

TAKE CAUTION WHEN REPRESENTING CLIENTS ACROSS STATE LINES: THE SERVICES PROVIDED MAY CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW

I. INTRODUCTION

Attorneys engage in the unauthorized practice of law on a daily basis. Many transactional activities not requiring an appearance in court, which are performed in jurisdictions in which the attorney is not licensed to practice, are considered the unauthorized practice of law. Such activities include, among others, the preparation of legal documents, entering into negotiations on behalf of a client, and rendering legal advice.¹ These activities can result in disciplinary action, criminal prosecution, or, more commonly, the loss of attorney's fees. In view of the mobility of society and the resultant need for attorneys to travel to foreign jurisdictions in order to protect their clients' interests, the prohibition against the unauthorized practice of law should not be as strictly applied to licensed attorneys.

The interpretation of the statutes against the unauthorized practice of law must be changed to enable practicing attorneys to feel free to represent their clients to the fullest extent. This Article provides a survey of applicable case law to illustrate the courts' inconsistencies in determining which types of activities performed by out-of-state attorneys constitute the unauthorized practice of law. The Article then examines possibilities for rectifying these issues.

II. DEFINING THE PRACTICE OF LAW

The practice of law has been defined among the states in various ways, usually in broad terms that encompass almost any legal service provided by an attorney. When performing these activities in a jurisdiction in which the attorney is not licensed,

1. See *infra* notes 20-48 and accompanying text.

such attorney may be subject to sanctions.² For instance, in California, the practice of law has been defined to include not only services related to matters pending in court, but also "legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation."³ Along the same lines, the Michigan Court of Appeals has stated that the practice of law includes the "preparation of instruments for others which 'define, set forth, limit, terminate, specify, claim, or grant legal rights,'" but does not include preparatory work such as research or collecting information and data.⁴

Many other states have similar definitions of practicing law. In New York, the practice of law includes giving legal advice as well as "holding oneself out as a lawyer."⁵ The Supreme Court of Colorado has held that "one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counselling, advising and assisting him in connection with these rights and duties is engaged in the practice of law."⁶ In Illinois, the practice of law includes "any activity which requires legal expertise or knowledge," such as counseling clients or drafting documents.⁷ Similarly, in New Jersey, "the practice of law is not limited to the conduct of cases in court but is engaged in whenever and wherever legal knowledge, training, skill and ability are required."⁸ In South Carolina, the practice of law includes "acting professionally in legal formalities, negotiations or proceedings by the warrant or au-

2. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5(a) (1996) (prohibiting lawyers from practicing law "in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction").

3. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 5 (Cal. 1998) (citing *People v. Merchants' Protective Corp.*, 209 P. 363 (Cal. 1922)).

4. *Shapiro v. Steinburg*, 440 N.W.2d 9, 11 (Mich. Ct. App. 1989) (quoting 7 AM. JUR. 2D *Attorneys at Law* § 101).

5. *Spivak v. Sachs*, 211 N.E.2d 329, 330 (N.Y. 1965).

6. *Denver Bar Ass'n v. Public Utilities Comm'n*, 391 P.2d 467, 471 (Colo. 1964) (en banc).

7. Illinois State Bar Ass'n Advisory Opinion on Professional Conduct, Op. 92-15 (1993), available in 1993 WL 851038 (citing *People ex rel. Illinois State Bar Ass'n v. Schafer*, 404 Ill. 45 (1949); *People ex rel. Chicago Bar Ass'n v. Tinkoff*, 399 Ill. 282 (1948)).

8. *State v. Rogers*, 705 A.2d 397, 400 (N.J. Super. Ct. App. Div. 1998) (quoting *Stack v. P.G. Garage, Inc.*, 80 A.2d 545, 546 (N.J. 1951)).

thority of [a] client[]"⁹ In Oregon, "personal contact . . . in the nature of consultation, explanation, recommendation or advice" is included in the practice of law.¹⁰

Both the Office of Disciplinary Counsel and the Board on the Unauthorized Practice of Law in Delaware recognize a working definition of the unauthorized practice of law.¹¹ The unauthorized practice of law in Delaware includes holding oneself out as authorized to practice in the jurisdiction, preparing legal documents for use in a state legal tribunal without supervision of local counsel, and giving advice regarding state law.¹²

These broad definitions of the practice of law make it nearly impossible for an out-of-state attorney to represent his or her client without the threat of sanctions. The application of these definitions in determining whether an attorney has engaged in the unauthorized practice of law should be modified in order to conform with the role of interstate transactions in modern society. While the "practice of law" should rightly include the definitions previously described, when these activities are performed by an attorney already licensed in another state, the courts should apply a less restrictive standard in determining whether the practice is unauthorized.

III. SANCTIONS FOR ENGAGING IN THE UNAUTHORIZED PRACTICE OF LAW

Statutes prohibiting the unauthorized practice of law in some states provide that such practice is punishable by injunction or contempt of court or as a criminal misdemeanor.¹³ In

9. South Carolina Malpractice Joint Underwriting Ass'n v. Froelich, 377 S.E.2d 306, 307 (S.C. 1989) (quoting *In re Duncan*, 65 S.E. 210, 211 (S.C. 1909)).

10. Oregon State Bar v. Gilchrist, 538 P.2d 913, 919 (Or. 1975) (en banc).

11. David Curtis Glebe, *Interstate Practice and the Unauthorized Practice of Law: Uncertainties Mandate Professional Caution*, 14 DEL. LAW. 20, 21 (Spring 1996).

12. *Id.*

13. See, e.g., CONN. GEN. STAT. ANN. § 51-88 (West 1985) (contempt of court); HAW. REV. STAT. § 605-17 (Supp. 1997) (misdemeanor); MISS. CODE ANN. § 73-51-1(1) (1995) (injunction); N.J. STAT. ANN. § 2C:21-22 (West 1995) (crime of the fourth degree); N.D. CENT. CODE § 27-11-01 (1992) (misdemeanor); WIS. STAT. § 757.30(1) (1981) (contempt of court); Carol A. Needham, *Negotiating Multi-State Transactions: Reflecting on Prohibiting the Unauthorized Practice of Law*, 12 ST. LOUIS U. PUB. L.

addition, the attorney is subject to disciplinary action by the bar of the state in which he or she is licensed to practice.¹⁴ Although the unauthorized practice of law is not aggressively enforced, the possibility of such sanctions is enough to require clearer definitions of permissible conduct of transactional lawyers.¹⁵

A common sanction against out-of-state attorneys who engage in the unauthorized practice of law is the disallowance of compensation for services rendered in the jurisdiction in which the attorney is not licensed.¹⁶ Attorneys engage in such practice continuously across the country, but the issue generally only arises when the attorney is not paid for his or her services and must sue the client to recover.¹⁷ The client uses the unauthorized practice statutes as a defense for failure to compensate the attorney, and the courts must decide whether the attorney is entitled to his or her fee.¹⁸ Attorneys admitted *pro hac vice* by the state for litigation purposes are exempt from this threat.¹⁹ However, attorneys participating in numerous areas of transactional law are affected by these provisions because states have no procedure for admitting an out-of-state attorney for legal services not involving courtroom appearances.

IV. DECISIONAL LAW BARRING THE COLLECTION OF FEES

Courts base their determinations of whether an attorney has engaged in the unauthorized practice of law by rendering services in a jurisdiction in which the attorney is not licensed to

REV. 113, 114 (1993).

14. Needham, *supra* note 13, at 114.

15. *Id.* at 117; see Samuel J. Brakel & Wallace D. Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 715 (1975) (noting that "there exists a large gray area, a no-man's land of unenforced or unenforceable proscriptions on professional activity").

16. D.P. Grawunder, Annotation, *Right of Attorney Admitted in One State to Recover Compensation for Services Rendered in Another State Where He Was Not Admitted to the Bar*, 11 A.L.R. 3D 907 (1967).

17. See Glebe, *supra* note 11, at 21.

18. See Brakel & Loh, *supra* note 15, at 715.

19. This Article does not address situations in which an attorney is participating in litigation where *pro hac vice* admission is available.

practice on the particular facts of the situation. Because of the variations presented in each fact situation, it is difficult to ascertain any consistent application of rules by the courts.²⁰ Ironically, even when the courts hold that an out-of-state attorney has engaged in the unauthorized practice of law, they often recognize that the regulation of interstate activities by attorneys should not be too strictly construed.²¹ This recognition should be more consistently applied in court decisions in order for competent attorneys to provide unconstrained legal services to all of their clients.

Several states have held against attorneys trying to collect fees. In a recent case, *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*,²² a firm of attorneys licensed to practice in New York, but not in California, was retained by a California corporation in a contract dispute.²³ The attorneys filed a demand for arbitration in the underlying action, and the matter was eventually settled, but the corporation later sued the firm for malpractice, and the firm counterclaimed for its fees for work performed in both New York and California.²⁴ The Supreme Court of California stated that it was aware of the "interstate nature of modern law practice" and "the reality that large firms often conduct activities and serve clients in several states."²⁵ Nevertheless, the court held that the firm could not recover fees for services performed in California.²⁶

The court opined that the primary inquiry as to whether an activity constitutes the practice of law in California depends upon the attorney's contacts with the state and the nature of the legal services provided.²⁷ Physical presence in the state is a factor used in determining whether the attorney had sufficient contacts with the state, but an attorney could also be practicing law in the state by advising a client by telephone, fax, or computer.²⁸ This statement could have a great impact on the way

20. See Brakel & Loh, *supra* note 15, at 715.

21. See *infra* notes 30, 42-43 and accompanying text.

22. 949 P.2d 1 (Cal. 1998).

23. *Birbrower*, 949 P.2d at 3.

24. *Id.* at 3-4.

25. *Id.* at 2.

26. *Id.* at 3.

27. *Id.* at 5.

28. *Birbrower*, 949 P.2d at 5-6.

lawyers must conduct their practice in this era of modern technology.²⁹ In contrast to its holding, the court stated that in light of the nature of business and the mobility of our modern society, "the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters"³⁰

In Connecticut, the statute proscribing the unauthorized practice of law applies to services rendered by an attorney not admitted to practice in the state, regardless of whether the attorney appeared in a courtroom.³¹ A New York attorney retained by an investment group in Connecticut, which sought to acquire a New York corporation, was denied recovery of attorney's fees.³² The Appellate Court of Connecticut held that the preparation of legal documents relating to the acquisition, as well as the formation of a Connecticut corporation to assist with the acquisition, constituted the unauthorized practice of law for which the attorney could not recover compensation.³³ In another Connecticut case, a New York attorney who provided services in Connecticut involving the creation of an interstate transportation empire was barred from recovering compensation.³⁴ The attorney was the president of the new corporation, so it was impossible for the court to determine when he was acting on behalf of the defendants and not as a member of the corporation.³⁵ Although this situation may have provided the defendants with a good defense, the court chose to rely on the fact that the attorney was not licensed in Connecticut.³⁶ According to the court, this fact alone was enough to deny the attorney's

29. Debra Baker, *Lawyer, Go Home: Firms Negotiating Multistate Deals Should Take Heed of California Decision on Unauthorized Practice*, 84 A.B.A. J. 22 (May 1998) (stating that "[e]ven with cell phones, fax machines and computer technology available to help lawyers move into the 21st century, . . . a recent California Supreme Court decision could turn back the clock on the way lawyers practice law").

30. *Birbrower*, 949 P.2d at 6.

31. *Perlah v. S.E.I. Corp.*, 612 A.2d 806, 808 (Conn. App. Ct. 1992).

32. *Perlah*, 612 A.2d at 808.

33. *Id.*

34. *Taft v. Amsel*, 180 A.2d 756, 757 (Conn. Super. Ct. 1962).

35. *Taft*, 180 A.2d at 757.

36. *Id.*

request for compensation.³⁷

In a neighboring state, a New York court denied recovery of attorney's fees to a California attorney who had been contacted by a New York resident for assistance in a divorce and custody case pending in Connecticut.³⁸ The attorney told the client he was not licensed to practice in New York, but he would travel to New York to consult with her and advise her New York counsel for a reasonable fee.³⁹ The attorney stayed in New York fourteen days where he examined drafts of agreements and rendered advice to the client as to financial provisions, the proper jurisdiction for the divorce, and the need for a change in New York counsel.⁴⁰

The Court of Appeals of New York held that this was an illegal transaction, and the attorney was not entitled to recover compensation for the services performed.⁴¹ Despite its holding, the court did recognize that the statute proscribing the unauthorized practice of law should not be used to prohibit "customary and innocuous practices."⁴² The court also stated that because of "the numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York."⁴³

In another New York case, a New York resident contacted a Pennsylvania attorney with respect to three legal problems in Illinois.⁴⁴ The attorney participated in negotiations with trustees and attorneys in Illinois and submitted his legal opinion to them; the Supreme Court of New York held these actions to be the unauthorized practice of law for which the attorney could not recover legal fees.⁴⁵ Similarly, in Illinois, a company retained an attorney licensed to practice only in Wisconsin in regard to a land sale contract, and the court subsequently

37. *Id.*

38. *Spivak v. Sachs*, 211 N.E.2d 329, 331 (N.Y. 1965).

39. *Spivak*, 211 N.E.2d at 330.

40. *Id.*

41. *Id.* at 331.

42. *Id.*

43. *Id.*

44. *Ginsburg v. Fahrney*, 258 N.Y.S.2d 43, 44 (N.Y. Sup. Ct. 1965).

45. *Ginsburg*, 258 N.Y.S.2d at 44.

barred the attorney from collecting his fees.⁴⁶ The attorney engaged in negotiations and gave legal advice to the client, which the Supreme Court of Illinois held constituted the unauthorized practice of law.⁴⁷ The court limited its holding by stating that there could be circumstances in which an out-of-state attorney could recover compensation for services performed in Illinois, but did not explain what those circumstances might be.⁴⁸

V. DECISIONAL LAW ALLOWING THE RECOVERY OF FEES

Court decisions holding that an attorney has not engaged in the unauthorized practice of law, and thus is entitled to collect attorney's fees, have been rare. A few broad exceptions to the unauthorized practice of law have been recognized by some states, but they are inconsistent.⁴⁹ A case often cited by proponents for allowing compensation for services provided by attorneys in a jurisdiction in which they are not admitted to practice is *In re Estate of Waring*.⁵⁰ That case involved a New York law firm which rendered services relating to the administration of an estate in New Jersey.⁵¹ The law firm had a long-standing association with the business affairs of the decedent and the decedent's family.⁵² The New York law firm conferred with New Jersey counsel, but participated individually in activities involving the preparation and filing of income tax and estate tax returns, the termination of the decedent's lease on a summer residence, and other administrative work.⁵³

The Supreme Court of New Jersey recognized the importance of protecting the public from incompetent legal service, but stated that the public's "freedom of choice in the selection of

46. *Lozoff v. Shore Heights, Ltd.*, 362 N.E.2d 1047 (Ill. 1977).

47. *Lozoff*, 362 N.E.2d at 1048.

48. *Id.* at 1049 ("We recognize there are transactions involving parties and attorneys from more than one State which would require a result different from today's holding.").

49. See *infra* notes 66-130 and accompanying text.

50. 221 A.2d 193 (N.J. 1966).

51. *Waring*, 221 A.2d at 194.

52. *Id.*

53. *Id.* at 195.

their own counsel is to be highly regarded and not burdened by 'technical restrictions which have no reasonable justification.'⁵⁴ The court explained that the subject of the practice of law by attorneys licensed in other states "must be viewed practically and realistically and must be dealt with in commonsensible fashion and with due regard for the customary freedom of choice in the selection of counsel."⁵⁵

In allowing the firm to recover for legal services, the court relied on its earlier decision in *Appell v. Reiner*,⁵⁶ in which a New York lawyer had furnished legal services to New Jersey clients relating to creditor claims.⁵⁷ The work involved settlement negotiations with New York and New Jersey creditors, but the court held that the attorney was entitled to compensation for services rendered relating to both sets of creditors.⁵⁸ The court reasoned that it would not be in the public interest to require the clients to retain two separate attorneys for independent negotiations because the transactions were so intertwined and to require the client to pay aggregate fees would be impractical and inefficient.⁵⁹ The court recognized the "numerous multi-state transactions arising in modern times"⁶⁰ and reasoned that "there may be instances justifying such exceptional treatment warranting the ignoring of state lines."⁶¹

Likewise, an attorney admitted to the Bar of South Carolina was allowed to recover fees for services performed in Florida and Alabama for his sister.⁶² The attorney advised her regarding stocks and trusts for four years, and by oral agreement they decided he would receive payment for legal services in the form of stock transfers.⁶³ The court did not explain its reasoning for

54. *Id.* at 197 (citing *New Jersey State Bar Ass'n v. Northern N.J. Mortgage Assocs.*, 161 A.2d 257, 261 (N.J. 1960), *overruled by In re Opinion No. 26 of Committee on Unauthorized Practice of Law*, 654 A.2d 1344 (N.J. 1995)) (internal quotation marks omitted).

55. *Id.* at 198-99.

56. 204 A.2d 146 (N.J. 1964).

57. *Appell*, 204 A.2d at 147.

58. *Id.* at 148.

59. *Id.*

60. *Id.*

61. *Id.*

62. *See Lamb v. Jones*, 202 So. 2d 810, 815 (Fla. Dist. Ct. App. 1967).

63. *Lamb*, 202 So. 2d at 812-13.

holding that this was not the unauthorized practice of law, but stated that the attorney did not appear in court and prepared only two written instruments, a will and a trust agreement.⁶⁴

Many of the cases holding that an out-of-state attorney can recover compensation for legal services can be loosely grouped into several categories: federal practice, arbitration, legal consultation, lack of physical presence in the state, association of legal counsel, and full disclosure to the client.⁶⁵ While some courts have found attorneys practicing within these categories not to be engaged in the unauthorized practice of law, these exceptions are not consistently applied and are not a dependable base on which to avoid the sanctions of unauthorized practice. The following sections describe the application of law in each of these categories.

A. Federal Practice

Some states recognize an exception to the unauthorized practice of law if the services provided are related solely to federal issues.⁶⁶ The Second Circuit has held that an attorney admitted to practice in California who performed antitrust services in New York, in association with New York counsel, was entitled to compensation because, had the motion been made, he would have been granted *pro hac vice* admission.⁶⁷ On reconsideration *en banc*, the court discussed the mobility of attorneys and the rights of citizens to bring in attorneys from other states to represent their interests.⁶⁸ The court also admonished these clients, who had brought in the expert legal assistance of their choice, for refusing to pay the bill.⁶⁹ However, at least one commen-

64. *Id.* at 813, 815 (citing *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir. 1966); *In re Estate of Waring*, 221 A.2d 193 (N.J. 1966); *Appell v. Reiner*, 204 A.2d 146 (N.J. 1964)).

65. See *infra* notes 66-130 and accompanying text.

66. See *Sperry v. Florida*, 373 U.S. 379 (1963) (patent law practice by non-lawyer); *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir. 1966) (antitrust law); *Western Life Ins. Co. v. Nanney*, 296 F. Supp. 432 (E.D. Tenn. 1969) (federal contract claim); Supreme Court of Texas Professional Ethics Comm., Op. 516 (1996), available in 1996 WL 277355 (immigration and nationality law).

67. *Spanos*, 364 F.2d at 169.

68. *Id.* at 170.

69. *Id.*

tator finds the continuing validity of this case to be debatable.⁷⁰

The United States District Court for the Eastern District of Tennessee has held that no provision of state law could prevent an attorney from practicing under the rules of the federal court.⁷¹ The court cited *Appell v. Reiner* for the proposition that it would not serve the public interest "where the intervenors were to represent their client in matters involving practice of an essentially interstate nature, to hold that attorneys are not entitled to compensation for such representation, because some of their services were to be performed in a state where they were not admitted to practice."⁷²

In contrast, other federal courts do not permit an exception for unauthorized practice involving federal claims.⁷³ In *Servidone Construction Corp. v. St. Paul Fire & Marine Insurance Co.*,⁷⁴ a New York corporation retained an attorney who was not licensed to practice in New York, but was admitted to practice in federal courts, regarding a federal contract action.⁷⁵ In holding that the attorney's retainer agreement was unenforceable and that he was not entitled to collect for services rendered, the court relied in part on the facts that the attorney had not associated with local counsel and that his only office was maintained in New York.⁷⁶

The Supreme Court of North Dakota did not allow an attorney licensed in Minnesota to recover legal fees for services provided to a North Dakota resident regarding the sale of the client's business and the federal tax implications involved.⁷⁷ The court did not consider the federal court exception because

70. See Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 675 n.26 (1995) (stating that the court's decision assumed an association with local counsel).

71. *Western Life Ins. Co. v. Nanney*, 296 F. Supp. 432, 440 (E.D. Tenn. 1969).

72. *Nanney*, 296 F. Supp. at 440 (citing *Appell v. Reiner*, 204 A.2d 146 (N.J. 1964)).

73. See Illinois State Bar Ass'n Advisory Opinion on Professional Conduct, Op. 92-6 (1992), available in 1992 WL 754611 (stating that whether activities involved in filing a federal suit constitute the unauthorized practice of law will depend on the facts of the particular case).

74. 911 F. Supp. 560 (N.D.N.Y. 1995).

75. *Servidone*, 911 F. Supp. at 563.

76. *Id.* at 570, 575, 578.

77. *Ranta v. McCarney*, 391 N.W.2d 161, 166 (N.D. 1986).

the representation did not involve any court appearances.⁷⁸ In its decision, the court relied on the fact that the attorney had advised many other clients in the state and at one point had opened a branch office in the state.⁷⁹ In dissent, Justice Levine stated that the purpose of ensuring that an attorney practicing in the state is competent and qualified was fulfilled by the fact that the attorney was licensed to practice in Minnesota.⁸⁰ The dissent further opined that the "modern demands of business and the mobility of our society—indeed the public interest, require a sensitivity to the ramifications of regulating the practice of law."⁸¹ Justice Levine also advocated the right of all citizens to choose the best attorney available, regardless of the state in which the attorney is licensed to practice.⁸²

B. Arbitration

Some states view arbitration proceedings as an exception to the unauthorized practice of law.⁸³ The petitioner in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*⁸⁴ argued that the fundamental differences between arbitration proceedings and legal proceedings merit an exception to the general rule.⁸⁵ The dissent would have allowed an exception for arbitration based on the definition of the practice of law articulated in *Baron v. City of Los Angeles*,⁸⁶ which provides: "if the application of legal knowledge and technique is *required*, the activity constitutes the practice of law."⁸⁷ In dissent, Justice Kennard opined that the representation of a party in an arbitration pro-

78. *Ranta*, 391 N.W.2d at 164.

79. *Id.* at 165.

80. *Id.* at 166 (Levine, J., dissenting).

81. *Id.* at 167.

82. *Id.*

83. See New Jersey Supreme Court Committee on Unauthorized Practice, Op. 28 (1994), available in 1994 WL 719208 (stating that an out-of-state attorney participating in arbitration proceedings under the American Arbitration Association Rules is not engaged in the unauthorized practice of law).

84. 949 P.2d 1 (Cal. 1998).

85. *Birbrower*, 949 P.2d at 8.

86. 469 P.2d 353 (Cal. 1970).

87. *Birbrower*, 949 P.2d at 15 (Kennard, J., dissenting) (quoting *Baron*, 469 P.2d at 353).

ceeding does not necessarily require the application of legal skills and technique as the decisions in arbitration may be based upon justice and equity.⁸⁸

The United States District Court for the Southern District of New York held that participation in arbitration proceedings does not constitute the practice of law.⁸⁹ In *Williamson, P.A. v. John D. Quinn Construction Corp.*,⁹⁰ the attorney who performed arbitration services in New York was only admitted to practice in New Jersey, but the court found he was nevertheless entitled to recover compensation.⁹¹ In its decision, the court relied on the informality of arbitration proceedings and the differences from court proceedings in fact-finding, rules of evidence, discovery and testimony.⁹²

C. Legal Consultation

When an attorney acts as a legal consultant to a law firm in a jurisdiction in which he or she is not admitted to practice, courts have compared the attorney's services to that of unlicensed law clerks and paralegals and have found no unauthorized practice of law.⁹³

The Supreme Court of Hawaii recently addressed this issue, holding that the counsel of an Oregon corporation engaged in business in Hawaii was entitled to collect fees for legal services provided to the company's Hawaii counsel, pursuant to a statute providing for the award of attorney's fees to the prevailing party.⁹⁴ The corporation became involved in litigation in Hawaii and retained local counsel.⁹⁵ In addition to consulting with the Hawaii counsel regarding an appeal, the corporation's general counsel assisted the local counsel with research and the analysis

88. *Id.* at 17.

89. *Williamson, P.A. v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613, 616 (S.D.N.Y. 1982).

90. 537 F. Supp. 613 (S.D.N.Y. 1982).

91. *Williamson*, 537 F. Supp. at 616.

92. *Id.* (citation omitted).

93. *See, e.g., Dietrich Corp. v. King Resources Co.*, 596 F.2d 422, 426 (10th Cir. 1979).

94. *Fought & Co. v. Steel Eng'g and Erection, Inc.*, 951 P.2d 487, 497-98 (Haw. 1998).

95. *Fought*, 951 P.2d at 494.

of briefs and papers submitted by other parties to the litigation.⁹⁶

In its decision, the court relied on the fact that all of the general counsel's activities were performed in Oregon, not in Hawaii, as well as the fact that the general counsel's role was one of consultant.⁹⁷ The court also set forth an important policy argument in favor of allowing counsel to collect their fees.⁹⁸ A rule prohibiting the award of fees for the services of foreign legal counsel who assist local counsel would undermine the policies behind the statutes, namely protecting the public from incompetent and improper legal services.⁹⁹ The court reasoned that in complex litigation such as the case at hand, which involved parties from at least five different jurisdictions, competent representation necessarily requires consultation with legal counsel licensed to practice in those other jurisdictions.¹⁰⁰

The Tenth Circuit held that an attorney-consultant not licensed to practice law in Colorado was entitled to compensation when his services were performed in relation to a class action suit in Colorado.¹⁰¹ In its decision, the court of appeals relied on the fact that the attorney was a consultant to a law firm and did not render legal advice directly to clients.¹⁰²

Similarly, an attorney who was licensed to practice only in North Carolina, but held the position "of counsel" with a Maryland law firm was determined not to be engaged in the unauthorized practice of law in Maryland.¹⁰³ The attorney participated in drafting pleadings and briefs and supervised associates and paralegals, but never directly advised the firm's clients.¹⁰⁴ The court held that the primary indicator of the practice of law is responsibility to clients and found that the attorney's activities were services to the firm rather than to the clients; therefore, he was not engaged in the unauthorized practice of law.¹⁰⁵

96. *Id.* at 496.

97. *Id.* at 497-98.

98. *Id.* at 497.

99. *Id.*

100. *Fought*, 951 P.2d at 497.

101. *Dietrich Corp. v. King Resources Co.*, 596 F.2d 422 (10th Cir. 1979).

102. *Dietrich*, 596 F.2d at 426.

103. *In re R.G.S.*, 541 A.2d 977, 983 (Md. 1988).

104. *R.G.S.*, 541 A.2d at 980.

105. *Id.* at 980, 983. The court reasoned that "[t]he Hallmark of the practicing

D. Lack of Physical Presence in the State

It is possible that legal services performed without the attorney actually entering the foreign state will not be construed as the unauthorized practice of law. In *Estate of Condon v. McHenry*,¹⁰⁶ a Colorado attorney retained by the co-executor of a California resident's estate was not engaged in the unauthorized practice of law because the attorney never performed services while physically present in the state of California.¹⁰⁷ The attorney participated in researching California law, negotiating transactions, drafting documents, giving legal advice, and conferring over the telephone with people in California, but all services were performed from his Colorado office.¹⁰⁸ The court stated that the executor of an estate is free to choose independent counsel to engage in legal services regarding the estate.¹⁰⁹ Further, the court felt it was reasonable for the attorney to be involved because he had previously performed legal services for the family and was familiar with the decedent's property.¹¹⁰ In permitting the attorney to recover compensation from the estate, the court noted: "[i]n an era when business and personal relationships commonly cross geopolitical boundaries, we see no sense in making it more aggravating and more expensive to conduct legal discussions and resolve legal disputes across those same boundaries without good reason."¹¹¹ On appeal, the Supreme Court of California ordered a reconsideration of the decision in *Condon*, in light of its decision in *Birbrower*.¹¹² Upon review, the appellate court upheld the right of the Colorado

lawyer is responsibility to clients regarding their affairs, whether as advisor, advocate, negotiator, as intermediary between clients, or as evaluator by examining a client's legal affairs." *Id.* at 980 (quoting the Maryland Board of Law Examiners).

106. 64 Cal. Rptr. 2d 789, 793 (Cal. Ct. App. 1997).

107. *Condon*, 64 Cal. Rptr. 2d at 793. *But see* *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 5-6 (Cal. 1998) (stating that an attorney could be practicing law in the state by advising a client by telephone, fax, or computer).

108. *Condon*, 64 Cal. Rptr. 2d at 791.

109. *Id.* at 792.

110. *Id.*

111. *Id.* at 793.

112. *Estate of Condon v. McHenry*, 76 Cal. Rptr. 2d 922, 924 (Cal. Ct. App. 1998).

attorney to collect his fees, but based its decision on the fact that the client/executor was also a Colorado resident, rather than a California client, and found, therefore, that the actions were not within the proscription of the unauthorized practice of law statute, as interpreted by *Birbrower*.¹¹³

E. Association of Local Counsel

In most instances, when an out-of-state attorney associates with local counsel to provide legal services, the attorney will not be engaged in the unauthorized practice of law.¹¹⁴ The participation of local attorneys satisfies the policy concern that the out-of-state attorney will not be competent to advise on out-of-state law, as well as ensuring that an attorney is subject to discipline by the state's bar.¹¹⁵ In a Colorado case, sellers of real estate who agreed to reimburse the buyers for the attorneys' fees in obtaining a variance were held responsible for such fees although one of the attorneys who provided such services was licensed to practice law only in Florida.¹¹⁶ Neither attorney made any court appearances to secure the variance.¹¹⁷ The court did not mention the fact that the Florida attorney was associated with the local attorney as a reason for allowing the recovery of compensation, but it was likely an important element to the court's decision.

The requirement of associating local counsel for every interstate transaction is impractical for several reasons. This requirement is costly to the client because it creates excess legal fees for an additional attorney.¹¹⁸ Many clients do not want the

113. *Condon*, 76 Cal. Rptr. 2d at 927-28.

114. See *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 170 (2d Cir. 1966) (out-of-state attorney who associated with local New York counsel on federal anti-trust claim was entitled to fees); *Condon*, 64 Cal. Rptr. 2d at 793 (co-executor retained local attorney and out-of-state attorney to make appearances, and both were entitled to fees); *In re Estate of Waring*, 221 A.2d 193, 199 (N.J. 1966) (out-of-state attorney who conferred with local New Jersey counsel, but also individually participated in legal activities, was entitled to compensation). *But see Spivak v. Sachs*, 211 N.E.2d 329, 331 (N.Y. 1965) (out-of-state attorney who consulted with local counsel was barred from collecting fees due to the extent of his individual activities).

115. See *infra* note 133 and accompanying text.

116. *Catoe v. Knox*, 709 P.2d 964, 967 (Colo. Ct. App. 1985).

117. *Catoe*, 709 P.2d at 967.

118. *Appell v. Reiner*, 204 A.2d 146, 148 (N.J. 1964); *Wolfram*, *supra* note 70 at

burden of higher legal costs created by such a requirement and may be forced by financial constraints to choose a local attorney who is not as familiar with the client's affairs. Further, the local counsel is required to "supervise" the out-of-state counsel, which is often an empty requirement.¹¹⁹ A prominent attorney in a specific field of practice is not likely to submit to a locally admitted attorney in performing the legal services of his or her specialty.¹²⁰ The association of a local attorney will likely result in the client's paying for an attorney who does nothing to contribute to the legal services provided.

F. Full Disclosure to the Client

It is arguable that if an attorney makes a full disclosure to the client that he or she is not licensed to practice in the jurisdiction in which services are needed, then the attorney should be entitled to compensation for the legal services. The Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline issued an opinion stating that an out-of-state law firm representing lending institutions regarding loans made to Ohio persons and entities and secured by property located in Ohio does not engage in the unauthorized practice of law.¹²¹ While the opinion was not based solely on disclosure, the Board emphasized that the firm must make a full disclosure to the client that the lawyers are not licensed to practice in the jurisdiction and must explain the limitations involved.¹²² The Board opined that the law firm may participate in preparing loan documents, negotiating the terms of agreement, offering legal advice to the lending institution regarding Ohio law and representing the lending institution at the loan closing without engaging in the unauthorized practice of law.¹²³

In making this decision, the Board noted that the *Model Code of Professional Responsibility* discourages the placement of

677.

119. Wolfram, *supra* note 70, at 677.

120. *Id.* at 678.

121. Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Op. 90-12 (1990), available in 1990 WL 640507.

122. *Id.*

123. *Id.*

"unreasonable territorial limitations" and "undue geographical restraints" upon both the rights of lawyers to handle their clients' affairs and on clients to choose the lawyer to represent them.¹²⁴ The Board also cited to commentator Charles Wolfram's opinion that "no distant state has the power to prohibit an out-of-state lawyer from advising a client about the distant state's law."¹²⁵

In a 1930 case, an Oklahoma attorney was allowed recovery for services rendered in an Idaho probate court because he had not falsely represented himself as qualified to practice in Idaho.¹²⁶ The full disclosure exception was argued by the petitioner in *Birbrower*, but the Supreme Court of California decided it would be contrary to the policy of assuring competent practicing attorneys in the state if a disclosure exception were allowed.¹²⁷

One commentator has proposed guidelines for allowing attorneys to represent their clients in a jurisdiction in which they are not admitted to practice, the first of which is the requirement of full disclosure.¹²⁸ An attorney properly admitted in one jurisdiction should be able to provide occasional services in another jurisdiction if the client is informed in writing of the attorney's lack of admittance to practice in the jurisdiction, provided the attorney meets certain requirements.¹²⁹ Such requirements include that the lawyer must regularly represent the client in the jurisdiction in which the lawyer is licensed to practice, the services provided must be related to representation of

124. *Id.* (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-9, EC 8-3 (1981)); see *infra* notes 164-67 and accompanying text.

125. Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Op. 90-12 (1990), available in 1990 WL 640507 (citing CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 867 (1986)). Wolfram offers the conclusion that practice by an out-of-state lawyer is permissible if the services are provided to a regular client and "either (1) the lawyer's presence is an isolated occurrence and the work is not extensive in duration or (2) the in-state practice is more extensive but is 'incidental' to advising a client on a multi-state problem." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 867-68 (1986).

126. *Freeling v. Tucker*, 289 P. 85, 86 (Idaho 1930).

127. *Birbrower*, 949 P.2d at 11; see also *Spivak v. Sachs*, 211 N.E.2d 329, 331 (N.Y. 1965) (holding that a California attorney who disclosed to his client that he was not licensed to practice in New York was nevertheless not entitled to recover compensation).

128. Stephen Gillers, *Conflict of Laws: Real-World Rules for Interstate Regulation of Practice*, 79 A.B.A. J. 111 (Apr. 1993).

129. *Id.*

the client in the authorized jurisdiction, and the services must consist of advice either on issues of law in the jurisdiction in which the attorney is admitted or on issues of federal law.¹³⁰

VI. PROPOSALS FOR INTERSTATE REGULATION

The mobility and complexity of society necessitate changes in the way legal services are regulated.¹³¹ It has become common practice for attorneys to cross jurisdictional boundaries in representing their clients, but this involves professional risks which will not be eliminated until further case law "authorizes" such activities.¹³²

The legislature of each state has enacted statutes proscribing the unauthorized practice of law for important policy reasons. These statutes have been enacted in order to protect the public from incompetent legal advice given by persons who are not under the disciplinary control of the state bar.¹³³ Through case law, some states have enforced this policy equally among those never licensed to practice law and those licensed in other jurisdictions.¹³⁴ While protecting the public is a legitimate policy goal, applying these statutes to persons already licensed to practice law can become overly restrictive on the rights of both the attorneys and the clients. Once an attorney has been admitted to practice in one state and seeks to render services in another state, there is a greater degree of client protection available than when the person seeking admission has never been licensed to practice in any jurisdiction.¹³⁵ The attorney has dem-

130. *Id.*

131. Glebe, *supra* note 11, at 20 (stating that "we are consequently going to have to change our traditional concepts of the regulation of the practice of law in order to accommodate and address the new problems arising in the real world, especially with regard to interstate practice").

132. *Id.* at 20, 21.

133. See *Ex parte Ghafary*, 1998 WL 12622, at *1 (Ala. Jan. 16, 1998); *Chandris v. Yanakakis*, 668 So. 2d 180, 184 (Fla. 1995); *Fought & Co. v. Steel Eng'g and Erection, Inc.* 951 P.2d 487, 495 (Haw. 1998); *Kennedy v. Bar Ass'n of Montgomery County, Inc.*, 561 A.2d 200, 207 (Md. 1989); see also *Baron v. City of L.A.*, 469 P.2d 353, 356 (Cal. 1970) (regulation of the practice of law is a matter of public concern which is a proper subject of legislative control).

134. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 8 (Cal. 1998); *Spivak v. Sachs*, 211 N.E.2d 329, 331 (N.Y. 1965).

135. Carol A. Needham, *The Multijurisdictional Practice of Law and the Corpo-*

onstrated that he or she meets the standards of fitness to practice and is competent to perform legal services.¹³⁶ Several ideas for change in the regulation of interstate practice have been proposed, including national or state registration of lawyers and the redefinition of the unauthorized practice of law.¹³⁷

A. National Registration

Several commentators have discussed the viability of creating a national bar in order to allow attorneys to provide services in out-of-state jurisdictions without sanctions.¹³⁸ Such a system would require that attorneys be licensed in at least one state and subject to discipline by that attorney's primary bar, providing accountability for attorneys and an opportunity for aggrieved clients to lodge complaints.¹³⁹ Another proposal regarding a national bar would include a national bar examination allowing an attorney to practice in federal courts, engage in services not before a tribunal, and practice in the courts of any state on a limited basis until proving knowledge of local law.¹⁴⁰

Several problems exist with the idea of a national registry. First, a "race to the bottom" effect may occur, wherein attorneys become licensed to practice in the state with the least stringent requirements for admission and retain the ability to practice in any state.¹⁴¹ Candidates who are refused admission in some states may be allowed admission in others, and therefore qualify for the national bar, which would undermine the individual state's ability to determine which candidates are fit to practice in their state.¹⁴²

rate Lawyer: *New Rules for a New Generation of Legal Practice*, 36 S. TEX. L. REV. 1075, 1082 (1995).

136. *Id.*

137. See *infra* notes 138-63 and accompanying text.

138. See Marvin Comisky & Philip C. Patterson, *The Case for a Federally Created National Bar by Rule or Legislation*, 55 TEMP. L.Q. 945 (1982); Needham, *supra* note 13, at 127-30; Wolfram, *supra* note 70, at 703-07.

139. Needham, *supra* note 13, at 127.

140. Comisky & Patterson, *supra* note 138, at 957-64.

141. Needham, *supra* note 13, at 128. The variation in requirements for admission by different states relates to both the actual examination and the consideration of the person's fitness to practice. *Id.*

142. See Brakel & Loh, *supra* note 15, at 736; Needham, *supra* note 13, at 129.

Further, one of the policies behind prohibiting out-of-state attorneys from rendering services in the state is that the attorney is not familiar with the laws of the state and would not provide competent representation.¹⁴³ A proposal for preserving this policy behind licensing is to require the attorneys in the national registry to consult with a local attorney regarding state law issues to ensure a proper analysis of state law.¹⁴⁴ The out-of-state attorney would then be free to provide services without further supervision from the local attorney.¹⁴⁵ This would satisfy the policy issue, yet allow the out-of-state attorney to provide services to the client without the added expense of retaining a local counsel for the entire representation.¹⁴⁶

As a political matter, the creation of a bureaucracy to oversee such a national registry is implausible.¹⁴⁷ A centralized administration of the legal profession is contrary to the political preference for regulation at the local rather than the national level.¹⁴⁸ A national bar could also threaten the independence of lawyers, subjecting them to political pressures and control.¹⁴⁹ Federal bureaucracies are subject to political influence and the potential power of a national bar could be used to exert control over the way lawyers represent their clients.¹⁵⁰

B. State Registration

Another structural solution offered by commentators involves the implementation of a state registration system, whereby attorneys would register with each state in which they wish to render services.¹⁵¹ Such a system would be comparable to, but broader than, the *pro hac vice* admission allowed to attorneys participating in litigation in a jurisdiction in which they

143. See *supra* note 133 and accompanying text.

144. Needham, *supra* note 13, at 129.

145. *Id.* at 129-30.

146. See *id.* at 130.

147. Wolfram, *supra* note 70, at 704.

148. Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715, 783 (1995).

149. Wolfram, *supra* note 70, at 706-07.

150. *Id.*

151. Needham, *supra* note 13, at 130-31; Wolfram, *supra* note 70, at 702.

are not licensed to practice.¹⁵² States would maintain a standing list of attorneys permitted to render legal services, and unlike pro hac vice admission, attorneys would not be limited to doing work on a specific matter.¹⁵³ Each state could subject the attorneys to its own code and put certain conditions on the attorneys' ability to practice in that state.¹⁵⁴

The primary problem with a state registration system is the expense and difficulty of administration, especially in states such as Delaware, New York, and California, where large numbers of business transactions typically take place.¹⁵⁵ Further, if a state were to try to limit the representation to particular matters, as is done with pro hac vice admission, the state would have the problem of trying to police the advice given.¹⁵⁶

C. *Redefining the Unauthorized Practice of Law*

The most plausible solution may be to reformulate the definition of unauthorized practice of law as applied to interstate lawyers, either by statute or through the courts.¹⁵⁷ In Michigan, the statute proscribing the unauthorized practice of law specifically exempts attorneys who are licensed in other states if they are in Michigan temporarily working on a particular matter.¹⁵⁸ Changing the statutes prohibiting the unauthorized practice of law to allow out-of-state attorneys to render services within the jurisdiction would avoid the administrative costs and procedural difficulties of registration systems.¹⁵⁹ The states could require the out-of-state attorney to comply with conditions,

152. Needham, *supra* note 13, at 130-31; Wolfram, *supra* note 70, at 702.

153. Needham, *supra* note 13, at 130.

154. *Id.*; Wolfram, *supra* note 70, at 702.

155. Wolfram, *supra* note 70, at 702.

156. Needham, *supra* note 13, at 130-31.

157. *Id.* at 132; Wolfram, *supra* note 70, at 701; see Baker, *supra* note 29, at 23. Baker quotes James Towery, a member of the ABA Standing Committee on Client Protection, as stating that "[t]he reality is we have more law firms with practices that are national and international in scope. We have more in-house lawyers who are required to interpret laws of various jurisdictions These trends in law practice suggest the rules be re-examined." Baker, *supra* note 29, at 23.

158. MICH. COMP. LAWS ANN. § 600.916 (West 1995).

159. Needham, *supra* note 13, at 132.

including abiding by the disciplinary regulations of the state, to fulfill the goal of client protection.¹⁶⁰

The current judicial interpretations of the legislative definitions of the unauthorized practice of law are not consistent with the modern national economy and its interstate implications.¹⁶¹ Attorneys who only occasionally practice in a jurisdiction in which they are not licensed should not be offensive to the policies of prohibiting unauthorized practice.¹⁶² Redefining the unauthorized practice of law statutes as applied to out-of-state attorneys would allow attorneys who are familiar with their clients' needs and who are skilled in dealing with a particular specialty to fully represent their clients in interstate transactions.¹⁶³

VII. CONCLUSION

The increasing mobility of society and the resulting changes in the practice of law have been recognized for many years. Often an attorney must travel to a foreign jurisdiction in order to serve the interests of a client. This often involves activities for which the attorney may be sanctioned, as illustrated by the inconsistent interpretation of the unauthorized practice of law by the courts. The dilemma of regulating such interstate practice is referenced in the *Model Code of Professional Responsibility*. While the *Code* did not address the issue of multi-jurisdictional practice in its disciplinary rules, it made two references to the issue in its ethical considerations.¹⁶⁴ These references are embedded within canons not specifically discussing multi-jurisdictional practice, but the considerations exemplify that the drafters recognized the need to allow attorneys to properly represent their clients and the rights of clients to retain an attorney of their own choosing, even when such representation crosses over

160. *Id.*

161. Wolfram, *supra* note 70, at 708.

162. *Id.* at 710-12. This suggestion does not address the issues involved when an attorney consistently practices in a jurisdiction in which he or she is not admitted or whose client matters do not involve interstate matters.

163. *Id.* at 712.

164. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-9, EC 8-3 (1981).

state lines.¹⁶⁵ Ethical Consideration 3-9 provides:

[T]he demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.¹⁶⁶

Ethical Consideration 8-3 provides in part: "Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce."¹⁶⁷

Although the problems inherent in the modern practice of law have been recognized by the courts, the *Model Code*, and commentators, the issue has yet to be resolved. A practicing attorney who must travel to another jurisdiction in order to provide legal services for a client will find little protection from the sanctions previously described, other than lack of prosecution. Under the broad wording of the various state statutes, even an incidental contact such as taking a deposition in a state in which the attorney is not licensed or communication via computer could be construed as unauthorized practice. The statutes should not be applied to prevent attorneys from providing legal services in their area of competence. The interests of an attorney in representing a client to the fullest extent, as well as the interests of a client in choosing legal representation, warrant a reconsideration of the applicability of unauthorized practice of law

165. *See id.*

166. *Id.* at EC 3-9. The MODEL CODE cites to ABA Opinion 316 (1967) which states:

Much of clients' business crosses state lines. People are mobile, moving from state to state. Many metropolitan areas cross state lines. It is common today to have a single economic and social community involving more than one state. The business of a single client may involve legal problems in several states.

Id.

167. *Id.* at EC 8-3.

statutes. In the meantime, attorneys who travel across state lines to provide legal services to their clients must be aware of the risks involved.

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