"YOU ARE NOW FREE TO MOVE ABOUT THE COUNTRY": WHY BANKRUPTCY LAWYERS SHOULD BE FREE TO ENGAGE IN MULTIJURISDICTIONAL PRACTICE

Daniel Pouladian* & Leslie Reed**

For bankruptcy professionals, particularly transactional attorneys, the ability to practice nationwide without the fear of breaking ethical and legal standards is surprisingly not a given. While litigators can be granted temporary pro hac vice admission, there is no equivalent safe harbor for the transactional bankruptcy attorney. Fewer than fifteen states have adopted any rule allowing for transactional practice on a temporary basis. Thus, unauthorized practice of law violations are not easy to avoid, and they are difficult to define because of anachronistic rules. Cases interpreting these rules are murky and contradictory both to other decisional law and to common sense. Consequently, the rules are often ignored by both practitioners and courts. The tension between the law as it is and the law as it is practiced should be resolved in favor of more liberal rules for bankruptcy practitioners, whose unique specialty provides a strong rationale for change.

This Comment explains the conflict between requirements for admission to state and federal courts and illustrates the general shortcomings of state admissions requirements, particularly with respect to bankruptcy practice. It also explains how the case law defines unauthorized practice of law, in conjunction with the ABA Model Rules of Professional Conduct *as recently reworked and adopted and the* Restatement (Third) of the Law Governing Lawyers. *It also examines enforcement mechanisms for these restrictions. Finally, the Comment asserts that arguments for restricting multijurisdictional practice are unpersuasive, especially in the bankruptcy context. Such arguments smack of anticompetitive rather than consumer protection aspirations. Moreover, the restrictions are economically inefficient, serving form over function in a very specialized arena where there is absolutely no room for waste. We argue that widespread state reform is required, in the form of the new ABA Model Rule 5.5 or legislation such as Michigan's recent exemption rule. Such reform would replace the apparent indifference that currently exists so that practitioners can represent clients legally, effectively, and with confidence.*

---

* J.D. candidate, UCLA School of Law, 2005; B.A., University of California, Berkeley, 2001.

** Managing Editor, UCLA Women's Law Journal. J.D. candidate, UCLA School of Law, 2005; B.A., University of California, Los Angeles, 1992. The authors would like to acknowledge their debt to Professor Kenneth N. Klee for his guidance and assistance with the original version of this Comment.

INTRODUCTION

For bankruptcy professionals, the ability to practice nationwide without the fear of breaking ethical and legal standards is surprisingly not a given. Almost every forum treats litigators differently than nonlitigators, even though the nature of bankruptcy practice requires both services in providing effective counsel. The fear of going into bankruptcy propels out-of-court negotiations and settlements, choices

that involve nonlitigators and that can avoid protracted and bitter courtroom battles. But if those negotiated workouts take place outside the state where the attorneys are admitted to practice law, undoubtedly someone, somewhere in the interaction is violating both legal and ethical rules to get the job done.

These violations threaten dire consequences. Surprisingly, the threat often proves to be only a paper tiger, except where enforcement comes from those clients or their opponents hoping to avoid paying fees for services rendered by pointing out the violations after the fact. Yet the violations themselves are difficult to avoid, and sometimes, even difficult to determine. The rules are anachronistic, and as such, have prompted debate that has led to recent ABA *Model Rule* modifications and recommendations for change. Consequently, the rules are often ignored not just by practitioners but also by courts. Both tend to turn a blind eye to violations—if they are even aware of them. Decisional law interpreting the rules is murky and contradictory both to other decisional law and, at times, to common sense. This tension between the law as it is written and as it is practiced should be resolved in favor of more liberal rules for bankruptcy practitioners, whose unique specialty provides a strong rationale for change.

To that end, this Comment outlines the requirements for becoming authorized to practice law and illustrates their shortcomings, particularly with respect to bankruptcy practice. First, Part I looks at both state and federal court admissions requirements to establish where these requirements conflict. Next, Part II examines the practice of law. More specifically, it exposes how the legal practice is unsatisfactorily bounded by the case law definitions of the unauthorized practice of law (UPL). It also examines flawed and disingenuous enforcement mechanisms. In addition, it describes bankruptcy practice as a compelling place from which to launch change.

Next, Part III asserts that arguments for restricting multijurisdictional practice are unpersuasive in the bankruptcy context, where they not only smack of anticompetitive rather than consumer protection aspirations but also are economically inefficient, serving form over function in an arena where there is no room for waste. The Comment concludes by advocating that state reform is required in the form of wider adoption of the new Model Rule 5.5 or legislation such as Michigan's exemption rule. Such measures would establish a level of certainty that will relieve attorneys of apprehension over needlessly treading too fine a line legally or ethically in their practice.

I. REQUIREMENTS TO PRACTICE LAW

A. State Court Admissions

The law has long provided that only those specifically authorized to practice law may do so. There is no natural right to practice law,[1] and lawyers must meet a minimum standard of competence represented by bar admissions. A primary policy consideration behind such authorization is that the public should be protected from lawyers who are not conversant in the field of law.[2] Though nothing requires that one be authorized to practice law before representing oneself in court—even bankruptcy court[3]—should one wish to advise or represent others, the government requires that a higher bar be met.

Within a state, the power to authorize the practice of law and regulate lawyers is typically shared by the judiciary and the legislature.[4] Lawyers are officers of the courts, which are inherently empowered to regulate lawyers' admission to the practice of law, to set proficiency-related requirements for continuing practice, and to oversee their conduct.[5] The legislature, through its police power, can similarly regulate admission, the conduct of lawyers, and the practice of law.[6] In fact, the California Supreme Court recognized that the "judiciary and the legislature are in some sense partners in regulation," and noted that the courts may impose higher requirements than the statutory minimums codified by the legislature.[7]

Normally, admission to practice law is regulated under the auspices of a quasi-governmental organization working in tandem with the highest court of the state. For example, in California, the legislature enacted the State Bar Act (the "Act") to serve as a comprehensive scheme to regulate the practice

1. Application of Stone, 305 P.2d 777, 781 (Wyo. 1957) (stating that the right to practice law is a privilege and not a constitutional right); *cf.* Sup. Ct. v. Piper, 470 U.S. 274, 288 (1985) (stating that the practice of law is a privilege protected by the Constitution where a resident of Vermont passed the New Hampshire bar exam but had been denied admission based on her residency).

2. *See* Gerard J. Clark, *The Two Faces of Multi-Jurisdictional Practice*, 29 N. KY. L. REV. 251 (2002).

3. "A debtor, creditor . . . or other party may . . . appear in a [bankruptcy] case . . . and act either *in* [*his*] . . . *own behalf* or by an attorney . . . ." FED. R. BANKR. P. 9010(a) (emphasis added); *see also* 1 ROSEMARY WILLIAMS, BANKRUPTCY PRACTICE HANDBOOK § 3:15 (2d ed. 2003).

4. *See* Clark, *supra* note 2, at 252.

5. *See* Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 248 (1957) (Frankfurter, J., concurring); *In re* Attorney Discipline Sys., 967 P.2d 49, 54 (Cal. 1998) ("An attorney is an officer of the court and whether a person shall be admitted [or disciplined] is a judicial, and not a legislative, question." (quoting Hustedt v. Workers' Comp. Appeals Bd., 636 P.2d 1139, 1143 (Cal. 1981))).

6. *See In re* McKenna, 107 P.2d 258, 258–59 (Cal. 1940).

7. *In re Attorney Discipline Sys.*, 967 P.2d at 61 (quoting Santa Clara County Counsel Attorneys Ass'n v. Woodside, 869 P.2d 1142, 1151 (Cal. 1994)).

of law in the state.[8] The Act created the State Bar of California, a public corporation to regulate admission to the bar and conduct of lawyers. Section 6125 of the Business and Professions Code makes bar admission a prerequisite to practicing law. The Act involves the judiciary in the process by making admission to the state bar contingent upon the affirmation of the Supreme Court.[9] That is, though the State Bar administers the admissions test, it can make only a recommendation to the highest court to admit successful candidates.[10] The Supreme Court must then approve those applications. In fact, case law suggests and practice confirms that the State Bar actually operates as an "arm" of the state's Supreme Court.[11]

A second policy consideration emphasizes the benefits of a local bar comprised of lawyers who support the local community with pro bono work and other community service efforts. The theory is that lawyers who remain local will put time, money, effort and other resources back into their communities, improving the reputation of attorneys generally and assisting in providing access to legal services to the community at large. In addition, enforcement of rules of conduct is more convenient when the lawyer remains tied to one state bar. When one's admission and continued ability to practice one's profession can be impacted swiftly and directly by the state bar, one's inclination to follow at least the bare minimum rules increases.

Finally, unstated but implied considerations include the desire of most states to keep their lawyers generating wealth and tax revenue within their own borders.[12] Creating artificial barriers to practice by out-of-state[13] attorneys not

---

8. CAL. BUS. & PROF. CODE §§ 6000–6238 (West 2003).

9. *Id.* § 6064.

10. *Id.* Section 6064 provides: "Upon certification by the examining committee that the applicant has fulfilled the requirements for admission to practice law, the Supreme Court may admit such applicant as an attorney at law in all courts of this State . . . ."

11. *In re Attorney Discipline System*, 967 P.2d at 59.

12. Practicing law in other states implicates the issue whether attorneys must, and in practice do, properly account for revenues generated in non-home states, and whether appropriate taxes are paid in those states and/or municipalities. Appropriate accounting may be outside the scope of this paper, but provides another basis for the ethical considerations of practicing law outside the home state, especially where the unauthorized practice of law in a host state could be used as an argument by the home state for making income taxable in the home state. *See In re* Vigliano, No. 809303, 1993 WL 33301, at *6 (N.Y. Div. Tax App. Jan. 28, 1993); *see also* 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, 734 n.66 (1995) (citing general resources on the issue of taxation, including Gary Spencer, *Out-of-State Lawyer's Income Ruled Taxable Here*, N.Y. L.J., Feb. 9, 1993, at 6).

13. The terms "out-of-state lawyer," "state not admitted," "foreign state," and "host state" all refer to attorneys practicing in a state where they are not admitted to the bar, and therefore risking unauthorized practice of law sanctions. *Cf.* Clark, *supra* note 2, at 251, 253–54 (using the term "out-of-state buyer" with this meaning). The terms are used interchangeably throughout this Comment. The terms "in-state lawyer," "admitted state," and "home state" each refer to an attorney

only cuts down on competition but may also keep the home state's lawyers' hourly rates relatively high where competition from other states with lower rates could otherwise operate to bring rates down.[14] Of course, where the out-of-state attorneys' fees are higher, this may not always be the case. In those instances, it makes financial sense for home state attorneys to attend to matters for which highly paid experts' time (and fees) would be wasted. However, where home state rates otherwise stand to be cut by competition, the rule appears to benefit the attorneys and the state's tax base rather than the consumers whom the rules ostensibly protect.

B. Federal Court Admissions

In federal courts, admission requirements are slightly different. Courts have generally held that "under the privileges and immunities clause of the Constitution no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advice concerning it within the state."[15] In 1963, in *Sperry v. Florida ex rel. Florida Bar*,[16] the U.S. Supreme Court held that a state could not restrict the practice of nonlawyers doing solely patent work.[17] The Court conceded that advising on and preparing of patent applications constituted the practice of law under Florida law. However, federal legislation specifically allows persons qualified under the relevant federal statutes to practice patent law.[18] The Court conceded that the state "has a substantial interest in regulating the practice of law" in its own territory.[19] Nevertheless, it reaffirmed over one hundred years of case law in stating that "'the law of the State . . . must yield' when incompatible with federal legislation."[20] In response to the state's concern "for protecting its citizens from unskilled and unethical practitioners," the Court pointed out that standards for patent practice protect against these harms "by insisting on the maintenance of high standards of integrity."[21] While the Court did not address enforcement of

practicing where she is admitted to the state bar and thus not risking unauthorized practice of law sanctions. The term "UPL" is used as an abbreviation for "unauthorized practice of law."

14. *See id.*

15. Spanos v. Skouras Theatres Corp., 364 F.2d 161, 170 (2d Cir. 1966) (en banc); *see also* Cowen v. Calabrese, 41 Cal. Rptr. 441, 443 (Ct. App. 1964) ("The State Bar Act of California does not purport to regulate the practice of lawyers before the United States Courts . . . .").

16. 373 U.S. 379 (1963).

17. *Id.* at 385.

18. *Id.*

19. *Id.* at 383.

20. *Id.* at 384 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824)).

21. *Id.* at 402.

such standards, it appeared satisfied that federal requirements were both supreme to the state concerns and designed to meet policy goals of high quality representation.

In *Spanos v. Skouras Theatres Corp.*,[22] a Second Circuit Court of Appeals faced the issue of whether an out-of-state attorney could recover for legal services rendered in an antitrust suit in a New York federal court. The en banc panel opined that an out-of-state lawyer practicing solely federal law before a federal court was not bound by state law admission rules.[23] However, the panel limited its decision to the facts of the case—specifically, that an out-of-state lawyer had engaged local counsel to work on a federal matter.[24]

Moreover, federal district courts have autonomous rules regarding admission to their respective bars.[25] Thus, an attorney admitted to the bar of the state also needs to seek admission to the bar of the federal court. In *Cowen v. Calabrese*,[26] a California court of appeal justified these rules, stating "federal courts are governed entirely by federal enactment and their own rules as to admission and professional conduct [and t]his state, should it attempt . . . to regulate the practice of law in the federal courts . . . would be acting entirely without right and beyond its jurisdiction."[27] California district court rules enacted after *Cowen*, however, require proof of a lawyer's admission to the State Bar of California before admitting her to the bar of the district court.[28]

---

22. 364 F.2d 161 (2d Cir. 1966).
23. *Id.* at 171.
24. *Id.*
25. *See, e.g.*, E.D. CAL. L.R. 83-180.
26. 41 Cal. Rptr. 441 (Ct. App. 1964).
27. *Id.* at 443 (quoting *In re* McCue, 293 P. 47, 51 (1930)).
28. *See, e.g.*, E.D. CAL. L.R. 83-180 ("Admission to and continuing membership in the Bar of this [federal] Court are limited to attorneys who are active members in good standing of the State Bar of California."); N.D. CAL. L.R. 11-1 (analogous to rule in Eastern District).

District court rules in other states are similar. For example, to be admitted to the bars of the Eastern and Southern Districts of New York, an applicant must be a member of district courts in New Jersey, Connecticut or Vermont, or a member of the New York State Bar. S.D.N.Y. L.R. 1.3; E.D.N.Y. L.R. 1.3. Local court rules of the Western District of New York state that only members of the State Bar of New York "may" apply to be admitted to practice in the district court. W.D.N.Y. L.R. 83.1 ("A person admitted to practice before the courts of New York State . . . may, on motion of a member of the bar of this Court, apply to be admitted to practice in this Court . . . ."). *But see id.* R. 83.1(f) ("A member in good standing of any United States District Court and of the bar of the State in which such District Court is located may apply to be admitted to practice in this Court . . . .").

Relevant California bankruptcy court rules:

In the Bankruptcy Court for the Central District of California, "appearance before the court on behalf of a person or entity may be made only by an attorney admitted to the bar of, or permitted to practice before, the district court." BANKR. C.D. CAL. L.B.R. 2090-1; BANKR. E.D. CAL. L.B.R. 1001-1(c). Eastern and Northern District rules are similar. BANKR. N.D. CAL. L.B.R. 9010-1(a). Southern District rules require an attorney to apply under applicable court rules

The *Restatement (Third) of the Law Governing Lawyers* has also sounded its horn in this debate. It allows a lawyer admitted to practice in a state to also practice before a tribunal of the federal government (for example, federal district courts), "in compliance with requirements for temporary or regular admission to practice before that tribunal . . . ."[29] Comments to this provision emphasize that a lawyer admitted to the district court in a state in which he is not admitted may practice law, but is limited to cases filed in that federal court.[30] The comments suggest that federal courts requiring admission to the state bar before a lawyer may practice in the federal court are not complying with the "federal nature of the court's business."[31]

Furthermore, although the en banc panel in *Spanos* limited its holding to the facts presented, it warned that it will not condone a "practice whereby a lawyer not admitted to practice by a state maintains an office there and holds himself out to give advice to all comers on federal matters."[32] Thus, the scope of practice becomes important. Even courts that recognize an exception to a state bar's admission requirements have emphasized that the nonadmitted attorney's practice must be restricted to advising on and litigating federal law. In *State ex rel. State Bar v. Keller*,[33] a Wisconsin court recognized that an administrative practitioner had federally conferred authority to practice before the Interstate Commerce Commission.[34] However, the court noted that the practitioner was limited to advising the client on the documents' compliance with federal law and could not address enforceability under state law. Following the *Sperry* decision, the Oregon State Bar addressed a lawyer's question as to whether he could practice patent, trademark, and copyright law in Oregon without being admitted to practice the state. The court stated that "he could meet with Oregon residents in Oregon to discuss their rights under federal law, but could not

---

in that district. BANKR. S.D. CAL. L.B.R. 9010-2 ("Applications for admission under Local District Court Rule 83.3(c)(1) shall be presented to the clerk of the United States District Court.").

Relevant New York bankruptcy court rules:

The local court rules for the Bankruptcy Court for the Western District of New York require that the applicant be admitted to practice before the District Court for the Western District of New York. BANKR. W.D.N.Y. L.B.R. 2090-1. The Northern District bankruptcy court rules are similar. BANKR. N.D.N.Y. L.B.R. 2090-1.

29. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3(2) (2000) ("A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client . . . before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency . . . .").

30. *Id.* § 3 cmt. g.

31. *Id.*

32. Spanos v. Skouras Theatres Corp., 364 F.2d 161, 171 (2d Cir. 1966) (en banc).

33. 123 N.W.2d 905 (Wis. 1963).

34. *Id.* at 906.

discuss their rights under the common law even if attendant to a discussion of their federal rights."[35] The inefficient result would be that another lawyer would be needed, at additional cost, to handle any common law discussion that could be relevant to such a case.

In addition, the local district court rules that regulate admission to federal courts, and the relevant case law, do not differentiate between diversity and federal question jurisdiction.[36] When federal courts admit attorneys to litigate diversity cases where state law is used, then lawyers who appear before them may practice even state law without being admitted to the bar of the state. This shows that the federal court system is not concerned with lawyers practicing state law in nonadmitted states. This stands in marked contrast to the state admission rules that purport to ensure that lawyers are competent in a given state's law. However, for such states' policy concerns over multijurisdictional practice to seem valid, these apparent contradictions should be made consistent by state legislatures.[37]

II. THE PRACTICE OF LAW

A. What Constitutés the "Practice of Law"

Statutes do not typically explain what "practicing law" includes on the premise that it is constantly evolving. Thus, the definition must remain dynamic to meet the demands of the ever-changing profession.[38] Practice of law is often defined in the negative by cases illustrating when a defendant's practice is unauthorized. Some of these cases will be examined below. Common law has come to define the "practice of law" as including the "rendering of services that require knowledge and application of legal principles to serve the interests of another,"[39] and, more generally, "as doing and performing services in a court of justice in any matter pending therein throughout its various stages . . . ."[40] However, it is not limited to litigation or

35. George A. Riemer, *Limited Practices: Is There a "Federal Law Only" Exception to the Oregon Bar Examination?*, OR. ST. B. BULL., June 2001, at 25, 31.

36. *See, e.g.*, E.D. CAL. L.R. 83-130 (failing to distinguish between diversity and federal question jurisdiction and not even mentioning them). Further, the court in *Spanos* refused to decide what would happen if the lower court had been sitting in diversity jurisdiction.

37. Moreover, an unexpected result of these rules is that the lawyer with a diversity jurisdiction case has an advantage, since he would not have to be admitted in the state in order to litigate the case in that state, whereas a lawyer with a nondiversity case would have to be admitted.

38. *See* Fla. Bar v. Brumbaugh, 355 So. 2d 1186, 1191–92 (Fla. 1978).

39. 7 AM. JUR. 2D *Attorneys at Law* § 1 (1997).

40. *Id.* § 118.

to preparing to litigate a matter. It includes advising clients on their legal options and so-called transactional work: "prepar[ing] . . . legal instruments and contracts by which legal rights are secured, although such matter may or may not be pending in a court."[41]

In fact, transactional work constitutes the bulk of many practitioners' careers. Bankruptcy's unique implication of both litigation and transactional work requires professionals to be adept in both skills at different stages of a given case. Yet no provision accommodates such transaction-heavy professionals to ensure their whole practice is authorized and thus ethical as well as legal. For attorneys, charged with avoiding even the appearance of impropriety, this is an untenable position.

B. What Constitutes the Practice of Bankruptcy Law

On any given day, a bankruptcy lawyer might be found counseling a debtor on the consequences of filing bankruptcy, preparing a business plan, drafting a plan of reorganization, negotiating the sale of a business, or renegotiating a lease. Transactional bankruptcy work involves advising clients on their legal rights before a bankruptcy petition is ever filed, while litigation work includes the entire bankruptcy proceeding, which is itself completely governed by a court. Yet, some bankruptcy practice never even reaches the front steps of a courthouse. Much takes place in the shadows of both the courthouse and Title 11, in what are loosely termed out-of-court workouts. When a debtor starts to see trouble brewing in the business or insolvency on the horizon, he may choose to negotiate with his creditors to a workout, where the structure of debt is modified in a legally enforceable way.

Workouts attempt to avoid the potential hassles of a full-blown bankruptcy court case and are often successful. Yet they are transactional in nature and may implicate as much state law as federal law, though it is the specter of the federal law to which a bankruptcy filer and his creditors will be subject that puts teeth into the workout process. Because creditors, debtors, and property are typically located in different states, the geographical, legal, and ethical lines of this practice may not line up neatly in every case—in fact, they are unlikely to. This unique gray area of bankruptcy only contributes to the already foggy aspect of unauthorized practice of law. However, it makes crystal clear that bankruptcy practitioners in particular need reliable, workable standards for practicing law legally and ethically.

41. 7 C.J.S. *Attorney & Client* § 29 (1980).

C. The Unauthorized Practice of Law

While most states' UPL statutes seek primarily to prevent nonlawyers from practicing law at all, they also prohibit lawyers not admitted to practice in that particular state from practicing law. That is, UPL prohibitions extend to nonlawyers and lawyers alike. Though this is a concern for any attorney who desires to work across state lines, our discussion focuses on lawyers admitted in at least one state but engaging in the practice of bankruptcy law in another state.

The public policy reasons for prohibiting licensed attorneys from practicing in states not admitted include the incompetency concerns acknowledged above.[42] They also include administrative and enforcement concerns, such as ensuring that a judicial department can exercise maximum control over representatives to guarantee "full amenability to the authority of [the] court at all times and at all stages of the proceedings."[43] This encompasses not just trial representation, but also "counsel[ing] a client through a transaction culminating in the client's execution of legally binding documents,"[44] otherwise known as transactional work.

Generally, a lawyer engages in the unauthorized practice of law when she engages in "practice of law" activities in a state where she is not admitted.[45] She does not even need to be receiving compensation in order to be enjoined from practicing law.[46] Though imperfect, a few means exist that allow nonadmitted attorneys to work around admission requirements.

For example, the nonadmitted litigator may always apply to the court for admission pro hac vice, whereby the court, on a temporary basis, allows her to practice in the state where she is not admitted.[47] This right is not absolute and restricts the practice of law in and out of court to the proceeding for which the pro hac vice admission is sought. However, it is well established

---

42. *See* Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27, 31 (Mass. 1943).

43. 7 C.J.S. *Attorney & Client* § 30 (citing Organized Vill. of Kake v. Egan, 354 P.2d 1108 (Alaska 1960)).

44. *In re* Jackman, 761 A.2d 1103, 1105 (N.J. 2000).

45. *See, e.g.*, CAL. BUS. & PROF. CODE § 6125 (West 2003) ("No person shall practice law in California unless the person is an active member of the State Bar."); *see also* Cleveland Bar Ass'n v. Moore, 722 N.E.2d 514, 515 (Ohio 2000) (noting that a licensed attorney not admitted to practice in Ohio engaged in unauthorized practice of law when he negotiated on behalf of Ohio clients on Ohio law, communicated with the clients' insurance companies, prepared settlement packages, and made settlement demands on third parties).

46. Fla. Bar v. Smania, 701 So. 2d 835, 836 (Fla. 1997).

47. Many states have pro hac vice rules in place. *See, e.g.*, Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct., 949 P.2d 1, 6 (Cal. 1998) (citing CAL. R. OF CT. 983).

that pro hac vice admission does not authorize a general license to practice.[48] In California, pro hac vice admission requires that the lawyer be a member of the bar of another state and that she be in good standing.[49] The out-of-state attorney must also engage local counsel (who is admitted to the California bar) as part of the application to appear pro hac vice, and she becomes subject to California's Rules of Professional Conduct.[50] However, because typically only litigators can be admitted pro hac vice, transactional lawyers and litigators who provide out-of-court services (or work prior to the filing of a suit) are left with no similar mechanism for out-of-court work.

Next, some states allow admission to their bar without taking the state's bar examination. Typically, the host state requires the applicant to have practiced in another state for a specified period and to be of good moral character.[51] A few states infrequently allow other experience to substitute for practice.[52] However, these same states frequently restrict this manner of admission to lawyers from states that offer a reciprocal privilege to the host state's lawyers—which means that such opportunities are very limited.[53] Moreover, some states require the lawyer to have intentions to establish a domicile in the state and to devote full-time practice to the new state—requirements that are beyond the scope of this Comment.[54]

Despite these workarounds, it is settled law that a nonadmitted lawyer may not set up a permanent office in a nonadmitted state and practice law by "inviting the general patronage of the public."[55] Certainly an attorney should be able to do quite a lot and still fall far short of the unauthorized practice of law. However, the extent to which a nonadmitted lawyer may act and still steer safely clear of unauthorized practice remains ambiguous. Unfortunately, case law does not always provide much "guidance that would help lawyers figure out when their contacts with [a] state [do and do not] put them in

48. *See* 7 C.J.S. *Attorney & Client* § 27.

49. *Birbrower*, 949 P.2d at 6 (citing CAL. R. OF CT. 983).

50. *Id.*

51. *See* 7 AM. JUR. 2D *Attorneys at Law* § 21 (1997).

52. *See* Michael A. DiSabatino, Annotation, *Validity, Construction, and Effect of Reciprocity Provisions for Admission to Bar of Attorney Admitted to Practice in Another Jurisdiction*, 14 A.L.R. 4th 7, §§ 15–16, 18 (1982).

53. *See* 7 AM. JUR. 2D *Attorneys at Law* § 21. Although so-called "admission on-motion" exist, where a lawyer is admitted to practice before the state courts just by motion without sitting for a bar exam, the practice is limited to a few states. About half of the states, including California, Florida, Arizona, and New Jersey, do not allow "admissions on-motion." *See* Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 680 (1995).

54. *See* Wolfram, *supra* note 53, at 680 n.42.

55. William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501, 1509 (2001).

violation of its unauthorized practice law."[56] This leaves attorneys in the position of violating the rules or guessing at when they are in compliance.

In fact, a relatively recent California Supreme Court decision sent ripples throughout the legal profession and emphasized that the state is serious about prohibiting the unauthorized practice of law. In *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*,[57] a New York law firm whose attorneys were not admitted to the California bar was denied fees in connection with work done for a California client in California. The court found that the New York firm had violated California law when its attorneys traveled to California to discuss with the client matters pertaining to the dispute, then advised and made recommendations to the client with respect to those matters and made a settlement demand to a third party.[58] The court found the fee agreement invalid because the work was done unlawfully.[59] It distinguished between work done in California and work done in New York and allowed payment for only work done in New York.[60] In dicta, however, the court stated that the definition of the practice of law was not contingent on the physical presence of the lawyer, although that was a factor.[61] Despite the allowance of fees for work done in New York, the court asserted "one may practice law in . . . [California illegally] *although not physically present here* by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means."[62]

Fortunately however, the *Birbrower* decision's trendsetting potential has been somewhat limited and refined in two subsequent decisions dealing with nonadmitted lawyers representing their home clients in foreign states. In *Fought & Co. v. Steel Engineering & Erection, Inc.*,[63] the Hawaii Supreme Court, considering *Birbrower*, held that an Oregon law firm was entitled to recover fees when it represented its Oregon client in a summary judgment proceeding in a Hawaii court for subcontracting work the Oregon client had

56. Stephen Gillers, *Lessons From the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 688 n.21 (2002) (discussing the *Birbrower* case).

57. 949 P.2d 1 (Cal. 1998).

58. *Id.* at 1.

59. *Id.* at 12.

60. *Id.* at 2 ("[W]e do not believe . . . the Legislature intended section 6125 to apply to those services an out-of-state firm renders in its home state."); *see also id.* at 11.

61. *Id.* at 5.

62. *Id.* at 5–6 (emphasis added). However, the court in the same breath mentioned that "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. . . . We must decide each case on its individual facts." *Id.* at 6 (citations omitted).

63. 951 P.2d 487 (Haw. 1998).

done for the State of Hawaii.[64] The court declined to extend the reach of the UPL statutes to the Oregon firm, explaining that the policy of protecting Hawaii's public from incompetent lawyers would not be served by prohibiting out-of-state lawyers from representing out-of-state clients in proceedings in Hawaii.

The Hawaii court was sympathetic to the globalization of the legal practice and recognized the public interest in enabling a client to choose his own attorney. In fact, the court suggested that the prohibitions on nonadmitted lawyers have the opposite effect of harming some of the public in that they are not able to choose their own competent lawyers.[65] The court held that the Oregon firm had not engaged in the unauthorized practice of law, as distinguished from *Birbrower*, because it was representing an Oregonian, or in-state, client and not a Hawaiian, out-of-state client.[66]

A California appellate court reached a similar result in *Condon v. McHenry (Estate of Condon)*.[67] There, the court considered the *Birbrower* decision and held that Colorado counsel for a Colorado client in a California court proceeding involving a probate matter was authorized to be paid, even if work was done while "physically" present in California.[68] The court here, like the Hawaii court, also noted that the Colorado client had a right to choose the attorney who was most convenient and who was to his liking.[69] The court interpreted the *Birbrower* decision as only prohibiting nonadmitted lawyers from representing California clients.[70]

A lower court in New Jersey, in finding that a contract for fees was illegal because it involved the services of a New York-admitted lawyer in New Jersey for New Jersey clients, laid out factors to determine when an out-of-state attorney is practicing law in the state not admitted:

---

64. *Id.* at 497–98.

65. *Id.* at 497. The court stated:

> [A] commercial entity that serves interstate and/or international markets is likely to receive a more effective and efficient representation when its general counsel, who is based close to its home office or headquarters and is familiar with the details of its operations, supervises the work of local counsel in each of the various jurisdictions in which it does business.

Id.

66. *Id.* at 497–98.

67. 76 Cal. Rptr. 2d 922 (Ct. App. 1998). This opinion affirmed the appellate court's earlier holding. The California Supreme Court had previously ordered the appellate court to reconsider its decision in light of *Birbrower*. The holding of the appellate court remained the same even though the language of the opinion was modified slightly. *See* 957 P.2d 866 (Cal. 1998); 64 Cal. Rptr. 2d 789 (Ct. App. 1997).

68. *Condon*, 76 Cal. Rptr. 2d at 928.

69. *Id.*

70. *Id.*

1. [W]ere the services rendered *in the jurisdiction* of this State;
2. [W]ere the services and legal advice rendered *based upon the laws of* this State;
3. [D]id the legal services relate to a transaction, property right or subject matter, *the* res *of which is in* . . . [this State], and
4. [I]f litigation might result, would the forum be the courts of this State.[71]

The New Jersey court refused to comment on what would happen if the New York lawyer had merely visited New Jersey incidentally in relation to the legal work.[72]

With respect to the operations of an interstate law firm, a stipulation in *Florida Bar v. Savitt*[73] was adopted to explain what could and could not be done in that case.[74] The stipulation required, inter alia, that the managing partner of the law firm be admitted to practice before the Florida Bar, that non-Florida lawyers only be engaged in legal work to the extent allowed by "applicable rules of temporary admission," that non-Florida lawyers have no right to supervise any work "with respect to matters essentially involving Florida law for persons [or business enterprises] residing in Florida," and that they effectively have to serve as the "traditional law clerk" to lawyers admitted to the Florida Bar in the aforementioned matters.[75] All communication with Florida Personnel should "merely constitute assistance to a member of The Florida Bar," after informing the personnel that the respective attorney is not licensed to practice law in Florida.[76] However, the stipulation stated that non-Florida attorneys might give advice to non-Florida clients engaged in transactions with Florida citizens or businesses as long as the non-Florida lawyer is in Florida on a transitory basis.[77] Similar decisions on interstate law firm practice have held that lawyers not admitted to a particular state may advise clients in that state on the law of the state in which the lawyer is admitted to practice.[78]

71. Appell v. Reiner, 195 A.2d 310, 315 (N.J. Super. Ct. Ch. Div. 1963) (emphasis added) (noting that method of contact between the lawyer and client is not a decisive factor and should not control).

72. *Id.* at 317 ("I do not intend to imply that . . . a foreign attorney . . . will be denied a recovery . . . even [if] . . . incidental to his employment, [he] find[s] it necessary to occasionally come to this State for the better performance of his duty."). In addition, the *Appell* court mentioned that its decision does not imply that the New York attorney would be denied fees in a New Jersey court for legal work that was done within the jurisdiction of New York. *Id.*

73. 363 So. 2d 559 (Fla. 1978).

74. *Id.* at 559.

75. *Id.* at 560–61.

76. *Id.* at 560.

77. *Id.* at 561.

78. *See* Barker, *supra* note 55, at 1520 (citing VA. CODE ANN. UPL Op. 201 (Michie 2001)).

Moreover, the *Spanos* court held that a California lawyer had not violated New York's prohibition of the unauthorized practice of law where he helped New York lawyers in connection with antitrust proceedings but did nothing on his own responsibility, was not the attorney of record, and never acted for clients during or out of court proceedings.[79]

As for legal work that is done solely in an attorney's home state for a foreign client in relation to a proceeding in the client's state dealing with the client's state's law, case law has indicated that the foreign state will not deny that lawyer's fees. Both the *Appell* and *Birbrower* opinions suggest that a lawyer's work in the state where she is admitted can be compensated, even when the work is done for a foreign client with respect to legal matters in a foreign state.[80] "As a constitutional matter, it is doubtful that a state properly *could* restrict practice by a lawyer who remains physically within a state in which the lawyer is authorized to practice, even if the client and matter are located [in a state in which she is not admitted]."[81]

However, the *Birbrower* opinion suggested that if a lawyer enters a state virtually, he would, for all practical purposes, be practicing law where he is not admitted.[82] But this elevates form over substance, since there is little practical difference between the two situations in terms of effect—if practicing New York law requires a New York attorney for the protection of New York citizens who need informed, experienced attorneys, then why *should* it be acceptable to practice New York law from the California homestead?

Courts and commentators differ over whether the circumstances change when an attorney serves solely as a consultant to an admitted attorney versus when the out-of-state attorney is supervised by an admitted attorney. One court stressed that the prohibition on the unauthorized practice of law even extends to nonadmitted attorneys who associate themselves and work with licensed attorneys.[83] However, one commentator has suggested that it is possible to avoid practicing law when the nonadmitted lawyer acts as a consultant to the admitted lawyer or by having the admitted lawyer closely supervise the

79. Spanos v. Skouras Theatres Corp., 364 F.2d 161, 168–69 (2d Cir. 1966) (en banc). This finding was partly premised on the panel's reasoning that had the California lawyer applied to be admitted pro hac vice, he would have surely been admitted.

80. Appell v. Reiner, 195 A.2d 310, 317 (N.J. Super. Ct. Ch. Div. 1963); *see also* Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct., 949 P.2d 1, 2 (Cal. 1998).

81. Barker, *supra* note 55, at 1508.

82. *Birbrower*, 949 P.2d at 5–6.

83. People v. Munson, 150 N.E. 280, 286 (Ill. 1925). Note however that the defendant in this case was an unlicensed lawyer. The case might have come out differently had the defendant been admitted in another state.

work of the nonadmitted lawyer.[84] This line of reasoning finds support in the *Fought* case, where the Hawaii court also held that the Oregon law firm's legal work was purely consultational because the Oregon client had hired local Hawaii counsel and the "[Oregon firm] did not draft or sign any of the papers filed during the appeal, did not appear in court, and did not communicate with counsel for other parties on [Oregon client's] behalf."[85] The court was convinced that the Oregon client's representation was at all times under the charge of the local Hawaiian counsel, even though the Oregon law firm "undoubtedly contributed to the successful completion of the litigation."[86]

D. Different Perspectives on UPL: The ABA, The *Restatement (Third) Governing Lawyers*, and California Law

Following the recent increase in case law regarding multijurisdictional practice, the general evolution in the nature and scope of legal practice and concern over lawyers' increasing transjurisdictional practices, the ABA weighed in on the subject. In July 2000, the ABA appointed the Commission on Multijurisdictional Practice to study the application and impact of current bar admission rules on the multijurisdictional practice[87] of law—especially the practice of transactional lawyers and litigators—and to make "recommendations to govern the multijurisdictional practice of law that serve the public interest."[88] In June 2002, the Commission filed its Final Report with the ABA House of Delegates, including nine proposed amendments to the ABA *Model Rules of Professional Conduct* that the delegates subsequently adopted (with slight revisions) in August 2002. In making its recommendations, the Commission was guided by a "search[ ] for the proper balance between the interests of a state in protecting its residents and justice system, on the one hand; and the interests of clients in a national and international economy in the ability to employ or retain counsel of choice efficiently and economically."[89]

---

84. Barker, *supra* note 55, at 1508.
85. Fought & Co. v. Steel Eng'g & Erection, Inc., 951 P.2d 487, 498 (Haw. 1998).
86. *Id.*
87. "Multijurisdictional practice" is defined as "the legal work of a lawyer in a jurisdiction in which the lawyer is not admitted to practice law." ABA CTR. FOR PROF'L RESPONSIBILITY, CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 4 (2002), *available at* http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf [hereinafter REPORT OF THE COMMISSION ON MJP].
88. *Id.* at 1.
89. *Id.* at 4.

In adopting revisions to the ABA *Model Rules of Professional Conduct*, the ABA continued to support state judicial regulation of the practice of law[90] and did not recommend "the wholesale elimination of jurisdictional limits on law practice," or that lawyers should be permitted to practice law nationally.[91] Further, the ABA supported most states' prohibitions on the unauthorized practice of law[92] and now expressly prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in . . . [a] jurisdiction"[93] where he is not admitted.

However, within amended Model Rule 5.5, the ABA established certain new criteria clarifying when a lawyer admitted in one state, who is not disbarred or otherwise suspended, may practice law in another state on a temporary basis:

- Work on a temporary basis in association with a lawyer admitted to practice law in the jurisdiction, who actively participates in the representation [Model Rule 5.5(c)(1)];
- Services ancillary to pending or prospective litigation or administrative agency proceedings in a state where the lawyer is admitted or expects to be admitted pro hac vice or is otherwise authorized to appear [Model Rule 5.5(c)(2)];
- Representation of clients in, or ancillary to, an alternative dispute resolution ("ADR") setting, such as arbitration or mediation [Model Rule 5.5(c)(3)]; and
- Nonlitigation work [for example, transactional work] that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice [Model Rule 5.5(c)(4)].[94]

90. *Id.* at 13.
91. *Id.* at 16.
92. MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (2002).
93. *Id.* 5.5(b)(1).
94. REPORT OF THE COMMISSION ON MJP, *supra* note 87, at 4–5 (summary of proposed amendments to Model Rule 5.5(c) as part of Recommendation 2). The full text of Model Rule 5.5(c) is as follows:

> (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
>
> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
>
> (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
>
> (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution [ADR] proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in

The discussion portion following the above adopted amendments makes it clear that where the out-of-state lawyer wishes to "work on a temporary basis" with a lawyer admitted to practice in the jurisdiction, "the lawyer admitted to practice in the jurisdiction could not serve merely as a conduit for the out-of-state lawyer, but would have to share actual responsibility for the representation."[95] Requiring local counsel's responsibility for the representation ensures the state's interests in protecting the public will be served, since counsel will be competent and conversant in the state's laws, as well as subject to the state's disciplinary rules.

Examples of conduct that fits within Rule 5.5(c)(2), "services ancillary to pending or prospective litigation," include meetings with the client, interviews of potential witnesses, review of documents, and taking depositions.[96] In addition, this category would cover supporting work done by assisting lawyers (that is, those lawyers that serve in supporting roles, such as conducting legal research and drafting documents) who will not be counsel of record and cannot be admitted pro hac vice since they will not appear before the court.[97]

Regarding the provision allowing transactional work in multijurisdictional respects, the "relationship" to the lawyer's practice in a jurisdiction in which the lawyer is admitted is determined by a variety of factors. For example, the transactional work is sufficiently related to the jurisdiction to which the lawyer is admitted to practice when the client may have been previously represented by the lawyer, or the client maintains residence in the lawyer's jurisdiction, or the matter has significant connection with the lawyer's jurisdiction.[98] The same holds true if substantial portions of the work may be done in the lawyer's jurisdiction or the legal work may involve laws of the lawyer's jurisdiction.[99] In fact, the discussion following these amended rules suggests that this provision would cover preexisting and ongoing lawyer-client relationships by allowing lawyers to work on related matters, even if they have no relation to the

---

> which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
>
> (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

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

95. REPORT OF THE COMMISSION ON MJP, *supra* note 87, at 24 (discussing adopted Model Rule 5.5(c)(1), which allows work in association with a lawyer admitted to practice law in the jurisdiction on a temporary basis so long as that lawyer participates in the representation). Note that this rule would aid large, interstate law firms that rotate associates and partners among the firm's interstate branches, as long as the rotation is "temporary."

96. *Id.* at 3 (comments on Model Rule 5.5(c)).

97. *Id.* at 26.

98. *Id.* at 27–29.

99. *Id.* at 28.

lawyer's home state.[100] The rationale is that through past experience, the lawyer has become acquainted with the client's business and would most efficiently serve as counsel to multiple matters.[101] Another conforming scenario would be if the legal work will draw on the "lawyer's recognized expertise though the regular practice of law on behalf of clients in matters involving a particular body of federal [or] nationally-uniform law."[102] The Commission notes that "[a] client has an interest in retaining a specialist in federal tax, securities or antitrust law, . . . regardless of where the lawyer has been admitted to practice law."[103] This could have a profound effect on bankruptcy practice because it acknowledges that specialists may be uniquely fitted to a client's needs, but existing rules and constraints on practice prohibit clients from getting the representation they seek. If such acknowledgement of clients' interests becomes the rule of law, then it would expand the ability of bankruptcy professionals, and perhaps eventually other practitioners, to ethically and legally serve their clients' needs without violating the rules.

The Commission recommended specific categories of conduct for nonadmitted lawyers that would not violate UPL prohibitions. It reasoned:

> it is in the public interest for a lawyer admitted in one United States jurisdiction to be allowed to provide legal services in another . . . because the interests of the lawyer's client will be served . . . and doing so does not create an unreasonable risk to the interests of the lawyer's client, the public or the courts.[104]

The *Restatement* has also chimed in on the subject. In determining whether the lawyer's activities "reasonably relate to the lawyer's practice in the lawyer's home state," as is required by the *Restatement*, the comments have set forth several factors to be considered:

> [W]hether the lawyer's client is a regular client of the lawyer or, if [the matter concerns] a new client, is from the lawyer's home state, [or] has extensive contacts with that state, or [has] contacted the lawyer . . . [in the home state]; whether a multistate transaction has other significant connections with the lawyer's home state; whether significant aspects of the lawyer's activities are conducted in the lawyer's home state; whether a significant aspect of the matter involves the law of the lawyer's home state; and whether either the activities of the client

100. *Id.*
101. *Id.*
102. MODEL RULES OF PROF'L CONDUCT R. 5.5 cmts. 12–13 (2002).
103. REPORT OF THE COMMISSION ON MJP, *supra* note 87, at 28.
104. *Id.* at 22.

> involve multiple jurisdictions or the legal issues involved are primarily either multistate or federal in nature.[105]

The *Restatement* factors balance the state's local interest in maintaining disciplinary control over lawyers and its historical role in regulating the attorneys in its state with the need to provide efficient legal services to the clients who would be inconvenienced by having to find new counsel every time a legal matter came up in a state where their counsel was not admitted.[106] In its effort to balance both interests, and with a focus on the needs of the clients, the *Restatement* would allow lawyers who have been admitted to practice in at least one state to provide legal services in other states "to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice."[107] The comments to the *Restatement* argue that this provision is a necessity because, although litigators have pro hac vice admission rules, transactional and litigators working out of court have no similar provisions.

Finally, in California, pursuant to legislative bill 1782, the California Supreme Court acted in January 2001 to "fill a gap in the current legal system" by creating a task force to examine multijurisdictional practice, to consider clients' interest in retaining counsel for litigation spanning multiple jurisdictions, and to recommend action.[108] As a result, in March 2004, the court adopted four new rules[109] allowing out-of-state lawyers to practice law in California under certain circumstances. In addition to rules for in-house corporate counsel and legal services attorneys, the court adopted two new "safe harbor" rules relevant here that allow litigators and transactional attorneys to engage in the practice of law in California on a temporary basis.

First, Rule 966 allows litigators to provide services in California for litigation[110] pending or anticipated to be filed in a jurisdiction other than California and for litigation anticipated in California in which pro hac vice

105. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (2000).

106. *Id.* § 3 cmts. b, e.

107. *Id.* § 3(3).

108. SUPREME COURT OF CAL., REPORT OF THE CALIFORNIA SUPREME COURT MULTIJURISDICTIONAL PRACTICE IMPLEMENTATION COMMITTEE 6 (2004), *available at* http://www.courtinfo.ca.gov/reference/documents/mjpfinalrept.pdf.

109. Although the rules were adopted in March 2004, they did not take effect until November 2004.

110. The word "litigation" is used throughout this Comment to refer to what is generally thought of as court proceedings, such as a lawsuit wherein a complaint has been filed. However, it must be noted that the language of Rule 966 covers "formal legal proceeding[s]," which are therein defined more broadly as "litigation, arbitration, mediation, or a legal action before an administrative decisionmaker." CAL. R. OF CT. 966(g) (effective Nov. 15, 2004). Thus, it appears that at least for the purposes of the safe harbor, "litigation" can be construed more broadly than simply those instances where a court filing is made. Rule 966 may then provide a wider haven than pro hac vice admission. *Id.* R. 966(j)(1).

admission will be sought.[111] Next, Rule 967 allows transactional lawyers to provide legal services in California to a client concerning a transaction a material aspect of which takes place in their admitted jurisdiction. This rule particularly responds to clients' wishes to have a lawyer engage in transactions that span more than one jurisdiction.[112] In addition, these new rules recognize clients' needs for lawyers that are experts in particular fields of law. Accordingly, a transactional lawyer may provide legal assistance on an issue of federal or non-California law or to a lawyer licensed in California.[113]

Interestingly, no mention of the *Birbrower* case appears in the California Supreme Court report published in connection with these rules. Though these rules arose as a direct response to litigation rather than that case, it seems clear that such rules would have markedly affected the situation addressed in *Birbrower*. After all, the New York lawyers' legal work in *Birbrower* on settling the dispute in California would arguably be in anticipation of litigation since work on a settlement agreement can always fail. In such event, the lawyers would likely resort to a lawsuit—the very litigation they attempted to avoid through a settlement. If that assumption holds true, then the lawyers in that case would have been protected by such a safe harbor and not subjected to the loss of their fees for the services provided in California.

E. The Practice of Law in Federal and Bankruptcy Courts in Nonadmitted States

Most bankruptcy lawyers are intimately familiar with Title 11 of the United States Code as well as the Federal Rules of Bankruptcy Procedure (FRBP). Both are exclusively federal constructs governing this unique practice area in the federal domain. However, although most federal courts have separate admission rules from the state courts,[114] the federal case law is split as to whether a lawyer admitted to practice law in at least one jurisdiction may practice law in another state if that practice is strictly focused on federal laws. Here again, as with state law, the scope of practice becomes important.

In re Poole,[115] a recent case out of the Ninth Circuit, establishes that "practice before federal courts is not governed by state court rules."[116] In *Poole*, the United States Trustee objected to a debtor's counsel receiving

111. *Id.* R. 966(b)(1)–(3).
112. *See* SUPREME COURT OF CAL., *supra* note 108, at 6.
113. CAL. R. OF CT. 967(b)(1)–(2).
114. See *supra* note 28 and accompanying text for a discussion of admission requirements.
115. 222 F.3d 618 (9th Cir. 2000).
116. *Id.* at 622.

compensation for his services on the grounds that he was not admitted to practice before the State Bar of Arizona.[117] The bankruptcy court, the Bankruptcy Appellate Panel (BAP), and the Ninth Circuit all agreed that the lawyer was entitled to compensation for "advice and counsel regarding bankruptcy law, assistance with form preparation, [and] representation at the first meeting of creditors and client consultations,"[118] all within Arizona, because the lawyer was properly admitted before the bankruptcy court. The court also dismissed the trustee's claim that even if the lawyer was properly admitted before the bankruptcy court, section 101(4) of the Bankruptcy Code defines "attorney[s]" only as those "'authorized under applicable law to practice law'" and "'applicable law'" refers to state law.[119] The court rejected this argument, repeating that "Supreme Court precedent makes clear [that] practice before federal courts is not governed by state court rules"[120] because "[t]he two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included,"[121] and thus, the court concluded that "applicable law" under section 101(4) was the federal court rules of admission, rather than Arizona law.[122]

Persuaded by the Ninth Circuit opinion, the Sixth Circuit handed down a similar decision in *In re Desilets*,[123] over a dissenting opinion. The court there held that a Texas-licensed lawyer was permitted to set up an office in Michigan with a practice limited to bankruptcy matters in federal court. The court reasoned that federal standards govern practice before the federal bar and that because the lawyer was properly admitted before the Michigan district court, he was permitted to continue counseling bankruptcy clients.[124] The court focused on section 101(4)'s reference to "applicable law" and concluded, as had the Ninth Circuit in *Poole*, that "applicable law" was the

117. In 1999, another case called *In re Mendez*, 231 B.R. 86 (B.A.P. 9th Cir. 1999), decided by the BAP, involving the *same* lawyer and the same fact scenario, also allowed the lawyer to receive his compensation on the same grounds. *Poole*, 222 F.3d at 620.

118. *Poole*, 222 F.3d at 620. In 1991, when the lawyer was admitted to practice in federal courts in the District of Arizona, all that was required for nonresident attorneys was a showing that the lawyer was a member in good standing of any other federal court. *Id.* at 621–22. The rule was subsequently modified to require the lawyer to show that he is a member of the State Bar of Arizona. The Ninth Circuit relied on the old rule to hold that the lawyer was admitted to practice before the federal courts in Arizona. *Id.* at 621.

119. *Id.* at 621 (quoting 11 U.S.C. § 101(4) (2000)).

120. *Id.* at 622.

121. *Id.* at 620 (quoting Theard v. United States, 354 U.S. 278, 281 (1957)).

122. *Id.* at 622.

123. 291 F.3d 925 (6th Cir. 2002).

124. *Id.* at 931.

district court rules that did not require Michigan state bar admission. In addition, the court emphasized that although the district court rules only permitted "practice before the court," that practice included counseling the client outside of the court, presumably even before the bankruptcy petition has been filed.[125]

In contrast, a 1994 bankruptcy court case out of Connecticut did not carve out an exception for a bankruptcy-only practice. In *In re Peterson*,[126] the court held that a lawyer not licensed to practice in Connecticut, but licensed in New York and the Connecticut federal district courts,[127] must disgorge fees in relation to a bankruptcy case in Connecticut because he was engaged in the unauthorized practice of law.[128] The court reasoned that even if the lawyer had "limited his practice to federal law and never advised his clients on matters of Connecticut law . . . [he] would still be engaged in the practice of law as defined by Connecticut and bankruptcy courts."[129] Further, the court pointed out that bankruptcy law cannot be completely separated from state law insomuch as "applicable state law applies in every instance in which the [Bankruptcy C]ode does not provide a controlling federal rule."[130] The court went on to say that decisions made in bankruptcy cases "require[ ] an attorney to make judgments as to the extent, validity and priority of the creditor's lien, which generally implicate state law."[131]

The court then focused on the "federal practice exception," whereby a lawyer authorized by a district court to appear before it may do so, despite the state's admission requirements. It said that a lawyer authorized to practice before the bankruptcy court may practice bankruptcy law despite Connecticut's admission requirements "so long as services rendered are limited to those reasonably necessary and incident to the specific matter pending in [the bankruptcy] court." The lawyer in this case had gone further than that and had opened an office "for the purpose of giving legal advice on bankruptcy matters to all clients who seek it and accepting all cases which can be filed . . . [in the Connecticut bankruptcy court]."[132] Thus, the court distinguished between bankruptcy lawyers who specifically work on a single matter had before the court, and those that invite all business that could potentially come before the bankruptcy court.

125. *Id.* at 930.
126. 163 B.R. 665 (Bankr. D. Conn. 1994).
127. *Id.* at 671–72. The bankruptcy district court rules for Connecticut automatically admit any lawyer who is admitted before the district court.
128. *Id.* at 675–76.
129. *Id.* at 672.
130. *Id.* at 673 (citation omitted).
131. *Id.*
132. *Id.* at 675.

This suggests that the court might have accommodated the attorney if the matter had only involved federal law, but was unwilling to allow him carte blanche to invite the public to utilize his services for fear that in doing so, the attorney would inevitably reach cases that involve state as well as federal law. The rationale that he is practicing federal law rather than state law can perhaps be stretched to protect many such instances of federal practice. After all, the same logic that justifies excusing a single instance of practice under the federal practice exception should excuse a string of such instances in turn. Such a stretch would, of course, be wholly inconsistent with the goals of most states that seek to control and regulate the quality of those practicing law in their state on behalf of their citizens. We do not advocate such a far-reaching result. Instead we agree with the court here that limited instances and changing business practices warrant exceptions to an otherwise acceptable rule. That is, the rule need not be thrown out altogether if safe harbors accommodating practice as it empirically occurs can be crafted. For bankruptcy attorneys whose practice revolves generally around federal practice but includes unprotected transactional work, such a safe harbor is critical. Policy concerns should be mitigated in this arena for two reasons. First, bankruptcy attorneys' practice centers generally around the Code, a federal construct that should invoke the federal practice exception for all the reasons that the doctrine exists. Federal courts certainly require levels of integrity and competency to rival those of state courts so that protection of the public is considered. Next, because of the Code's frequent implication of state law,[133] bankruptcy attorneys are uniquely accustomed to assessing state law as it affects their clients and to familiarizing themselves with state law nuances where necessary. Thus, a safe harbor designed to cover them for more than a single federal practice exception but less than full-scale marketing for all business would provide appropriate protections for the bankruptcy attorney without opening up the scope of practice too wide.

Scope of practice was again at issue in *State ex rel. State Bar of Wisconsin v. Keller*,[134] where the court, in light of the *Sperry* decision, held that a person licensed by the Interstate Commerce Commission (ICC), a federal agency, had parallel rights to the attorney who was registered with the United States Patent Office in *Sperry*, and therefore could practice before the ICC. Although the Supreme Court of Wisconsin easily held that Keller was allowed to engage in "activities[135] in Wisconsin . . . before the [ICC] or [that] are incident to such

133. *See infra* note 165.

134. 123 N.W.2d 905 (Wis. 1963).

135. The court's opinion included a list of what the defendant may do in the state including activities such as giving advice to persons regarding their rights under the ICC, preparing applications to submit to the ICC, and appearing before the ICC. *Id.* at 907.

representation,"[136] it had more trouble clearly determining what the scope of work that was "incidental" to such representation included, since some work that was "incidental" might border on the unauthorized practice of law.[137] However, the court did discuss whether Keller could create and advise his clients on the enforceability of some contracts and leases:

> Although we recognize that he may advise whether a particular lease or contract complies with federal law or regulations, leases and contracts create substantive rights and obligations of parties and to prepare them and advise concerning their significance other than their standing under the interstate commerce laws and regulations would constitute the practice of law outside the scope of his practice before the [ICC].[138]

The Court of Appeals in Maryland further refined the impact of scope of practice when it held that an attorney who was solely licensed before the federal district court of Maryland was allowed to practice federal law within the state.[139] However, he was not allowed to open a permanent office there, because sifting through clients that appear at his office to find those whom he could represent in the federal court required intensive interviewing that could implicate state law questions.[140] There again, opening an office to accept work presented a UPL violation.

The district court in *State Unauthorized Practice of Law Committee v. Paul Mason & Associates*[141] addressed the question whether a nonlawyer firm could engage in the practice of bankruptcy law under the auspices of Bankruptcy Rule 9010(a).[142] The court found that the language of Rule 9010(a) that allows an agent to perform "act[s] not constituting the practice of law" preempted state law and authorized nonlawyers to do some bankruptcy work, just as the Supreme Court had found that the Patent Office could authorize a nonattorney to practice patent law.[143] Specifically, the court found that these nonattorneys, who were strictly filing—never litigating—claims on behalf of creditors[144] in bankruptcy court, were not practicing law because of the

136. *Id.* at 906–07.
137. *Id.* at 907
138. *Id.*
139. Kennedy v. Bar Ass'n, 561 A.2d 200, 210 (Md. 1989).
140. *Id.*
141. 159 B.R. 773 (N.D. Tex. 1993).
142. *Id.* at 775–76.
143. *Id.* at 777.
144. Once a debtor objected to a claim or filed a complaint, the nonlawyer agents would send the work back to the creditor, suggesting they obtain counsel.

"uniquely administrative practice of the federal bankruptcy courts."[145] Thus, their actions comported with Bankruptcy Rule 9010(a).

F. Enforcement Mechanisms for UPL

Now that the stage has been set, the question of the consequences of violating the rules looms. What happens when an attorney violates the UPL provisions of her state—or another state? Who punishes her, in which forum, and how severely? The range of punishments for UPL runs from professional discipline to injunctions and contempt of court citations to disgorgement of or denial of fees for the services rendered in the unauthorized manner to suspension—at one time, even disbarment was possible.[146] In some instances, such as in *Birbrower*, fee disallowance can be extremely costly when fees reach past the million-dollar mark.[147] In addition to injunctions or contempt citations, some courts also provide that an attorney found to engage in such unauthorized practice also must pay the costs of the proceedings against him regarding that practice.[148]

As already noted, the state bars usually take responsibility for sanctioning the attorneys under its domain. In California, both the legislature and the court empowered the State Bar to control its attorneys through sanctions imposed in the court setting.[149] Moreover, California has also recently given itself power to discipline nonadmitted attorneys who come there to practice for violations of its rules, joining others such as Maryland and the District of Columbia.[150] But when an attorney violates the UPL laws and retreats to his home state borders, is it up to the home state or the foreign state that was the "scene of the crime" to discipline him? And who is it that monitors this process?

---

145. *Paul Mason & Assocs.*, 159 B.R. at 778.

146. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 6126–6127 (West 2003). Note that a violation of section 6125 ("No person shall practice law in California unless the person is an active member of the State Bar") is punishable both as a misdemeanor and as contempt of court. In *Birbrower*, as has already been noted, fees attributed to the unauthorized practice of law in California were denied. Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct., 949 P.2d 1, 13 (Cal. 1998); *see also In re* Prudhomme, 43 F.3d 1000, 1005 (5th Cir. 1995) (holding that disgorgement of undisclosed retainer was within bankruptcy court's discretion). Further, Arkansas, Idaho, Washington and Wisconsin characterize unauthorized practice violations as both misdemeanor and contempt while New Hampshire, Florida and Texas, for instance, use injunctive measures. *See* Carol A. Needham, *Negotiating Multi-State Transactions: Reflections on Prohibiting the Unauthorized Practice of Law*, 12 ST. LOUIS U. PUB. L. REV. 113, 116 n.12 (1993) (listing representative statutes including the Kansas disbarment statute (since repealed)).

147. *See, e.g.*, *Birbrower*, 949 P.2d at 4.

148. *See, e.g.*, Fla. Bar v. Hughes, 697 So. 2d 501, 503 (Fla. 1997); *see also* Wolfram, *supra* note 53, at 686 n.64 (describing cases where restitution, costs and even attorney's fees were imposed).

149. *See* Clark, *supra* note 2, at 254–56.

150. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. h (2000).

Where a state adopts Model Rule 5.5,[151] one of its lawyers who violates away-state rules on unauthorized practice may in fact face disciplinary charges for that violation on the home front as well as in the state of violation, since Rule 5.5 prohibits practicing in violation of another jurisdiction's regulations.[152] Depending on the severity of sanctions for violation of that rule, which may differ from those for actual unauthorized practice in the home state's jurisdiction that other attorneys might face, an attorney may face steep sanctions both where he is not admitted as well as where he is admitted. Furthermore, the ABA's *Model Rules for Lawyer Disciplinary Enforcement* provide that a jurisdiction should accept and enforce the disciplinary recommendation of the jurisdiction where an attorney has violated a conduct rule.[153] This means the home state may impose the sanction requested by the state where the violation occurred. Additionally, many states require that their attorneys inform them if they have been disciplined elsewhere, especially when attorneys are admitted in more than one jurisdiction; the ABA's National Regulatory Data Bank exists to help track such infractions and associate them with the attorneys in question.[154]

Although the threat of all these sanctions and disciplinary measures sounds dire, the away jurisdiction may in fact have fairly limited sanctioning power available to it to directly punish the offender; often, the sanction is limited to restricting or prohibiting practice in that jurisdiction[155]—formidable for the lawyer with considerable business to be lost via such punishment, but of negligible value in itself against the attorney with little or no return business in that jurisdiction. This is because only the home state judiciary can act to restrict an attorney's ability to practice in her home jurisdiction—the away state's

151. Only Delaware has adopted Model Rule 5.5 as written. Seven states have recommendations pending in their highest court to adopt the identical rule as well: Arkansas, Illinois, Indiana, Michigan, Montana, Nebraska and South Carolina. Ten states have adopted a similar rule: Arizona, California, Colorado, Georgia, Idaho, Nevada, New Jersey, North Carolina, Pennsylvania, and South Dakota. Five more, Florida, Louisiana, Minnesota, New York, and Indiana, have recommendations pending in their highest courts to adopt a similar rule. The rest are "studying the issue" or have created committees to do so. Connecticut has rejected a similar rule outright. Thus, less than half the states have taken any action at all to confront this issue.

152. Model Rule 5.5 states "(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (2002).

153. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 22E (2001).

154. *See* REPORT OF THE COMMISSION ON MJP, *supra* note 87, at 39 (discussing in recommendation 5 that the database be updatable from the ABA web site, that attorneys be numbered uniquely to promulgate effective identification of disciplinary problems, and to improve interstate regulation of conduct and enforcement of sanctions for misconduct). For further information on the data bank, visit http://www.abanet.org/cpr/databank.html.

155. *See id.* at 38.

restrictions do not affect home state practice.[156] But it is the foreign state that is most likely to conduct at least the initial review of the behavior at issue, and to impose the sanctions that are applicable—even if the disciplinary punishment its own admitted lawyers would face as bar members cannot be applied.[157] A large factor motivating states to maintain control over who may practice within their borders is their desire to ensure that the ethical and legal rules they promulgate for everything including the practice of law are followed by those practicing within their borders.[158] Yet their recourse against a renegade out-of-state lawyer in terms of their own professional conduct sanctions is limited, unless the attorney's home state cooperates. There may be other routes for them, including using rules of commerce and any criminal sanctions as well as contempt of court findings, and also pro hac vice hearings in which they may revoke such admission and even perhaps proscribe any future such admission.[159]

III. ARGUMENTS FOR REFORM

A. Bankruptcy Lawyers Need Concrete Rules Allowing Practice in Nonadmitted Jurisdictions

Given the unique nature of bankruptcy practice,[160] ubiquitous state rules against the unauthorized practice of law, the liberal interpretations of those rules by some of the cases discussed above, and the laxity of enforcement of those rules in other cases, bankruptcy lawyers admitted to practice law in at least one state should, in certain common circumstances, be able to practice bankruptcy law in other states unfettered. Those circumstances should generally mirror those of the newly adopted ABA Model Rule 5.5(c) as well as the existing section 3(3) of the *Restatement*—specifically, bankruptcy lawyers that are admitted to practice in at least one state and who are not disbarred or suspended, should be able to practice bankruptcy law in a state not admitted that is related to current or expected litigation in the lawyer's home state, or that is in preparation for current litigation or anticipated litigation that will

156. *See* Charles W. Wolfram, *Expanding State Jurisdiction to Regulate Out-of-State Lawyers*, 30 HOFSTRA L. REV. 1015, 1015 (2002).

157. *See id.* at 1015–16, 1022–30.

158. *See* Clark, *supra* note 2, at 271.

159. *See* Wolfram, *supra* note 156, at 1022–30.

160. *See* Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45, 67 (1998) ("Bankruptcy . . . is a hybrid of cour [sic] and non-court activity, and the less it behaves as a traditional adversarial model, the less we should use traditional adversarial models of ethics to govern bankruptcy lawyers' behavior.").

take place in the state not admitted if the attorney reasonably expects to be admitted pro hac vice in that other state.

Adoption of this sort of rule would cover situations where the bankruptcy lawyer goes out of state to negotiate a workout with other parties or to begin negotiations in preparation for a petition that is to be filed in the lawyer's home state. In addition, such a rule would cover situations where the lawyer is invited to another state and needs to do preparatory work before the petition and the request for pro hac vice are filed. Although these rules generally cover all work that is in preparation for litigation or expected litigation, and most workouts and negotiations between debtors and creditors are in preparation for a petition filing, bankruptcy lawyers should also be free to engage in transactional work, such as engaging in contractual modifications and restructuring of capital structures, on behalf of their home state clients in states not admitted to practice. The hybrid nature of bankruptcy practice and the unique way in which the location of debtors, creditors and the property at issue can be in so many locations[161] militates in favor of creating an exception or a special set of rules to protect the ethical practitioner, much as California recently did with the Supreme Court task force rules that it adopted as described above.[162] The following sections flesh out the reasons that such rules should be promulgated on behalf of the bankruptcy practitioner.

1. Uniformity of the Law Most Implicated in Bankruptcy Work Negates the Need for Local "Experts"

Bankruptcy petitions and all the legal rights and consequences that flow therefrom are regulated by federal law—a uniform set of laws set out in Title 11 of the United States Code. Where law is uniform, there is far less—if any—real concern for protecting the citizenry of states from lawyers who are not conversant or competent in the given state's law[163]—one of the original arguments for individualized state bars with separate admissions. Most of the Bankruptcy Code is self-supporting, infrequently relying on nonbankruptcy law to answer a question. And although some statutory exemptions, fraudulent transfer attacks,[164] and preference avoidance actions are governed by

161. *See id.* at 66–67.

162. *See* discussion *supra* Part II.D.

163. *See* La Tanya James & Siyeon Lee, *Adapting the Unauthorized Practice of Law Provisions to Modern Legal Practice*, 14 GEO. J. LEGAL ETHICS 1135, 1145–47 (2001); *see also* REPORT OF THE COMMISSION ON MJP, *supra* note 87, at 6.

164. *See, e.g.*, 11 U.S.C. § 544(b)(1) (2000) ("[T]he trustee may avoid any transfer of an interest of the debt in property or any obligation incurred by the debtor that is voidable under *applicable law* . . . ." (emphasis added)).

state law,[165] these laws are generally straightforward and not complicated to comprehend. Moreover, some topics—such as rules on how to properly perfect a creditor's lien to avoid attack by the trustee under the trustee's strong-arm powers—are often governed by Article 9 of the Uniform Commercial Code (UCC), which is generally adopted by the states with few amendments or changes.[166] Therefore, even the state laws most often at issue have become much more uniform in certain respects, reducing the traditional concern that attorneys will be unacceptably unfamiliar with the state's laws.

The relevant laws that govern claims adjudication are mainly premised not on state statutes but on common law principles. More importantly, the jurisdiction in which the court sits is not always indicative of the controlling law—laws dealing with "conflicts of law" decree which state's laws govern the claims adjudication process. Thus, "foreign" state law may govern in a bankruptcy court proceeding, and a lawyer not licensed in that governing law may still represent his client because he is licensed in the state where the proceeding is held. Empirically, the need to suddenly become acquainted with

---

165. To determine when a "transfer" is made for purposes of Section 547 of the Bankruptcy Code, Section 547(e)(2)(A) relies on state law perfection rules. 11 U.S.C. § 547.
Specific mentions of the applicability of nonbankruptcy law in the Bankruptcy Code include the following provisions:
11 U.S.C. § 363(f):

> The trustee may sell property . . . free and clear of any interest in such property of an entity other than the estate, only if—(1) applicable *nonbankruptcy law* permits sale of such property free and clear of such interest . . . . (emphasis added).

11 U.S.C. § 365(c):

> The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—(1)(A) *applicable law* excuses a party, other than the debtor, to such contract or lease from accepting performance . . . to an entity other than the debtor or the debtor in possession . . . . (emphasis added).

11 U.S.C. § 502(b):

> [I]f such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of the such claim . . . and shall allow such claim in such amount, except to the extent that—(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or *applicable law* . . . . (emphasis added).

11 U.S.C. § 522—This Section allows use of federal or state exemptions.
11 U.S.C. § 1126(b):

> [A] holder of a claim or interest that has accepted or rejected the plan before the commencement of the case under this title is deemed to have accepted or rejected such plan, as the case may be, if—(1) the solicitation of such acceptance or rejection was in compliance with any *applicable nonbankrupcty law, rule, or regulation* governing the adequacy of disclosure in connection with such solicitation . . . . (emphasis added).

166. It is conceded, however, that recording against real property, so as to avoid a 11 U.S.C. § 544(a)(3) attack, is generally governed by common law and has been codified somewhat differently across jurisdictions.

other jurisdictions' laws has presented no major competency roadblocks, and cases proceed every day without incident.

In fact, it could be argued that of all practitioners, bankruptcy attorneys are uniquely experienced in handling the interplay of state laws. Therefore the policy concerns that might be more applicable in general practice should not apply to them. What's more, no current law prohibits lawyers from advising home state clients about laws of other states.[167] But if current law maintains that the home state client is not hurt when it is advised on law that counsel is purportedly not an expert on, what consumer protection rationale genuinely exists for a concern that clients in away states would be harmed? It seems increasingly likely that the rationale has its roots in economic or enforcement concerns.

Moreover, the fact that many of the claims in bankruptcy proceedings are adjudicated according to state common law principles under contract or tort law cuts in favor of allowing bankruptcy lawyers unfettered ability to practice. Even negotiations or workouts outside of the home state typically play out in the shadows of the Bankruptcy Code, with all participants working as closely as possible within its confines since the alternative strategy is to push the negotiations into bankruptcy. And although certain districts have particular local court rules, these are almost always available on the district's web site or on an electronic research system. This point is not that critical, because district court rules are generally similar anyway, and the Federal Rules of Bankruptcy Procedure are as uniform as the Bankruptcy Code. Therefore, bankruptcy practitioners are less likely to tread on unfamiliar territory under the Bankruptcy Code and in the federal practice than other nonfederal practitioners.

2. Pro hac vice Temporary Admission is an Incomplete Solution That Does Not Best Serve Efficiency for Attorneys or Clients

As noted already, there is no functional equivalent of pro hac vice rules for lawyers who practice out of court. Consequently, litigators generally enjoy the safe harbor of temporary pro hac vice admission, but transactional attorneys stand at a disadvantage for no good reason, except where, as in Michigan, special exceptions to UPL laws are carved out for temporary work in the jurisdiction. There, a statute has been passed that exempts an out-of-state lawyer from the UPL laws "while temporarily in this state and engaged in

167. *See* Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct., 949 P.2d 1, 6–7 (Cal. 1998).

a particular matter."[168] Further, many attorneys whose work would be needed on a case for interviewing and preparation but who would not normally apply for pro hac vice admission because they would not actually be needed in court are at a similar disadvantage.[169] Additionally, although courts generally grant the safe harbor of pro hac vice admission, such admission is purely discretionary, not an absolute right, and thus cannot be counted on in every instance.[170] Some states, such as Nevada, limit pro hac vice appearances by all attorneys from one firm to ten times in one year for a bankruptcy matter.[171] In the status quo, then, even the protected cannot rest completely assured they will not run afoul of the law at some point—perhaps at a most inopportune time.

Perhaps the best solution would be to become fully admitted wherever one wishes to practice. Yet even obtaining full admission in multiple jurisdictions may not be feasible or even possible where the desired states have conflicting rules for their attorneys; for instance, dual or multiple admission would be impossible where those requirements prove mutually exclusive,[172] leaving pro hac vice or the risk of UPL as the only alternatives to simply not taking on a given client at all. Inevitably, clients and attorneys alike therefore suffer the chilling effect this lack of safe harbor has on upstanding attorneys who will not risk even the appearance of violating professional rules.[173] Consequently, clients have a smaller range of professionals to choose from when attorneys cannot confidently take on a case—and in the province of bankruptcy, they may both want and desperately need a specialist. Further, the

168. MICH. COMP. LAWS ANN. § 600.916(1) (West 1996 & Supp. 2004).

169. *See* Gillers, *supra* note 56, at 710 (discussing trial lawyers who, though eligible, would not apply for admission because they would not be ultimately needed in the courtroom, but would work on the case and so need protection).

170. *See* Needham, *supra* note 146, at 118 (noting that there is no guarantee that a complying lawyer will be granted pro hac vice admission, that it is entirely discretionary, and that case law provides no entitlement or Due Process right to such admission); *see also* Leis v. Flynt, 439 U.S. 438 (1979) (per curiam).

171. *See* NEV. L.R. IA 10-2(i)(1) (made effective as of March 1, 2004 by Special Order No. 107 (Jan. 20, 2004), *available at* http://www.nvd.uscourts.gov/Files/Special Order 107.pdf).

172. *See* Needham, *supra* note 146, at 121–22 & nn.41–42. For instance, a rule in the District of Columbia allows its attorneys to partner with nonlawyers—but should these attorneys wish to practice in Maryland or Virginia, such an arrangement is prohibited. Further, some states' confidentiality or other requirements could differ, requiring attorneys to breach one state's rules to fulfill another's if the difference was irreconcilable. Illinois' duty of confidentiality requirements are stricter, for instance, than Missouri's, requiring an attorney to follow the stricter construction to heed Illinois rules, though in Missouri she could follow a less stringent rule. What can one do when the Missouri client could best benefit from Missouri's rule, but his attorney is obligated to walk Illinois' finer line?

173. *See* REPORT OF THE COMMISSION ON MJP, *supra* note 87, at 12 (explaining that a chilling effect occurs when such laws are sporadically and unpredictably enforced, and a further public disrespect for "[k]eeping antiquated laws on the books . . . where the laws relate to the conduct of lawyers, for whom there is a professional imperative to uphold the law").

requirements to associate extra local counsel when not necessary—particularly when the specialist is of eminent stature[174]—is both costly[175] and in some cases, almost patently absurd—an elevation of form over substance. Bankruptcy lawyers should be able to engage in a limited practice of law, knowing full well that they are not violating any of the laws of the away state—or the home state, for that matter.

3. Supremacy of Federal Law

Under the U.S. Constitution's Supremacy Clause,[176] admission rules for the federal bankruptcy courts trump the states' ability to regulate admission before such courts. In the alternative, since Congress has the ability to establish federal bankruptcy courts[177] and thus, under the "necessary and proper" provision of the Constitution,[178] has the ability to regulate the attorneys that appear before those courts, states may not impose their own admission rules.[179] These arguments are consistent with the holdings in *Sperry* and *Cowen*, as well as the Ninth Circuit decision of *In re Poole* and the Sixth Circuit decision of *In re Desilets*. All of these decisions evidenced federal court preeminence with respect to state courts and emphasized that states could not restrict attorneys who practice in federal courts.[180] Thus, wherever state rules require admission to the state bar in order to practice in federal court, there is a violation of the Supremacy Clause.

In addition, where federal bankruptcy courts require that the applicant be admitted to the bar of the state in which the bankruptcy court resides, bankruptcy court admission rules become onerous and quite ineffective.[181] Instead, admission to the bar of the bankruptcy court should allow the lawyer to practice before the bankruptcy court as well as perform legal work outside of court that relates to the pending or prospective litigation. The state's pow-

174. "[I]n the case just put of the corporation having nationwide operations, it would seem absurd that when the out-of-state trademark specialist goes to a local branch, he should be required to obtain the assistance of a resident general practitioner for whose views he would have little regard." Spanos v. Skouras Theatres Corp., 364 F.2d 161, 171 (2d Cir. 1966) (en banc).

175. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §3 cmt. e (2000).

176. U.S. CONST. art. VI, cl. 2.

177. *Id.* art. I, § 8, cl. 14.

178. *Id.* art. I, § 8, cl. 18.

179. *See generally* Rapoport, *supra* note 160, at 74, 78–83 (discussing constitutional provision for Congress to make bankruptcy laws, its concomitant ability to establish standard ethics should it care to, and the manner in which "permitting state ethics rules to affect this federal practice may undercut the Constitution's purpose in making it federal").

180. *See* discussion *supra* Part I.B.

181. *See* discussion *supra* note 28.

ers to regulate the practice of law could continue with respect to work done outside the context of bankruptcy, retaining the same federalism values that the ABA refused to flout when it made its recommendations in 2002. Though, as noted earlier, the logic underlying a federal practice exception arguably should support even a myriad of federal practice instances, this Comment does not argue that bankruptcy lawyers should be able to set up shop to solicit all business in states where they are not admitted, even solely to practice bankruptcy law. We agree in principle with many of the court decisions that have considered what sort of work a nonadmitted bankruptcy lawyer should be able to engage in.[182] To be sure, an attorney may need to establish an office as a temporary meeting place for permissible activity, especially in a protracted case. However, such establishment should be limited in scope to the occasional matters for which the attorney must be in the state, and should not constitute a full-scale attempt at permanent full-time work there.

Instead, we advocate that limited instances and changing business practices warrant exceptions to an otherwise acceptable rule for temporary or intermittent situations, much like Michigan has done.[183] That is, state rules need not be thrown out altogether if safe harbors accommodating practice as it actually occurs can be crafted. For bankruptcy attorneys whose practice revolves generally around federal practice but includes unprotected transactional work, such a safe harbor is critical. Policy concerns should be mitigated in this arena for two reasons.

First, as noted, bankruptcy attorneys' practice centers generally around the Code, a federal construct that should invoke the federal practice exception for all the reasons that doctrine exists. Federal courts certainly require levels of integrity and competency to rival those of state courts so that protection of the public is considered. Next, because of the Code's frequent implication of state law, bankruptcy attorneys are uniquely accustomed to assessing state law as it affects their clients and to familiarizing themselves with state law nuances where necessary. Therefore, a safe harbor designed to cover them for more than a single federal practice exception but less than full-scale

182. *See, e.g.*, Spanos v. Skouras Theatres Corp., 364 F.2d 161 (2d Cir. 1966) (en banc) (not extending its opinion so far as to sanction a practice whereby an out-of-state lawyer, who is authorized to practice before a federal court, gives advice to all potential clients who come before him); *In re* Peterson, 163 B.R. 665, 674–75 (Bankr. D. Conn. 1994) (lawyer had to limit his work to matters pending in the bankruptcy court and could not open a permanent office); Kennedy v. Bar Ass'n, 561 A.2d 200, 210 (Md. 1989) (lawyer could not have principal office in a state where he is not admitted even when the sole purpose is to find clients to represent in jurisdictions where he is admitted because interviews themselves constitute practicing law).

183. MICH. COMP. LAWS ANN. § 600.916(1) (West 1996 & Supp. 2004).

marketing for all business would provide appropriate protections for the bankruptcy attorney without opening up the scope of practice too wide.

This Comment limits itself to the proposed rule that bankruptcy lawyers should be able to visit states where they are not admitted in relation to legal matters that substantially involve bankruptcy law and related counsel similar to the manner in which Michigan's exemption to UPL provides, or through adoption of revised Model Rule 5.5. Attorneys should not be hampered by the fact that the work may be transactional in nature, or that it leads to a workout rather than a litigious result, but as the laws stand, with no safe harbor analogous to pro hac vice admissions, they certainly are.

B. Haphazard Enforcement of UPL Regulations: Sanctions or Strategy?

Despite the apparently serious consequences outlined above for outlaw attorneys, the reality is that UPL sanctions are simply not common, leading to a sense of an "understanding" within the profession that attorneys will not face any real repercussions.[184] In fact, according to some, "[a] very large, yet undetermined number of lawyers are flouting at least the literal terms" of unauthorized practice rules, and "many transactional lawyers often—some habitually—practice" where they are not admitted;[185] another commentator calls the number "legion."[186] Because the potential sanctions and repercussions can be so severe, this only makes sense if it is indeed true that empirically, enforcement is not consistent or even common for such infractions.

This may be why much of the decisional law in this sector, particularly in the bankruptcy context, exists in cases over fee denials.[187] Instead of volumes of state-initiated proceedings enforcing these rules out of principle, the case law instead reveals that most examinations of UPL take place in the context of fee disputes where a client or a third party such as an insurance company or the bankruptcy trustee challenges the legality of a contract for fee payment, claiming illegal practice of law invalidates the contract.[188] One argument for reformation of UPL laws is that certain clients stand to obtain free legal work from these situations, even though they may have sought out specialized out-of-

184. *See* REPORT OF THE COMMISSION ON MJP, *supra* note 87, at 11–12 (explaining that regulatory actions are rarely brought against attorneys in multistate matters, leaving a widespread but highly mistaken "understanding" within the profession that UPL laws will not be enforced, or will be interpreted favorably by courts to accommodate multistate practice and therefore need no improvement or clarification); *see also* Wolfram, *supra* note 53, at 686.

185. Wolfram, *supra* note 53, at 685.

186. *Id.* at 685 n.61 (citing chair of D.C. bar committee estimates of local unauthorized practice).

187. *See, e.g.*, Birbrower, Montalbano, Condon & Frank, P.C. v. Super. Ct., 949 P.2d 1 (Cal. 1998).

188. *See, e.g.*, *id.*

state counsel (say, for their stellar reputation in bankruptcy) whose fees could later be challenged on this basis, the work may have been excellent, and the client was well aware the counsel was not admitted in his state but anticipated that the work was federal in nature.[189] Courts will impose forfeiture because they deem letting offenders be paid for the work constituting the offense is itself offensive to public policy.[190]

Surely, the potential for losing the right to payment for services rendered may be a real discouragement to unauthorized practice. It may produce a chilling effect on professionals' willingness to take on clients who need their services and should be free to use them. However, when unjust enrichment of a client becomes a primary enforcement mechanism for professional conduct and consumer protection rules, clearly the need for better solutions that take into account the rapidly changing nature of practice must be addressed.

C. The Public Policy Arguments for Restricting Out-of-State Practice Are Not Persuasive

1. State Bar Admission Requirements Are Neither Necessary nor Sufficient to Guarantee Attorney Proficiency in Relevant State Law

As noted, states have an apparently compelling interest in protecting their citizens from unethical and incompetent, unlearned practitioners.[191] Admission to the state's bar purportedly ensures expertise or at least basic competence in that state's legal nuances and will protect unsophisticated clients from attorneys who just do not have the knowledge they should have to effectively advocate for those citizens. Yet this assertion is only valid inasmuch as a state's exam covers state material, and it fails to recognize the increasing homogenization of both the law tested on such exams and the national focus of most ABA accredited law schools' curricula.[192] In the context of a fairly uniform federal practice specialty like bankruptcy, such concern should be reduced precisely because of the uniform nature of the law most at issue—the Code. Indeed, when a good portion of the state law that comes into play in bankruptcy proceedings itself stems from either the common law or from

189. *See* Gillers, *supra* note 56, at 694–95. While in theory accurate, the cost of litigating the claim makes the strategy seem redundant—what is avoided in fees from one attorney would likely be paid to another to get the avoidance.

190. *See id.* at 696.

191. *See* Clark, *supra* note 2, at 251, 257.

192. *See* Daly, *supra* note 12, at 725, 731–33.

uniform laws such as Articles 2 and 9 of the UCC, such concerns erode even more quickly.

On top of the uniformity of both the Bankruptcy Code and the UCC exists the reality of electronic research capability.[193] The ability to research statutes and interpretive decisional law with comparative lightning speed with a few keystrokes means that whatever state law is not known offhand can be found exceedingly quickly, in stark contrast to the capabilities extant at the time the original bar admission considerations were created.[194] As with the conflict of law situation already discussed, familiarization with out-of-state law is simply not the great hurdle it may once have been. Average law students, and thus more and more average new associates, are extremely agile with computerized research, and no strangers to book research either. This means that discovering the distinguishing characteristics of property law or other relevant state-specific detail that will be operational in given bankruptcy proceedings is not insurmountable, and does not require state bar admission and years of in-state practice to be mastered.

In fact, newly minted law school graduates are considered qualified to practice in the state they are admitted without requiring extra training first. Surely if such neophytes can be entrusted with client services out of the gate, experienced bankruptcy experts can be expected to decipher state law intricacies as necessary when their business takes them outside the state where they themselves were given the stamp of approval. In fact, bankruptcy practitioners are already used to doing so, and their experience with that process should again mitigate the concern. To promote policy based on local expertise, then, seems anachronistic under the most flattering light. Instead, requiring bankruptcy experts to team up with local counsel looks more and more like an economic consideration rather than a truly necessary ethical and consumer-protection measure.[195] In bankruptcy, payment often depends on carving out fees from already overtapped sources. Persisting with a system that encourages hiring multiple attorneys unnecessarily is wasteful, extravagant and against public interest in a manner that outweighs illusory and outdated competency concerns.

A similar rationale applies to the issue of state differences in ethical standards and professional rules of conduct. While variations in these rules and valid concern for their proper promulgation and enforcement together comprise another argument for state-by-state admission, it is one which is

193. *See id.* at 733–34.

194. *See id.* at 734 n.63 (explaining that the development of online library access through Westlaw and Lexis systems marks one of the most important changes for the profession).

195. *See* Clark, *supra* note 2, at 254 (noting that "the rules serve to protect against competition instead of incompetence"); *see also* Daly, *supra* note 12, at 739.

subject to the same logic as above. Such rules are easily discoverable and not drastically different from one another, though concededly they are not identical and as already noted, where they are mutually exclusive, they would make admission to all fifty states impossible.

However, even in pro hac vice admission cases, and in other situations where temporary practice is authorized, compliance with the local rules of court and conduct is often expected if not required. Conscientious attorneys have proven capable of determining and following these rules, as evidenced by the fact noted above that most violations of practice rules are brought to disallow fees, rather than to sanction other ethical behavior per se. While this may be because enforcement is lax for whatever reason, if the concern were truly valid or the harm truly egregious, surely the enforcement would be stepped up beyond merely disallowing fees.[196]

Moreover, states are increasingly adopting reciprocity provisions which, as discussed above, help ensure that ethical violators will be appropriately punished on the home front as well as within the host state; indeed, Rule 22 of the *Model Rules for Lawyer Disciplinary Enforcement* encourages this.[197] Additionally, potentially severe sanctions can be applied by the host state on top of practice restrictions in the home state. Further, national registration of violators coupled with the requirement that attorneys self-report provides adequate protections of the public. This is particularly true when enforcement is lax enough in general to call into question how harmful such violations really are. Thus, concern that a state cannot appropriately control out-of-state attorneys is mitigated.

Besides, lawyers looking to practice unfettered in another state have obviously already been admitted in at least one other. The "race to the bottom" argument addresses the concern that less competent attorneys can pass the least stringent bar exam and then seek admission elsewhere to prey upon unsuspecting consumers who will think them as competent as home-grown attorneys. However, even if that were true, the market would soon weed out those who could not perform competently in the host state, and nothing would bar malpractice or other claims against the truly incompetent lawyer. Where the attorney comes from a state with a reputation for an extraordinarily strict bar examination, this concern is eliminated. Furthermore, for bankruptcy practice, admission will largely include federal court admission as well as at least one state court admission, proving an ability to learn and function within more than one system. Moreover, in a profession where compe-

196. *But see* Gillers, *supra* note 56, at 696.
197. *See supra* note 153 and accompanying text.

tition for honors and distinctions is quite high, it defies reason to think that most attorneys will suddenly seek out the least prestigious qualifications possible just to practice elsewhere in compliance with infrequently enforced ethical rules.

More important, a client has a right to counsel of his or her choice, and this right should not be limited by formalistic UPL rules. In bankruptcy, along with the location of the debtor, the creditor, and any property at issue comes also the issue of where to file the petition, if and when it comes to that. Clients should not be hindered strategically or financially in their filing decisions based on which attorney is admitted in which state. Neither should they be effectively precluded by the increased costs involved with associating local counsel who may not even be involved or properly expert in the subject, but who is expected to take responsibility for overseeing proceedings. Where a renowned expert may be desired, needed and retained, the idea that local counsel whose sole purpose is to meet a formality should be required (and be paid out of the same pot everyone else is fighting over)[198] defies both logic and common sense.

2. Local Bars Do Not Promote Community Activism, Improve Attorney Relations, or Increase Access to Legal Services

A more credible argument seeks to protect the community environment, which might suffer if attorneys practicing in the state had few or no ties to the community. Yet nothing about allowing outsiders to practice precludes insiders from contributing to their communities. In fact, many attorneys want and need to contribute in the form of activities and pro bono work just to feel rewarded in what they do. Many would do more than they already do if they felt that their firms would authorize or allow it—or that they could make their billings if they did so.[199] Approving looser practice restrictions cannot rationally be expected to decrease community involvement by those committed to it and practicing it on either the home or the host front. Furthermore, the argument that "local bars" and local communities will somehow be destroyed or lose their character in an appreciable way due to an increased ability to practice across state borders carries

198. *See* Mitchell A. Seider, *Getting Retained, Staying Retained, and Keeping the Money: A Discussion of Some of the Requirements and Obligations of Lawyers Hired Under Section 327(a) of the Bankruptcy Code*, 9 J. BANKR. L. & PRAC. 231, 241 (2000) (citing *In re Federated Dep't Stores, Inc.*, 44 F.3d 1310 (6th Cir. 1995) to illustrate that the costs to the estate are of great import in the bankruptcy process and decisionmaking of the courts).

199. *See* Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 939–40, 948 (1999) (discussing large and small firm practice and lawyer satisfaction with respect to billing practices).

less weight in an age when technology[200] and travel level the playing field and bring the coasts closer together.

Moreover, business, and thus bankruptcy practice, is more national than ever before—indeed, it is now global. The nature of the town-square style local bar has already changed. No state of any size can truly consider its bar local or congenial. For instance, California is the size of many small countries—larger in fact than many in economic terms. It is disingenuous to suggest that the state bar "community" that encompasses all California lawyers is somehow more congenial and tight-knit than the community that would exist among the relatively small group of bankruptcy practitioners. Civic responsibility should not be forced into existence by placing a figurative ball and chain around the ankles of practitioners.

CONCLUSION

Bankruptcy is a specialty that is unlike the general practice of law. While the exceptions that most states provide for out-of-state litigators may adequately serve those who are permitted to take advantage of them, they are insufficient to handle the discipline as a whole. Where the transactional and litigational aspects of a single case can be varied and overlapping at different points in the case, a rigid system will not effectively serve clients. Where the need for transactional and negotiation work often precedes and can even pre-empt litigation altogether, it is not enough to throw those practitioners into the fray unprotected and hope that no one notices their transgressions.

The current practice of ignoring disciplinary rules rather than changing them has been fittingly described as "indifference, rather than an acceptable solution."[201] Attorneys should not be put in the position of violating rules of conduct that they are supposed to uphold simply because custom says that they can probably get away with it. States that intend to regulate such matters should begin by adopting revised Model Rule 5.5; alternately, they should strive, as Michigan has done, to find ways to make legal the exceptions that are often practiced, even if they start by allowing such exceptions only for the bankruptcy specialization. Should this occur, bankruptcy attorneys will finally have certainty about their ethical and legal obligations and will be able to rely on their compensation for those obligations. Additionally, consumer clients will seek counsel from the attorneys they most desire to work

200. *See* Daly, *supra* note 12, at 734.

201. John F. Sutton, Jr., *Unauthorized Practice of Law by Lawyers: A Post-Seminar Reflection on "Ethics and the Multijurisdictional Practice of Law,"* 36 S. TEX. L. REV. 1027, 1034 (1995).

with without having to pay more for formalities or to travel all over just to be sure their lawyer stays "in" the right jurisdiction. Because bankruptcy practice implicates so many of the rationales both for and against multijurisdictional freedom to practice, it is the perfect place to begin making those changes.