



April 18, 2022

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By email: rturner@clarkhill.com

Reginald M. Turner, Esq.
President, American Bar Association

Re: APRL's Proposal for a Revised Model Rule 5.5

Dear President Turner:

On behalf of APRL, an association of over 400 lawyers and law professors advising and representing lawyers in ethics matters, I enclose APRL's proposal for a replacement Model Rule 5.5 to better reflect the way lawyers practice in the 21st Century. Our proposal advocates that a lawyer admitted in any United States jurisdiction should be able to practice law and represent willing clients without regard to the geographic location of the lawyer or the client, without regard to the forum where the services are to be provided, and without regard to which jurisdiction's rules apply at a given moment in time. At the same time, our new Model Rule 5.5 would still preserve judicial authority in each state to regulate who appears in state courts, emphasizes that lawyers must be competent under Rule 1.1 no matter where they are practicing or what kind of legal services they are providing, and ensures that lawyers will be subject to the disciplinary jurisdiction of not only their state of licensure but wherever they practice.

Several years ago, one of my predecessors as President of APRL, George Clark, established a committee focused on the Future of Lawyering. The Future of Lawyering Committee is chaired by two other past presidents of our organization, Jan Jacobowitz and Art Lachman. After several years of hard work and discussions, the first action item from that group is a proposal to replace current ABA Model Rule 5.5 with a new version. That group has also created a very detailed report that discusses the history of the existing rule, how it is rooted in troubling presumptions, and how it is anachronistic in relation to the modern practice of law. In addition to the revised proposed rule itself, I also enclose a copy of that Report of the Future of Lawyering Subcommittee of the Association of Professional Responsibility Lawyers.

In March, APRL's Board voted to adopt the proposed revised rule as APRL's own proposal and authorized the report prepared by a Subcommittee of our Future of Lawyering Committee to be publicly disseminated. We hope to garner support not only within the ABA for this proposal, but also in any states independently willing to consider changes to their own versions of RPC 5.5. I would ask that you help disseminate these materials to the appropriate channels within the ABA.

I thank you for your time, your consideration, and your service to our profession.

Very truly yours,

Brian S. Faughnan
APRL 2021-2022 President
Lewis Thomason, P.C.

APRL MODEL RULE 5.5

RULE 5.5: Multijurisdictional Practice of Law

- (a) A lawyer admitted and authorized to practice law in any United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction, subject to the other provisions of this rule.
- (b) Only a lawyer who is admitted to practice in this jurisdiction may hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer who provides legal services in this jurisdiction shall:
- (1) Disclose where the lawyer is admitted to practice law;
 - (2) Comply with this jurisdiction's rules of professional conduct, including but not limited to Rule 1.1 (Competence), and with the admission requirements of courts of this jurisdiction;
 - (3) Be subject to Rule 8.5 regarding the disciplinary authority and choice of law rules of this jurisdiction; and
 - (4) Not assist another person in the unauthorized practice of law in this, or any other, jurisdiction.
- (d) A lawyer admitted and authorized to practice law in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services in this jurisdiction that:
- (1) are provided to the lawyer's employer or its organizational affiliates;
 - (2) are not services for which the forum requires pro hac vice admission; and
 - (3) do not arise under the law of any U.S. jurisdiction, unless the services are provided after consultation with a lawyer authorized to practice law in this jurisdiction.

New Comments

1. This rule acknowledges that the practice of law now routinely transcends geographic jurisdictional boundaries. The question of what it means for a lawyer to practice law "in" a jurisdiction has been clouded by advances in technology that facilitate lawyers' ability to communicate, work, and appear in other jurisdictions. For example, historically a lawyer's physical presence in a jurisdiction was the predominate factor in determining where the lawyer practiced law. In modern law practices, lawyers routinely send e-mails, place phone calls, and participate in video calls with clients and other parties in other jurisdictions, rendering the lawyer's physical location irrelevant to the lawyer's capacity to provide legal

services. Similarly, the advent of on-line research, including access to local rules and ordinances, has enhanced lawyers' ability to master competency without regard to artificial geographic limitations. Hence, this rule recognizes the realities of current law practice and expanding access to lawyers while still being mindful of the need for public protection.

2. The definition of the practice of law may be established by statute or common law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to individuals admitted and authorized to practice law in at least one United States jurisdiction, protects the public against rendition of legal services by unqualified and unaccountable persons. Under the circumstances specified in section 5.5(d) of this rule, lawyers licensed in a foreign jurisdiction may also practice law without undue risk of harm to the public.
3. A lawyer is "admitted" in a jurisdiction when they have been formally licensed to appear in the courts of that jurisdiction without limitation. A lawyer may be "authorized" to practice in a jurisdiction if they are admitted to practice in any U.S. jurisdiction or, where court rules so require, the lawyer has been admitted to appear by a pro hac vice procedure, or other similar mechanism. A lawyer may be admitted to practice but not authorized to do so, because, for example, the lawyer is on inactive status. Under this rule, a lawyer must be both admitted and authorized to practice in at least one United States jurisdiction.
4. The distinction of being admitted in a particular jurisdiction relates to the privilege of regularly appearing in the courts of this jurisdiction and communicating that privilege to the public. Thus, while lawyers admitted in other jurisdictions may practice in this jurisdiction as provided in this rule, only lawyers admitted in this jurisdiction may represent that they are fully authorized to appear regularly in the courts of this jurisdiction.
5. Paragraph (c)(1) requires that all lawyers, including lawyers admitted in this jurisdiction, disclose the jurisdiction(s) in which they are admitted. Such disclosure is necessary to inform consumers of legal services and other parties where the lawyer's license originates and to facilitate disciplinary enforcement. This Rule anticipates that the primary form of disclosure will be in written communications, such as lawyers' signature blocks on correspondence and in lawyer advertising, including websites. A lawyer who communicates orally with another person and knows, or reasonably should know, that the other person has a misunderstanding about the lawyer's licensure, has an affirmative duty to correct the person's impression. *See* Rule 4.3.
6. A lawyer may establish an office for the practice of law in this jurisdiction with proper disclosure of the jurisdiction(s) in which the lawyer is admitted.
7. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 – 7.3.
8. All lawyers are required to be competent in the practice of law. *See* Rule 1.1. The lawyer's duty of competence applies regardless of practice area or the jurisdiction in which a matter is located.

9. All lawyers are subject to the disciplinary authority of the jurisdictions in which they practice. *See* Rule 8.5(a). The frequency with which disciplinary authorities have exercised their authority to prosecute and discipline lawyers not licensed in their jurisdiction has increased in the past decade, suggesting that geographic boundaries are not an impediment to holding lawyers accountable for ethical misconduct. Hence, allowing lawyers to practice in multiple jurisdictions does not undermine public protection.
10. A lawyer does not engage in the unauthorized practice of law by employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. *See* Rule 5.3. A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.
11. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority. In the absence of such requirements, this Rule permits lawyers to appear before administrative agencies in jurisdictions in which they are not admitted, subject to the other provisions of this Rule.
12. In situations in which pro hac vice admission is required, this Rule permits a lawyer to engage in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law under this rule but for which pro hac vice admission has not yet been obtained. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents.
13. Paragraph (d) applies to a foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the foreign lawyer to provide personal legal services to the employer's officers or employees or legal services to the general public. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the foreign jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under this Rule needs to first consult with a lawyer admitted and authorized to practice in at least one U.S. jurisdiction.

**REPORT OF THE FUTURE OF LAWYERING SUBCOMMITTEE OF THE
ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS
REGARDING PROPOSED REVISED MODEL RULE 5.5¹**

Introduction

The Association of Professional Responsibility Lawyers Committee on the Future of Lawyering proposes a revised Model Rule 5.5 that offers a 21st century approach to the practice of law. Since the adoption of the current Model Rule 5.5 in 2002, lawyers in the United States have continued to expand their practices beyond state and national borders. The existing rule no longer adequately addresses the day-to-day questions lawyers have about multi-jurisdictional practice and it preserves outdated notions of how lawyers serve their clients. APRL believes that a broader rule is critical to the future of the profession.

APRL's proposed revision of Model Rule 5.5 reflects the concept that a lawyer admitted in any U.S. jurisdiction should be able to engage in the practice of law and represent willing clients without regard to the geographic location of the lawyer or the client, the forum the services are provided in, or which jurisdiction's rules apply at a given moment in time. The proposed revision recognizes that ethics rules will continue to govern the conduct of lawyers and require competence in the delivery of legal services provided; acknowledges that courts and other tribunals have the inherent power to control who appears before them; and embraces the fact that technology has fundamentally changed the ease with which clients and lawyers work together over vast distances.

The proposed revised Model Rule 5.5 offers up a regulatory model that would be similar, though not identical to the way that driver's licensing works in our nation. Although each jurisdiction implements its own scheme for granting drivers' licenses, those licenses are, of necessity, recognized in every U.S. jurisdiction. Drivers are expected to inform themselves of the laws in jurisdictions to which they travel.

APRL's proposal does not ignore state licensure. To the contrary, APRL's proposal would enhance public protection by requiring that all lawyers, in every jurisdiction,

¹ The members of the subcommittee involved in the drafting of the proposed rule and of this report are: Kendra Basner (San Francisco, CA), Eric Cooperstein (Minneapolis, MN), Craig Dobson (New York, NY), Brian S. Faughnan (Memphis, TN), Jan Jacobowitz (Miami, FL), Arthur Lachman (Lake Forest Park, WA), David Majchrzak (San Diego, CA), Sari Montgomery (Chicago, IL), Lynda Shely (Scottsdale, AZ), and Hope Todd (Washington, D.C.).

disclose the jurisdictions in which they are licensed. APRL's proposal preserves the authority of judicial branches to regulate who appears before them, reminds lawyers of their ethical obligation under Rule 1.1 to be competent in all the services they provide, and ensures that lawyers will be held responsible for any misdeed committed in the relevant jurisdictions.

The proposal which APRL now urges acknowledges that clients must continue to be protected from the incompetent practice of law. However, the proposal also elevates the client's right to choose counsel to a co-equal status in the context of the regulation of multijurisdictional practice and acknowledges that protecting clients from incompetent lawyering does not require artificial boundaries that prevent clients from choosing competent counsel of their choice even if the lawyer they choose is licensed elsewhere.

The report provides APRL's reasoning and support for its proposal, including some significant historical context for Rule 5.5. The report addresses the realities of today's practice to highlight the unnecessary restriction on the ability of lawyers to practice in multiple jurisdictions and considers the recent experience of lawyers and their clients during the global pandemic.

The report also expands the principles that APRL believes should be at the heart of a regulatory structure that addresses multijurisdictional practice in a manner that benefits both clients and their lawyers. The report also discusses why certain existing "solutions" to these problems are insufficient, unjust, or both. Finally, the report includes historical context and insight into the origin of today's approach and the systemic problems that are exacerbated by its continuing existence.

Technology and the Evolution of the Practice of Law

If it was not already clear before the onset and consequences of the Covid-19 Global Pandemic ("2020 Pandemic") that technology has changed the modern practice of law, the conclusion is now undeniable. In the face of stay-at-home and other quarantine orders, technology has allowed lawyers to remotely meet with clients, negotiate deals, mediate, and appear in court via Zoom and other video conferencing technology.² Today's

²Jan L. Jacobowitz, Chaos or Continuity? The Legal Profession: From Antiquity to the Digital Age, the Pandemic, and Beyond, 23 *Vanderbilt Journal of Entertainment and Technology Law* 279 (2021);

technology readily allows a lawyer to practice law from almost anywhere assuming available access to a wireless network. However, Model Rule 5.5 and its various state iterations prohibit the unauthorized practice of law—even with the use of remarkable technology during a global Pandemic. As discussed below, both the historical underpinnings of Rule 5.5 and the contemporary practice of law compel a review and revision to what should be considered the unauthorized practice of law and the rules that prohibit it.

It is important to note that not only is there a lack of evidence that lawyers are harming the public by working across state lines (assuming that they are licensed and in good standing in at least one state), but also that there is no evidence clients prioritize the location of their lawyer when deciding who to retain. In fact, Clio’s 2020 Legal Trends Report indicates that:

- ...Many consumers (37%) prefer to meet virtually with a lawyer for a consultation or first meeting, and 50% would rather conduct follow-up meetings through video conference. 56% of consumers would prefer videoconferencing over a phone call.
- ...The majority of consumers (65%) prefer to pay using electronic forms of payment, such as credit cards, debit cards, or online payment systems such as Clio Payments, PayPal, or Apple Pay over cash or check.
- ...The majority of consumers (69%) prefer working with a lawyer who can share documents electronically through a web page, app, or online portal.³

Thus, not only can lawyers and clients conduct the business of law remotely, regardless of physical location, but many even find it preferable. Just as the rules have evolved regarding competence, confidentiality, and technology so too should Rule 5.5 be revised to permit lawyers and clients to work together remotely without fear of

<https://news.bloomberglaw.com/us-law-week/pandemic-pressures-restriction-on-where-lawyers-can-practice>.

³ 2020 Legal Trends Report (Clio) available at <https://www.clio.com/resources/legal-trends/2020-report/>.

disciplinary or statutory action against the lawyer for violations of Rule 5.5 or UPL regulations.

Geographical Limitation and The Public's Access to Legal Services

There is no legitimate dispute that there is an access to justice crisis in the United States. This access to justice crisis – in all U.S. jurisdictions - exists under the current regulatory framework restricting the unauthorized practice of law. The “access to justice” gap includes many under-served clients who are willing to pay legal fees for a lawyer’s representation, but do not ever hire a lawyer. Admittedly, there are multiple reasons why clients with some means to pay may not hire a lawyer. One of those reasons is an actual physical access problem -- the unavailability of lawyers in the clients’ geographic area. Legal services “deserts” exist in many states where there are too few lawyers, or none at all, in a geographic area. Rural consumers have less access to lawyers than urban and suburban consumers.⁴ Geographic restrictions on admission further compound the problem.

In some rural areas lawyers are retiring, but new lawyers are not moving to those areas to replace them. Other locations do not have locally admitted lawyers, thus causing consumers in these legal services deserts to have to travel long distances to meet with a lawyer.

The lack of truly local lawyers can be remedied to some degree by harnessing technology to make representation by lawyers from other parts of the same state easier, but it is only the profession’s current ethical rules that make using lawyers geographically nearby but, in another state or jurisdiction as a broader remedy untenable.

Unfortunately, even in jurisdictions that have written their UPL rules and laws to be in line with ABA Model Rule 5.5, lawyers in another state or jurisdiction cannot provide legal services on a regular basis in a jurisdiction where they are not admitted. The current state regulatory restrictions on practicing law reinforce some of the reasons these geographic legal deserts continue to exist.

⁴ See Conference of State Court Administrators, *Courts Need to Enhance Access to Justice in Rural America*, p. 1-3 (2018).

Lawyers who may be only a few miles away from clients in need cannot provide the services if the lawyers are not admitted to practice law where the clients live. Those same available lawyers may be under-employed or unemployed, yet an arbitrary state boundary prohibits them from providing services.

Additionally, those unemployed and under-employed lawyers may not be able to afford to pay a second state's admission fees, repeatedly satisfy CLE requirements, and so forth. Yet those lawyers may be competent and would otherwise be available at a reasonable fee but for current ethical and regulatory restrictions. Forcing unemployed lawyers who are competent and licensed in at least one state to take an additional bar examination, pay additional bar dues, and be challenged again about their character and fitness for the ability to serve underserved legal communities in another jurisdiction is illogical.

An unyielding, purely geographic, border inhibits the ability for competent and willing lawyers to provide legal services to consumers who need access to those services. The current state admission framework inhibits clients' ability to receive legal services and further inhibits clients' choice of counsel. If there were more flexibility for "border" lawyers to provide legal services for clients who are geographically close, whatever the applicable state law may be, the cost of legal services would be reduced, availability and access would be increased, and lawyers could be more gainfully employed.

U.S. jurisdictions continue to struggle to bridge the access to justice gap by failing to adequately amend rules concerning the "practice of law" and who may provide legal services because much of the focus is on including more and more categories of nonlawyers.⁵ This is not the only solution, and it blatantly ignores an obvious path forward.

Jurisdictions continue to have lawyers who are unemployed and under-employed⁶ all while legal services "deserts" exist in places where paying clients would be willing to

⁵ See, e.g., *Washington LLLTs and legal navigators, AZ CLDPs and LPS, California Document Preparers, Minnesota Nonlawyers, NM nonlawyers, NY advocates, Utah Sandbox Participants*. National Center for State Courts, *Non-Lawyer Legal Assistant Roles Efficacy, Design, and Implementation* (2015) at 2 (A study by the National Center for State Courts (NCSC) in 2013, "Estimating the Cost of Civil Litigation" reports that the average cost for typical civil court case types puts the courts beyond the financial means of many litigants).

⁶ 2020 Legal Trends Report (Clio), *supra*.

hire a lawyer who is presently unavailable to them. The current outdated state regulatory framework further reinforces the access to legal services problem in the U.S and it does so despite a wealth of experience demonstrating that modern technology can allow lawyers to provide many legal services seamlessly and competently to clients from just about any location.

Competency and the Paradox of the Licensed Lawyer

The seemingly arbitrary nature of the geographical limitations imposed by the current regulatory structure is heightened by an understanding of the paradox associated with how few restrictions exist on a lawyer's ability to practice by subject matter. Once admitted in a U.S. jurisdiction, a lawyer is permitted to practice in any area of law of the lawyer's choosing or in multiple areas of law.

Indeed, historically, lawyers might take any case that crossed their office threshold, be it a family law matter one day, a criminal matter the next, or HIPAA compliance for a third-party provider of information systems the day after that. Over the past several decades, the profession has observed a trend away from the concept of lawyers as generalists and toward lawyers narrowing their practice to only one or two areas, in which they develop deep expertise. But that outcome has arisen because of the marketplace, not any ethical restrictions on practice.

A lawyer's voluntary devotion to one area of practice, however, in no way restricts the scope of the lawyer's license in their state. An attorney with 20 years of experience, but only involving family law, who learns of a neighbor's, relative's, or former client's severe car accident may agree to represent that person. Similarly, a lawyer who, following admission to the bar, works in a non-legal setting for twenty years, faces no licensing restrictions in taking on that same personal injury case as long as they have an active law license. Moreover, a newly minted lawyer immediately after passing the bar could take on a family law case, a car-accident lawsuit, and a contract negotiation with a hospital for a physician. The lawyers in these scenarios might not be the best lawyers for the job, but the Rules of Professional Conduct assume that the lawyers can educate themselves about the subject matter and competently handle the case. *See* Rule 1.1, cmt. [2].

The “Competency Fallacy of Rule 5.5,” however, dictates that a lawyer licensed in “State A”, who has devoted their entire career to personal injury work for example, would not be competent to represent the car-accident victim described above (without the association of local counsel)⁷ because the lawyer is presumed to be incapable of knowing or coming to understand “the law of State B.” Instead, if that State A-licensed lawyer wanted to be able to regularly represent clients with personal injury cases in State B, the lawyer would have to obtain a second license to practice law, a license issued by State B. Those who accept the current systemic issues often rely upon arguments that lawyers who wish to be able to practice across state lines more freely can simply obtain such additional licenses through reciprocity. This option to pursue additional licenses through reciprocity is not an adequate solution, and for many jurisdictions, is simply not true.

Those who tout the virtues of reciprocity not only ignore that 11 states do not offer reciprocity or provisional/reduced admission requirements at all, but they usually gloss over the burdens that this default imposes upon lawyers in the jurisdictions where it is a possibility. First, many jurisdictions impose a “time in practice” requirement such that a lawyer seeking to become licensed in a new jurisdiction without having to sit for the bar examination must have either practiced law for a set number of years, often five or more, or must have been engaged in active law practice for some percentage (often 60% or more) of the most recent time-period or both.

For example, to seek admission by reciprocity in Tennessee, a lawyer must have been licensed in another jurisdiction for at least 5 years and must have been engaged in the active practice of law for 5 of the 7 years preceding the date of the application. See Tenn. Sup. Ct. R. 7, § 5.01(a)(3). On the other hand, there are some jurisdictions that allow reciprocity if the lawyer received a minimum passing score on the Multistate Bar Examination so long as the lawyer applies within a certain amount of time after passing that test.

Second, for those jurisdictions that conditionally allow reciprocity, the application and admissions process for reciprocity has built in expenses – both upfront and recurring

⁷ Of course, even with local counsel, the lawyer will likely also have to seek pro hac vice admission to appear in the State B court in connection with the litigation. Furthering the paradox, most rules for pro hac vice admission do not include anything that would require the lawyer seeking admission to demonstrate substantive competence with respect to the issues being litigated or even as to litigation generally.

-- in the form of application fees, the fee charged by the National Conference of Bar Examiners for conducting a background investigation (discussed below), additional annual registration or bar fees, and, in some jurisdictions, additional imposed taxes in the form of professional privilege taxes and the like.

Third, the addition of another state of licensure can also lead to the imposition of even more required hours of continuing legal education if both the lawyer's original jurisdiction and the new jurisdiction impose mandatory hours requirements and if the states' approaches to calculating hours or certifying courses are not identical.

Fourth, even for lawyers that have practiced for long enough to be eligible for admission by reciprocity, the process can take an excessive time, especially when considering that the person awaiting a ruling on their application is someone who has most likely already passed a bar examination (unless they are among the small minority of lawyers (pre-pandemic) to have obtained licensure in a diploma-privilege state) and also has already been vetted through a state's character and fitness evaluation process.

The process can take months and may even last for a year or longer. The timing of the process is prolonged because it is not one of a rubber stamping of decisions made in the home licensing jurisdiction; nor is it one in which the exploration into the applicant's background is reasonably limited to life events occurring after the issuance of the original law license.

Instead, an applicant must authorize a brand-new background investigation by either the National Conference of Bar Examiners or other state authorized investigatory body. The state entity from which reciprocity is sought then waits for the results of that new investigation and has the power to dig into any aspects of the applicant's background that it feels raises substantial questions about the applicant's character and fitness.

Thus, someone who is already a licensed lawyer in one state can find themselves facing opposition to their admission in another jurisdiction on character and fitness grounds involving past conduct that did not prevent their admission to their home jurisdiction. These situations seem discordant enough when the grounds being examined truly involve only "conduct." But the unfairness is made even starker when situations arise involving concerns about physical or mental health conditions rather than actual incidents of past misconduct. Such a situation, indirectly presented in subsequent federal court litigation, resulted in one federal district judge (now a member of the D.C. Circuit Court of Appeals),

authoring a scathing opinion taking Kentucky’s regulatory process to task. *See Jane Doe v. Supreme Court of Ky.*, No. 03:19-cv-00236-JRW, (W.D. Ky. Aug. 28, 2020).

The collective burdens this general approach imposes have been the subject of scrutiny with application to military spouse attorneys, a very small subset of the population with very successful lobbying efforts at seeking regulatory reforms. Roughly 30 states have enacted rule revisions or other accommodations in response to such efforts. You can find an up-to-date listing of such revisions at <https://www.msjudn.org/rule-change/>.

While much of the focus of lobbying efforts made on behalf of military spouse attorneys focused on the sympathetic nature of their circumstances and the practical realities associated with being required to move frequently – sometimes even faster than the wheels of the regulatory system can turn to fully process a reciprocity application – there is fundamentally little reason to believe that a lawyer falling within this small subset is more ethical or more competent than another lawyer simply because they are married to someone in active military service.

Returning to Tennessee as an example, after lobbying efforts and a rules revision petition filed by a prominent military spouse attorneys’ group, an exception was adopted in Tennessee that permits someone who is not licensed in Tennessee, but who is married to an active member of the U.S. armed forces, to obtain a temporary license in Tennessee without having to submit to a new NCBE character and fitness investigation as long as they are “the spouse of an active duty servicemember of the United States Uniformed Services,” are “physically residing in Tennessee or Fort Campbell, Kentucky due to the servicemember’s military orders,” and can demonstrate several other basic requirements. *See Tenn. Sup. Ct. R. 7, § 10.06(a)*.

Although the overall sample size is small when compared to the bar as a whole, the apparent dearth of any known cases of discipline for incompetent handling of matters by military spouse attorneys in the 30 jurisdictions where barriers to licensure have been dropped cannot be overlooked as an indicator that the “Competency Fallacy of Rule 5.5” cries out for re-evaluation. While allowing these lawyers more freedom to represent clients has not resulted in any noticeable increase in discipline, state bars have been actively imposing discipline against lawyers solely for engaging in “unauthorized practice

of law” in circumstances where the existence of any harm to consumers of legal services is questionable.

Client Trust and Choice of Counsel

APRL’s proposed revisions to Model Rule 5.5 do not reject the need for client protection but elevates the client’s right to choose counsel to a co-equal status in the context of the regulation of multijurisdictional practice. Providing client protection does not require artificial boundaries that prevent clients from choosing competent counsel of their choice even if the lawyer they choose is licensed elsewhere.

A client’s right to choose, discharge, or replace their lawyer is a core ethical principal that permeates the Rules of Professional Conduct and is underscored in case law throughout the country. The law of law firm breakups and lawyer departures clarifies that neither a law firm nor any of its lawyers have a possessory interest in clients. The Supreme Court of Indiana has articulated in concise fashion the broadly recognized concept that clients are not “chattel” but independent actors with agency: “Although the firm may refer to clients of the firm as ‘the firm’s clients,’ clients are not the ‘possession’ of anyone, but, to the contrary, control who will represent them.” *Kelly v. Smith*, 611 N.E.2d 118, 122 (Ind. 1993).

The concept that an individual has a right to legal counsel is traditionally centered around the concept that “choice” necessarily suggests alternatives from which to choose. When the client is prepared to pay for legal representation, it would make sense that the client should be empowered to choose whoever the client wishes. This largely unchallenged freedom of choice continues past the initial selection of a lawyer. “[T]he right to change attorneys, with or without cause, has been characterized as ‘universal.’” *Echlin v. Super. Ct. of San Mateo County*, 90 P.2d 63, 65 (Cal. 1939).

One scenario that highlights this issue is when a lawyer who has been working on a matter departs the firm where they have been employed. In such instances, the client has three choices, to remain a client with the firm, to remain a client with the departing lawyer, or whether to select new counsel altogether. *See, e.g.*, ABA Formal Ethics Op. 489; Rules Regulating the Florida Bar, rule 4-5.8; Virginia State Bar Professional Guidelines, rule 5.8 (both requiring that clients be notified of these three options).

It is because of a client's choice of counsel that restrictive covenants precluding lawyers who depart a firm from competing in the same marketplace have generally been found to be unenforceable outside of conditions on retirements, such as permitted by Model Code of Professional Responsibility DR 2-108(A) and Model Rule 5.6. Such restrictions not only discourage mobility within the marketplace but also deny clients the ability to choose between the firm and the withdrawing lawyer who previously represented them.

Under common law, the client's right to choose who should serve as their lawyer has been regarded as necessary to ensure that the proper dynamics exist for this unique fiduciary relationship. More than 90 years ago, the City Court of New York remarked, "It is unquestioned that a client has the right to terminate the relationship of attorney and client at any time, with or without cause. That right is afforded him by the law because of the peculiar nature and character of the relationship, which in its very essence is one of trust and confidence. It is a right for the benefit of the client and is intended to save him from representation by an attorney whose services he no longer desires." *Gordon v. Mankoff*, 261 N.Y.S. 888, 889-90 (1931).

Further, under the Sixth Amendment, there is a presumption that a criminal defendant may retain counsel of choice. For example, the Supreme Court concluded that the denial of a defendant's request for a continuance to consult with a lawyer violated due process rights. "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified. ...A necessary corollary is that a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth." *Chandler v. Fretag*, 348 U.S. 3, 9, 10 (1954). This is consistent with the Supreme Court's earlier statement that "it is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932).

A client's preference for counsel is even honored when looking at the termination of the relationship between a lawyer and a client. Clients may end a lawyer's representation at any time and for any reason. Conversely, lawyers may terminate the relationship only based on one or more of the enumerated situations set forth in Model

Rule 1.16(a) and (b)—and may only do so upon following the procedures set forth in (c) and (d).

Indeed, it is not unheard of for a court to deny a lawyer’s application to withdraw from representing a client, even when the appropriate conditions are present. This issue is often litigated when a client terminates a lawyer’s engagement before the occurrence of an event that a fee is contingent upon. The terminated lawyer often argues that the client’s decision is unfair, particularly if the lawyer believes there was no just cause for the termination. But fairness to lawyers is subordinate to clients’ right to choose and change their legal representatives. *See, e.g., Fracasse v. Brent*, 494 P.2d 9, 13 (Cal.1972). The Supreme Court of California has remarked:

The interest of the client in the successful prosecution or defense of the action is superior to that of the attorney, and he has the right to employ such attorney as will in his opinion best subserve his interest. The relation between them is such that the client is justified in seeking to dissolve that relation whenever he ceases to have absolute confidence in either the integrity or the judgment or the capacity of the attorney. . . . The fact that the attorney has rendered valuable services under his employment, or that the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action, does not deprive the client of this right. (*Id.*)

Even where a client’s right to choose is not absolute, for example, where a lawyer has a conflict of interest that cannot be waived, courts still articulate that the right to choose counsel should be of paramount importance. Particularly when addressing challenges by third parties—often in the context of asserted conflicts—courts have consistently concluded that a client’s choice of counsel should be infringed upon only in cases where injustice will result.⁸

⁸ *See, e.g., Blumenfeld v. Borenstein*, 247 Ga. 406, 408 (1981) (reversing disqualification based solely on marital status, holding, “The mere fact that the public may perceive some conduct as improper is, without some actual impropriety, insufficient justification for interference with a client’s right to counsel of choice.”); *United States v. Urbana*, 770 F. Supp. 1552, 1556 (S.D.Fla. 1991) (courts disqualify an accused’s lawyer of choice only as a measure of last resort). *Macheca Transport Co. v. Philadelphia Indem. Co.*, 463 F.3d 827, 833 (8th Cir. 2006) (the extreme measure of disqualifying counsel of choice should be used only when absolutely necessary); *In re BellSouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003) (the right to counsel of choice may only be overridden for compelling reasons); *Optyl Eyewear Fashion Intern. Corp. v. Style Companies, Ltd.*, 760 F.2d 1045, 1050 (9th Cir. 1985) (because of potential for abuse, disqualification motions should be subject to particularly strict judicial scrutiny); *Evans v. Artek Sys. Corp.*, 715 F.2d 788, 794 (2d Cir. 1983) (movant must meet a heavy burden to remove opposing counsel).

Yet when it comes to the multi-jurisdictional practice of law, the principal of client choice of counsel is strikingly absent. No matter that the prospective client has known the lawyer personally for many years, is related to the lawyer, has a prior professional relationship with the lawyer, is familiar with the lawyer's expertise in a narrow area of the law, or was referred to the lawyer by a trusted associate. If the lawyer is not licensed in the state in which the client resides or where a matter occurs, the client's choice receives no deference under Rule 5.5. Client choice of a lawyer is paramount, except when it contravenes an outdated regulatory scheme based on state boundaries

The Long and Problematic History of Placing Geographic Restrictions on the Right to Practice Law

Historical context proves useful when attempting to understand the current framework and to justify amending it to reflect the contemporary practice of law. In fact, “[t]he state-based licensing process originated more than two centuries ago when the need for legal services was locally based and often involved the need for representation in court.”⁹ It is worthwhile to journey back to this time to understand both the historical reasoning and its inapplicability to today's legal profession.

The authority to admit lawyers to practice in a jurisdiction derives from the role of the judiciary in the American legal system:

From the colonial period until today, American courts have claimed the English common law tradition of inherent power—a power not derived from statute—to regulate the lawyers practicing before them, especially with respect to admission to practice. Thus, the courts must license lawyers before lawyers will be given audience, courts set the terms upon which legal practice is pursued, and courts enforce the rules they have themselves established.¹⁰

From Colonial Times to 1921

⁹ Report of the ABA Commission on Multijurisdictional Practice, at 7 (August 2002) (“2002 MJP Report”).”

¹⁰ 1 Geoffrey Hazard, Jr., William Hodes & Peter Jarvis, *THE LAW OF LAWYERING* §1.07, at 1-26 (4th ed. 2021).

In colonial America, local judges generally determined admission in colonial courts, usually based on service in an apprenticeship for a number of years. An alternative approach was to permit lawyers admitted to the English bar to practice anywhere in the colonies.¹¹ After the American Revolution, states imposed varying admission requirements, with bar examinations, where they existed, generally a mere formality that could be bypassed by choosing a different area of study, such as clerking under a practitioner or judge.¹²

“[C]ontrol of the American legal profession remained highly localized and dispersed through the first hundred years or so following the Revolution.”¹³ Thus, “during the Jacksonian era, Bar admission requirements became increasingly less strict because of the perceived elitism of admission practices as contrary to democratic ideals.”¹⁴ As a result, almost any *man* who desired to practice law could gain admittance.¹⁵ Where examinations were required, they were often oral and minimal, and have been characterized as “laughable” and almost a “farce” or a “joke.”¹⁶ “By 1860, of the thirty-nine states, only nine had any specific requirements for admission to their Bar.”¹⁷

¹¹ Daniel Hansen, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1193-94 (1995).

¹² *Id.* at 1194-95.

¹³ James Jones, Anthony Davis, Simon Chester & Caroline Hart, *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?*, 30 GEORGETOWN J. LEGAL ETHICS 125, 129 (2017).

¹⁴ Hansen, *supra*, at 1195; Carol Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193, 1199 (2008). *See also* Jones, et al., *supra*, at 129 (“early efforts by the old established bars of the original colonies to keep the legal profession small and elite through rigorous admissions standards following the American Revolution largely collapsed, in no small part because of the diverse legal needs of a vast and rapidly expanding country of individual entrepreneurs”), citing Lawrence Friedman, *A HISTORY OF AMERICAN LAW* 315–18 (2d ed. 1985).

¹⁵ Hansen, *supra*, at 1195-96; Langford, *supra*, at 1199. *See also* Matthew Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions*, 39 CAL W. L. REV. 1, 7 (2002) (“Although good moral character remained requisite for admission to the practice of law in many states, Bar membership was effectively open at the end of the Civil War to any and all male citizens who could produce a personal reference.”).

¹⁶ Hansen, *supra*, at 1196, 1200; Lawrence Friedman, *A HISTORY OF AMERICAN LAW* 317, 652 (2d ed. 1985). An often-told anecdote from the pre-Civil War period is of Abraham Lincoln examining an Illinois bar applicant while the future president was taking a bath. Hansen, *supra*, at 1196 (quoting Joel Seligman, *Why the Bar Exam Should be Abolished*, JURIS DR., at 48 (Aug.-Sept. 1978).

¹⁷ Ritter, *supra*, at 7.

“The radical democratization of Bar admissions prompted widespread calls for its reform in the later nineteenth century.”¹⁸ The post-Civil War years saw the beginning of the standardized law school curriculum in this country, as Christopher Columbus Langdell’s theory of legal education, based on the case method of Socratic instruction and focused on increased standards and more uniformity (which would effectively limit competition in the profession), became accepted.¹⁹

In addition, “[e]xpanding post-war industrialization increased concern over the character certification and competency of lawyers to deal with the extensive legalization of the social economy.”²⁰ “The ancestor to the modern written bar examination developed between 1870 and 1890 and gained substantial ground and acceptance in the 1890s... [B]y the 1920s, there was a written bar examination in most states.”²¹ Further, “[b]etween 1880 and 1920, states adopted additional entry procedures, such as publication of applicants’ names, probationary admissions, recommendations by the local Bar, court-directed inquiries, and investigation by character committees.”²²

1921 ABA Root Report

What has become the traditional route to bar admission now includes “graduating from an accredited law school, passing the admitting state’s bar examination, and satisfying the state’s bar examiners that the applicant possesses the requisite character to

¹⁸ Deborah Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 498 (1985)

¹⁹ Hansen, *supra*, at 1198-99.

²⁰ Langford, *supra*, at 1204.

²¹ Hansen, *supra*, at 1200 (noting that “the written bar exam principally developed as a replacement for oral bar exams, and not as a check on law schools,” and citing George Stevens, *Diploma Privilege, Bar Examination or Open Admission*, 46 B. EXAMINER 15, 25-26 (1977), for the proposition that “the bar exam was intended to standardize admissions requirements and was considered egalitarian in the sense that its mission was to equalize the disparate admissions requirements in various regions around the country”).

²² Rhode, *supra*, at 499.

practice law.”²³ This uniform route to lawyer admission in virtually every state has its roots in the ABA Root Committee Report, issued 100 years ago, in 1921.²⁴

The Root Report established the ABA’s position that three years of law school education should be required for licensed lawyers (with two years of college as a prerequisite for law school entry), but that such a requirement alone was not sufficient. “[G]raduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.”²⁵ The diploma privilege was eventually eliminated and replaced by required exams by all of the states with the exception of Wisconsin as of 2020.²⁶

The Root Report urged states to impose these legal education and bar examination requirements based on two primary considerations: “efficiency” and “character.” “The part played by lawyers in the formulation of law and in the establishment and maintenance of personal and property rights requires a high degree of efficiency for the proper service of the public.”²⁷

As to “character” considerations specifically, the Report noted that “it is plain that the private and public responsibilities of the profession demand a high standard of morality and implicit obedience to correct standards of professional ethics.”²⁸ Thus, “character screening effectively arrived in the early twentieth century.”²⁹ By 1927, a large

²³ 2002 MJP Report, at 7.

²⁴ Elihu Root, et al., *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 44 REP. ANNUAL MTG. A.B.A. 679 (1921) (“Root Report”).

²⁵ *Id.* at 687-88

²⁶ See Hansen, *supra*, at 1192 & n.7. Objections to the diploma privilege in the 20th Century included “(1) a fear that law school education lacked uniformity in the length of time given over to study; (2) a belief that the diploma privilege was anti-democratic because it tended to favor state law schools over private schools, which were often not granted the privilege; (3) a belief that the diploma privilege discriminated against state residents who studied at out-of-state institutions; (4) a belief that the bar examination produced a higher standard of practice; and (5) a fear that the diploma privilege allowed law schools to circumvent the state’s control of the bar.” Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You’ll Like It*, 2000 WISC. L. REV. 645, 647. The third and fifth of these objections implicate federalism concerns that form the basis of current UPL regulation in state statutes and the ethics rules.

²⁷ *Id.* at 680.

²⁸ *Id.*

²⁹ Keith Swisher, *The Troubling Rise of the Legal Profession’s Good Moral Character*, 82 ST. JOHN’S L. REV. 1037, 1041 (2008). Other articles exploring the history of character and fitness requirements in detail

majority of the states had “strengthen[ed] character inquiries through mandatory interviews, character questionnaires, committee oversight, or related measures.”³⁰

The Report urged immediate action by the organized bar, the ABA, and state and local bar associations “to prevent the admission of the unfit and to eject the unworthy,” and to “purify the stream at its source by causing a proper system of training to be established and to be required.”³¹ It is probably an understatement to say that when enforcement of character requirements began in earnest in the middle part of the 20th Century, “both its motivations and outcomes were extremely problematic.”³² In 1971 and again in 1991, the ABA and the National Conference of Bar Examiners reaffirmed the basic conclusions and recommendations of the Root Report.³³

Statutory Developments and Enshrinement of UPL Restrictions in the Ethics Rules

Although the original 1908 ABA Canons on Professional Ethics did not contain a provision regarding the Unauthorized Practice of Law (UPL), professional bar associations began to organize against UPL about a decade before the issuance of the Root Report. In 1914, “the New York County Lawyers Association launched the first unauthorized practice campaign by forming an unauthorized practice committee to curtail competition from title and trust companies,” and the ABA followed suit by forming

include Deborah Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 498-503 (1985); Roger Roots, *When Lawyers Were Serial Killers: Nineteenth Century Visions of Good Moral Character*, 22 N. ILL. U. L. REV. 19 (2001); Matthew A. Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions*, 39 CAL. W. L. REV. 1, 4-13 (2002); and Carol Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193, 1196-1208 (2008).

³⁰ Swisher, *supra*, at 1041 (quoting Rhode, *supra*, 94 YALE L.J. at 499).

³¹ Root Report, at 681.

³² Swisher, *supra*, at 1040. As well documented in Professor Rhode’s seminal 1995 article and expanded upon by Professor Swisher in his 2008 piece, scrutiny based on “character” excluded from admission “unworthy groups” based on gender and ethnicity considerations, as well as other perceived “problem” applicants. *Id.* at 1041-42. By the late 1950s, the U.S. Supreme Court had imposed constitutional constraints on these standards, requiring a rational connection to fitness to practice. *Id.* at 1042 (citing cases).

³³ Hansen, *supra*, at 1201 & nn.62, 63 (citing the 2nd and 3rd editions of the NCBE’s Bar Examiner’s Handbook).

its own committee on unauthorized practice by 1930.³⁴ “Beginning in the 1920s, bar associations attempted to gain greater control over the practice of law by spearheading efforts to ‘integrate’ the bar through court rules (pursuant to inherent powers) or statutes that required every lawyer to belong to the state bar.”³⁵ And beginning in the 1930s, most state legislatures adopted statutes outlawing (and sometimes criminalizing) UPL,³⁶ with state supreme courts asserting their authority (often stated as “exclusive” authority vis-à-vis the legislature) to define and regulate UPL and the practice of law.³⁷

UPL was first mentioned in an ABA ethics code in a September 30, 1937, amendment to the ABA Canons. New Canon 47, titled “Aiding the Unauthorized Practice of Law,” provided that “No lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.”

Three decades later, the restriction on assisting UPL was enshrined in the ABA Model Code of Professional Responsibility but also paired with a new prohibition. Canon 3 of the 1969 ABA Model Code of Professional Responsibility was titled “A Lawyer Should Assist In Preventing the Unauthorized Practice of Law.” DR 3-101 of the Model Code,

³⁴ Derek Denckla, *Nonlawyers & the Unauthorized Practice of Law: An Overview of the Legal & Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2583-84 (1999).

³⁵ *Id.* at 2582. “Invoking ‘inherent powers,’ the highest state courts have claimed the jurisdiction—sometimes exclusive—to regulate every aspect of the practice of law, through such activities as specifying conditions for admission, disciplining or disbaring those lawyers who fail to exercise good conduct, and promulgating lawyers’ codes of conduct.” *Id.*; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §1, cmt. c (2000) (“The highest courts in most states have ruled as a matter of state constitutional law that their power to regulate lawyers is inherent in the judicial function. Thus, the grant of judicial power in a state constitution devolves upon the courts the concomitant regulatory power.”). The historical development of, and the role of the organized bar in, the “inherent power” doctrine in the context of state UPL regulation is extensively discussed in Laurel Rigertas, *Lobbying & Litigating Against “Legal Bootleggers”—The Role of the Organized Bar in the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 *CAL. W. L. REV.* 65 (2009); and in Laurel Rigertas, *The Birth of the Movement to Prohibit the Unauthorized Practice of Law*, 37 *QUINNIPIAC L. REV.* 97 (2018).

³⁶ The language of these statutes appears to focus on the unauthorized practice of law by nonlawyers, but “most jurisdictions regarded even out-of-state *lawyers* as engaged in UPL, unless they had met local licensing requirements. Thus, lawyers were prohibited from practicing law in violation of local regulations, which meant that in courtroom litigation, at least, and perhaps in arbitration as well, out-of-state lawyers were required to seek admission *pro hac vice*. . . . Furthermore, whether out-of-state lawyers could participate in interstate transactional work in the ‘wrong’ jurisdiction, or even advise clients about the situation was uncertain, and many lawyers were willing to test the limits of a state’s tolerance.” 2 Hazard, Hodes & Jarvis, *supra*, §49.02, at 49-5.

³⁷ See Denckla, *supra*, at 2585.

titled “Aiding Unauthorized Practice of Law,” provided that “(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law” and “(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.” The focus of the Ethical Considerations in Canon 3 was on practice by so-called non-lawyer “layman,” but EC 3-9 explained the restriction on multijurisdictional practice:

Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

In a footnote supporting the first proposition in this EC (that regulation of the practice of law is accomplished principally by the respective states), the ABA Code cited the U.S. Supreme Court decision in *United Mine Workers v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967): “That the States have broad power to regulate the practice of law is, of course, beyond question.” Quoting ABA Ethics Op. 316 (1967), the footnote also noted that “It is a matter of law, not of ethics, as to where an individual may practice law. Each state has its own rules.” In recognizing the potential practical difficulties with imposing these restrictions, another footnote also quoted ABA Ethics Op. 316 for the proposition that

Much of clients’ business crosses state lines. People are mobile, moving from state to state. Many metropolitan areas cross state lines. It is common today to have a single economic and social community involving more than

one state. The business of a single client may involve legal problems in several states.”³⁸

The Ethical Consideration noted these practical difficulties without providing guidance on how to resolve them.

This uncertainty continued with the enactment of the Model Rules. “When Model Rule 5.5 was originally promulgated in 1983, . . . it carried forward from the Model Code of Professional Responsibility, without elaboration, both aspects of the traditional prohibition on the unauthorized practice of law.”³⁹ The rule simply provided that “A lawyer shall not (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.” There was a single comment:

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

As of the adoption of the Model Rules in the early 1980s, the state-based framework for regulation of lawyer admission and practice by the 50 individual states and

³⁸ An additional footnote quoted from a New Jersey Supreme Court case, *In re Estate of Waring*, 47 N.J. 367, 376, 221 A.2d 193, 197 (1966): “[W]e reaffirmed the general principle that legal services to New Jersey residents with respect to New Jersey matters may ordinarily be furnished only by New Jersey counsel; but we pointed out that there may be multistate transactions where strict adherence to this thesis would not be in the public interest and that, under the circumstances, it would have been not only more costly to the client but also ‘grossly impractical and inefficient’ to have had the settlement negotiations conducted by separate lawyers from different states.”

³⁹ 2 Hazard, Hodes & Jarvis, *supra*, §49.02, at 49-4.

the District of Columbia was a *fait accompli*, altogether consistent with traditional and historical federalism principles, and seemingly immutable.⁴⁰ Any and all constitutional and other challenges to the individual states' authority to regulate the practice of law within their borders, as well as federal courts' authority to condition admission based on admission in the state in which they sit, have been decisively and universally rejected by the courts.⁴¹

Birbrower: The California Supreme Court Grabs Lawyers' Attention

Despite the long history of the restrictions set forth above, the application of UPL restrictions to licensed lawyers who practice law across state lines where they are not licensed, referred to as interstate UPL, did not receive much attention in the profession until 1998 when the Supreme Court of California issued its landmark decision in the case *Birbrower, Montalbano, Condo & Frank v. Superior Court of Santa Clara County*.⁴² In sum, the Court held that New York-licensed lawyers from the New York law firm of Birbrower, Montalbano, Condo & Frank had engaged in UPL because the firm's lawyers

⁴⁰ For example, the 2002 MJP Report, at page 7, noted: "Lawyers in the United States are not licensed to practice law on a national basis, but are licensed by a state judiciary to practice law within the particular state. In general, state admissions processes are intended to protect the public by ensuring that those who are licensed to practice law in the state have the requisite knowledge of that state's laws and the general fitness and character to practice law." And §3 of the Restatement of the Law Governing Lawyers, adopted in 2000, accepts as essentially unchangeable based on historical experience the concept of judicial authority of each state to regulate law practice within state boundaries. *See* RESTATEMENT, *supra*, §3 & cmt. b ("[J]urisdictional limitations on practice applicable to lawyers are primarily a function of state lines. . . . Occasionally, proposals are put forward for removal of state-line limitations on practice, as by means of a national bar-admission process. However, local interest in maintaining regulatory control of lawyers practicing locally is strong and historically has prevented adoption of such proposals.").

⁴¹ *E.g.*, *Schoenefeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016) (upholding against constitutional challenge under the Privilege and Immunities Clause a state requirement for nonresident bar members to maintain a physical office in the state), *cert. denied*, 137 S. Ct. 1580 (2017); *National Association for the Advancement of Multijurisdictional Practice (NAAMJP) v. Howell*, 851 F.3d 12 (D.C. Cir.) (joining "the chorus of judicial opinions" rejecting constitutional challenges of the NAAMJP and lawyer Joseph Giannini to local rules of practice limiting who may appear in particular state and federal courts), *cert. denied*, 138 S. Ct. 420 (2017); *NAAMJP v. Lynch*, 826 F.3d 191 (4th Cir.) (rejecting NAAMJP's constitutional challenge to conditions placed on admission to the Maryland federal district court bar), *cert. denied*, 137 S. Ct. 459 (2016); *Giannini v. Real*, 911 F.2d 354 (9th Cir.) (upholding constitutionality of California bar examination and local federal rules conditioning admission), *cert. denied*, 498 U.S. 1012 (1990); *Lawyers United Inc. v. U.S.*, 2020 WL 3498693 (D.D.C. June 29, 2020) (rejecting constitutional challenges to federal bar admission rules in D.C., California, and Florida), *aff'd*, 839 Fed. Appx. 570 (March 15, 2021).

⁴² 949 P.2d 1 (1998), *cert. denied*, 525 U.S. 920 ("*Birbrower*")

handled a matter in California for a California client in preparation for a California arbitration based on a contract governed by California law. The Court further held that because the firm violated California's UPL statute it could not enforce its fee agreement and collect the substantial fees it had earned for the California legal services it had provided.⁴³

Birbrower generated a great deal of controversy and concern among lawyers and law firms throughout the country. It particularly created uncertainty for lawyers who regularly practiced across state lines as to what amount of legal work and activity would constitute the unlawful practice of law. (Those interested in a more thorough discussion of *Birbrower* can find a deeper dive into its facts and ramifications at Appendix A.)

Although the California Court of Appeal case that quickly followed on the heels of *Birbrower*, *Estate of Condon v. McHenry* 65 Cal.App.4th 1138, 76 Cal. Rptr. 2d 922 (1998) ("*Condon*"), attempted to clarify some of these concerns by emphasizing that purpose of the UPL rules to protect the state's people and entities should be paramount in any analysis, the holding in *Condon* that a Colorado lawyer did not commit UPL by representing a Colorado client concerning a California matter was not widely noticed.

While there are courts that have deviated from *Birbrower*, *Birbrower's* influence continues to impact interstate UPL. For example, in the 2016 case *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016), a Colorado-admitted lawyer agreed to represent his in-laws in a post-judgment debt collection matter in Minnesota. The Colorado lawyer was not licensed in Minnesota and never set foot in the state, but he unsuccessfully tried to negotiate a settlement of the Minnesota matter by telephone and email.

In defending himself against disciplinary charges, the Colorado lawyer argued that a lawyer practices law *in* a jurisdiction in one of three ways: (1) by being physically present in the jurisdiction; (2) by establishing an office or other systematic and continuous presence in the jurisdiction; or (3) by entering an appearance in a matter through the filing of documents with a tribunal. *Id.* at 665. Citing *Birbrower*, the court determined that physical presence in the state was not the only way to practice law in Minnesota and that through multiple e-mails sent over several months, the lawyer advised Minnesota

⁴³ *Id.* at 11.

clients on Minnesota law in connection with a Minnesota legal dispute and attempted to negotiate a resolution of that dispute with a Minnesota attorney demonstrating an ongoing attorney-client relationship with his Minnesota clients and that his contacts with Minnesota were not fortuitous or attenuated. *Id.* at 666. Thus, the court held that the out-of-state lawyer committed the unauthorized practice of law in Minnesota by violating Minn. R. Prof. Conduct 5.5(a) resulting in the lawyer being disciplined.

In response to *Birbrower* and after issuance of the 2002 MJP Report, the ABA eventually adopted a revision to the Model Rules to authorize temporary practice in jurisdictions other than a lawyer's licensed jurisdiction.

The 2002 MJP Report and the Most Recent Revisions to ABA Model Rule 5.5

The 2002 MJP report, which preceded and largely served as an advocacy piece for changes to ABA Model Rule 5.5 adopted by the House of Delegates the same year, summarized the purported policy basis for multijurisdictional UPL restrictions in state statutes and the lawyer ethics rules:

In general, a lawyer may not represent clients before a state tribunal or otherwise practice law within a particular state unless the lawyer is licensed by the state or is otherwise authorized to do so. Jurisdictional restrictions promote a variety of state regulatory interests. Most obviously, by limiting law practice in the state to those whom the state judiciary, through its admissions process, has deemed to be qualified to practice law in the state, they promote the state interest in ensuring that those who represent clients in the state are competent to do so. Jurisdictional restrictions also promote the state interest in ensuring that lawyers practicing law within the state do so ethically and professionally. Lawyers licensed by the state are thought to be more conversant than out-of-state lawyers with state disciplinary provisions as well as with unwritten but understood expectations about how members of the local bar should behave, and lawyers in the state may be disciplined more easily and effectively than out-of-state lawyers when they engage in professional improprieties. By strengthening lawyers' ties to the particular communities in which they maintain their offices, jurisdictional restrictions may also help maintain an active and vibrant local bar, which in many communities serves a crucial public role, because lawyers serve voluntarily on court committees, in public office, and on boards of not-for-profit institutions in the community. 2002 MJP Report, at 9.

The 2002 MJP Report noted that “no state categorically excludes out-of-state lawyers and there is general agreement that, as a practical matter, lawyers cannot serve clients effectively unless accommodations are made for multijurisdictional law practice, at least on a temporary or occasional basis.” *Id.* at 10. For litigation matters, the Report noted that *pro hac vice* admission rules existed in every state but was not available for some aspects of litigation matters, such as pre-litigation work and ADR. *Id.* at 10, 12. Transactional lawyers “also commonly provide services in states in which they are not licensed,” and on behalf of clients in their state of admission, often “travel outside the state in order to conduct negotiations, gather information, provide advice, or perform other tasks relating to the representation.” *Id.* at 12. Thus, the Report noted that lawyers, as of the end of the 20th Century,

have general understandings about how jurisdictional restrictions apply to their work in states where they are not licensed. These understandings are shaped less by the wording of the UPL provisions or by decisional law, which is sparse, than by conventional wisdom or by what the U.S. Supreme Court has called “the lore of the profession.” On one hand, lawyers understand that they may not open a permanent office in a state where they are not licensed and also that they may not appear in the court of a state where they are not licensed without judicial authorization. On the other hand, lawyers recognize that they may give advice in their own states concerning the law of other jurisdictions, that they may represent out-of-state clients in connection with transactions and litigation that take place where the lawyer is licensed, and that they may travel to other jurisdictions in connection with legal work on behalf of clients who reside in and have matters in the state where the lawyer is licensed.

Id. at 13. And these understandings were “to some extent, reinforced by the sporadic enforcement of state UPL laws,” with regulatory actions “rarely brought against lawyers who assist clients on a temporary basis in connection with multi-state or interstate matters.” *Id.*

Consistent with the recommendations of the 2002 MJP Report, the ABA adopted temporary practice rules contained in Model Rule 5.5(c). It permits four exceptions to UPL that allow lawyers to “provide legal services on a temporary basis” in a jurisdiction where they are not admitted: (1) when they associate with local counsel who actively

participates in the matter; (2) when they are assisting or participating in an actual or potential proceeding before a tribunal, generally by obtaining pro hac vice admission; (3) when they are participating in an arbitration, mediation or other alternative resolution; and (4) where the legal services in the second state “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.” Model Rule 5.5(c) (1-4).

Model Rule 5.5(d) further allows lawyers admitted in another US jurisdiction or in a foreign jurisdiction, or a person lawfully practicing as in-house counsel under the laws of a foreign jurisdiction to provide legal services through an office or other systematic or continuous presence in a jurisdiction where the lawyer is not licensed if certain criteria are met. Model Rule 5.5(d-e). Model rule 5.5(a-b), however, essentially continued, other than otherwise as excepted under the above sub-sections, to prohibit interstate multijurisdictional practice.

These revisions to the ABA Model Rules met widespread approval in terms of being adopted by a majority of U.S. jurisdictions, but not all jurisdictions have done so, and issues persist. Some of those issues revolve around lawyers’ need to evaluate the approaches of jurisdictions that have not embraced the Model Rule approach to temporary practice, while other issues stem from problems involving the lack of “fit” between modern law practice and either regulating activity based only on geographic boundaries or based upon notions that any lawyer practices “the law of a jurisdiction.”

Competence as an Ongoing Regulatory Justification

Defenders of the current version of Rule 5.5 often assert that restrictions on multi-jurisdictional practice are necessary to ensure the competence of lawyers who represent clients in their jurisdiction. In addition to the previously discussed competence paradox involved in the privileges of licensed lawyers under the current regulatory structure, the modern landscape of how lawyers become licensed to practice law across the United States undermines this rationale.

As discussed above, jurisdiction to regulate the practice of law has been largely a matter of geographic boundaries up to this point,⁴⁴ with some exceptions.⁴⁵ Notably, authorization to practice law within the state of licensure is comprehensive; the license does not limit a lawyer to work involving the law of the licensing jurisdiction. Although jurisdictional licensing based exclusively on a lawyer's location has provided the benefit of clarity both in terms of the authorization and freedom to practice regardless of what laws or jurisdictions the lawyer's work might touch; lawyers can now effectively practice nationwide in many respects without ever leaving their licensing jurisdictions. Moreover, the jurisdictional regulatory scheme limits lawyers' ability to physically relocate while serving clients only in those jurisdictions in which the lawyers are admitted to practice.

Licensing Lawyers in 2021

Admission by Bar Examination

As discussed above, the competency argument for multi-jurisdictional practice restrictions assumes that admission to practice in one jurisdiction does not establish competence to practice in any other jurisdiction. The underlying premise in that proposition is that some special training or testing is required to demonstrate competence in a particular jurisdiction.

Presently, 41 U.S. jurisdictions have adopted the Uniform Bar Examination (including Michigan, which announced in October 2021 that it would adopt the UBE, to be administered starting in 2023). The candidates for admission in those jurisdictions take identical bar examinations, although the minimum threshold for passing scores varies among jurisdictions:⁴⁶

⁴⁴ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §3(1) (2000), "A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client...at any place within the admitting jurisdiction." *Id.* COMMENT (e): "Admission in a state permits a lawyer to maintain an office and otherwise practice law anywhere within its borders."

⁴⁵ Federally authorized practice, for example, allows one to practice law nationwide. See *Sperry v. Florida*, 373 U.S. 379 (1963). Federal law sets the maximum qualifications required to practice before all but one federal agency at being a member of the bar of a state. See 5 USC §500(b). Some federal courts also allow for application to admission based upon a bar license in any jurisdiction along with admission to a federal court in that jurisdiction. See, e.g., L.R.Civ.P. 83.1 (WDNY).

⁴⁶ See <https://www.ncbex.org/exams/ube/score-portability/minimum-scores/> (last visited Jan. 8, 2022).

260	Alabama, Minnesota, Missouri, New Mexico, North Dakota
264	Indiana, Oklahoma
266	Connecticut, District of Columbia, Illinois, Iowa, Kansas, Kentucky, Maryland, Montana, New Jersey, New York, South Carolina, Virgin Islands
270	Arkansas, Maine, Massachusetts, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wyoming
272	Idaho, Pennsylvania
273	Arizona
276	Colorado
280	Alaska

Twenty-four of the UBE jurisdictions have no additional or substitute exam component tailored to that particular jurisdiction.⁴⁷ Of the 16 jurisdictions that have a state-specific component, nine require attending a course or tutorial in the jurisdiction’s law (all the courses but one, New Mexico’s, are online, and only New York requires both an online course and an online test). When an applicant from another jurisdiction transfers in a passing UBE score, such applicants may also be required by these nine states to complete the state-focused course or tutorial. Seven jurisdictions (including New York) require an applicant to complete an online multiple-choice test. All seven states require anyone seeking admission, either by bar exam or transfer of score from another jurisdiction, to complete the test.

⁴⁷ <https://reports.ncbex.org/comp-guide/charts/chart-5/#1610472174303-4aeeee78b-6a74> (last visited Jan. 8, 2022).

Admission on Motion

Virtually all of the jurisdictions permitting admission by motion impose the same jurisdiction-specific exam and course requirements for those applicants. Otherwise, the states permitting admission by motion treat the lawyer's experience in their home jurisdiction as sufficient to demonstrate competence to be licensed in the new jurisdiction.

Conclusion

Geographic limitations on a lawyer's provision of services long accepted by the legal profession in the name of client protection often deprive clients of ever having an opportunity to exercise a truly full and free "choice" of counsel. These geographic restrictions exist even if lawyer and client are both willing to enter into the engagement, oftentimes already having an existing professional relationship. Geographic limitations also make no accommodation for the idea that the relationship may benefit from both the level of trust that the client has in the lawyer as the "first choice" as well as any existing knowledge the lawyer has about the client, including relevant goals, priorities, tendencies, and communication style.

Instead of such a rigid approach, APRL's proposed Model Rule 5.5 allows clients to consciously choose the lawyer they want to represent them as long as the lawyer has disclosed to the client the facts as to where they are licensed. It does not abandon client protection in empowering client choice. It also ensures that lawyers who ultimately do provide incompetent legal services, or who otherwise run afoul of their ethical obligations, will be capable of being held responsible for their misconduct or shortcomings in any (or all) of the relevant jurisdictions.

APRL's proposal to revise Model Rule 5.5 is also consistent with the trend that has come from several jurisdictions who have issued guidance during the 2020 Pandemic to lawyers who found themselves practicing across state lines less by choice and more by necessity.⁴⁸ Not all of the guidance issued in these jurisdictions has been focused entirely

⁴⁸ D.C. Opinion 24-20: Teleworking from Home and the COVID-19 Pandemic (March 23, 2020) (interpreting the "incidental and temporary practice" exception of DC's Rule 49(c)(13)); *see also* N.J. Committee on the Unauthorized Practice of Law Op. 59, Advisory Committee on Prof. Ethics Op. 742 (Oct. 6, 2021); Pennsylvania State Bar Op. 300 (April 2020); Utah State Bar Ethics Advisory Committee Opinion

upon, or limited to situations where, lawyers were forced for public health reasons to live somewhere other than where they were licensed, but, if history is a guide, absent further improvements in the rule itself, then the progress that has been made will likely not come to fruition. APRL's proposed Model Rule 5.5 embeds the concepts of client choice, transparency, and accountability in a way that we believe will long outlive those who currently practice law under the existing regulatory system.

No. 19-03 (May 14, 2019); The Fla. Bar re: Advisory Opinion – Out-of-State Attorney Working Remotely From Florida Home, SC20-1220 (Fla. May 20, 2021).