

March 2003

Behind Bars: Are Corporate Counsel Captive to State Licensure?

Elizabeth A. Wickerham

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Law Commons](#)

Repository Citation

Elizabeth A. Wickerham, *Behind Bars: Are Corporate Counsel Captive to State Licensure?*, 44 Wm. & Mary L. Rev. 1913 (2003), <https://scholarship.law.wm.edu/wmlr/vol44/iss4/7>

Copyright c 2003 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

BEHIND BARS: ARE CORPORATE COUNSEL CAPTIVE TO STATE LICENSURE?

INTRODUCTION

"[A]n English judge observed ... 'short of those heavy consequences which would attach to the greater and more heinous offences, I own I can conceive of no jurisdiction more serious than that by which a man may be deprived of his degree and status as a barrister.'"¹ In the United States, as in England, the "arduous profession"² of practicing law enjoys a level of esteem afforded few other occupations. As a prerequisite to entering the hallowed field, however, there is an obstacle: the bar exam.³

Administration of the bar system has historically been delegated to the fifty states and the District of Columbia.⁴ Because each of these has its own unique set of procedural and substantive laws, it follows that each necessitates a comprehensive examination unique to that jurisdiction's intricacies. Budding attorneys, having completed law school, often take a professional preparatory class to master a state's law.

The system at its base seems simple: hopefuls should take the bar exam in the state where they hope to begin their legal career. In reality, however, the nature of state licensure is anything but straightforward. The essence of law practice is changing rapidly. With the growing ease of interstate travel, the expansion of large companies, a multitude of mergers, and the explosion of technology,

1. *Cohen v. Hurley*, 366 U.S. 117, 147 (1961) (quoting *Hudson v. Slade*, 3 F. & F. 390, 411 (Q.B. 1862)).

2. *Id.*

3. Passage of the bar exam licenses an individual to practice only in the state in which the exam was administered.

4. "Since the founding of the [nation], the licensing and regulation of lawyers has been left exclusively to the states and the District of Columbia within their respective jurisdictions." *Leis v. Flynt*, 439 U.S. 438, 442 (1979); *see also* *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("That the states have broad power to regulate the practice of law is, of course, beyond question.").

the practice of law crosses more state borders than at any time in United States history.

Modern practice of law differs from its traditional, largely local foundations. The American Corporate Counsel Association, the leader in law organizations tailored to in-house counsel, cites three characteristics of modern practice that together signify a changing landscape: (1) most U.S. companies do business nationwide, and most large companies have a centralized legal department; (2) companies need to attract and retain good counsel, regardless of where those attorneys reside; and (3) a typical in-house attorney has but one client: his or her employer.⁵ These developments have placed the traditional licensure scheme at a critical crossroads. The stark contrast between the idealistic foundation of state licensure and attorneys' real-world, multijurisdictional practice necessitates addressing whether the traditional licensure model should exist in today's dynamic environment.

The California case of *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*⁶ brought this conflict to the forefront. In *Birbrower*, the California Supreme Court held that a New York law firm had engaged in the unauthorized practice of law when it aided a California client in the settlement of a contract dispute.⁷ The court's ruling barred the law firm's recovery of more than one million dollars in attorneys' fees.⁸

The *Birbrower* decision immediately "stirred the pot" of an already brewing controversy over multijurisdictional practice.⁹ In determining what constituted the unauthorized practice of law in the state of California, the court found unimportant the lawyers' physical presence in the state. Specifically, the court noted that the

5. Letter from American Corporate Counsel Association to the American Bar Association Commission on Multijurisdictional Practice (Feb. 16, 2001) [hereinafter ACCA Letter], available at http://www.acca.com/advocacy/mjp/accaposition_cl.html (last visited Feb. 26, 2003).

6. 949 P.2d 1 (Cal. 1998).

7. *Id.* at 3.

8. *Id.* at 10, 13.

9. Morton Moskin, *As the World Shrinks: Don't Let Globalization Leave You Behind*, BUS. L. TODAY, Jan./Feb. 2000, at 38, 44 (2000).

defendants' failure to actually enter California was not dispositive of whether they had practiced law in the state.¹⁰

Critics, supporters, and legal scholars have scampered to assess the implications of the *Birbrower* decision. Transactional law has been at center stage. To date, dozens of law review articles and journal analyses have examined *Birbrower* under the lens of transactional law.¹¹ After all, transactions in today's marketplace are largely multijurisdictional.

As attorneys across the board face the issue of practicing law in different geographic regions when they, for example, give advice or engage local counsel in arbitration or litigation, in-house counsel are in a unique position in their vigorous representation of their one corporate client. They are compelled to meet the needs of their employer in various regions, and their practice is often *predominantly* interstate.

This Note examines what has thus far been a secondary consideration for many scholars: the practice of in-house counsel. With respect to multistate work, the practice is distinguishable from that of outside counsel working in law firms or as sole practitioners. Corporate counsels' work is, by its very nature, often

10. *Birbrower*, 949 P.2d at 5. Addressing the definition of unauthorized practice of law in California, the court noted:

The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.

[The California Supreme Court's] definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence ... is one factor

Id. Advice a lawyer may render to a "California client on a California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means" is another factor. *Id.* at 5-6.

11. See, e.g., 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, 538 (1999) (calling for "clearer definitions of permissible conduct of transactional lawyers" after *Birbrower* required a fact-based assessment in making unauthorized practice of law determinations); William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501, 1503 (2001) ("[T]he most important practical problems concern transactional practice"); LaTanya James & Siyeon Lee, *Adapting the Unauthorized Practice of Law Provisions to Modern Legal Practice*, 14 GEO. J. LEGAL ETHICS 1135, 1137, 1140-41 (2001) (asserting that the implications of *Birbrower* are markedly more significant for transactional lawyers, because there is more ambiguity about the nature of their work than for their litigation colleagues).

multistate. This Note considers unauthorized practice of law doctrine and suggests that in-house counsel should be answerable to more flexible guidelines than their outside counterparts. In-house counsel and other counsel should be accountable to different definitions of "unauthorized practice of law," though the consequences of violating those parameters should remain the same for both groups.

Part I of this Note provides background on the unauthorized practice of law doctrines and multistate practice. After a brief introduction to the unauthorized practice law and its policy justifications, this Note explores the difficulties states have encountered in developing a common statutory definition. Of particular concern is the regulation of multistate practice, which at its core is diametrically opposed to the state-based system of licensure. In cases involving the several ways in which multistate practice occurs, courts have not been consistent in assessing whether activities constitute the unauthorized practice of law. This Note discusses the implications of the inconsistent employment of standards and their applicability to in-house counsel.

Part II discusses various states' approaches to corporate counsel activities. Some states classify the practice as unique and therefore deserving of different evaluation; others consider the practice to be the same as that of outside counsel and subject it to the same rules and regulations for violation of unauthorized practice of law provisions. The picture that develops from this analysis is blurred.

Part III relates a variety of suggestions for resolving inconsistencies among states regarding the unauthorized practice of law with respect to in-house counsel. The American Corporate Counsel Association and the American Bar Association (ABA) have each put forth solutions. Other proposals, including temporary licensure and pro hac vice admission, may also resolve the problem. Part III reviews each of these options and examines the feasibility of each in turn.

Part IV concludes that the ABA Ethics Commission's proposed changes to Model Rule 5.5 are the most practical of reasonable alternatives. The ABA proposal includes accommodations for in-house counsel but requires across the board enforcement for

statutory violations.¹² It suggests that in-house counsel should be subject to the same disciplinary proceedings as outside counsel for disregarding the multistate rules (to which they need comply). As a result, although in-house counsel should have rules tailored to the unique nature of their practice, the enforcement for violation of those rules should parallel the enforcement of the rules for outside counsel—discipline should be uniform.

There is a pressing need for conformity in the unauthorized practice of law doctrine as applied to in-house counsel. States apply different standards to similar fact patterns that by nature often cross state borders, resulting in divergent results that cannot guide the practice of counsel to multistate corporations.

I. UNAUTHORIZED PRACTICE OF LAW VERSUS MULTISTATE PRACTICE

A. *Unauthorized Practice of Law*

Unauthorized practice of law statutes seek to implement public policy goals. The goal is to protect the public “against unlearned and unskilled advice and service in matters relating to the science of the law.”¹³ Unauthorized practice of law statutes may have originated to shield the public from unscrupulous lawyers and to control competition among corporations.¹⁴ There is some fear that, in the absence of prohibitions on corporations practicing law, each business entity would perform its own services without resort to private attorneys.

[E]xamples could be multiplied indefinitely. Ultimately most legal work, other than the trial of cases in the courthouse, would be performed by corporations and others not licensed to practice law. The law practice would be hawked about as a leader or

12. ABA COMM'N ON MULTIJURISDICTIONAL PRACTICE, REPORT 201B (Aug. 12, 2002) [hereinafter ABA REPORT], available at <http://www.abanet.org/cpr/mjp/201B.doc> (last visited Feb. 26, 2003).

13. *Pioneer Title Ins. & Trust Co. v. State Bar of Nev.*, 326 P.2d 408, 409 (Nev. 1958); see also *Auerbacher v. Wood*, 59 A.2d 863, 864 (N.J. Ct. Err. & App. 1948).

14. Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 MO. L. REV. 151, 158 (2000).

premium to be given as an inducement for business transactions.¹⁵

According to the New Jersey Supreme Court, "[t]he reason for prohibiting the unauthorized practice of the law by laymen [and those attorneys not licensed under state law] is not to aid the legal profession but to safeguard the public from the disastrous results that are bound to flow from the activities of untrained and incompetent individuals"¹⁶ Further, unauthorized practice of law doctrines protect independence of judgment. The idea is that unlicensed lawyers, who are effectively nonlawyers in states where they are not authorized to practice, may engage in multidisciplinary practices affecting their legal judgment. That is, if an attorney is providing legal services and nonlegal services to the same client, the extent and quality of the legal services may be affected by the profits received from the nonlegal services. This is inimical to the core values of the legal profession; among those values is independence of professional judgment.¹⁷ Courts have concurred:

The public interest therefore requires that in the securing of professional advice and assistance upon matters affecting one's legal rights one must have assurance of competence and integrity and must enjoy freedom of full disclosure with complete confidence in the undivided allegiance of one's counsellor in the definition and assertion of the rights in question.¹⁸

15. *Hexter Title & Abstract Co. v. Grievance Comm.*, 179 S.W.2d 946, 953 (Tex. 1944).

16. *In re Baker*, 85 A.2d 505, 511 (N.J. 1951); *see also* *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 5 (Cal. 1998); *J.W. v. Superior Court*, 17 Cal. App. 4th 958, 969 (1993).

17. *See* Giesel, *supra* note 14, at 151, 155 (explaining that unauthorized practice of law doctrines traditionally prevent in-house counsel from providing services to any client except for the corporate employer out of fear that the corporate employer would exercise "impermissible control" over the attorney). *But see* John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 139 (2000) (finding the "independence of judgment" justification for the unauthorized practice of law doctrines to be "without any significant evidentiary basis").

18. *Pioneer Title Ins. & Trust Co.*, 326 P.2d at 409-10; *see also* *Hulse v. Criger*, 247 S.W.2d 855, 857-58 (Mo. 1952); *Auerbacher*, 59 A.2d at 863.

The aforementioned changing landscape on the legal horizon, however, is causing tension between these goals and state statutes.¹⁹

There is not just one statutory definition of the "practice of law," and neither statutory nor judicial definitions offer clear guidelines to national players, because these definitions vary from one state to another. For example, the Virginia Code implies that one who does not hold a license or certificate to practice law under the laws of the Commonwealth is engaged in the unauthorized practice of law if he acts as counsel or attorney to another.²⁰ The Alabama Code is more specific, stating:

If any person shall, without having become duly licensed to practice, or whose license to practice shall have expired either by disbarment, failure to pay his license fee within 30 days after the day it becomes due, or otherwise, practice or assume to act or hold himself out to the public as a person qualified to practice or carry out the calling of a lawyer, he shall be guilty of a misdemeanor²¹

Given the amorphous and policy-laden justifications underpinning these statutes, courts have increasingly found it difficult to apply consistent standards to unauthorized practice cases. In light of changing realities, the California Supreme Court said in *Birbrower* that it would deal with issues of unauthorized practice of law in a commonsense fashion.²² The Supreme Court of New Jersey employed the same reasoning in an earlier case, stating:

19. See, e.g., *Estate of Condon v. McHenry*, 65 Cal. App. 4th 1138, 1145-46 (1998). The California court noted the effects of increasingly seamless boundaries upon unauthorized practice of law doctrines:

In the real world ... we do not live or do business in isolation within strict geopolitical boundaries. Social interaction and the conduct of business transcends state and national boundaries; it is truly global. A tension is thus created between the right of a party to have counsel of his or her choice and the right of each geopolitical entity to control the activities of those who practice within its borders.

Id.

20. VA. CODE ANN. § 54.1-3900 (Michie 2001).

21. ALA. CODE § 34-3-1 (1975); see also JOHN K. VILLA, CORPORATE COUNSEL GUIDELINES § 3.02 (1999).

22. *Birbrower, Montalbuno, Condon & Frank, P.C. v. Superior County*, 949 P.2d 1, 10 (Cal. 1998).

[T]he determination of whether someone should be permitted to engage in conduct that is arguably the practice of law is governed not by attempting to apply some definition of what constitutes that practice, but rather by asking whether the public interest is disserved by permitting such conduct. The resolution of the question is determined by practical, not theoretical, considerations; the public interest is weighed by analyzing the competing policies and interests that may be involved in the case; the conduct, if permitted, is often conditioned by requirements designed to assure that the public interest is indeed not disserved.²³

The unauthorized practice of law doctrine has seen increasing press over the past couple of years, particularly since *Birbrower* in 1998. Strangely though, there have been relatively few prosecutions nationwide in the wake of the increased scrutiny.²⁴ This paradox is attributable to the novel way in which law is practiced.²⁵ Modern communications technology and transportation have enabled attorneys and clients to travel easily and conduct business across state and national boundaries. This globalization necessitates that lawyers be able to assist clients in multiple jurisdictions to meet their needs. There is no longer a "fairly broad range of out-of-court activities an out-of-state lawyer can engage in without running afoul of the prohibition."²⁶ Because the legislators themselves have been remiss in their duty to provide definitive standards, courts have been tasked with doing it themselves. This Note will discuss how courts should clarify the multistate subset of the unauthorized practice of law.

23. *In re* Opinion No. 26 of the Comm. on the Unauthorized Practice of Law, 654 A.2d 1344, 1352 (N.J. 1995). The court in that case also tartly stated: "[T]his Court does not wear public interest blinders" *Id.*

24. See Ronald C. Minkoff, *Unauthorized Practice of Law*, 80 PLINY 265, 268 (2000).

25. See *id.*

26. Sylvia Stevens, *A Cautionary Note: The Wagons May be Circling*, 58 OR. ST. B. BULL. 29, 29 (1998).

B. Multistate Practice

Under the state licensure model in the United States legal system, multistate practice takes place when an attorney licensed in one state carries his business from his "home" state, the state in which he is licensed, into a "foreign" state, one in which he has not passed the bar examination, and performs legal services therein. This seemingly simple definition unfortunately, does not play out very easily in actual cases.²⁷

In the particular circumstances presented by the facts of each case, courts have held that out-of-state counsel who performed legal services for a single client in a single matter had or had not engaged in the unauthorized practice of law; those who advised clients via the Internet and other technological means had or had not violated unauthorized practice of law doctrines; attorneys who maintained an office in the foreign state had or had not performed an unauthorized practice of law; and out-of-state counsel residing in the foreign state of licensure had or had not violated the provisions disallowing multistate practice under the unauthorized practice of law. The following discussion further examines each of these scenarios in which the practice of law has changed, illustrating the unpredictability in the application of unauthorized practice of law doctrines.

1. Single Client, Single Matter

Although lawyers often face repetitive or continuous issues in representation of their clients' interests, many occasions arise in which attorneys are called on to solve one problem or to give advice on a single issue. For example, estate planning and criminal defense often deal with one client and one "need." Even in these clear-cut cases in which the issue has well-defined parameters,

27. Recall that unauthorized practice of law doctrines apply to: (1) persons not licensed to practice law but doing so under the guise of competence as an attorney and (2) attorneys practicing law in a state different from that in which they are licensed. Multistate practice encompasses the latter subset.

courts have rendered disparate opinions as to what constitutes the unauthorized practice of law.²⁸

2. *Technological Interaction*

In the new and relatively uncharted area of practice via the Internet, jurisprudence is also mixed. "Attorney communications via the Internet carry risks that are not immediately obvious."²⁹ In

28. Compare *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998) (holding it illegal for a New York law firm to have represented a California corporation during execution of an arbitration agreement wherein counsel traveled to California to meet with client and negotiate on its behalf), *Butler v. State*, 668 N.E.2d 266 (Ind. Ct. App. 1996) (opining that an attorney engaged in the unauthorized practice of law by representing an Indiana criminal defendant in an Illinois court without *pro hac vice* admission), *Spivak v. Sachs*, 211 N.E.2d 329 (N.Y. 1965) (finding a California attorney in violation of New York's unauthorized practice of law doctrine for coming to New York to advise a resident about her marital problems), and *Norton v. Hughes*, 5 P.3d 588 (Okla. 2000) (holding that Oklahoma attorneys were not permitted to file a lawsuit in a foreign jurisdiction on behalf of a client once the same matter was dismissed in Oklahoma for lack of personal jurisdiction), with *Estate of Condon v. McHenry*, 65 Cal. App. 4th 1138 (1998) (determining that a Colorado law firm did not engage in the unauthorized practice of law in California by physically and virtually entering California on behalf of a Colorado client, who, together with his sister, a California resident, were co-executors on a will that had been prepared in Colorado by the Colorado firm), *Fought & Co. v. Steel Eng'g & Erection, Inc.*, 951 P.2d 487 (Haw. 1998) (finding for a company's out-of-state general counsel's consultation with its in-state trial attorneys was not authorized practice of law), *In re Waring's Estate*, 221 A.2d 193 (N.J. 1966) (asserting that a New York law firm was authorized in its representation of estate matters for a New Jersey family with which the firm had a longstanding relationship and for whom the New York firm had, in many instances, provided representation), and *Appell v. Reiner*, 204 A.2d 146 (N.J. 1964) (holding that a New York attorney did not violate unauthorized practice of law provisions when he represented a New Jersey couple regarding financial matters relevant to both New York and New Jersey creditors).

29. Michael Gemignani, *The Practice of Law On the Internet: Ethical Concerns*, 64 TEX. B.J. 632, 634 (2001). Gemignani proffers the following hypothetical to demonstrate the ease with which the practice of law via the Internet could arise daily:

Attorney Jones has a website approved by the State Bar Jones' website includes a form that allows visitors to submit legal questions to Jones, who will respond with a free opinion. When providing the free opinion, Jones sends a telephone number the inquirer can call if he or she wishes to schedule an appointment with him to follow up on the matter. Once a week, Jones also hosts a chat room which anyone can visit to pose legal questions.... In addition, Jones, a specialist in computer law, has a listserv (email mailing list) on which he provides commentaries to subscribers on the latest developments in computer law.

Id.

Birbrower, the court held that, to the extent services for the California client were rendered in New York, the severability doctrine³⁰ allowed for the recovery of attorneys' fees for the practice of law outside of California. Law practiced using technological means without physical presence in California—for example, e-mail correspondence, facsimile transmissions, and long-distance telephone conversations with the California client—was not practiced in-state and therefore did not violate California law.³¹ Without principled guidelines³² with which courts may make distinctions in the relatively uncharted area of technological law practices, inconsistent holdings are inevitable.

3. Out-of-State Counsel with Office In-State

Often an attorney licensed in one state holds offices in another state from which he engages in the practice of law. In these cases, courts have made disparate findings as to whether given fact patterns constituted or did not constitute the unauthorized practice of law.³³ For example, in *Ranta v. McCarney*, the Supreme Court of

30. The severability doctrine allows for recovery of fees generated under a fee agreement that may have in part been illegal and in part legal.

[C]ourts may sever the illegal portion of the contract from the rest of the agreement.... When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the Courts will make the distinction, for the ... law ... [divides] according to common reason; and having made that void that is against law, lets the rest stand

Birbrower, 949 P.2d at 11-12 (quoting *Keene v. Harling*, 392 P.2d 273, 275 (Cal. 1964)).

31. *Id.* at 6, 13. In this respect, application of the *Birbrower* holding becomes enigmatic. It is not as easy as the court suggests to conclude whether electronic transactions take place at the site of transmission or reception.

32. Although the *Birbrower* holding makes it apparent that technological interaction with clients may constitute entering a state and thus trigger unauthorized practice of law violations, there are no bright-line principles by which a determination of "when enough is enough" can be made. *See id.*

33. *Compare* *Servidone Constr. Corp. v. St. Paul Fire & Marine Ins. Co.*, 911 F. Supp. 560 (N.D.N.Y. 1995) (applying New York law and finding an out-of-state attorney had engaged in the unauthorized practice of law by establishing an office in New York and representing a New York corporation in federal court in a matter involving federal law), *In re Peterson*, 163 B.R. 665 (Bkrtcy. D. Conn. 1994) (holding that an attorney violated the Connecticut unauthorized practice of law statute for maintaining an office in Connecticut from which he represented clients on federal bankruptcy issues), *Perlah v. S.E.I. Corp.*, 612 A.2d 806 (Bkrtcy. D. Conn. 1992) (finding unauthorized practice of law where a New York attorney,

North Dakota found that "[a]n out-of-state lawyer who is not authorized to practice law in [North Dakota, such as one holding an officer therein to serve clients,] sits in the same position as a suspended attorney ... such a person cannot lawfully practice law in [North Dakota]"³⁴ In contrast, the Court of Appeals of Michigan, in *Shapiro v. Steinberg*, found that collecting information as counsel in preparation for a trial, though serving in an office in which he was not licensed, was a service that "[did] not constitute the unauthorized practice of law."³⁵ As with the single client, single matter, and Internet practice examples, the varying approaches courts have taken have done little to bring clarity to this area of the law.

4. Out-of-State Counsel Resides in State

Occasionally counsel resides in a state in which he is not licensed. As with the preceding three scenarios, courts have not been consistent in their application of the unauthorized practice of law

working from a Connecticut office, prepared documentation for a Connecticut corporation to acquire the controlling interest in a New York corporation), *Ranta v. McCarney*, 391 N.W.2d 161 (N.D. 1986) (deciding an attorney licensed in Minnesota had violated the North Dakota unauthorized practice of law provisions by providing tax advice to a North Dakota resident from a branch office in Bismarck), and *Cleveland Bar Ass'n v. Misch*, 695 N.E.2d 244 (Ohio 1998) (holding that an attorney not licensed to practice law in Ohio, but who had provided legal services relating to the financial matters of clients of an Ohio firm with whom he had a contractual relationship, had engaged in the unauthorized practice of law), with *Sobol v. Perez*, 298 F. Supp. 392 (E.D. La. 1968) (applying Louisiana law and finding it allowable for an out-of-state attorney to represent a criminal defendant after being in the state temporarily and associating with local counsel), *Ex parte McCue*, 293 P. 47 (Cal. 1930) (holding a Montana attorney did not engage in the unauthorized practice of law for participating in state court cases while maintaining an office in California from which to practice in federal court), and *Shapiro v. Steinberg*, 440 N.W.2d 9 (Mich. 1989) (holding it was not unauthorized practice of law for a Massachusetts attorney operating in a Michigan office to do preparatory work for a possible wrongful death claim on behalf of a deceased friend's family against an airline). In *McCue*, however, the same court found that the preparation of depositions did constitute the unauthorized practice of law in California because he was not yet admitted there. See *McCue*, 293 P. at 68.

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

35. *Shapiro*, 440 N.W.2d at 12.

doctrine.³⁶ In the case of *In re Jackman*,³⁷ a Massachusetts attorney was found to have violated the unauthorized practice of law doctrine by serving eight years as an associate at a New Jersey law firm.³⁸ The attorney petitioner pointed to the ongoing national debate concerning licensure issues implicated by modern multi-jurisdictional practice that this Note describes.³⁹ The Supreme Court of New Jersey rejected that argument finding:

That ongoing national discussion has nothing to do with this case. We have not amended our rules. Our practice requirements are straightforward and may not be ignored. Unless and until we amend our rules governing admission to practice, *the existing rules must be followed*. The California Supreme Court expected no less in *Birbrower* We regard with concern Jackman's assertion that there are numerous others in circumstances like his Accordingly, we refer that assertion to the Committee on the Unauthorized Practice of Law for review and appropriate recommendation.⁴⁰

C. Implications

The implications of the variation in case law are markedly problematic. Courts have failed to provide a working definition or

36. Compare *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180 (Fla. 1995) (holding that a Massachusetts attorney residing in Florida had engaged in the unauthorized practice of law for entering into a contingent fee agreement with an accident victim in Florida), *Lozoff v. Shore Heights, Ltd.*, 362 N.E.2d 1047 (Ill. 1977) (finding that participating in negotiation of real estate transaction was the unauthorized practice of law by a Wisconsin attorney for services performed in Illinois), and *In re Jackman*, 761 A.2d 1103 (N.J. 2000) (penalizing a Massachusetts attorney for engaging in the unauthorized practice of law in New Jersey while awaiting admission thereto), with *Dietrich Corp. v. King Res. Co.*, 596 F.2d 422 (10th Cir. 1979) (applying Colorado law and finding that a professor of law, licensed to practice in Illinois, was permitted under the statute to act as consultant to attorneys of record in a Colorado lawsuit), *Disciplinary Council v. Brown*, 584 N.E.2d 1391 (Ohio Bd. Comm'rs on Unauthorized Practice of Law 1992) (finding that distributing a resume reflecting Ohio licensure was not the unauthorized practice of law, though serving as an Ohio arbitrator was for a New York attorney whose application to the Ohio bar was pending), with *In re Waters*, 447 P.2d 661 (Nev. 1968) (holding it allowable for a Texas attorney to correspond with California inmates on letterhead with a Nevada return address while a bar application was pending in Nevada).

37. 761 A.2d 1103 (N.J. 2000).

38. *Id.* at 1103.

39. *See id.* at 1109.

40. *Id.* (emphasis added).

framework for analysis that clearly can guide in-house counsel in their adherence to licensure laws in daily practice.⁴¹

II. SHOULD THE UNAUTHORIZED PRACTICE OF LAW DOCTRINE EVEN APPLY TO IN-HOUSE COUNSEL?

In-house counsel are unique in many aspects of their practice: they have duties to only one client and their employers often require interstate practice to service each of the company's locations. For these reasons some scholars have suggested that the unauthorized practice of law doctrine should not apply to in-house counsel. One attorney aptly noted that "[t]he rules of this game are convoluted."⁴²

By consistently validating a rule that disables multijurisdictional practice, states are ignoring the metamorphosis of the practice of law.⁴³ Modern practice is not the same as it was at the turn of the century when the corporate practice of law was an emerging area of legal scholarship:

The corporate practice of law doctrine might be valid if everything in the practice of law were the same as it was in 1910. The role and position of attorney-employees is not the

41. *Birbrower* offered a "sufficient contacts" test:

In our view, the practice of law "in California" entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contact will not sustain a finding that the unlicensed lawyer practiced law "in California." The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.

Birbrower, 949 P.2d at 5. The court went on to clarify its understanding of sufficient contacts by saying, "Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person automatically practices law 'in California' whenever that person practices California law anywhere, or 'virtually' enters the state by telephone, fax, e-mail, or satellite." *Id.* at 6. This test is both amorphous and unworkable. In failing to provide a clear explanation of its sufficient contacts test, the California Supreme Court muddled other courts' understandings of the holding and its applicability to similar unauthorized practice of law challenges.

42. Gerard E. Wimberly, Jr., *The Unauthorized Practice of Law by Licensed Attorneys: A Perilous Paradox*, 37 ARIZ. ATT'Y 29 (2001).

43. *See id.*

same. A large percentage of the practicing bar now practices in-house. Not only have the numbers of attorney-employees increased but in-house attorneys also have gained prestige in the last twenty years. Corporations now hire attorneys to do very sophisticated legal work. Attorneys with much power, experience, and prestige commonly move in-house.⁴⁴

The cultural shift has rendered traditional unauthorized practice of law doctrines outmoded⁴⁵ and obsolete.⁴⁶ Yet courts have failed to rally with the times.⁴⁷ There is an ongoing debate about whether the *Model Rules of Professional Responsibility* ought to be revised⁴⁸ to rescind some of these restrictions.⁴⁹ Moreover, recent calls to eliminate restrictions on the corporate practice of law in favor of a more commonsense approach have swelled.⁵⁰ Abolition of

44. Giesel, *supra* note 14, at 180-81; *see also* Moskin, *supra* note 9, at 38 (referring to a "new system ... animated by ... dynamism"); Stevens, *supra* note 26, at 29 (citing *Birbrower* as failing to bring regulation of lawyers into consonance with modern legal practice); ACCA Letter, *supra* note 5 (introducing substantive evidence of a changing practice of law).

45. Giesel, *supra* note 14, at 205. In 1928, when the ABA put forth its *Canons of Ethics*, Canon 35 provided:

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary.

ABA CANONS OF PROFESSIONAL ETHICS Canon 35 (1969). These Canons were adopted by the ABA to serve as a general guide for the profession. When adopted, the rationale was that the administration of justice could only be "pure and unsullied" if members of the legal profession maintained a certain level of conduct and character. ABA CANONS OF PROFESSIONAL ETHICS pmbl. (1908). To that end, the *Canons* were to serve as guiding principles in that endeavor. *See id.* These *Canons* were reflective of both "bench and bar." Giesel, *supra* note 14, at 205 (citing Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?*, 40 HASTINGS L.J. 577, 585 (1989)).

46. *See* Giesel, *supra* note 14, at 180-82.

47. *See, e.g.,* Third Nat'l Bank v. Celebrate Yourself Prods., Inc., 807 S.W.2d 704, 706 (Tenn. Ct. App. 1990) ("It is well established that a corporation cannot practice law, nor can it employ a licensed practitioner to practice for it.").

48. Giesel, *supra* note 14, at 206 (referring the proposed revisions to the *Model Rules* that seek to eliminate restrictions on the type of entity in which an attorney may practice as well as barriers to lawyers joining with nonlawyers in a multidisciplinary fashion).

49. *See infra* Part IV for in-depth analysis of proposed amendments to the *Model Rules*.

50. Giesel, *supra* note 14, at 207. H.H. Walker Lewis long ago wrote: "If, however, there is a real evil in the practice of law by corporations it should be met on real grounds. Only mythological demons can long be exorcised with hocus pocus." H.H. Walker Lewis, *Corporate Capacity to Practice Law—A Study in Legal Hocus Pocus*, 2 MD. L. REV. 342, 354 (1938). "The *Model Rules* protect more directly against the evils feared if corporations can practice law

unauthorized practice of law doctrines for in-house counsel is but one possible solution to the growing problem. States have tried, unsuccessfully, to address the issue.

III. STATES' APPROACHES

States have been as divided as the scholars and courts in their approach to dealing with this "in-house counsel problem." This variety of approaches offers no clear guidance for corporate counsel.⁵¹ Of the fifty-one jurisdictions nationwide, merely fourteen have corporate counsel rules recognizing the unique needs of in-house attorneys.⁵² In Michigan, the Board of Law Examiners Rule 5 provides in part: "An attorney ... practicing law in an institutional setting, *e.g.*, counsel to a corporation or instructor in a law school, may apply to the Board for a special certificate of qualification to practice law."⁵³ Michigan thus recognizes special exemptions for corporate counsel.⁵⁴ Ohio provides even more specific language to exempt corporate attorneys not licensed in the state to nonetheless practice therein:

An attorney who is admitted to the practice of law in another state, but not in Ohio, and who is employed full-time by a nongovernmental Ohio employer may register for corporate status by filing a Certificate of Registration An attorney who is granted corporate status may perform legal services in Ohio

via attorneys." Giesel, *supra* note 14, at 205.

51. For a thorough look at what different states have done with their statutory provisions in this area, see ATTORNEYS' LIABILITY ASSURANCE SOCIETY, INC., STATUTES AND RULES LIMITING MULTIJURISDICTIONAL LAW PRACTICE FROM 51 UNITED STATES JURISDICTIONS (2000) (compiled for the American Bar Association Symposium on Multijurisdictional Practice of Law), available at <http://www.abanet.org/cpr/mjp-uprules.html> (last visited Feb. 26, 2003).

52. The fourteen are Colorado, Florida, Idaho, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nevada, Ohio, Oklahoma, Oregon, South Carolina, and Washington. *Corporate Counsel*, at http://www.crossingthebar.com/corporate_counsel.htm (last visited Feb. 26, 2003) [hereinafter *Corporate Counsel*].

53. MICHIGAN STATE BAR, RULES FOR THE BOARD OF LAW EXAMINERS (2000), available at <http://www.michbar.org/admission/ble.html> (last visited Feb. 26, 2003).

54. These exemptions usually take the form of temporary licensure. Attorneys are given authorization to practice law for a certain period of time, three months for example, if they are already licensed elsewhere. After the period of temporary authorization passes, the attorney may not practice law without gaining full licensure in the foreign state. This model basically allows for a grace period once an attorney begins work in a foreign state.

solely for a nongovernmental Ohio employer, as long as the attorney is a full-time employee of that employer.⁵⁵

The Washington State Court Rules⁵⁶ are much the same as Ohio's.⁵⁷ Fourteen jurisdictions have employed similar provisions.⁵⁸

Eight additional jurisdictions, though they have not drafted distinct rules for in-house counsel, have created exceptions *within* their rules providing that corporate attorneys may practice in a foreign state in which they are not licensed.⁵⁹ Washington, D.C.'s Unauthorized Practice Rule 49(c)(6), for example, contains an exception from the prohibition against practicing law in the District of Columbia for "Internal Counsel."⁶⁰ Seven states have analogous provisions.

Remarkably, the remaining jurisdictions have neither drafted rules calling for special application to in-house counsel nor created exceptions wherein some leniency is given to this incomparable class.⁶¹

The inconsistency in states' approaches, coupled with the imminence of the issue, spurred several recommendations in anticipation of an ABA proposal in 2002. Part IV will discuss these alternatives

55. OHIO RULES OF COURT, SUPREME COURT OF OHIO, RULES FOR THE GOVERNMENT OF THE BAR OF OHIO, available at <http://www.sconet.state.oh.us/Rules/govbar/> (last visited Feb. 26, 2003).

56. See WASHINGTON STATE COURT RULES, WASHINGTON COURTS, RULES OF GENERAL APPLICATION: ADMISSION TO PRACTICE, available at <http://www.courts.wa.gov/rules/> (last visited Feb. 26, 2003).

57. *Washington State Court R. 8(f)* reads:

A lawyer admitted to the practice of law in a state or territory of the United States or the District of Columbia may apply to the Board of Governors for a limited license to practice law as in-house counsel in this state when the lawyer is employed in Washington as a lawyer exclusively for a profit or not for profit corporation, including its subsidiaries and affiliates, association, or other business entity, that is not a government entity, and whose lawful business consists of activities other than the practice of law or the provision of legal services.

Id.

58. To access the information about these jurisdictions' rules listed in note 42, as well as those who have crafted exceptions, see *Corporate Counsel*, *supra* note 52.

59. *Id.* These jurisdictions are Alabama, Connecticut, Maryland, New Jersey, North Carolina, Texas, Virginia, and Washington, D.C. *Id.*

60. D.C. COURT OF APPEALS COMMITTEE ON UNAUTHORIZED PRACTICE OF LAW, R. 49, UNAUTHORIZED PRACTICE OF LAW, available at http://www.dcbart.org/for_lawyers/courts/court_of_appeals/rule49.cfm (last visited Feb. 26, 2003).

61. See *Corporate Counsel*, *supra* note 52.

and their feasibility and adequacy with regard to their goal of presenting a principled, consistent approach to apply in future practice scenarios.

IV. ALTERNATIVE SUGGESTIONS FOR IN-HOUSE COUNSEL

Various interested groups of legal professionals have put forth their ideas for addressing in-house counsel's unique and growing needs with respect to state licensure. The ABA created the Commission on Multijurisdictional Practice, which presented its final report in August 2002. In addition to sometimes endorsing those practices already adopted by the states, several interest groups and scholars have put forth new suggestions to create uniformity in adapting the unauthorized practice of law provisions to in-house counsel. Although this is inherently difficult, given the inconsistent nature of the statutes⁶² and states' definitions of the unauthorized practice of law,⁶³ the nature of interstate practice and commonplace practice of companies' hiring in-house attorneys demands a prompt and uniform recommendation.⁶⁴ The following discussion explains several proposed alternatives.

A. American Corporate Counsel Association Proposal

The American Corporate Counsel Association (ACCA) is the predominant professional organization to which in-house counsel belong. Its triumvirate proposal⁶⁵ entails the following.

62. See discussion *supra* Part I.

63. See discussion *supra* Part II.

64. See Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 668-69 (1995). For a brief summary of these changes, see C. Evan Stewart, *Corporate Counsel and the Unauthorized Practice of Law: "Special" is Not Necessarily Better*, N.Y. L.J. (2001).

65. The entire proposal can be found on ACCA's website. AMERICAN CORPORATE COUNSEL ASSOCIATION, THE IN-HOUSE CASE FOR THE MULTIJURISDICTIONAL PRACTICE OF LAW IN THE UNITED STATES, at <http://www.acca.com/advocacy/mjp/accaposition.html> (last visited Feb. 26, 2003).

1. *"Home State Admission"*⁶⁶

The ACCA proposal would permit a lawyer to relocate to a second state without having to take the bar exam in the new state. The proposal would require that the attorney be in good standing in his home state (state of origin) and register in his new state within a certain number of days. The new state would have regulatory authority over the attorney and could further set requirements, the meeting of which would entitle the attorney to be eligible for full admission to the new state's bar. An attorney would take one bar exam, in his home state, and would receive "permission" to practice in other states, if that practice is occasional, not regular.⁶⁷ For example, if an attorney moves from his home state of licensure, State A, to State B, and establishes a residence therein, this provision allows State B to admit the attorney to practice in State B if the attorney was in good standing in State A, registered in State B within a defined period, and passed State B's requirements for character of fitness. Unlike the current model in place, the attorney would not have to take State B's bar exam, and, upon being admitting to practice in State B, would be subject to discipline in State B as if licensed under the traditional method.

2. *"Occasional/Temporary Presence"—The "Drivers' License" Model*⁶⁸

Pursuant to the second part of the ACCA proposal, all U.S. states would infer a license for attorneys whose practice occasionally or temporarily takes them to a foreign (non-home state) jurisdiction to practice.⁶⁹ Unlike home state admission, this proposal applies to attorneys not seeking to relocate their practice but rather those whose practice sometimes crosses over to the foreign state. This is referred to as the "drivers' license model" because, as with a drivers' license, the traveling is often temporary, yet the party is subject to local rules, regulations, and discipline for any infractions occurring in those states.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

This prong requires no formalities like the first prong; the foreign state does not need to admit the attorney to practice therein. There is no fee, exam, or registration required.⁷⁰ The host state in which the attorney is practicing could assert disciplinary jurisdiction, as with a car accident, and may defer to the attorney's home state or jointly prosecute the attorney with the home state's enforcement personnel.⁷¹

3. *"The States' Compact to Enact This System"*⁷²

Pursuant to this prong of the ACCA proposal, states would collectively create a "model" compact, and then each jurisdiction would "endorse the compact locally as the vehicle for regulating licensure within their jurisdiction."⁷³ This "model compact" would apply only to those attorneys already licensed to practice in at least one state; for non-licensed individuals, the states' traditional unauthorized practice of law doctrines would remain intact. This model would not require states to adopt a standard code, but it would require that they give recognition to the original admission standards of other jurisdictions (a database may facilitate this prong—one that would keep track of those counsel admitted nationwide as well as their bar standing). In the alternative, ACCA calls for the application of the first two prongs of the proposal to only in-house counsel, who would not be required to take a second bar examination upon relocation.⁷⁴

The ACCA proposal, admittedly in need of development, is also far too broad and abstract to receive widespread approval. Lawyers may have a tendency to take the bar in the "easiest" state and waive into a second state where they are actually practicing. Pursuant to the first prong of the proposal, an attorney licensed in State A could occasionally practice in State B without jumping through too many proverbial hoops. For that reason, an attorney may choose to make his State A the state which has a notably

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* (referring to a "common framework [developed by the states] that would create coordinated reciprocity").

74. *Id.*

higher bar passage rate, yet practice in State B with some consistency. Pursuant to the third prong, this becomes more problematic, because an attorney licensed in State A presumably could practice permanently in State B if both states adopted the compact, requiring State B to give deference to the attorney's admission to the bar of State A. Although the proposal addresses enforcement concerns by mentioning jurisdiction, there remain considerations as to in-house counsel being subjected to more than one jurisdiction. The proposal as written allows the host state, State B in the above example, to assert jurisdiction over the attorney, to refer jurisdiction to State A, or to jointly prosecute the lawyer in conjunction with State A's enforcement personnel.⁷⁵ In theory, then, in-house counsel who become admitted under the third prong of the ACCA proposal could be subject to discipline by both State A and State B simultaneously, as State B determines. Enforcement becomes a principal problem when applied to the real-world likelihood of an attorney subject to two states' laws. In addition, although limiting the suggestions to in-house counsel would address their arguably unique positioning, it would create a disparity within the law community as to "real" counsel and "in-house" counsel.⁷⁶ There may be downsides to singling out in-house counsel. First, counsel may be treated as they are in the European Community, i.e., as less independent and perhaps not as professionally worthy of the privileges and responsibilities of the legal profession.⁷⁷ Second, when in-house counsel are subject to plaintiffs' depositions, as they often serve as the point contact in corporate investigations, allowing disclosure of confidential, attorney-client information could prove problematic in in-house counsel's accountability and trustworthiness as recipients of information.⁷⁸

75. *Id.*

76. See generally Stewart, *supra* note 64 (asserting that treating in-house counsel as "special" is problematic because it creates a snubbing, or turned-nose effect by outside counsel when examining in-house attorneys).

77. See, e.g., Case 155/79, *Australian Mining & Smelting Europe Ltd. v. Commission*, 1982 E.C.R. 1575 (requiring client to provide investigating agency documents which contained communications with legal counsel); see also J. Case, *Are Your Internal Communications Protected?*, ACCA DOCKET 32, 36-37 (Nov./Dec. 1996).

78. See Stewart, *supra* note 64.

B. ABA Ethics 2000 Commission Proposal

The ABA Ethics Commission presented its final report in August, 2002.⁷⁹ Included in that report were several proposed changes to Model Rule 5.5.⁸⁰ Section (d) has been amended to read: "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 provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission"⁸¹ These rules are referred to as "safe harbor"⁸² provisions—excepting in-house counsel from traditional state unauthorized practice of law rules.

This revision to the *Model Rules* would permit in-house counsel to work for their employer-clients in transactions on the employers' behalf, in jurisdictions outside the attorney's home state of licensure, provided that the work does not involve judicial or agency proceedings that would otherwise require pro hac vice admission. For example, an in-house attorney working for ACME Corporation could serve ACME at all of its offices and in all of its matters in the United States so long as that service did not vitiate the pro hac vice doctrines.

This proposal may seem similar to the third prong of the ACCA proposal, but such an analogy is inaccurate. Like the ACCA proposal, the ABA recommendations clearly make exceptions for certain types of law practice, but the ABA proposal does not inherently distinguish⁸³ a class of attorneys from their colleagues in terms of the practice of law. Moreover, this does not vitiate the policies behind unauthorized practice of law doctrines—protecting the *public* from incompetent attorneys. "From a regulatory perspective, a lawyer who is employed to represent an organization on

79. ABA REPORT, *supra* note 12.

80. *Id.* These changes are similar to what many of the eastern states have done. See discussion *supra* Part III.

81. *Id.* (emphasis added).

82. *Id.*

83. For discussion of the problems with singling out classes of attorneys, see *supra* notes 76-78 and accompanying text.

an ongoing basis poses less of a risk to the client and the public than a lawyer retained by an individual on a one-time basis.⁸⁴

C. Pro Hac Vice Extended

Pro hac vice admission allows an attorney to practice in a foreign state before a tribunal for one purpose and one matter only.⁸⁵ Beyond that, attorneys need to seek licensure in the foreign state. As applied to in-house counsel, an analogous provision could make single matter representation allowable upon a special request for certification.

Pro hac vice admission is an established tradition with “almost no reported problems”⁸⁶ that applies across the board to all counsel. It is the status quo response to the problem of multijurisdictional practice. It may be sufficient for transactional attorneys but not for in-house counsel whose work is often repetitive and continuous. That is, special dispensation for allowable work on one matter fails to address the steady-stream nature of corporate counsel’s work. Moreover, it is becoming particularly problematic in today’s complex legal environment in which isolated legal situations are seldom the norm with corporate clients—their problems may span several issues or matters.

D. Temporary Licensure with Full Licensure Beyond Threshold

No one has suggested this fourth proposal as a national solution. Many central states have called for temporary licensure and, if the attorney’s work exceeds some threshold, require application for full licensure.⁸⁷ Minnesota, for example, allows in-house counsel to

84. ABA Report, *supra* note 12. *Contra* Pamela A. McManus, *Have Law License; Will Travel*, 15 GEO. J. LEGAL ETHICS 527, 543 (2002) (“States would not willingly grant permission to incompetent lawyers to practice within the state, so states necessarily presume the competence of all corporate counsel.”).

85. For example, an attorney may work on one transaction or arbitration but not more without running afoul of the *pro hac vice* admission. William T. Barker, *IADC Submits Model Pro Hac Vice Rule to ABA Multijurisdictional Practice Commission*, 68 DEF. COUNS. J. 148, 149, 151-53 (2001).

86. *Id.* at 151.

87. The proposal is less aggressive than the alternatives by merely requiring an overlay to the current system. For a more in-depth explanation of temporary licensure, see discussion *supra* Part II.

apply for a twelve-month, temporary license to practice in the state.⁸⁸ Missouri similarly provides for a five-year limited admission to qualifying corporate counsel.⁸⁹ As with the first prong of the ACCA proposal, application for full licensure may include establishing residence, showing evidence of good standing in the previous state of licensure, and passing the new state's requirements for character of fitness. Contrary to tradition, the attorney would not have to take the new state's bar exam if these other formalities are met. Because this licensure would become permanent upon completing the requirements, the attorney would now be subject to the new state's jurisdiction and enforcement mechanisms.

This proposal could well discourage corporations from hiring in-house counsel at the expense (both in time and money) of requiring in-house counsel to obtain multiple certifications and, in doing so, subjecting those attorneys to sanction in multiple jurisdictions in the event of wrongdoing. Moreover, it may spur a trend towards multistate or mega-firm monopoly in the legal arena and resulting disadvantage in smaller firms' ability to compete.

V. RECOMMENDATION

The ABA Ethics Commission's proposed changes to the *Model Rules* are the most workable and the least combative solution.⁹⁰ First, as has been shown in many of the eastern states, this proposal is feasible. It allows attorneys to cross state lines in working for their one client, the corporation, and in working on general, nonlitigation issues. On this type of work, the attorney operates within "safe harbor" from unauthorized practice of law statutes. For work before a tribunal, the attorney must still receive licensure or pro hac vice admission in the foreign state.

This is not combative in large part because it is clear by the very nature of the businesses for which they work that these lawyers must serve in more than one locale. Moreover, corporate counsel have already been serving the needs of their employers across state boundaries. Nationwide adoption of the ABA's proposal would

88. *Minnesota Corporate Counsel Rule*, at <http://www.crossingthebar.com/MN-CC.htm> (last visited Feb. 26, 2003).

89. *Id.*

90. See discussion *supra* Part IV.B.

validate this already entrenched practice. The enforcement of these revisions should be the same as for outside counsel. That is, typically attorneys are subject to punishment, up to and including disbarment, for the unauthorized practice of law. In-house counsel should be subject to the same provisions upon violating the revised *Model Rules*. Violation of the *Model Rules* would include the practice of law outside of the safe harbor. Therefore, if an attorney appears before a tribunal, his violation will be sanctioned with the same severity as would the violation of any lawyer practicing law in a foreign state for any outside client.

CONCLUSION

The state licensure model is steeped in tradition and history and it is unlikely to change in the foreseeable future. The nature of state licensure and federalism concerns render much change in this area improbable, or at least slow. States have long enjoyed the privilege of defining the requirements to practice law within their boundaries. They are unlikely to relinquish this privilege easily in the interest of a uniform standard for practicing law.

Nevertheless, the nature of law practice is changing. With the increase in interstate travel and the advent of facsimile, e-mail, and Internet transmissions, attorneys are practicing law and delivering legal advice in new and cross-boundary ways. As many industries have globalized during the past several years, and corporations that "hold court" in several locales are prevalent, corporate counsel needs to cross boundaries as never before. Finally, employers frequently hire inside legal help to handle corporate issues and likely assume that in-house counsel are competent to handle their needs corporate-wide. For these reasons, though unauthorized practice of law statutes are well-founded, there is a need to accommodate the different ways in which law is practiced today.

States have largely disparate rules and variously interpret the unauthorized practice of law doctrine. There is a need for uniformity, both because of the state discrepancies and because of the modern trend towards multistate practice and blurred state and practice boundaries.

The ABA Commission on Multijurisdictional Practice gave little more than a passing mention to in-house counsel in its final report.

In-house counsel have unique duties to their clients, and a new approach to state licensure, in certain instances excluding work before tribunals and for this one class of attorneys, may be in order. Just as pro hac vice admission allows attorneys to practice before tribunals in foreign states, a parallel exception should allow in-house counsel to perform extended practice for their employers in foreign jurisdictions, even when not appearing before tribunals. This most workable and helpful approach is embodied the ABA Ethics Commission's proposed amendment to Model Rule 5.5.

One thing is certain: counsel would be better guided by uniformity. Standards and application today are too scattered to render any clear picture of what the law is. Multistate practice can only be adapted to meet the growing, changing needs of counsel if there is a clear picture of the law. Violations of the doctrine are increasingly common, and the rising trend in interstate practice for in-house counsel is likely to continue with or without a change in the law. The time has come to recognize that the practice of law has not been, is not, and will not be the same; the rules should not be either.

*Elizabeth A. Wickerham**

* The Author would like to thank Professor Jayne Barnard for her suggestions in initially charting the course of this Note. Thanks also to Ed Brunins for his thoughtful comments and continued assistance.