when out-of-state lawyers are free to move into local communities, big out-of-state firms will squeeze out small local law firms, the same way that Wal-mart and other national retailers wipe out the “mom and pop” groceries when they come to town.<sup>118</sup> A variation of this theme is that out-of-state lawyers will not participate in local community boards and politics, pro bono, and other public service activities.<sup>119</sup>

The truth is that locals can be “Wal-Marted” by in-state firms, and resourceful invaders can easily recruit in-state lawyers to work in their local offices.<sup>120</sup> There is little empirical evidence to suggest that out-of-state lawyers have much of an effect on public service by lawyers. What this opposition really amounts to is an attempt to use the regulatory process to engage in economic protectionism. It makes more sense to encourage efficient delivery systems that serve clients better than to impose artificial barriers to practice.

It may be argued that MJP is just another scheme to undermine professional values and de-professionalize the practice of law, and that legal advertising and MDP were just the tip of the de-regulation iceberg. The topic of professionalism raises thornier questions. The question should be, “What are the core values of the profession?” Such values should be more than just apple pie and motherhood, or rhetoric for Law Day speeches. The list of core values might include independent professional judgment, confidentiality, loyalty, public service, peaceful resolution of disputes, fairness, honesty, and integrity. Ten years ago, the ABA’s MacCrate Task Force articulated a statement of basic values of the legal profession.<sup>121</sup> Although the practice of law has changed considerably in the past decade and there is continued to talk about professional values, very little discussion has occurred about the how these values might have evolved.<sup>122</sup>

Perhaps most problematic is the question: “Are we two professions or one?” In contrast to many other legal systems around the world, the American Model espouses a unified profession. If we cannot find ways to accommodate multijurisdictional practice, it may be time to ask whether the goals of litigation are inconsistent with the goals of transactional representation? Are the values of litigation compatible with the values of transactional lawyering? Does a bifurcated system make more sense in today’s complex business, political, and social environment? If the professional

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117. See American Bar Association, *Supplemental Testimony on MJP from Elizabeth Reilly and the Akron Bar Association*, available at [http://www.abanet.org/cpr/mjp-comm\\_akronba2.html](http://www.abanet.org/cpr/mjp-comm_akronba2.html) (last visited Sept. 16, 2002).

118. See *id.*

119. See *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 292-93 (1985) (Rehnquist, C.J., dissenting) (a case about admission of a non-resident bar applicant).

120. See *id.*

121. See Munneke, *supra* note 23, at 130.

122. *Id.* at 136.

rules are designed to protect the integrity of the adversarial justice system, are those rules meaningful for transactional, non-judicial dispute resolution?

Perhaps the current debate will not answer all of these questions. There are, however, a few fundamental issues that the ABA and state regulators will have to decide: How much change is appropriate or possible under our federal constitutional form of government? Do we desire to continue to criminalize MJP or find ways to legitimize legal work? Do we want a regulated or deregulated practice? Are we interested in protecting lawyers' turf or protecting clients' right to choose an attorney? Do we want to create a viable environment for today's practice realities or marginalize lawyers in the competitive marketplace for professional services? The bar must find ways to open jurisdictional barriers or lawyers will find themselves working in an Eighteenth Century system in a Twenty-First Century world.

Looking at the MJP Commission's call for MJP reform, one should analyze a number of questions: Who will be protected by changing the rules? Who will be harmed by changing them? What benefits to clients will accrue from making lawyers more accessible? What dangers are posed by allowing lawyers to advise clients outside the states where they are licensed? What enforcement problems accompany either changing or maintaining the status quo? These are not easy questions, but the Commission resolved all of them in favor of reform.

A key to the Commission's recommendations was the principle of state control of lawyer regulation.<sup>123</sup> Thus, the Final Report did not alter the basic right of the states to determine who is qualified to practice law in the jurisdiction. Although the final recommendations recognized the concept of MJP, they retained the state's ability to regulate lawyers in the jurisdiction in two ways: to impose discipline on lawyers who temporarily provide services in the jurisdiction, and to require admission of lawyers who established a permanent presence there.<sup>124</sup> Thus, an unlicensed lawyer could engage in limited temporary practice in a state, but when the presence becomes permanent, the lawyer must take steps to obtain state licensing.<sup>125</sup>

The Final Report addressed the question of temporary practice by visiting lawyers, including activities that are commonly practiced by a large number of today's transactional lawyers.<sup>126</sup> The Final Report required a lawyer's temporary presence to have a nexus to the lawyer's home state practice.<sup>127</sup> Under the revised recommendation, a lawyer could work for a client in a state where he or she is not licensed if the client brings the lawyer a legal problem connected to the lawyer's home state practice.<sup>128</sup> As long as

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123. See MJP Final Report, *supra* note 82.

124. See *id.*

125. See *id.*

126. See *id.*

127. See *id.*

128. See MJP Final Report, *supra* note 82.

the representation is not part of a permanent and continuing presence in the foreign state, the visiting lawyer's conduct would not be improper.<sup>129</sup>

The Final Report would permit in-house practice, lawyers working on home state cases who follow those cases to other states, federal practice, and national experts.<sup>130</sup> The recommendations would prohibit non-licensed lawyers from holding themselves out as practitioners in a state where they are not licensed, as well as branch offices without resident counsel licensed in the state where the branch is located.<sup>131</sup>

The Final Report would continue state pro hac vice requirements for litigation.<sup>132</sup> The Report contemplates disciplinary authority and full faith and credit by home state disciplinary authority over all non-licensed lawyers practicing in the state.<sup>133</sup> These protections assure that the basic principle of state regulation over the practice of law is retained.

Significantly, the Final Report did not change the attitude of the bar toward the unauthorized practice of law by non-lawyers.<sup>134</sup> The recommendations continued the prohibition against lawyers assisting non-lawyers to engage in the unauthorized practice of law.<sup>135</sup> In contrast, amendments to both Rules 5.5 and 8.5 imply different treatment for lawyers licensed in another state, who are subject to multijurisdictional practice rules and reciprocal discipline, and non-lawyers who are not licensed anywhere and who are subject to unauthorized practice rules.<sup>136</sup>

The Commission incorporated enough of the Common Sense Approach to garner the support of many reformers who opposed the original safe harbor approach. Although the Common Sense Proposal was much simpler and shorter,<sup>137</sup> the Commission's recommendations attracted a wider circle of support than either the Commission or Common Sense Coalition achieved previously.<sup>138</sup>

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129. See *id.* This view was adopted in Model Rule 5.5(c)(3), stating:

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 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.

MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (2002).

130. See MJP Final Report, *supra* note 82.

131. See *id.*

132. See *id.*

133. See *id.*

134. See *id.*

135. See MJP Final Report, *supra* note 82, at 201B.

136. See *id.*

137. See ACCA Common Sense Proposal, *supra* note 70 and accompanying text. Proponents of the Common Sense Proposal, while arguing that the language in their proposal remained superior to the language proposed by the Commission, nevertheless agreed to join the Commission and other reformers in presenting a common, if compromised, front.

138. Compare ABA Comment Summaries, *supra* note 70, with American Bar Association, *Positions on Final MJP Report and Recommendation*, available at <http://www.abanet.org/cpr/mjp-home.html> (last visited Sep. 16, 2002).

Some opposition to the Commission's approach was voiced by Norman Redlich, House Delegate from the Section of Legal Education and Admissions to the Bar.<sup>139</sup> The Legal Education Section expressed concern that MJP reforms could have the effect of permitting graduates of law schools not approved by the American Bar Association to practice law more widely.<sup>140</sup> The Legal Education Section has long held the view that no one who has not graduated from an ABA-approved law school should be permitted to practice law.<sup>141</sup>

Commission member Peter Ehrenhaft complained that the Commission's recommendations did not go far enough to address the problem of foreign (non-U.S.) lawyers.<sup>142</sup> Although treaties such as NAFTA and GATT seem to open the door to United States practice to foreign lawyers, some people are concerned that the standards and even the definition of the term "lawyer" may not be the same in other countries.<sup>143</sup> As global law practice continues to evolve this problem will undoubtedly continue to be relevant to regulatory authorities and United States practitioners as well.

Despite these concerns, in the months prior to the ABA Annual Meeting in August, a coalition of supporters, including those who had supported the original Commission proposals, adherents to the Common Sense Proposal, leaders in the professional responsibility community, state and local bar groups, and leaders in the ABA, came together behind the language presented in the Commission's Final Report. Although opponents of reform may not have been persuaded, these opponents were surprisingly silent in the months leading up to the House of Delegates debate.

Notwithstanding the passage of the reform package by the House, every state will have to address the MJP issue in the coming year.<sup>144</sup> Those who favor the status quo and retrenchment, as well as the more radical reformers,

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139. See Commission on Multijurisdictional Practice, *Public Hearing, Thursday, March 21, 2002*, available at [http://www.abanet.org/cpr/mjp/trans\\_nyc.doc](http://www.abanet.org/cpr/mjp/trans_nyc.doc) (last visited Sep. 16, 2002) (hereinafter ABA March 2002 Public Hearing) (transcribing Mr. Redlich's comments at the public hearing).

140. See ABA Comment Summaries, *supra* note 70. Presently, most states will not admit a lawyer who is licensed in another state who did not graduate from an ABA-approved law school. Although such a lawyer can presently be admitted pro hac vice for court appearances, some fear that more liberal rules for MJP could open the door to a wider range of opportunities for graduates of non-ABA law schools to engage in law practice in states that do not permit licensure of anyone who did not graduate from a law school approved by the ABA. This in turn undermines the legitimacy of the entire law school approval process.

141. *Id.*

142. See ABA March 2002 Public Hearing, *supra* note 139 (transcribing Mr. Ehrenhaft's comments at the public hearing).

143. See generally Peter D. Ehrenhaft, *The Role of Lawyers in the World Trade Organization*, 34 VAND. J. TRANSNAT'L L. 963 (2001).

144. Amendment of state rules of professional conduct is not dependant upon any action by the ABA, and many states are considering changes to recognize multijurisdictional practice. These states may follow the lead of the MJP Commission's recommendations in its Interim or Final Reports, turn to the Common Sense Proposal, or devise a different formulation. Some states have considered regional compacts, permitting MJP by lawyers licensed in any of those states. One or two states might vie to become the Delaware of law practice, following the lead of Delaware incorporation and banking statutes, by protecting state-licensed lawyers in their extra-jurisdictional activities. A few states will undoubtedly take steps to make MJP more difficult.

will have fifty plus new bites at the apple. Some states may continue to promulgate and enforce the existing rules regardless of the ABA's decision. Unlike MDP, which involved the relationship between the practice of law and other professions, MJJ only involves lawyers. Unlike admission for recent graduates, MJJ is about lawyers who are already licensed to practice law. Proponents of MJJ take the view that cross-jurisdictional practice should be permitted to evolve, and that states should strive to promulgate rules that reflect actual practices, consistent with the need to assure competent legal services for the citizens of the states.

One other question remains that has not been fully explored in the ABA debate or the literature, but will be raised judicially if a significant number of bar associations impose greater restrictions on multi-state practice. Such efforts undoubtedly will be met with challenges to restrictions on the practice of law. Arguably, the practice of law today is a part of interstate commerce, in that almost no lawyer engages in a purely local practice. Accordingly, law practices may be subject to Constitutional protection under the Commerce Clause<sup>145</sup> and the Privileges and Immunities Clause,<sup>146</sup> may be within the statutory scope of the Sherman Anti-trust Act,<sup>147</sup> and may be within the regulatory framework of the Federal Trade Commission.<sup>148</sup> The result of any of these litigations could mean not only the invalidation of restrictive ethical rules regarding MJJ, but an attack on the legal profession's traditional right of self-regulation.

If states attempt to limit MJJ through the prosecution of lawyers for the unauthorized practice of law, they will find themselves entangled in a more pernicious debate over the definition of the practice of law.<sup>149</sup> UPL laws have been particularly ineffective as a tool to enforce the professional monopoly in the case of non-lawyers engaging in law-related activities; they are not likely to contribute to the exclusion of out-of-state lawyers from multijurisdictional practice.<sup>150</sup>

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145. U.S. CONST. art. I, § 8, cl. 3.

146. U.S. CONST. art. IV, § 2, cl. 1.

147. 15 U.S.C. § 1 (2002).

148. 15 U.S.C. § 45 (2002).

149. ABA President A.P. Carlton has created a Commission to create a Model Definition of the Practice of Law, which will attempt to resolve this question once and for all. Given the plethora of opinions on the subject dating back to the early part of the Twentieth Century, these efforts are no more likely to produce a consensus than prior ABA attempts to define professionalism.

150. For example, if a New York lawyer goes to California to do work for a California client that is a subsidiary of a New York client, as was the case in *Birbrower*, prosecution for the unauthorized practice of law in California is likely to have little effect on the New York lawyer's practice. If he or she has not gotten his or her fee up front, California says that he or she may not recover for California legal work. If he or she is convicted of UPL in California, he or she may not fare too well the next time he or she seeks to appear in a California court pro hac vice, but California's actions will not have a material effect on his or her practice in New York, or in other states where he or she engages in MJJ.

## IV. ABA ACTION AUGUST 2002

The ABA House of Delegates considered recommendations submitted by the MJP Commission on August 12, 2002, during the ABA Annual Meeting in Washington, D.C.<sup>151</sup> Under House rules, reports with recommendations must be filed well in advance of the meeting where they will be considered, so that reports can be circulated to the delegates prior to meetings of the House.<sup>152</sup> The House Committee on Rules and Calendar is responsible for placing reports on the agenda for the meeting and managing debate.<sup>153</sup> Because the House is a democratic body, resolutions can be adopted, defeated, modified by amendment, or postponed. Given the diversity of interests in the House, it is not uncommon for controversial matters to face parliamentary attack.

Given the divergence of viewpoints on the subject of multijurisdictional practice, it was very possible that the House would have treated the Commission's proposals with the same disdain it had shown the Commission on Multidisciplinary Practice two years earlier.<sup>154</sup> The confrontation never emerged, perhaps because the MJP Commission learned from the mistakes of the MDP Commission,<sup>155</sup> perhaps because the Commission inundated House members with information,<sup>156</sup> and perhaps because the Commission lined up its political support in advance.<sup>157</sup> Probably the most significant strategic decision by the Commission was the abandonment of the safe har-

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151. The American Bar Association (ABA), with 408,000 members, is the largest professional association in the world, and certainly the pre-eminent voice of the legal profession in the United States. The House of Delegates is the governing body for the ABA, although because the House meets only twice annually, many day-to-day operational decisions are made by a smaller Board of Governors and a professional staff, leaving the House essentially as a policy-making body. The House is comprised of 539 members, drawn from four basic groups: delegates from state and local bar associations, representatives of ABA sections and divisions (representing the substantive interests of ABA members), members of the Board of Governors and past officers of the Association, and individuals representing affiliated legal organizations.

152. See AMERICAN BAR ASSOCIATION POLICY AND PROCEDURES HANDBOOK (2001-2002).

153. *Id.*

154. In July 2000, the House overwhelmingly rejected the recommendations of the Multidisciplinary Practice Commission, which would have made it easier for lawyers and law firms to go into business with non-lawyers. The Commission's proposals did not even reach the House floor because a substitute resolution was adopted, which renounced changes in the Rules of Professional Conduct that would have removed the per se prohibition against lawyers partnering or sharing fees with non-lawyers, reaffirmed the ABA's commitment to the "core values of the profession," and abolished the MDP Commission. The MJP Commission was quick and persistent in distancing itself from the MDP Commission, and separating the MJP issue from MDP.

155. See, e.g., American Bar Association, *Transcript of Public Hearing, Friday, March 30, 2001*, available at [http://www.abanet.org/cpr/mjp-newyork\\_transcript.html](http://www.abanet.org/cpr/mjp-newyork_transcript.html) (last visited Sep. 16, 2002) (transcribing the author's remarks at the public hearing).

156. SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, WASHINGTON, D.C., (August 2002) (hereinafter HOUSE ACTION). Chair Wayne Positan stated in his opening remarks to the House that the Commission had sought input from diverse communities within the legal profession, issued two reports, conducted numerous hearings, posted thousands of pages of testimony on its website, and listened to over 110 entities weigh in on the subject.

157. *Id.* Chair Positan also noted that over forty-eight entities had endorsed the Commission's proposal. Indicative of this ecumenical approach was the enlistment of Robert MacCrate, the leader in the battle against MDP, to speak on behalf of the Commission's resolution.



bor approach it had offered in its Interim Report, in favor of broader language that was closer to the position advocated by the Common Sense Coalition.<sup>158</sup> Rather than facing a floor fight over small differences in philosophy, the Commission chose to find common ground for a compromise proposal that greatly expanded its base of support.

The chairman of the MJP Commission, Wayne Positan, introduced the Commission's nine recommendations. He asserted that the a key to the report was the Commission's attempt to balance the interests of states in regulating the legal profession and interests of clients of lawyers in the modern practice of law.<sup>159</sup> The Commission recognized the distinct points of view of these jurisdictions built over a span of 225 years. The report, he argued, reflected the core values of the legal profession.<sup>160</sup>

Chairman Positan introduced the Commission's nine recommendations and denominated Resolutions 201 A-J (excluding I).<sup>161</sup> Several other individuals introduced the separate resolutions. Resolution 201A, which reaffirmed support for state regulation of the practice of law, was introduced by former ABA President Martha Barnett.<sup>162</sup> President Barnett pointed to recent legislation<sup>163</sup> as evidence of the need to reaffirm the traditional role of state courts in the regulation of lawyers. Although this resolution represented a broad policy statement, the support of many states for MJP reform probably hinged on this reaffirmation of the states' role in the regulation of lawyers.<sup>164</sup> The resolution passed on voice vote.<sup>165</sup>

Resolution 201B was the most critical substantive proposal, because it revised Model Rule 5.5 on the Unauthorized Practice of Law.<sup>166</sup> Professor Steven Gillers, a member of the Commission, observed that the recommendations change the title of the rule to refer to Multijurisdictional Practice as

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158. See ACCA Common Sense Proposal and ABA Comment Summaries, *supra* note 73 and accompanying text.

159. HOUSE ACTION, *supra* note 156.

160. Robert MacCrate, former ABA president, commended the Commission for thoroughly canvassing lawyers about MJP and noted that the transformative act of guarding core values is instigated by courts' admission and discipline of lawyers. If MDP was bad, it was because relationships between lawyers and non-lawyers undercut core values, so the argument went, and, conversely, MJP was good because it upheld core values.

161. See REPORTS WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES, 2002 ANNUAL MEETING, WASHINGTON, D.C. (Aug. 2002) (hereinafter HOUSE REPORTS).

162. *Id.* at 201A.

163. For example, recently enacted legislation like the Corporate Responsibility, requires lawyers to report illegal acts of company officials; the Bankruptcy Reform Act that requires lawyers to certify the ability of a debtor to pay. One may argue the merits and demerits of these requirements; the question for lawyers is whether such regulation should be imposed by the legislature or by the courts, whose traditional role it is to regulate the practice of law.

164. This point was made by Chief Justice Norman Veasey, of Delaware, Chair of the ABA's Ethics 2000 Commission, and Chair of the Conferences of Chief Justices of the United States.

165. HOUSE ACTION, *supra* note 156.

166. HOUSE REPORTS, *supra* note 161, at 201B.

well as Unauthorized Practice.<sup>167</sup> Section (a) of Rule 5.5 remains substantially the same as the current Model Rule with revisions in language.<sup>168</sup>

Section (b), which is new, states that a lawyer may not establish a systematic and continuing presence in a state where he or she is not licensed or holding herself out as possessing a license in the host state.<sup>169</sup> This would include both services delivered while the lawyer is physically present in a state and services provided electronically, through a medium such as a website, as explained in Comment 4 to the proposed Rule.<sup>170</sup>

Section (c) provides that a lawyer may provide legal services on a temporary basis if the work is undertaken with a lawyer licensed in the jurisdiction who actively participates in the matter, if the services are reasonably related to an appearance before a host state tribunal, if the lawyer is authorized by law to appear in the matter (which covers pro hac vice admission as well as preliminary work on cases before pro hac vice admission is actually sought), if the services arise out of an alternative dispute resolution matter (e.g., a mediation or arbitration) that is reasonably related to the lawyer's home state practice (and are not subject to pro hac vice admission requirements), or if the work is related to the lawyer's home state practice in some other way.<sup>171</sup>

Professor Gillers noted that the literature and cases on multijurisdictional practice regularly used four words to describe permissible cross-border practice: transient, incidental, occasional, and temporary.<sup>172</sup> The Commission, for the sake of simplicity chose "temporary."<sup>173</sup> Professor

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167. HOUSE ACTION, *supra* note 156.

168. Compare ABA MODEL RULES OF PROF'L CONDUCT, R. 5.5 (a), as adopted in 1983 to Rule 5.5 (a), as amended February 2002.

169. Throughout this discussion, the term "home state" refers to a state where a lawyer is licensed, and the term "host state" to a state where the lawyer is not licensed and providing legal services on a temporary basis.

170. The text of Comment 4 includes the following language:

Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here.

HOUSE REPORTS, *supra* note 156, at 201B.

171. *Id.* The unnecessary verbosity of this provision may not be apparent at first, but if (b) prohibits a lawyer from establishing a permanent practice in a state where he or she is not licensed, and (c) permits the lawyer to practice on a temporary basis in a host state if the matter is reasonably related to the lawyer's home state practice, then much of the language in subsections (1)-(4) is superfluous, or at least could have been covered in the Comments to the Rule. These subsections ostensibly clarify the term temporary, but they leave the question whether some forms of temporary practice are not covered by the clarifying subsections. They can best be explained as remnants of the Commission's early safe harbors approach, under which all host state activity was deemed improper unless it was permitted by one of the safe harbors. The simpler Common Sense Proposal created the dichotomy between permanent and temporary practice, and the Standing Committee on Ethics and Professional Responsibility, borrowing from the Restatement of the Law Governing Lawyers, adds the requirement that the temporary practice must be reasonably related to the lawyer's home state practice. Thus, the fairest reading of section (c) is that temporary practice is permitted as long as it is reasonably related to the lawyer's home state practice, and, conversely, if there is no nexus to the lawyer's home state practice, then the lawyer's activities are improper.

172. HOUSE ACTION, *supra* note 156.

173. *Id.*

Gillers noted that, presumably, the contours of the term “reasonably related” could be fleshed out by disciplinary authorities and courts over time.<sup>174</sup>

Finally, Professor Gillers described section (d) of the proposed rule, which specifies that both employed lawyers<sup>175</sup> and lawyers engaged in federal practice<sup>176</sup> may engage in multijurisdictional practice. Because practitioners covered under (d) may provide services that could exceed the bounds of temporary practice defined in (c), the rule makes clear that this sort of multijurisdictional practice is permitted.<sup>177</sup>

Before debate concluded on Resolution 201B, Delegate David Funkhouser of Iowa moved to postpone consideration of the resolution to give states more time to consider it.<sup>178</sup> Professor Gillers observed the omission of consideration of Model Rules 5.5 and 8.5 by the House when it adopted the Ethics 2000 amendments to the Model Rules of Professional Conduct in February 2002.<sup>179</sup> Passage of Resolutions 201B and C was necessary, he argued, to complete consideration of the Rules of Professional Conduct.<sup>180</sup> Justice Norman Veasey, Chair of the Ethics 2000 Commission that had just completed a comprehensive revision of the Model Rules of Professional Conduct earlier in the year, pointed out the vast amount of testimony that had been taken and noted that the Ethics 2000 Commission and MJP Commission had been looking at this issue for a combined five years and urged the Delegates to move on.<sup>181</sup> The Funkhouser motion was soundly defeated.<sup>182</sup>

The House then adopted Resolution 201B without amendment or opposition.<sup>183</sup> This vote was significant, because section (c) represents the aspect of multijurisdictional practice about which there is the greatest divergence of opinion. It was the issue of temporary practice that generated the most heat in Commission hearings; it was the flashpoint at which the Commission and the Common Sense Coalition diverged. Yet, on this day, the Commission, the Coalition and other advocates of MJP reform agreed to agree.

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174. *Id.*

175. *Id.* This might include in-house counsel, federal government lawyers, and other institutional lawyers providing services for their employer.

176. *Id.* Substantive practice areas such as patents, copyrights, federal taxation, and environmental regulation, have governing law that is federal rather than state in character. The rule also leaves room for “other law in this jurisdiction,” suggesting that a state could authorize, if it elected, to permit any licensed lawyer to practice certain matters in the jurisdiction on a regular basis.

177. HOUSE ACTION, *supra* note 156.

178. It may be noteworthy that the opponents of MJP moved to postpone consideration of the MJP Commission’s Report when it came before the House in the Summer of 1999 in order to give the states more time to study the question. See SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, 1999 ANNUAL MEETING, ATLANTA, GEORGIA (August 1999). The ploy worked, and the next summer, opponents returned to execute a well-organized campaign to defeat the Commission’s MJP proposals.

179. See SUMMARY OF ACTION OF THE HOUSE OF DELEGATES, 2002 MIDYEAR MEETING, PHILADELPHIA, PENNSYLVANIA (February 2002).

180. HOUSE ACTION, *supra* note 156.

181. *Id.*

182. *Id.*

183. *Id.*

Delegate Larry Ramirez, a member of the Ethics 2000 Commission and former Chair of the General Practice, Solo and Small Firm Section, introduced Resolution 201C, which amends Model Rule 8.5.<sup>184</sup> Rule 8.5 provides that lawyers licensed in a jurisdiction are subject to the disciplinary authority in that jurisdiction and addresses choice of law questions involving multiple admissions.<sup>185</sup> The proposed rule does not change the relationship between licensed lawyers and the disciplinary authority, but adds that lawyers engaged in multijurisdictional practice will be subject to the disciplinary authority in the host jurisdiction.<sup>186</sup> The proposed rule goes on to say that the rules applicable to the disciplinary action will be those where the predominant effect of the lawyer's conduct took place, and if the predominant effect is not in a single jurisdiction, then in the jurisdiction where the conduct occurred.<sup>187</sup> This resolution also passed on voice vote without opposition.<sup>188</sup>

Resolution 201D was introduced by Delegate Lucian Pera, another member of the Ethics 2000 Commission.<sup>189</sup> The resolution, a necessary adjunct to Resolution 201C, amends Rules 6 and 22 of the ABA Model Rules of Lawyer Disciplinary Enforcement to provide for reciprocal discipline by a lawyer's home state when discipline is imposed by a host state.<sup>190</sup> The changes strengthen the presumption that the home state will honor host state discipline and narrows the grounds on which the home state may decline to do so.<sup>191</sup> This resolution passed without opposition as well.<sup>192</sup>

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184. As in the case of Rule 5.5, the Ethics 2000 Commission did recommend to the House changes to Rule 8.5 in either August 2001 or February 2002 when Delegates considered the E2000 Report, leaving these matters to the MJP Commission. The selection of Ramirez to present this Resolution signaled to the House that the proposed Rule had the blessing of the Ethics 2000 Commission, as did the inclusion of Justice Norman Veasey, Chair of the Ethics 2000 Commission, as a proponent for Rule 5.5.

185. See MODEL RULES OF PROF'L CONDUCT R. 8.5 (2002).

186. See MJP Final Report, *supra* note 8, at 201B.

187. This is the so-called price of multijurisdictional practice. In order to obtain the right to practice across state lines, lawyers must submit to the authority of the jurisdictions they visit. Interestingly, this change requires a paradigm shift in the concept of what it means to be a lawyer. Previously, everyone who was not licensed to practice law in a state was a non-lawyer in the eyes of the state; thus, a lawyer practicing in a state where he or she was not licensed engaged in the unauthorized practice of law. Pro hac vice rules represented a process for special, limited admission for individuals licensed to practice in other jurisdictions. The changes to Rule 8.5 recognize implicitly that a licensed lawyer is a lawyer, regardless of the state of licensure, in contrast to an unlicensed non-lawyer. The lawyer licensed in another state does not engage in the unauthorized practice of law, but rather the multijurisdictional practice of law, which is subject to the disciplinary authority (and the limitations imposed on that practice by Rule 5.5) of the host state.

188. Prior to submission to the House, the Commission had accepted proposed changes that added to Comment 1 of Rule 8.5 the following language: "A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be asserted over the lawyer for civil matters." Revised resolutions circulated to the Delegates on August 12, 2002, in the possession of the author.

189. HOUSE ACTION, *supra* note 156.

190. *Id.*

191. *Id.* The amendment would eliminate language that would have permitted the home state to decline host state sanctions if the "misconduct established warrants a significantly different discipline in this state," to language limiting home states to situations where the host state discipline would be "offensive to the public policy of the jurisdiction." Arguably, the proposed standard leaves less discretion to

Delegate John McDonald argued in support of Resolution 201E, which supports the use of a National Lawyer Regulatory Data Bank.<sup>193</sup> A disbarred or suspended lawyer should not be able to move to another state and practice law.<sup>194</sup> It may be possible to see that a lawyer disbarred in his or her home state might be able to engage in permitted multijurisdictional practice, particularly if it is transactional in nature, unless there is a means to notify other jurisdictions of the lawyer's status.<sup>195</sup> Resolution 201E passed without opposition.<sup>196</sup>

Alan Diamond, a member of the MJP Commission, described Resolution 201F, which adopts a new Model Rule on pro hac vice admissions.<sup>197</sup> Amendments to the language proffered in the Commission's Final Report as Resolution 201F provided exemption from fees imposed on pro hac vice admittees who are employed or associated with a pro bono project, involved in a case for a nonprofit legal services organization, or representing an indigent defendant or habeas corpus petition. Amendments also established that out-of-state lawyers may only appear pro hac vice if local counsel remains responsible for the case.<sup>198</sup> Resolution 201F, as amended, was then adopted.<sup>199</sup>

The House next considered Resolution 201G, which proved to be the only controversial resolution of the afternoon.<sup>200</sup> The Resolution, a new Model Rule on Admission by Motion, was introduced by Sandy D'Alemberte, former President of the American Bar Association and Chair of the Section of Legal Education and Admission to the Bar.<sup>201</sup> A review of state practices for admission of lawyers licensed in other states demonstrates a lack of uniformity.<sup>202</sup> This resolution recognizes that in the pro-

the home state disciplinary authority, because it must at least show that the host state discipline would violate a public policy of the home state.

192. *Id.*

193. *Id.* This databank presently exists, although it is not universally utilized. In anticipation of an increase in multijurisdictional practice, the Commission undoubtedly foresees the need to disseminate disciplinary information to prevent lawyers from thwarting the objectives of the disciplinary system.

194. *Id.*

195. *Id.*

196. *Id.*

197. Although pro hac vice admission is addressed in Rule 5.5, the Commission attempts to reduce the Byzantine web of regulations that vary from state to state and court to court. In recognizing that pro hac vice is the vehicle for handling temporary admission for litigation matters, the Commission may anticipate a rise in pro hac vice applications with the adoption of more liberal rules on multijurisdictional practice generally. To the extent that the rules and standards are the same from jurisdiction to jurisdiction, lawyers who engage in multijurisdictional litigation can do so more freely. At the same time, a Model Rule leaves to individual jurisdictions the adoption of pro hac vice standards suited to the practice in their courts.

198. Prior to submission to the House, the Commission had accepted these proposed changes to resolution 201F. Revised resolutions circulated to the Delegates on August 12, 2002, in the possession of the author.

199. HOUSE ACTION, *supra* note 156.

200. HOUSE REPORTS, *supra* note 161, at 201G

201. HOUSE ACTION, *supra* note 156.

202. For example, the BAR/BRI Bar Examination Digest (published annually) describes admission requirements for licensed attorneys who seek licensure in other states. The standards run from states

posed scheme of multijurisdictional practice some lawyers will exceed a host state's tolerance for temporary practice; in other words, at some point, the state will tell a visiting lawyer that he or she is no longer a visitor and needs to get a license.<sup>203</sup> As in the case of pro hac vice admission, if standards are similar from jurisdiction to jurisdiction, it will be easier for both states and individual lawyers to understand when and how they can gain permanent admission on motion.<sup>204</sup>

The sticking point involved a question raised earlier in the Commission's life,<sup>205</sup> the concern of the ABA's Section of Legal Education and Admission to the Bar that MJP reform should not serve as a vehicle for graduates of non-ABA approved law schools to gain admission to practice.<sup>206</sup> The Final Report of the Commission provided that admission on motion should only be permitted to graduates of ABA-approved law schools.<sup>207</sup> Delegate Anthony Vitale moved to strike language that would have required matriculation and graduation from an ABA-approved law school.<sup>208</sup> After debate, the amendment failed, and a divided House adopted Resolution 201G by a vote of 277-150.<sup>209</sup>

Resolutions 201H and J were both introduced by Delegate and MJP Commission member, William Hannay.<sup>210</sup> The former resolution reaffirms the ABA's 1993 adoption of Model Rules on Foreign Legal Consultants by the ABA in 1993, which provided that foreign lawyers could advise clients in the United States on matters involving the law of their home country;<sup>211</sup> the latter resolution establishes a Model Rule for Temporary Practice by Foreign Lawyers, which provides that foreign legal consultants are entitled to practice within the United States on matters reasonably related to their home country practice in the same way that U.S. lawyers may handle matters reasonably related to their home state practice in a host state.<sup>212</sup>

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providing reciprocity to states with comparable standards, to states that require all applicants to sit for the state's bar exam no matter how long they have been admitted.

203. HOUSE ACTION, *supra* note 156.

204. *Id.*

205. See ABA March 2002 Public Hearing, *supra* note 139 and accompanying text.

206. Most states require graduation from an ABA-approved law school, but a few, most notably California, permit graduates of law schools approved by the state, but not the ABA, to sit for the bar exam. Graduates of these state approved schools usually cannot take the bar exam in any state other than the one in which they attended law school. If these lawyers could, after several years of practice, gain admission on motion to another state, the practice would undermine the ABA's accreditation practice.

207. The Commission further accepted a proposed change that the school had to be approved at the time of the student's matriculation, rather than at the time of matriculation as provided in the Final Report. The Commission also removed language requiring all admission on motion candidates to have passed the Multistate Professional Responsibility Exam, because the exam was not introduced until 1981, and many older lawyers, who had never taken it, would have to do so.

208. HOUSE ACTION, *supra* note 156.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* The language of the proposed rule tracks the language of proposed Rule 5.5, adopted as a part of Resolution 201B. See *supra* notes 88-98 and accompanying text.

Hannay argued that not only did these rules assist American clients to deal with problems involving foreign law that United States lawyers would not be competent to handle, but that they also provided a basis for reciprocal treatment of United States lawyers practicing in foreign countries.<sup>213</sup> Although the Model Rule on Foreign Legal Consultants has received a tepid reception in most states, and the Model Rule on Temporary Practice by Foreign Lawyers may be the most radical of all the changes endorsed by the Commission, both resolutions passed by voice vote without opposition.<sup>214</sup>

At the end of the day, the House adopted all nine of the resolutions submitted to it by the Commission.<sup>215</sup> Collectively, these actions represent the most significant change in the way cross-jurisdictional practice is treated in two hundred years. The ABA chose to recognize the realities of modern practice and to strike a blow against parochial interests and Balkanization in the practice of law. Yet, the principle of state control of regulation affirms that states will have to consider these proposals.<sup>216</sup> Although the example of the Model Rules of Professional Conduct suggests that the states will not be unanimous in their promulgation of MJP standards,<sup>217</sup> the actions of the House moved lawyers in the direction of common standards throughout the United States and puts lawyers on an equal footing internationally.

## V. CONCLUSION

The ABA's action represents the beginning of a larger battle over the nature of the practice of law, the work of lawyers and the public's right of access to legal services. In the coming years, bar associations, licensing authorities, courts, law schools, and practitioners will have to make decisions about the institutions they represent. The decisions will have profound implications for the justice system as a whole and the professional lives of all those who work in the system.

If the current rules, as articulated in existing state versions of Model Rule 5.5, continue to be ignored by a large percentage of lawyers, the legitimacy of the regulatory system itself will continue to be undermined. If states ignore the calls to revise the rules, or even the calls to enforce the rules they have, then the credibility of the entire regulatory process can be called into question on the grounds that lawyers only enforce the rules that suit them and that when their economic interests dictate, they are willing to turn a blind eye to misconduct. Such an approach would be particularly

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213. *Id.*

214. *Id.*

215. *Id.*

216. See American Bar Association, *Statement of the Conference of Chief Justices* (August 2002), available at <http://www.abanet.org/cpr/mjp/ccj.doc> (last visited Sept. 16, 2002).

217. Debate on the Model Rules of Professional Conduct has been going on since 1980, when the first draft was introduced. Regardless of what the ABA House of Delegates has passed, states have been willing to steer their own course in promulgating ethical standards, rejecting model rules that did not garner enough support in the state.

inappropriate if, at the same time, the legal profession renews its efforts to keep non-lawyers out of the practice of law.

If the legal profession does not develop some nationally recognized standards for multijurisdictional practice by lawyers, a lattice of inconsistent rules will make it increasingly difficult for lawyers to provide legal services effectively or for clients to enjoy representation by the lawyer of their choice. If the profession cannot devise a coherent and rational system for regulating MJP, all lawyers will remain at risk of professional discipline meted out in an arbitrary and inconsistent manner.

The only real solution is to create a system of authorized MJP with restrictions to exclude lawyers permanently practicing in a jurisdiction where such lawyers appropriately ought to seek local licensure, to extend state disciplinary processes to cover MJP apart from UPL, and to cooperate across jurisdictional lines to honor disciplinary sanctions imposed by other states.

If the jurisdictions of the United States find the wherewithal to make these important changes, the American legal system will continue to grow and to assure the participation of American lawyers on a globalized stage for legal services. If, on the other hand, states let parochial interests and economic brinkmanship influence their decisions about MJP, this country will find itself in a chaotic legal environment, an intellectual backwater of international trade and business. Consumers of legal services will be the ultimate losers, if lawyers do not take steps to allow clients access to lawyers of their choosing, wherever the lawyers might be physically located. This in turn may trigger call for national licensing of lawyers and federal regulation of the legal profession.

Perhaps this worst-case scenario will never come to pass, but the fact is that the legal profession is at a crossroads: it can address the problem of MJP in a meaningful way, as urged by the Commission on Multijurisdictional Practice and many other reformers and adopted by the ABA House of Delegates, or it can risk the outcomes suggested above. Only time and tide will tell.