

# REPLACING GEOGRAPHIC LINES WITH CONCEPTUAL LINES: A PROPOSAL FOR LIMITED AUTHORIZATION OF MULTIJURISDICTIONAL PRACTICE OF LAW

Patrick Medley\*

*Abstract:* State regulations have created substantial barriers to lawyers who engage in multijurisdictional practice of law. Applying the amorphous concept of practice of law to modern society results in many lawyers who knowingly or unknowingly practice in multiple states—including states where they are not admitted to the bar. Yet there is no simple means by which a lawyer can obtain permission to engage in multijurisdictional practice in the United States.

This Comment proposes a way for Congress to authorize multijurisdictional practice for some aspects of legal practice without completely displacing the role of state bars. Drawing on analogies to the division of legal practice in the United Kingdom and other commonlaw countries, this Comment argues that the inherent difference between in-court and out-of-court practice—epitomized in the barrister and solicitor roles—defines the proper dividing line between what Congress should and should not preempt. This Comment thus proposes a scheme of decentralized authorization for multijurisdictional practice in a solicitor-like capacity, while reserving decisions about in-court representation to the states.

## INTRODUCTION

A newly minted attorney, fresh from having passed the Oregon bar, hangs up her shingle in Portland, Oregon. A client contacts the attorney about a new case: he works as a fisherman and was injured while fishing in Canadian waters. He is currently being treated across the Columbia River in Vancouver, Washington, where the attorney also lives. He wants to bring an action in federal court under maritime law. The two meet at a hospital in Vancouver, discuss the case, and sign a contingency agreement.

Unfortunately, the attorney may have just committed unauthorized practice of law in Washington.<sup>1</sup> Even if the attorney told her client up front

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\* J.D. Candidate, University of Washington School of Law, Class of 2020. I am also a practicing patent agent, so I have been able to experience the same freedom of interstate practice within my chosen field that this Comment advocates for lawyers in general. I would like to thank Professor Hugh Spitzer for his guidance in the early stages of writing this piece and the *Washington Law Review* editorial staff for their support and suggestions.

1. *Cf. Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 182–84 (Fla. 1995) (finding unauthorized practice in Florida under similar facts).

that she was not admitted to practice in Washington and that she would only be able to represent him in federal court, where she was admitted to practice, this may not save her from charges of unauthorized practice.<sup>2</sup> She could even face criminal charges.<sup>3</sup>

Upon realizing all of this and fearing these consequences, the attorney decides never to leave the state of Oregon. She eventually lands a large corporate client that wants to hire her on a continuing basis to handle a variety of legal matters. The client is a California corporation with offices in many states, including Oregon. The attorney only works from her office in Oregon and sends her work product by email and telephone to her client in California. Alas, even though she has never set foot in California, by handling corporate matters for the California corporation and communicating legal advice remotely, she may once again face charges of unauthorized practice of law.<sup>4</sup>

Admittedly, the odds of being prosecuted for these types of violations are small.<sup>5</sup> Perhaps lawyers should just flout the law and trust that they will beat the odds?<sup>6</sup> On the other hand lawyers, as a species, are often considered risk-averse.<sup>7</sup> This risk aversion can benefit clients by

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2. See *id.* at 182.

3. See WASH. REV. CODE §§ 2.48.180(2), (3)(a) (2019).

4. See, e.g., *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 5–6 (Cal. 1998) (observing that virtual presence in California can constitute practice of law in California); Daniel A. Vigil, *Regulating In-House Counsel: A Catholicon or a Nostrum?*, 77 MARQ. L. REV. 307, 312 (1994) (concluding, based on response from the California chief justice to a hypothetical problem mirroring the text facts, that “California likely would consider the hypothetical fact pattern to be the unauthorized practice of law”).

5. Sara J. Lewis, Note, *Charting the “Middle” Way: Liberalizing Multijurisdictional Practice Rules for Lawyers Representing Sophisticated Clients*, 22 GEO. J. LEGAL ETHICS 631, 634 (2009); see also Vigil, *supra* note 4, at 311–12 (discussing low likelihood of enforcement in several states).

6. Unfortunately, this appears to be the road many attorneys are forced to take. See Lewis *supra* note 5, at 634 (“Practicing attorneys violate [multijurisdictional practice] rules ‘habitually’ and on a ‘daily basis.’” (first quoting Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 685–86 (1995), and then quoting Diane Leigh Babb, *Take Caution When Representing Clients Across State Lines: The Services Provided May Constitute the Unauthorized Practice of Law*, 50 ALA. L. REV. 535, 535 (1999))). The Washington State Bar provides a way of estimating how many in-house counsel engage in this kind of practice. Washington requires out-of-state lawyers working as in-house counsel to register as “House Counsel.” WASH. ADMISSION & PRACTICE R. 8(f). A search of the legal directory of the Washington State Bar Association reveals 301 active, registered house counsel, compared to 32,661 active members of the bar. *Legal Directory*, MYWSBA, <https://www.mywsba.org/personifyebusiness/LegalDirectory.aspx> [https://perma.cc/N3SN-F3AT] (301 active, registered house counsel). By comparison, Daniel A. Vigil estimated over 8,000 of California’s 125,000 lawyers were in-house counsel. Vigil, *supra* note 4. If these ratios hold true generally, this suggests about one in every seven or eight in-house counsel in a state is not a member of the state’s bar.

7. See Paul Brest & Linda Krieger, *Symposium on the 21st Century Lawyer: On Teaching*

tempering their own risk preference and alerting them to risks they would otherwise ignore.<sup>8</sup> Yet it can also lead lawyers to systematically overestimate risks, and thus be excessively deterred in their practice, particularly where legal consequences are uncertain.<sup>9</sup>

And where rules against unauthorized practice of law are concerned, uncertainty is a major problem. Not only is “practice of law” ill-defined as a concept, but so too is the question of which state—or states—an attorney is practicing law in.<sup>10</sup> Nor can one realistically avoid the danger of engaging in unauthorized practice by becoming authorized: licensure is on a state-by-state basis, so it is impossible to simply receive a blanket authorization to practice law.<sup>11</sup>

States have justified their restrictions on practice of law primarily on consumer-protection grounds.<sup>12</sup> But the current system of controlling the practice of law at the state level inhibits interstate practice in a manner not justified by these arguments.<sup>13</sup> Thus, there is a need for Congress to intervene.<sup>14</sup>

This Comment discusses the problems involved in the current system of regulation of the practice of law and proposes a way that Congress can enable lawyers to practice law across state lines in some, but not all, aspects of legal practice. Part I discusses how the current system of regulation of law by individual states works and the barriers to multijurisdictional practice of law that result. Part II describes the tools available for Congress to intervene, the areas in which Congress already authorizes interstate practice of law, and the extent to which Congress may be limited in its intervention. Part II concludes by identifying a longstanding way of dividing the legal profession into in-court and out-of-court practice as a candidate for drawing the line between the types of

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*Professional Judgment*, 69 WASH. L. REV. 527, 541 (1994); Susan R. Helper, Comment, *Governing Alliances: Advancing Knowledge and Controlling Opportunism*, 53 CASE W. RES. L. REV. 929, 931 (2003). But cf. Alicia E. Plerhoples, *Risks, Goals, and Pictographs: Lawyering to the Social Entrepreneur*, 19 LEWIS & CLARK L. REV. 301, 304 (2015) (“The idea that lawyers are risk averse is often presented in legal scholarship as fact, with little to no empirical or anecdotal evidence.”).

8. Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 495 (2007).

9. Donald C. Langevoort and Robert K. Rasmussen, *Skewing the Results: The Role of Lawyers in Transmitting Legal Rules*, 5 S. CAL. INTERDISC. L.J. 375, 379, 438 (1997).

10. See *infra* section I.A.

11. Subject to exceptions in certain fields where federal law preempts state restrictions, such as those discussed in section II.B. Outside of these types of exceptions, to be authorized in every state, one must apply to each for admission to the bar. See *infra* section I.B.

12. See *infra* section I.D.

13. See *infra* sections I.C.I.D.

14. See *infra* Part II.

interstate practice that Congress should and should not authorize. Part III describes how Congress can use this dividing line to preempt local state monopolies on the practice of law and provide for uniform, interstate practice of law outside of court. Finally, Part IV describes how Congress could implement a decentralized system of admission for interstate solicitor-like practice.

## I. STATE REGULATION OF INTERSTATE PRACTICE OF LAW

This Part discusses the way the practice of law is currently regulated, including the scope of states' regulation of the profession,<sup>15</sup> the manner in which that regulation is controlled,<sup>16</sup> and the effect state regulation has on the practice of law and the provision of legal services.<sup>17</sup> Finally, this Part discusses the degree to which these regulations can benefit the public.<sup>18</sup>

### A. *Scope of State Regulation*

Traditionally, states have been the primary regulators of the practice of law.<sup>19</sup> The states' power to regulate practice of law has long been recognized, despite the burdens such regulations can impose upon the public.<sup>20</sup> Regulating the practice of law in a jurisdiction includes determining what counts as legal practice in that jurisdiction.<sup>21</sup>

Generally, states authorize practice of law for members of the state's bar.<sup>22</sup> As a corollary, they generally prohibit practice of law by nonlawyers, meaning "anyone who does not comport with state Bar requirements."<sup>23</sup> For example, Washington State criminalizes the

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15. See *infra* section I.A.

16. See *infra* section I.B.

17. See *infra* section I.C.

18. See *infra* section I.D.

19. MODEL CODE OF PROF'L RESPONSIBILITY EC 3-9 (AM. BAR ASS'N 1980).

20. See, e.g., *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("That the States have broad power to regulate the practice of law is, of course, beyond question. But it is equally apparent that broad rules framed to protect the public and to preserve respect for the administration of justice can in their actual operation significantly impair the value of associational freedoms." (internal citations omitted)).

21. See MODEL CODE OF PROF'L RESPONSIBILITY, *supra* note 19, Canon 3, note 2 ("What constitutes unauthorized practice of the law in a particular jurisdiction is a matter for determination by the courts of that jurisdiction.") (quoting ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 198 (1939)).

22. See, e.g., Elana Nightingale Dawson, *Lawyers' Responsibilities Under Title III of the ADA: Ensuring Communication Access for the Deaf and Hard of Hearing*, 45 VAL. U. L. REV. 1143, 1171 (2011).

23. Osman E. Nawaz, *You Are Not a Lawyer: Does Representation of Carriers by Non-Lawyers in Federal Motor Carrier Safety Administration Enforcement Cases Constitute the Unauthorized*

unlawful practice of law, which occurs when a nonlawyer “practices law, or holds himself or herself out as entitled to practice law.”<sup>24</sup> Unlawful practice of law also occurs when nonlawyers and lawyers join in a firm or similar business to practice law or otherwise share legal fees.<sup>25</sup>

Practice of law is defined in Washington as “the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law.”<sup>26</sup> This includes advising others of their rights in exchange for consideration; selecting, drafting, or completing legal documents for others; representation in court and similar proceedings; and negotiation of others’ legal rights and responsibilities.<sup>27</sup>

Some states treat unauthorized practice as a criminal matter, while others treat it as a civil matter.<sup>28</sup> But most states prohibit the practice of law by those who are not a member of the state’s bar, even if they are members of another state’s bar.<sup>29</sup> Determining the outer limits of the practice of law is fact-intensive, and states vary substantially in their definitions.<sup>30</sup> Indeed, some states have given up entirely.

For example, the Supreme Court of Arkansas concluded that a clear definition was impossible: “Research of authorities by able counsel and

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*Practice of Law?*, 32 TRANSP. L.J. 21, 22 (2004).

24. WASH. REV. CODE § 2.48.180(2)(a) (2019); *see also id.* § 2.48.180(3)(a) (“Unlawful practice of law is a crime. A single violation of this section is a gross misdemeanor.”).

25. *Id.* §§ 2.48.180(2)(b)–(e).

26. WASH. GEN. R. 24(a) (2019).

27. *Id.*; *see also* Hagan & Van Camp, P.S. v. Kassler Escrow, Inc., 96 Wash. 2d 443, 446, 635 P.2d 730, 732 (1981) (“[Practice of law] is generally acknowledged to include not only the doing or performing of services in the courts of justice, throughout the various stages thereof, but in a larger sense includes legal advice and counsel and the preparation of legal instruments by which legal rights and obligations are established.” (quoting Wash. State Bar Ass’n v. Great W. Union Fed. Sav. & Loan Ass’n, 91 Wash. 2d 48, 54, 586 P.2d 870, 875 (1978))).

28. *Compare* CAL. BUS. & PROF. CODE § 6126 (2019) (unauthorized practice a misdemeanor in California), *and* N.Y. EDUC. LAW § 6512 (2019) (unauthorized practice a felony in New York), *with* UTAH R. JUD. ADMIN. Rule 14-111(a) (2019) (stating unauthorized practice in Utah “shall not constitute a crime”), *and* Del. State Bar Ass’n v. Alexander, 386 A.2d 652, 665 (Del. 1978) (noting “the unauthorized practice of law is not a criminal offense in [Delaware]”).

29. *See* Pamela A. McManus, *Have Law License; Will Travel*, 15 GEO. J. LEGAL ETHICS 527, 538 (2002). *But see* COLO. R. CIV. P. § 205.1 (2018) (allowing practice of law by out-of-state lawyers non-courtroom context); *see generally* David A. Gerregano, Annotation, *What Constitutes “Unauthorized Practice of Law” by Out-of-State Counsel*, 83 A.L.R. 5th 497 (2000).

30. McManus, *supra* note 29. Many states eschew statutory definitions of “practice of law,” leaving it to courts to determine on a case-by-case basis. *Id.* For a comprehensive list of different states’ definitions of practice of law, *see* A.B.A. TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, STATE DEFINITIONS OF THE PRACTICE OF LAW app. A (2003), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/model-def\\_migrated/model\\_def\\_statutes.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/model-def_migrated/model_def_statutes.authcheckdam.pdf) [<https://perma.cc/U7JZ-BDR7>].

by this court has failed to turn up any clear, comprehensible definition of what really constitutes the practice of law.”<sup>31</sup> Broadly speaking, the result is a “lack of a nationwide consensus on what constitutes the ‘practice of law.’”<sup>32</sup> The amorphous nature of *practice of law* can lead to particularly thorny issues when lawyers engage in activities that cross state lines.

An example of the wide range of interstate activities that can implicate state unauthorized practice laws is *Birbrower, Montalbano, Condon & Frank v. Superior Court*.<sup>33</sup> In *Birbrower*, the California Supreme Court held that when lawyers from New York visited a California client to discuss a private arbitration proceeding and filed for private arbitration in San Francisco, the out-of-state lawyers were practicing law in California.<sup>34</sup> Although the lawyers in *Birbrower* did visit California, presence in California was not necessary to practice law there: the court explained that “one may practice law in the state . . . 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.”<sup>35</sup> The court “reject[ed] 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,” holding that a case-by-case analysis was required.<sup>36</sup> However, the upshot of *Birbrower* is that any contact with California in the course of practicing law might put an out-of-state attorney at risk of unauthorized practice, without the attorney having any practical way to know until after charges were filed.<sup>37</sup>

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31. Ark. Bar Ass’n v. Block, 323 S.W.2d 912, 914 (Ark. 1959); accord State Bar of Ariz. v. Ariz. Land Title & Tr. Co., 366 P.2d 1, 8–9 (Ariz. 1961) (“In the light of the historical development of the lawyer’s functions, it is impossible to lay down an exhaustive definition of ‘the practice of law’ by attempting to enumerate every conceivable act performed by lawyers in the normal course of their work.”).

32. Hugh D. Spitzer, *Model Rule 5.7 and Lawyers in Government Jobs—How Can They Ever Be “Non-Lawyers”?*, 30 GEO. J. LEGAL ETHICS 45, 52 (2017); see also *id.* at 45, 52–54 (arguing that the Model Rules of Professional Conduct fail to adequately distinguish between “lawyer” and “non-lawyer” functions, potentially forcing attorneys to treat any law-related activity as though it were practice of law).

33. 949 P.2d 1 (Cal. 1998).

34. *Id.* at 7.

35. *Id.* at 5–6.

36. *Id.* at 6.

37. Cf. La Tanya James & Siyeon Lee, *Adapting the Unauthorized Practice of Law Provisions to Modern Legal Practice*, 14 GEO. J. LEGAL ETHICS 1135, 1140 (2001) (“*Birbrower* generated a great deal of concern and anxiety among lawyers and created uncertainty about what level of legal work and activity would constitute the unlawful practice of law.”).

Not all states have gone as far as California did in *Birbrower*,<sup>38</sup> and some have made attempts to avoid parallel situations. For example, amendments to the Model Rules of Professional Conduct to permit small amounts of temporary practice by out-of-state lawyers.<sup>39</sup> This relaxation has only been adopted in some states, however; California, in particular, is not among them and for that reason *Birbrower*'s broad definition likely still holds.<sup>40</sup> But even in states that have not gone as far as California, the amorphous definition of *practice of law*, coupled with the need to evaluate each case on its own facts, means the risk remains that any given connection to a state might implicate its unauthorized practice laws.<sup>41</sup>

Moreover, state regulation of the practice of law is not limited to matters involving the law of that state. States generally prohibit the practice of law pertaining to any legal matter, even when lawyers in the state only handle matters involving the law of other jurisdictions.<sup>42</sup> For example, in *Chandris, S.A. v. Yanakakis*,<sup>43</sup> the Florida Supreme Court held that an attorney residing in Florida, but licensed only outside Florida, engaged in unlicensed practice of law when he gave a Greek seaman pre-litigation advice and entered into a contingent fee contract with him.<sup>44</sup> That the attorney informed the client that he was not admitted to practice law in Florida was of no moment.<sup>45</sup> Nor did it help that (1) the matter solely involved federal maritime law; (2) the attorney was admitted to practice in Massachusetts and in federal courts; or (3) the attorney "was especially well qualified in the practice and teaching of maritime law."<sup>46</sup>

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38. See, e.g., *Fought & Co. v. Steel Eng'g & Erection, Inc.*, 951 P.2d 487, 496–99 (Haw. 1998) (holding that Oregon counsel did not engage in unauthorized practice of law in Hawai'i despite consulting with a Hawai'i client, doing research for the client's case, and planning appellate strategy because the conduct occurred primarily in Oregon and local counsel handled the case itself).

39. See WILLIAM K. SJOSTROM, JR., *BUSINESS ORGANIZATIONS: A TRANSACTIONAL APPROACH*, 278–79 (2d ed. 2016).

40. *Id.*

41. See Spitzer, *supra* note 32, at 54.

42. See MODEL RULES OF PROF'L CONDUCT r. 5.5(b) (prohibiting any lawyer not admitted to practice in a jurisdiction from establishing a "systematic and continuous presence in [that] jurisdiction for the practice of law"); *id.* r. 5.5(c)–(d) (recognizing only limited exceptions, including "services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction"); *id.* cmt. 1 ("A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice."); David G. Ebner, *Crossing the Border: Issues in Multistate Practice of Law*, in 35 ROCKY MT. MIN. L. INST. 2-1, § 2.03, at 2–13 n.38 (1989) ("It is, of course, clear that a resident lawyer, not licensed by the state, may not avoid unauthorized practice sanctions simply by limiting his practice to federal questions.").

43. 668 So. 2d 180 (Fla. 1995).

44. *Id.* at 182–84.

45. See *id.* at 187–88 (Anstead, J., dissenting).

46. *Id.* at 187.

The same basic principle holds in other states as well: practice of any law in connection with a state equally implicates the state's monopoly on the practice of law, "whether the legal principles . . . were established by . . . [the state], some other state of the United States, the United States of America, or a foreign nation."<sup>47</sup>

Thus, neither by avoiding physical presence in a state nor by avoiding cases involving the state's laws can attorneys shield themselves from charges of unauthorized practice of law in states where they are not admitted: even the thinnest of contacts raises the specter of unauthorized practice. To understand the import of states' broad rules against unauthorized practice of law, it is necessary to understand how states authorize the practice of law.

### B. *The Way States Control Practice of Law*

Because states only forbid *unauthorized* practice of law, understanding the effect of state regulations requires an understanding of how states determine when to grant and when to withhold authorization to practice law. This section discusses how the states determine who is and is not authorized to practice law, and how the manner of regulation chosen by the states has produced localized monopolies in legal practice.

To enforce laws against unauthorized practice of law, it is essential to have a method to determine who is and is not authorized. Just as the question of what constitutes practice of law is complicated and fact-intensive,<sup>48</sup> so too is the question of how to determine who is authorized to practice law.<sup>49</sup> While many states address this question in part through legislation, entry into practice is ultimately controlled "by the judiciary, and hence effectively by the bar," thus putting lawyers themselves in charge of the regulation of the practice of law.<sup>50</sup> Judicial control is widespread: the American Bar Association has concluded that "judicial regulation of all lawyers is a principle firmly established . . . in every

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47. *Kennedy v. The Bar Ass'n of Montgomery Cty., Inc.*, 561 A.2d 200, 209 (Md. 1989); *accord Ginsburg v. Kovrak*, 139 A.2d 889, 893 (Pa. 1958); *see, e.g., In re Roel*, 144 N.E.2d 24, 26 (N.Y. 1957) (same principle applies in New York); *cf. Leis v. Flynt*, 439 U.S. 438, 443 (1979) ("[T]he Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another." (citing *Ginsburg*, 139 A.2d at 893)).

48. *See supra* section I.A.

49. *See, e.g., Deborah J. Merritt et al., Raising the Bar: A Social Science Critique of Recent Increases to Passing Scores on the Bar Exam*, 69 U. CIN. L. REV. 929, 936 (2001) (discussing the difficulty of determining whether bar exam difficulty is set to high or too low).

50. Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1698 (2008).



state.”<sup>51</sup> This arrangement, by which lawyers directly or indirectly control entry into their own profession, results in a legal monopoly, because by controlling access to the legal profession in a state, that state’s lawyers can set barriers to entry to reduce competition.<sup>52</sup> By controlling who is authorized to practice law, states control who is allowed to compete in the market for legal services.<sup>53</sup>

Receiving a general authorization to practice law in a state requires admission to the state’s bar, which is typically determined through the state’s bar examination.<sup>54</sup> In the majority of states, admission to the bar requires taking the Uniform Bar Exam (UBE), and many states add a jurisdiction-specific test either before or after taking the UBE.<sup>55</sup> Each participating jurisdiction independently sets a passing score on the exam, with current minimum passing scores ranging from 260 to 280.<sup>56</sup> Additionally, most states require a passing score on the Multistate Professional Responsibility Examination (MPRE),<sup>57</sup> as well as certain

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51. *Id.* (quoting ROBERT MACCRATE ET AL., A.B.A. SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 116 (1992)).

52. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581, 2581 (1999); see also Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *STAN. L. REV.* 1, 4 n.7 (1981) (pointing out that lawyers’ self-regulation technically constitutes a cartel, rather than a monopoly); Soha F. Turfler, Note, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach to Defining the Practice of Law*, 61 *WASH & LEE L. REV.* 1903, 1916–17 (2004) (“The resulting ‘legal monopoly’ allows for uncompetitive prices, and as the costs of legal services rise, less affluent individuals are pushed out of the market.”).

53. See generally Denckla, *supra* note 52 (discussing how control over authorization to practice has given monopoly power to state bars and reduced competition).

54. Abigail L. Deblasis, *Another Tile in the “Jurisdictional Mosaic” of Lawyer Regulation: Modifying Admission by Motion Rules to Meet the Needs of the 21st Century Lawyer*, 38 *N. ILL. U. L. REV.* 205, 208 (2018).

55. See *Understanding the Uniform Bar Examination*, NCBE (2019), (adapting Presentation, Nat’l Conf. of B. Examiners (July 2017)), <http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F209> [<https://perma.cc/9SU8-HH5U>] (showing adoption of the UBE by thirty-two states, the District of Columbia, and the Virgin Islands as of 2019, with Ohio joining in 2020). The UBE was introduced recently, with the first adoption in 2010 by Missouri. See Debra Cassens Weiss, *With Missouri Move, Idea of Uniform Bar Exam Finally Gets Legs*, A.B.A. J. (Apr. 29, 2010), [http://www.abajournal.com/news/article/with\\_missouri\\_move\\_idea\\_of\\_uniform\\_bar\\_exam\\_finally\\_gets\\_legs](http://www.abajournal.com/news/article/with_missouri_move_idea_of_uniform_bar_exam_finally_gets_legs) [<https://perma.cc/T8M7-3DFB>]. Prior to the introduction of the UBE, states used entirely separate admissions criteria, but nearly all states used the Multistate Bar Examination (a UBE component) as part of their admissions process. See Merritt et al., *supra* note 49, at 932 (noting that all but three states used the Multistate Bar Examination as of 2001).

56. *Understanding the Uniform Bar Examination*, *supra* note 55.

57. See, e.g., Hon. David L. Baker, *The Future of Legal Education: Should Law-School Applications Include a Warning Label?*, 96 *IOWA L. REV.* 1495, 1506 (2011). The MPRE is a multiple-choice test of the professional standards for practice of law. See *Multistate Professional*

other requirements such as evaluation of the attorney's character and fitness.<sup>58</sup> Passing the bar is a substantial and difficult undertaking<sup>59</sup> and thus represents a significant barrier to entry into the legal profession.

There are two main alternatives to the normal bar admission process that provide some limited mitigation of this barrier: reciprocity and pro hac vice admission.<sup>60</sup> Pro hac vice admission allows an attorney who is not a member of a state's bar to practice within a state, but that admission is limited to a specific matter. Furthermore, admission is only available in relation to court proceedings, not transactional practice.<sup>61</sup> This can lead to absurd situations like that in the Florida case of *Chandris, S.A. v. Yanakakis*.<sup>62</sup>

In *Chandris*, a highly-qualified attorney admitted to another state's bar, who would be undoubtedly qualified for pro hac vice admission, committed unauthorized practice by entering an agreement to represent the client in court.<sup>63</sup> Thus, pro hac vice admission only provides sporadic relief from the barriers of entry to legal practice in a state, and it does nothing to help practice outside of a courtroom context,<sup>64</sup> where the question of whether a lawyer is conducting unauthorized practice of law is most uncertain.<sup>65</sup>

Reciprocity admission provides a larger scope of protection to an attorney's practice. This type of admission involves the use of admission in one state's bar to shortcut admission into the bar of another state.<sup>66</sup> Because recipients of reciprocity admission are authorized to practice, they need no longer fear prosecution for unauthorized practice from the reciprocating state, regardless of the matter involved. Reciprocity

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*Responsibility Examination*, NCBE, <http://www.ncbex.org/exams/mpre/> [<https://perma.cc/7F3H-LLUG>]. It is used as a qualification requirement in U.S. jurisdictions except Wisconsin and Puerto Rico. *Id.*

58. Deblasis, *supra* note 54, at 258.

59. Benjamin H. Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 446 (2001).

60. See Gerregano, *supra* note 29, at 1a; McManus, *supra* note 29, at 533–34.

61. Turfler, *supra* note 52, at 1914–15.

62. 668 So. 2d 180 (Fla. 1995).

63. See *id.* at 182–83; *id.* at 187–88 (Anstead, J., dissenting) (“[The attorney] was, at all material times, admitted to practice in the federal courts and in Massachusetts, and he was especially well qualified in the practice and teaching of maritime law . . . Presumably, under the majority analysis, a Massachusetts lawyer, like Yanakakis, could have come to Florida and properly done the same things that Yanakakis did.”).

64. See Turfler, *supra* note 52, at 1914–15.

65. See *supra* section I.A (discussing the ill-defined boundaries of the practice of law outside of court).

66. McManus, *supra* note 29, at 533.

admission often involves additional requirements, such as a length of time in practice, intent to substantially practice, and independent fitness evaluation requirements.<sup>67</sup> Whether reciprocity is available is determined between different states on a pairwise basis, with the normal model being a symmetrical exchange: State A will only grant admission to State B attorneys if State B does the same to attorneys in State A.<sup>68</sup>

There are some weaknesses in this apparently symmetrical system, however. For example, the UBE provides for score portability, in which scores on the UBE used for one state's bar exam can be used for bar admission in other states.<sup>69</sup> But this introduces a qualification to the symmetry: a passing score in one state may not qualify for reciprocity in another state requiring a higher score.<sup>70</sup> Thus, by raising the passing score, a state can continue to reap the benefits of reciprocity with other UBE states while preventing many of those states' lawyers from competing within the state.<sup>71</sup> Because this eliminates a pressure to adopt uniform bar admission standards and incentivizes artificially high admissions requirements,<sup>72</sup> this may reduce the effectiveness of reciprocity in lowering barriers to entry.

Other aspects of reciprocity further weaken the reciprocity system's ability to mitigate monopoly effects of states' bar admission rules. First, as mentioned above, most states attach additional requirements to reciprocity admission, including requiring a certain minimum length of time in practice, demonstration of an intent to substantially practice in the reciprocating state, and independent evaluations of character and fitness requirements.<sup>73</sup> Lawyers who do not meet these extra requirements may lose out on reciprocity's protection.

Moreover, reciprocity admission requires an application, and is not

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67. *Id.*

68. *Id.*

69. See *Understanding the Uniform Bar Examination*, *supra* note 55.

70. See *id.*

71. For example, Alaska's current UBE minimum passing score is 280, while Missouri's is 260. *Id.* All passing Alaska UBE scores are thus "portable" to Missouri for admission purposes, unlike in Missouri, where attorneys scoring between 260 and 280 would not be able to use their UBE scores to qualify for admission in Alaska. See *id.*

72. In particular, raising passing scores allow states to confer a benefit to their lawyers (reduced competition) without incurring a corresponding cost (because they can still be authorized to practice in states with lower requirements).

73. McManus, *supra* note 29, at 533; cf. *Understanding the Uniform Bar Examination*, *supra* note 55 (showing, in contrast to the minimum practice term requirements of reciprocity, various "maximum ages" for transferring UBE scores, from two years to five years).

automatic,<sup>74</sup> so an attorney cannot simply rely on the availability of reciprocity to another state to avoid engaging in unauthorized practice—the attorney must actually apply (and be admitted) in advance of practicing. Thus, even if an attorney qualifies for reciprocity, actually taking advantage of it requires advance knowledge of which jurisdictions the lawyer will end up practicing in, which is hard to determine in retrospect, much less in advance.<sup>75</sup>

Finally, many states do not engage in reciprocity at all: California, for example, does not reciprocate with any state.<sup>76</sup> This results in disjointed cliques of reciprocating and non-reciprocating states, with multiple islands of no reciprocity at all.<sup>77</sup> This patchwork of reciprocating and non-reciprocating states has been criticized as a “balkaniz[ation]” of the American legal profession “by the geographical limits of state lines.”<sup>78</sup>

Thus, the current system of self-governance in state bar admissions has generated a patchwork of localized monopolies that inhibit free movement between states. Some avenues exist by which lawyers can avoid the resulting barriers to entry, but the extent of these safeguards is limited. The result is that lawyers continue to face burdens from state regulations when practicing across state lines.

### C. *The Burden of State Regulations on the Multistate Practice of Law*

The most obvious burden produced by the current system of regulating the practice of law is economic: state restrictions on practice reduce supply of lawyers, thus raising the price of legal services and reducing the quantity supplied.<sup>79</sup> This problem is closely tied to laws prohibiting interstate practice, because states impose barriers to admission to protect local attorneys from competition.<sup>80</sup> Monopoly pricing involves the power

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74. McManus, *supra* note 29, at 533.

75. For example, an attorney who unexpectedly finds himself practicing in a foreign jurisdiction due to a “virtual presence” rule, see *supra* notes 33–37 and accompanying text (discussing *Birbrower*), may be committing unauthorized practice even if he would have qualified for reciprocity in the state in question.

76. McManus, *supra* note 29, at 533. For a comprehensive guide to current bar admission requirements, see COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (NAT’L CONFERENCE OF BAR EXAMINERS & AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR 2018) [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/2018\\_ncbe\\_comp\\_guide.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/2018_ncbe_comp_guide.pdf) [<https://perma.cc/LNW2-WEQX>].

77. See generally *Reciprocity – Attorneys*, USLEGAL, <https://attorneys.uslegal.com/licensing-of-attorneys/reciprocity/> [<https://perma.cc/AP9M-KABW>].

78. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 865 (1986).

79. Denckla, *supra* note 52, at 2595–96.

80. See Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission*

to exclude competitors.<sup>81</sup> The opposite situation—“regulatory competition” in which states compete to provide legal rules to those they govern because the governed can choose which state’s laws will govern their actions—promotes more efficient law.<sup>82</sup>

This burden falls not only on lawyers who are excluded from practice, but also on the public at large: the higher prices resulting from this regulation likely cause less affluent members of the public, who often have the greatest need for legal services, to be priced out of the market.<sup>83</sup> Indeed, a common reason individuals do not obtain the services of an attorney is that the cost is too high.<sup>84</sup> The costs resulting from these inflated prices can ultimately be attributed to states’ provision of a “legal monopoly” to lawyers, shielding them from competition at the expense of the public.<sup>85</sup>

The changing character of modern society exacerbates these costs. Scholars have long commented on the widespread effects of society’s continuously increasing mobility, and these effects include an increasing need to allow multijurisdictional practice.<sup>86</sup> Of course, modern society provides not only the increased physical mobility recognized in the past, but also practically unlimited virtual mobility through the internet.<sup>87</sup> The

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*Rules for Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 147–48 (2004); Wolfram, *supra* note 6, at 679 (“The reasons given for the restrictions are probably largely pious eyewash. The real motivation, one strongly suspects, has to do with cutting down on the economic threat posed for in-state lawyers—those who make the in-state rules on local practice—by competition with out-of-state lawyers.”). Note that although these types of barriers might seem to be unlawful, the Supreme Court has held that they are not generally unconstitutional. *See* Denckla, *supra* note 52, at 2583.

81. *See* *United States v. du Pont*, 353 U.S. 586, 592 (1957) (“A monopoly involves the power to . . . exclude competition when the monopolist desires to do so.” (alteration in original) (quoting *Transamerica Corp. v. Bd. of Governors of Fed. Res. Sys.*, 206 F.2d 163, 169 (3d Cir. 1953))).

82. *See* Jonathan Klick et al., *Federalism, Variation, and State Regulation of Franchise Termination*, 3 ENTREPREN. BUS. L.J. 355, 366–67 (2009).

83. Denckla, *supra* note 52, at 2595–96.

84. *Id.* at 2596.

85. Turfler, *supra* note 52, at 1916–17.

86. For example, over twenty years ago, scholars recognized that both lawyers and clients had been becoming increasingly mobile for decades. *See* Mary C. Daly, *Ethics and the Multijurisdictional Practice of Law: 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, 723–24 (1995).

87. *See, e.g.*, Jordan E. Jacobson, *A Flexible Approach to Multijurisdictional Practice: Finding Flexibility and Clarity in Rule 5.5 Using Personal Jurisdiction Jurisprudence*, 26 GEO. J. LEGAL ETHICS 759, 768 (2013) (“[M]odern technology, starting with telephones and fax machines in the 20th century and culminating with computers and the Internet . . . now allows lawyers to interact with individuals across the country by using the computer in the lawyer’s office.”); *cf.* *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 6 (Cal. 1998) (recognizing that modern technology allows an attorney to “‘virtually’ enter [a] state by telephone, fax, e-mail, or satellite”).

conflict between an “increasingly shrinking” world and anachronistic barriers to free movement in the practice of law has led to calls to loosen the rules impeding multijurisdictional practice.<sup>88</sup>

A common response to this problem on an individual level has been to ignore it: one scholar has observed that “[t]here is probably no other rule that is more ignored by disciplinary authorities and more violated by lawyers than the rules prohibiting multijurisdictional practice.”<sup>89</sup> Indeed, it is “virtually impossible” for most modern lawyers to avoid violating these rules, at least when broadly interpreted.<sup>90</sup> This flouting of the rules is particularly conspicuous for in-house corporate practice: corporate counsel blithely ignore state rules against unauthorized practice, and as long as they provide services solely to a single corporation, state bars tend to turn a blind eye.<sup>91</sup>

However, not every state bar is willing to turn a blind eye to such behavior. In Washington State, for example, even in-house counsel are now starting to feel the pinch: the state’s regulations on practice of law now require in-house counsel who are members of another state’s bar but work for corporations in Washington to pay for a special license to practice law.<sup>92</sup> This licensing process does not try to pass itself off as protecting consumers; the counsel receive no rights to practice beyond what they otherwise did (for instance, practice limited to their corporate employer), and are required to pass no additional examinations.<sup>93</sup> Yet the rule does make sure to impose multiple fees on in-house counsel,<sup>94</sup> leading some commentators to observe, upon the rule’s promulgation in 2013, that it amounted to a mere “money grab.”<sup>95</sup> Since widespread practice had already shown there to be no justification for additional consumer protection from this kind of practice,<sup>96</sup> the only explanation for the rule

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88. See, e.g., Jack A. Guttenberg, *Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straightjacket: Something Has to Give*, 2012 MICH. ST. L. REV. 415, 484–85 (2012).

89. *Id.* at 485.

90. *Id.*; see also Lewis, *supra* note 6, at 634 (asserting that lawyers violate laws against multijurisdictional practice on a habitual, daily basis).

91. See Daly, *supra* note 86, at 729–31.

92. WASH. ADMISSION AND PRACTICE R. 8(f).

93. See *id.*

94. See *id.*

95. *Law: Washington In-House Counsel Face New Rules, Fees*, PUGET SOUND BUS. J. (Aug 23, 2013, 3:00 AM), <https://www.bizjournals.com/seattle/print-edition/2013/08/23/law-washington-in-house-counsel-face.html> [<https://perma.cc/DP9E-P77K>].

96. Cf. Daly, *supra* note 86, at 729–30 (describing in-house counsel’s characterization of “the current state-based admission system [as] inefficient and unnecessary,” and discussing how a marketplace solution of ignoring the rules has effectively “superseded the state-based admissions system”).

seems to be simple rent-seeking by the state bar.

As more and more of lawyers' practice involves multiple jurisdictions, the old methods of regulating legal practice suffer ever-increasing strain: on the one hand, individual lawyers find themselves subject to conflicting and contradictory rules governing their practice,<sup>97</sup> and on the other, the public is harmed by elevated costs of legal services.<sup>98</sup> This threatens to stifle the growth of multijurisdictional legal practice, preventing the legal market from properly responding to the changing realities of society.<sup>99</sup> At the very least, imposing these burdens upon the public demands a substantial justification. Unfortunately, as discussed in the next section, the justifications proffered for the status quo are wanting.<sup>100</sup>

#### *D. Justifications Asserted for the Current System of Regulation*

Proponents of the present system have put forth various arguments to justify states' regulation of the practice of law. These justifications include providing consumer protection, affecting public perception of lawyers, and providing for attorney discipline. However, as discussed below, the extent to which these arguments justify the current system is unsatisfactory.

The main argument used to defend the current system of self-regulation by lawyers is that it "protects the public from incompetent providers" by setting standards for competent practice of law.<sup>101</sup> As a broad justification for standards, this certainly has merit,<sup>102</sup> yet this argument cannot be stretched to justify the degree of restriction actually imposed.

An effect of laws banning unauthorized practice of law is to push marginal consumers of legal services out of the market.<sup>103</sup> Those deprived of legal services by potential lawyers who fall just short of the standards set by a state must instead proceed pro se.<sup>104</sup> The fact that the alternative

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97. See Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335, 345–46 (1994) (describing the practical issues involved when lawyers are subject to conflicting regulations from multiple jurisdictions).

98. See Denckla, *supra* note 52, at 2595–96.

99. See Guttenberg, *supra* note 88 (arguing that law practice "is being stifled by rules that hinder innovation and competition"); Turfler, *supra* note 52, at 1942–43 (noting that "law practice is becoming more national in scope" and that barriers to multijurisdictional practice make "regulation of the practice of law over the Internet difficult").

100. See *infra* section I.D.

101. Turfler, *supra* note 52, at 1916–17.

102. See *id.* at 1919–21 (arguing that by assuring a basic level of general competence, unauthorized practice laws may address "information asymmetry" problems).

103. *Id.* at 1916.

104. Barton, *supra* note 59, at 447–48.

to unauthorized legal representation is to proceed pro se undermines any argument that unauthorized practice regulations protect the public from poor representation, since a layman is presumably worse-equipped to handle legal issues than a subpar lawyer.<sup>105</sup>

The difficulty of bar exams relative to the degree of quality assurance they provide supports the same conclusion: bar exams, despite being quite difficult, guarantee little legal competency in practice, suggesting that they are “designed more to limit the number of lawyers than to guarantee any set level of competence.”<sup>106</sup> But even if the need for general legal competence could justify a program of legal licensure, that need alone would not justify state-based monopolies on the practice of law, since a uniform interstate standard would equally serve that end with less harm to competition.

A more nuanced argument in this vein is that state-specific regulation is needed to ensure “familiarity with local rules and customs.”<sup>107</sup> In essence, the argument is that states need to individually test applicants to ensure their knowledge of state law before they practice in the state.<sup>108</sup> However, it is doubtful that this need is legitimate.<sup>109</sup> Indeed, although some states do specifically test state and local law, the need to test lawyers from a diverse range of backgrounds limits the degree of specialization that can be tested in a given field.<sup>110</sup> The result is that there is “nothing about a state-law-specific test on local law that would enable a bar examiner to determine anything beyond the kind of general legal competence that more national concept testing already achieves.”<sup>111</sup>

Furthermore, most states place the lion’s share of their testing weight in the multistate portions of the bar exam.<sup>112</sup> Given these limitations, one scholar remarked that “it is difficult to take seriously the idea that a member of a particular state’s bar can be presumed to have a better knowledge of its law—the principal rationale for the exclusion of out-of-

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105. *Id.*

106. *Id.* at 446.

107. Kristen M. Blankley et al., *Multijurisdictional ADR Practice: Lessons for Litigators*, 11 CARDOZO J. CONFLICT RESOL. 29, 30 (2009).

108. *See* Perlman, *supra* note 80, at 171–73.

109. *See id.* at 171–72 (“[T]here is no evidence that a lawyer’s knowledge of state-specific law (or lack thereof) is a better indicator of an attorney’s competence than nationally based examinations that the attorney already has passed.”).

110. *See id.* at 172.

111. *Id.*

112. William H. Simon, *Who Needs the Bar?: Professionalism without Monopoly*, 30 FLA. ST. U.L. REV. 639, 647 (2003).



state lawyers.”<sup>113</sup> Thus, the admission requirements adopted by state bars reveal that the real criterion for competent practice is general legal knowledge, rather than specialized competence in state law that might justify a local monopoly.

The public-harm justification is also undermined by the existence of alternative means of assuring quality without stifling competition. One example is certification regimes.<sup>114</sup> Under a certification regime, admission to practice is not restricted (or is restricted to a lesser degree), but attorneys can obtain a certification in specific legal fields (or perhaps general practice).<sup>115</sup> Because obtaining certification is voluntary, lawyers cannot use it to entirely exclude competition; if the costs of certification are raised too high, this will “induce the public to use non-certified practitioners.”<sup>116</sup> This generally improves incentives for lawyers and for certification agencies, rendering certification typically less harmful than licensure while providing most of the benefits for which licensure is urged.<sup>117</sup>

Regulations on the practice of law have also been defended on the basis of public perception.<sup>118</sup> The basic idea is that, by treating attorneys as members of an exclusive and altruistic profession, clients would be more likely to trust lawyers not to use their unique position against them when handling the clients’ affairs.<sup>119</sup> The idea is that “[w]hen the public views the provision of legal services as honorable, this in turn breeds respect for the law, which then promotes social order.”<sup>120</sup> However, like the need for generalized competence, the need for generalized professionalism is not premised on the need for state-specific monopolies over the practice of law, but on “promot[ing] respect for the law and general societal good”<sup>121</sup> for the “legal services market” as a whole,<sup>122</sup> so that argument alone does not demonstrate benefits of state-specific regulations relative to uniform, nationwide standards.

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113. *Id.*

114. Barton, *supra* note 59, at 447.

115. *See id.*

116. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 149 (1962).

117. *See id.*

118. Turfler, *supra* note 52, at 1923–24.

119. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1239–40 (1995).

120. Turfler, *supra* note 52, at 1924.

121. *Id.* at 1924.

122. *Id.* at 1908.

Another proffered justification for state-specific control is providing courts with a mechanism to “exercise disciplinary control over a lawyer for professional misconduct.”<sup>123</sup> To the extent a method of dealing with attorney misconduct is necessary, that is a function that state bars currently fulfill.<sup>124</sup> But this only weakly supports a justification based on a need for competence, because few lawyers are actually disciplined for incompetence, rather than for other failings.<sup>125</sup> Moreover, the most common causes of malpractice claims are not related to matters tested on state bar exams.<sup>126</sup>

However, to the extent there is a need for disciplinary control, this justification does not specifically require state-level enforcement. For in-court misconduct, courts can directly punish the lawyer in question,<sup>127</sup> for example by revoking the privilege of appearing in the court. On the other hand, out-of-court misconduct tends to involve issues not unique to any particular state.<sup>128</sup> Furthermore, the state-centric method of regulating practice actually limits the effectiveness of court oversight: where an out-of-state lawyer is not licensed to practice in a state, it can limit the sanctions available.<sup>129</sup> For example, the bar of one jurisdiction cannot unilaterally disbar a lawyer from practice in another jurisdiction of which the lawyer is a bar member.<sup>130</sup> If anything, the need to be able to discipline lawyers who may be practicing across state lines suggests that methods of interstate discipline may be needed.

The necessity of bans on interstate practice for lawyers admitted to the bar of a state is also undermined, as a practical matter, by examples of

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123. WOLFRAM, *supra* note 78, at 865.

124. *See id.* (discussing justifications for local licensing power, including “assuring that courts of that state will be able to exercise disciplinary control over a lawyer for professional misconduct”). Some authorities are lukewarm on the extent to which such rules actually provide benefit. *See, e.g.,* Barton, *supra* note 59, at 448–49, 49 n.77 (observing that disciplinary rules mostly duplicate existing common law obligations, rendering them “of questionable value,” but also recognizing that “repeating a common law standard as lawyer regulation may, in fact, serve a salutary purpose”).

125. Guttenberg, *supra* note 88, at 471.

126. Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363, 383–84 (2002).

127. *See* Turfler, *supra* note 52, at 1905 n.11 (“State courts have long claimed the inherent authority to regulate the practice of law and lawyers.”)

128. *See generally* Sheldon R. Shapiro, Annotation, *Disbarment or Suspension of Attorney in One State as Affecting Right to Continue Practice in Another State*, 81 A.L.R.3d 1281, § 2a (1977), Westlaw (database updated Sept. 2019) (detailing the tendency of states to recognize other states’ determinations of misconduct for disciplinary purposes when a lawyer was a member of both states’ bars).

129. *See* Jonathan Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem That Won’t Go Away*, 34 ARIZ. ST. L.J. 585, 598–99 (2002).

130. *See* Theard v. United States, 354 U.S. 278, 282 (1957).

multijurisdictional authorization in various jurisdictions. For example, the European Union has authorized essentially unrestricted multijurisdictional practice, in which admission to one nation's bar authorizes practice in each other's.<sup>131</sup> More precisely, a lawyer who is a member of the bar in one European country can practice outside of court, including giving legal advice, throughout Europe.<sup>132</sup> In-court practice is not automatically permitted; instead, the court in question can condition practice on the equivalent of *pro hac vice* admission.<sup>133</sup>

Given the European Union's success in authorizing this type of practice, it is doubtful that any justification for maintaining the current system of localized monopolies in the United States holds water.<sup>134</sup> Along with the European Union, both Australia and Canada now allow attorneys free movement across state (or provincial) lines.<sup>135</sup> Furthermore, at least one state has already moved in this direction on its own: Colorado allows out-of-state lawyers to practice in Colorado but requires *pro hac vice* admission to litigate.<sup>136</sup>

Even if reform of the current system of regulating legal practice is necessary, scholars have criticized the idea of a national bar as impractical and apt to create an unworkable bureaucracy.<sup>137</sup> This criticism may have

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131. See generally Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 INT'L L. 307 (describing how multijurisdictional practice is now the norm throughout the European Union).

132. See D. Bruce Shine, *The European Union's Lack of Internal Borders in the Practice of Law: A Model for the United States?*, 29 SYRACUSE J. INT'L L. & COM. 207, 239 (2002); Florence R. Liu, Note, *The Establishment of a Cross-Border Legal Practice in the European Union*, 20 B.C. INT'L & COMP. L. REV. 369, 373–74 (1997).

133. See Shine, *supra* note 132, at 230–31.

134. See Guttenberg, *supra* note 88, at 487 (“[I]t is inconceivable that the European Union could set up a system that permits the free movement of lawyers between member countries, with their varying legal regimes, languages, and customs, and we in the United States with a common language, a unifying legal heritage, considerable uniformity in laws, and an overriding federal legal system, cannot create a system that permits the easy movement of lawyers across state lines.”).

135. James W. Jones et al., *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?*, 30 GEO. J. LEGAL ETHICS 125, 148, 178 (2017). In Canada, all of its common-law provinces have signed the National Mobility Agreement to authorize multijurisdictional practice, but Québec, which follows a civil-law system, has only agreed to a lesser degree of recognition of outside attorneys. *Id.* at 180. The extent to which this may argue for special accommodation of Louisiana, which also has a civil-law system, is beyond the scope of this Comment.

136. Melissa Pender, *Multijurisdictional Practice and Alternative Legal Practice Structures: Learning from EU Liberalization to Implement Appropriate Legal Regulatory Reforms in the United States*, 37 FORDHAM INT'L L.J. 1575, 1610, 1610 n.173 (2014); see also COLO. R. CIV. P. 205.1.

137. See, e.g., Samuel J. Brakel & Wallace D. Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 713–14 (1975); Daly, *supra* note 86, at 781–85. But cf. Malcolm Richard Wilkey, *Proposal for a “United States Bar,”* 58 A.B.A. J. 355, 356–58 (1972) (proposing a national bar for court admissions).

some merit; accordingly, this Comment argues in favor of a system with decentralized aspects similar to those adopted by the European Union and by Colorado.<sup>138</sup>

## II. THE FEDERAL GOVERNMENT'S POWER TO PREEMPT STATE UNAUTHORIZED PRACTICE LAW

If a national solution, in any form, is to be adopted for authorizing multijurisdictional practice of law, a preliminary question is: What kinds of action can and should Congress take to bring about that solution? This Part first discusses the constitutional power Congress has to implement a national system of legal practice,<sup>139</sup> then several existing examples of such authorization by the federal government are discussed.<sup>140</sup> Finally, this Part concludes with a discussion of how other common law systems have divided up the field of legal practice.<sup>141</sup>

### A. *Constitutional Basis for Federal Preemption for Practice of Law*

As an initial matter, states' current regulations of the practice of law directly conflict with any potential congressional scheme to authorize multistate practice of law.<sup>142</sup> Accordingly, for Congress to authorize such practice, it must be able to preempt state law in this arena. As a general rule, so long as Congress has the authority to legislate over a subject, its laws will preempt conflicting state laws.<sup>143</sup> This preemption can either be via express preemption, or it can be one of several varieties of implied preemption, such as "conflict" or "field" preemption.<sup>144</sup> In any case, state law will be preempted so long as Congress indicates its intent to do so through valid legislation.<sup>145</sup> This Comment will accordingly assume that any legislation passed to this effect will make its intent to preempt clear.

This leaves only the questions of what power Congress has to authorize practice of law and to what extent it should exercise this power. With regard to the former question, the Commerce Clause<sup>146</sup> is a natural source

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138. *See infra* section IV.A.

139. *See infra* section II.A.

140. *See infra* section II.B.

141. *See infra* section II.C.

142. *See supra* section I.

143. *See* U.S. CONST. art. VI, cl. 2.

144. *See, e.g.,* Geier v. Am. Honda Motor Co., 529 U.S. 861, 884–85 (2000).

145. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990).

146. U.S. CONST. art. I, § 8, cl. 3.

of the power to legislate multistate practice of law.<sup>147</sup> The Commerce Clause generally supports laws regulating channels of interstate commerce, persons or things in interstate commerce, and things that substantially affect interstate commerce.<sup>148</sup> Some exceptions to this broad power may apply—particularly when considering things that substantially affect interstate commerce—where traditional areas of State sovereignty and regulation are impinged.<sup>149</sup> On the other hand, where an activity is economic in nature, Congress has great leeway to regulate things that substantially affect interstate commerce.<sup>150</sup>

All currently regulated practice of law involves rendering of services to others because unauthorized practice statutes do not restrict pro se litigants.<sup>151</sup> Thus, the kinds of practice being regulated involve commercial activity of some kind.<sup>152</sup> Furthermore, the restrictions on multijurisdictional practice inherently involve interstate activity, since when states restrict practice by lawyers of other states, the states are banning practitioners licensed in one state from providing services in another state.<sup>153</sup> Indeed, a major purpose served by the Commerce Clause is the prevention of economic protectionism by the states—that is, the prevention of state laws that unfairly restrict interstate commerce for the benefit of in-state interests.<sup>154</sup>

Although state regulations of the practice of law might run afoul of the Dormant Commerce Clause,<sup>155</sup> the United States Supreme Court has recognized “a compelling interest in the practice of professions within their boundaries” that can justify state regulation where Congress has not acted.<sup>156</sup> Insofar as current regulations on multijurisdictional practice of law inhibit out-of-state attorneys from selling their services in-state, the

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147. See, e.g., Daly, *supra* note 86, at 782 n.266 (discussing power to regulate interstate commerce in context of establishing a national bar).

148. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

149. *Id.* at 564; *United States v. Morrison*, 529 U.S. 598, 615–16 (2000).

150. See *Gonzales v. Raich*, 545 U.S. 1, 19 (2005); *Wickard v. Filburn*, 317 U.S. 111, 128–29 (1942).

151. *Barton*, *supra* note 59, at 447; see also WOLFRAM, *supra* note 78, at 865 n.84 (“The obligation of a local license does not apply to an out-of-state lawyer appearing pro se any more than a local license is required for a nonlawyer litigant who appears pro se.”).

152. See Daly, *supra* note 86, at 782 n.266.

153. See *supra* section I.A.

154. See, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617, 623–24 (1978) (discussing anti-protectionism as a justification for Dormant Commerce Clause jurisprudence).

155. Indeed, where a state sweeps too much into the scope of practice of law, such a challenge can prevail. See, e.g., *Nat’l Revenue Corp. v. Violet*, 807 F.2d 285, 290 (1st Cir. 1986) (finding state’s treatment of all debt collection as practice of law violated the Commerce Clause).

156. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792–93 (1975).

Commerce Clause appears to squarely support preemption. Indeed, scholars have concluded that the Commerce Clause applies because “the provision of legal services is clearly an economic activity that has a substantial effect on interstate commerce.”<sup>157</sup> Although Congress has thus far abstained from directly regulating the general practice of law,<sup>158</sup> the Supreme Court has found in an antitrust context that the provision of legal services in a state sufficiently affects interstate commerce to fall within the purview of the Commerce Clause.<sup>159</sup>

One area where such legislation could face pushback involves attempts to require the admission of attorneys to practice before a state’s court against that court’s will. State courts have traditionally claimed the authority to regulate the practice of lawyers appearing before them.<sup>160</sup> Notably, states have a heightened interest in controlling who is authorized to appear in their courts, with some courts holding that their authority to control admissions is constitutionally based, and others holding that it is an inherent power essential to carry out a court’s duties.<sup>161</sup> There is thus reason to doubt that the federal government could override a state court’s decisions in this matter.<sup>162</sup>

By contrast, there is little question that Congress, having broad constitutional authority to regulate federal courts,<sup>163</sup> can institute uniform rules of admission to federal courts as it sees fit.<sup>164</sup> This power is distinct

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157. Daly, *supra* note 86, at 782 n.266; *see also* Timothy P. Glynn, *Federalizing Privilege*, 52 AM. U. L. REV. 59, 160–61 (2002) (arguing that national regulation relating to provision of legal services “would be a valid exercise of Commerce Clause power even though it would reach instances of noncommercial and wholly intrastate activity, because it would regulate a class of activities that is largely commercial and exerts both a direct and substantial effect on interstate commerce”).

158. *See* Hadfield, *supra* note 50, at 1699.

159. *Goldfarb*, 421 U.S. at 785.

160. Turfler, *supra* note 52, at 1905 n.11.

161. Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and their Resolution*, 39 WILLAMETTE L. REV. 795, 824–25 (2003).

162. *Cf. Printz v. United States*, 521 U.S. 898, 935 (1997) (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”); *Ex parte Young*, 209 U.S. 123, 163 (1908) (“[A]n injunction against a state court would be a violation of the whole scheme of our government.”). *But cf. Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 736, 738 (1980) (allowing injunction against state supreme court in “enforcement capacit[y],” but recognizing absolute immunity for creation of disciplinary rules in a “legislative role[.]”).

163. *See* U.S. CONST. art. III.

164. Wilkey, *supra* note 137, at 358; *see also Ex parte Garland*, 71 U.S. (4 Wall.) 333, 379 (1866) (observing that Congress “may undoubtedly prescribe qualifications for the office” of attorney and counselor in federal courts).

from any question of state regulation of the practice of law.<sup>165</sup> Thus, while Congress may wish to independently implement a uniform system of admission in federal courts,<sup>166</sup> it is at least questionable whether it can do so for state courts.

Accordingly, the Commerce Clause gives Congress the constitutional authority to implement nationwide rules allowing for multijurisdictional practice of law at least with regard to out-of-court practice.

### *B. Examples of Existing Federal Preemption for Practice of Law*

Congress's power to legislate in the area of practice of law is not just theoretical; there are multiple examples where it already has.

A clear example of Congressional preemption of state regulations on practice of law is the field of patent law, in which the federal scheme preempts state practice of law regulations.<sup>167</sup> The federal government alone determines who may practice patent law; any state laws to the contrary are irrelevant.<sup>168</sup> The United States Patent and Trademark Office authorizes practice by patent attorneys (attorneys admitted to practice in a state and before the Patent Office)<sup>169</sup> as well as patent agents (“[a]ny citizen of the United States who is not an attorney, and who fulfills the requirements” for registration).<sup>170</sup> The only substantive requirements for registration as a patent agent are a demonstration of sufficient technical knowledge (typically by a qualifying bachelor's degree) and passage of an examination (the “patent bar”) that tests Patent Office procedure.<sup>171</sup>

Despite not being attorneys, patent agents are authorized to practice law before the Patent Office, including preparing and prosecuting patent applications and disseminating advice regarding patentability of inventions.<sup>172</sup> In fact, the Federal Circuit has even recognized a “patent-agent privilege” similar to attorney-client privilege, due to the recognition

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165. *Cf.* *Theard v. United States*, 354 U.S. 278, 282 (1957) (holding disbarment in state court does not require disbarment in federal court).

166. *See, e.g., Wilkey, supra* note 137, at 357.

167. *See Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 399–401 (1963).

168. *See id.* at 388.

169. 35 U.S.C. § 2(b)(2)(D) (2012); 37 C.F.R. § 11.6(a) (2018); *see also* 5 U.S.C. § 500(e) (2012) (exempting patent practitioners from bar membership requirements for administrative representation).

170. 37 C.F.R. § 11.6(b) (2018).

171. *See id.* § 11.7; OFFICE OF ENROLLMENT & DISCIPLINE, U.S. PATENT & TRADEMARK OFFICE, GENERAL REQUIREMENTS BULLETIN FOR ADMISSION TO THE EXAMINATION FOR REGISTRATION TO PRACTICE IN PATENT CASES BEFORE THE UNITED STATES PATENT AND TRADEMARK OFFICE (2018), [https://www.uspto.gov/sites/default/files/documents/OED\\_GRB.pdf](https://www.uspto.gov/sites/default/files/documents/OED_GRB.pdf) [<https://perma.cc/JA5N-R8BU>].

172. *Sperry*, 373 U.S. at 386, 402 n.47.

that “patent agents are not simply engaging in law-like activity, they are engaging in the practice of law itself.”<sup>173</sup> The federal government has administered its program for regulating practice before the Patent Office since the mid-nineteenth century,<sup>174</sup> and in recent years has admitted around six to seven-hundred agents per year.<sup>175</sup> Accordingly, the authorization of patent attorneys and agents represents an example of a well-established, long-lived federal authorization of the practice of law that preempts conflicting state practice of law regulations.

In addition to patent law, the federal government has also authorized practice of law for practice areas involving other federal agencies, thereby preempting conflicting state laws. One example is immigration law, which has accredited representatives (which may include attorneys or laypersons) who are authorized to practice before the Department of Homeland Security in immigration matters.<sup>176</sup> Other agencies that regulate admission of practitioners for practice include the Security and Exchange Commission (SEC) and the Internal Revenue Service (IRS).<sup>177</sup> Accordingly, the federal government has an established track record in managing the authorization of legal practice across a range of fields.

### C. *The Barrister/Solicitor Distinction*

If Congress were to preempt state laws regulating unauthorized practice of law to authorize multijurisdictional practice, the question would remain: how far that preemption should go? Even if Congress could entirely preempt state law in this field, that does not necessarily mean that it should. But then, where should Congress draw the line? A promising answer to this question is to divide legal practice into two different types: in-court and out-of-court practice. As discussed below, this is where other common law jurisdictions have previously drawn a line between the roles of barrister and solicitor.

At least two factors, are relevant to the question of line-drawing: First, the constitutional basis for authorizing legal practice *outside* of court is

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173. *In re Queen’s Univ. at Kingston*, 820 F.3d 1287, 1296 (Fed. Cir. 2016).

174. *See Sperry*, 373 U.S. at 388 (“The power of the Commissioner of Patents to regulate practice before the Patent Office dates back to 1861 . . .”).

175. *Patexia Insight 1: Shortage of Patent Attorneys*, PATEXIA (Jul. 6, 2016), <https://www.patexia.com/feed/shortage-of-patent-attorneys-20160706> [<https://perma.cc/T3LY-PF5M>].

176. 8 C.F.R. §§ 292.1(a)(4), 292.2(d) (2019); *see also* *Ramirez-Durazo v. INS*, 794 F.2d 491, 499, 499 n.5 (9th Cir. 1986) (“[T]he regulations contemplate representation by accredited laypersons, as well as attorneys.”).

177. *See, e.g.*, 17 C.F.R. § 201.102 (2019) (standards for practice of attorneys and others before SEC); 31 C.F.R. § 10.3 (2019) (setting rules for admission of attorneys and others to practice before IRS).



generally clearer than the case for mandating admission to practice before state courts.<sup>178</sup> Second, the Federal government generally has more experience in preempting state regulation of legal practice outside of courts, since the Federal government tends to authorize practice either in non-representative capacities or before agencies, and it has not yet tried to mandate that state courts allow appearances by non-approved persons.<sup>179</sup> This suggests that there may be a natural line for Congress to draw between the practice of law before courts and practice not before courts.

Another reason that this division of legal practice represents a natural place to draw the line is because other common-law jurisdictions have also drawn the line here; this division is essentially the same as seen in countries recognizing a distinction between solicitors and barristers.<sup>180</sup> In the United Kingdom, barristers are admitted to represent clients in court, whereas solicitors generally engage in out-of-court practice as well as act as a go-between for clients and barristers.<sup>181</sup> Solicitors, by contrast, traditionally could not practice in all courts, though they now have limited abilities to practice in certain lower courts.<sup>182</sup>

In essence, a solicitor's practice encompasses transactional law, including activities typical of corporate or in-house counsel.<sup>183</sup> Solicitors often interact with barristers in a way similar to how attorneys in one U.S. jurisdiction engage local trial counsel in another: a solicitor interviews a client, writes a brief describing the legal issues, and finds a barrister to represent the client in court.<sup>184</sup> The split of the profession is largely defended on the basis that representation in court (especially high court) is qualitatively different from other aspects of law, so it requires specialized skills and a higher level of expertise.<sup>185</sup>

By contrast, the United States has traditionally fused these two aspects of legal practice together.<sup>186</sup> That is not to say that this Comment urges

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178. *See supra* section II.A.

179. *See supra* section II.B.

180. *See* Marylin J. Berger, *A Comparative Study of British Barristers and American Legal Practice and Education*, 5 N.W. J. INT'L L. & BUS. 540, 544 (1983).

181. *Id.*

182. *Id.* at 558–59, 557 n.70.

183. *See* Mary C. Daly, *Conflicts of Interest in Corporate and Securities Law: Monopolist, Aristocrat, or Entrepreneur?: A Comparative Perspective on the Future of Multidisciplinary Partnerships in the United States, France, Germany, and the United Kingdom after the Disintegration of Andersen Legal*, 80 WASH. U. L.Q. 589, 616–18 (2002).

184. *See* Berger, *supra* note 180, at 545–46.

185. *See id.* at 559.

186. *Id.* at 552–53. This is not a universal rule, however. For instance, the examples discussed in

adopting the British schism in the legal profession. After all, a mixture of “fused” and “unfused” practice is entirely possible; for example, some common law jurisdictions allow for “fused” barrister/solicitor combinations, but also have some practitioners as just one or the other.<sup>187</sup> The United States could exploit this natural dividing line in a similar way while eliminating barriers preventing multijurisdictional practice of law. As discussed in Part III, this could avoid problems surrounding ambiguous definition of *practice of law* while maintaining some state control over the aspects of legal practice in which states have the greatest interest.

### III. CONGRESS CAN AUTHORIZE MULTISTATE PRACTICE OF LAW USING THE BARRISTER/SOLICITOR DISTINCTION AS A DIVIDING LINE BETWEEN STATE AND FEDERAL INTERESTS

State regulations restricting unauthorized practice of law have produced a system that imposes unjustifiable burdens on multistate practice of law, harming both lawyers and their clients.<sup>188</sup> Congress has the power to preempt state law in this area, but the question remains how far such preemption should extend.<sup>189</sup> The States have a heightened interest in their own courtroom proceedings,<sup>190</sup> and Congress has greater experience authorizing practice of law outside the courtroom than inside it.<sup>191</sup> This suggests that the division between in-court and out-of-court legal practice provides a natural place for Congress to draw the line.<sup>192</sup> This Part provides a detailed description of why this division is justified.

#### A. *Direct Preemption is Available for Solicitor-Like Legal Practice*

In terms of solicitor-like practice, Congress has both the power to

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Section II.B of Congress authorizing non-lawyer representation before agencies but not in the courts closely resemble the type of practice authorized for British solicitors.

187. See, e.g., Virginia Grainer, *The Lawyer's Obligation to Provide Wisdom Advice and to Know Their Client: Is United States Law Susceptible to the New Zealand Development?*, 31 J. LEGAL PROF. 97, 98 (2007) (describing existence of fused and barrister-only practice in New Zealand); Bobette Wolski, *Reform of the Civil Justice System 25 Years Past: (In)adequate Responses from Law Schools and Professional Associations? (And How Best to Change the Behaviour of Lawyers)*, 40 COMMON L. WORLD REV. 40, 67–68, 67 n.190 (2011) (distinction retained in only three Australian states).

188. See *supra* Part I.

189. See *supra* Part II.

190. See *supra* section II.A.

191. See *supra* section II.B.

192. See *supra* section II.C.

preempt state law and a proven track record of doing so.<sup>193</sup> Solicitor-like practice involves provision of out-of-court legal services, such as providing legal advice, drafting contracts, and engaging local counsel to represent clients in court proceedings—generally the type of services provided by an “office lawyer.”<sup>194</sup> When a client hires a lawyer to provide legal services, the lawyer is engaging in commerce, since the sale of services is a commercial activity.<sup>195</sup> When lawyers from one state provide such services in another state—that is, when the lawyer engages in multijurisdictional practice of law—this activity both involves persons in interstate commerce and substantially affects interstate commerce.<sup>196</sup> This activity thus falls within the scope of the Commerce Clause, giving Congress the power to regulate it.<sup>197</sup> Congressional legislation authorizing this kind of interstate practice of law would properly preempt state laws banning unauthorized practice.<sup>198</sup>

Enhancing the prospect of Congress’s ability to produce a workable system for authorizing solicitor-like practice is the fact that Congress already has practice doing so in various fields of federal law. As discussed above, Congress has authorized types of legal practice involving specific federal issues, and it has preempted state laws regarding unauthorized practice in doing so.<sup>199</sup> Congress’s successful experience in regulating out-of-court legal practice in limited fields makes it more plausible that Congress can succeed in doing so for general legal practice.

Furthermore, a rule authorizing out-of-court multijurisdictional practice would also eliminate much of the uncertainty involved in unauthorized practice of law. While there may be doubt about which states a lawyer is practicing in when giving advice to a client or drafting a contract for a client connected to another jurisdiction,<sup>200</sup> there is no doubt about whether a lawyer is appearing before a state’s courts. A rule authorizing lawyers admitted to one state’s bar to practice in a solicitor-like capacity in any state would thus replace a fuzzy, difficult-to-apply

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193. See *supra* sections II.A and II.B.

194. Berger, *supra* note 180, at 544.

195. Cf. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 550 (2012) (“The power to *regulate* commerce presupposes the existence of commercial activity to be regulated.”). Pro bono work might appear to be an exception, but it is still an activity that affects interstate commerce, since pro bono work is a direct substitute for commercial legal services.

196. See *supra* section II.A.

197. See *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

198. See *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990).

199. See *supra* section II.B.

200. See *supra* section I.A (discussing the unclear boundaries of the practice of law).

rule with an easy-to-apply, bright-line rule.

*B. Direct Preemption May Not be Proper for Barrister-Like Legal Practice*

In contrast to solicitor-like practice, barrister-like practice involves representation in court.<sup>201</sup> The state has an increased interest at stake in this kind of practice, as state courts have traditionally considered themselves to have an inherent power, or even a constitutional power, to regulate who practices law before them.<sup>202</sup> Congressional action impinging this assumed right by state courts might thus meet more resistance. For example, regulation mandating admissions to practice before state courts—either by requiring action by state judges or legislation by state legislatures—may be opposed as involving improper coercion of states, exceeding Congress’s Article I powers and potentially violating the Tenth Amendment.<sup>203</sup> Meanwhile, the Commerce Clause provides less justification for regulating state court admissions, since admission to represent a party before a state court—like state criminal laws—involves an “area[] of traditional state concern” that is arguably more about regulating conduct in court than about “regulation of commercial activities.”<sup>204</sup> In particular, the Supreme Court has recognized that the role lawyers have in the judicial process as “officers of the courts” justifies an “especially great” interest in regulating lawyers.<sup>205</sup>

And even if Congress could overrule state court admissions rules, it is not so clear it should. Whereas all lawyers practice law, most lawyers are not litigators,<sup>206</sup> so there is less potential harm from keeping state courts in charge of in-court practice. Furthermore, while the practice of law outside the courtroom is plagued with uncertain boundaries,<sup>207</sup> there is not much uncertainty as to whether a lawyer has appeared in a given court. And the availability of pro hac vice admission provides an alternative

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201. Berger, *supra* note 180, at 544; *see also supra* section II.C (discussing limitation of solicitor representation to certain lower courts, with high court representation restricted to barristers).

202. *See* Johnstone, *supra* note 161, at 824–25; Turfler, *supra* note 52, at 1905 n.11.

203. *Cf.* Printz v. United States, 521 U.S. 898, 935 (1997) (holding unconstitutional law compelling action by state officials); New York v. United States, 505 U.S. 144, 188 (1992) (“The Federal Government may not compel the States to enact or administer a federal regulatory program.”).

204. United States v. Lopez, 514 U.S. 549, 577 (1995); *see also* Turfler, *supra* note 52, at 1905 n.11 (collecting references discussing the longstanding practice of state court control over practice of law).

205. Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975).

206. Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429, 430 (2005).

207. *See supra* section I.A.

method to appear in court that is simply not available for out-of-court practice.<sup>208</sup> The idea that there is less cause for Congress to intervene in court admissions is also supported by Congress's own past behavior: whereas Congress plainly has the power to regulate admissions in federal court,<sup>209</sup> it has not done so, even though it has repeatedly authorized out-of-court legal practice.<sup>210</sup> Finally, the ground is much better laid for the authorization of solicitor-like practice than for barrister-like practice; not only the European Union but also the state of Colorado have chosen to hold in-court appearance to a separate, higher standard.<sup>211</sup>

Thus, Congress need not override state courts' control of their own admission of lawyers.

#### IV. THE FEDERAL GOVERNMENT CAN CREATE A COMPETITIVE SYSTEM OF BAR ADMISSIONS

As discussed above, there is a need for Congress to preempt state laws regarding multijurisdictional practice of law. This Part outlines a method Congress could use to eliminate the system of localized monopolies created by state unauthorized practice laws while allowing the states to continue to participate in regulating practice of law.

##### A. *Congress Can Transform Bar Admission into a Competitive System by Eliminating State Bars' Power of Exclusion*

With regard to out-of-courtroom practice, one possibility is for Congress to eliminate local state bars and replace them with a federal bar.<sup>212</sup> However, the idea of "a unitary system of admission and discipline" has been criticized as "unrealistic as a matter of politics, unworkable as a matter of administration, and unsound as a matter of policy," because the resulting centralized system would be costly and inefficient.<sup>213</sup> However, this criticism would not apply to a decentralized system like that of the European Union.<sup>214</sup>

The federal government should take advantage of the existing state bar system to create a decentralized admission process similar to that in the

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208. See *supra* section I.B (discussing pro hac vice admission).

209. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 379 (1866).

210. See *supra* section II.B.

211. See *supra* section I.D.

212. Daly, *supra* note 86, at 782.

213. *Id.* at 782–83.

214. See Goebel, *supra* note 131, at 312–13.

European Union, enabling authorization of national practice with limited federal interference. Basically, each state would continue to operate its own bar and make its own admission decisions. The federal government would then set standards, such that admission to a state's bar qualifies for admission to national practice if the state has standards at least as high as the centralized standards. For example, the federal standard could be a sufficient score on the UBE and MPRE, mimicking many states' current standards.<sup>215</sup> Thus, each state would be put into a competitive position compared to other states for bar admission: setting standards too low would fail to meet the federal standard, but setting standards unreasonably high would encourage attorneys to seek admission through other states.

The system outlined above leaves out one important aspect of regulation of the practice of law: disciplinary proceedings such as disbarment.<sup>216</sup> For disbarment to work in a decentralized system, there must be some way to resolve conflicts between different states' bars. In general, if a state wants to disbar someone, other states will probably agree,<sup>217</sup> so a solution in most cases is to allow any state to disbar a lawyer that has practiced in that state. The only problem is when there is a conflict: State A wants to sanction an attorney, but State B disagrees. In such a case, a federal agency would act in an appellate capacity to resolve the dispute and determine appropriate sanctions.

This limited involvement may prevent federal overreach and alleviate some state objections to national involvement in authorizing practice of law.<sup>218</sup> For example, lawyers from affected localities would still have some control in discipline, but with limited monopoly power, since each state's bar is now in competition for applicants. Meanwhile, by eliminating the local monopolies, this competitive approach would mitigate the harms resulting from those monopolies.<sup>219</sup>

Another common objection to a national bar is the need for competency specifically in local law.<sup>220</sup> However, to the extent to which this is a serious concern, states can implement certification systems to inform

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215. See *supra* section I.B (discussing current state use of the UBE and MPRE).

216. See *supra* section I.D (discussing the need for disciplinary control and limitations on state discipline of out-of-state lawyers).

217. For example, disbarment or suspension in one state has frequently been treated as conclusive evidence of misconduct in other states, justifying similar disciplinary actions in those other states. See Shapiro, *supra* note 128, § 2a.

218. See *supra* section I.D (discussing objections to loss of local control).

219. See *supra* sections I.B, I.C (discussing the burdens resulting from allowing local bars to exert monopoly control over legal practice).

220. See *supra* section I.D.

clients of specializations in local law.<sup>221</sup> Several states (and some private entities) have implemented systems for certifying lawyers as specialists in a particular field;<sup>222</sup> expertise in local state law could simply be one more type of specialization. Although some may argue certification is insufficient on its own,<sup>223</sup> in combination with minimum standards of competency in law on the national level, this may be an effective compromise. In particular, the combination would allow specialization in a state's law if needed, while allowing nonspecialized practice without undue state interference.

Thus, by replacing the current system of local monopolies on bar admission with a competitive system for authorizing transactional practice of law, Congress can reduce the harms of state monopolies and keep the benefits of decentralized discipline. Furthermore, authorizing multistate practice for solicitor-like practice would provide multistate practitioners with a bright-line rule to determine whether practice involving a state's laws is authorized.

## CONCLUSION

States currently impose broad restrictions on lawyers' abilities to engage in multijurisdictional practice of law.<sup>224</sup> Exerting local control over admissions, states produce barriers to entry for new lawyers as well as lawyers from other jurisdictions.<sup>225</sup> The resulting local monopolies impose substantial burdens on competition, negatively affecting both clients and attorneys.<sup>226</sup> Although ostensibly justified as a consumer protection measure, the resulting monopolies fail to achieve this goal and harm the public.<sup>227</sup>

To address the harms resulting from local monopolies in legal practice,

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221. See, e.g., Barton, *supra* note 59, at 447 (discussing certification as an alternative to licensing).

222. See Thomas P. Sartwelle, *Trial Lawyers, Plumbers, and Electricians: Should They All Be Certified?*, 59 S. TEX. L. REV. 59, 64 (2017) (counting eleven states with specialist-certification plans, plus eight more states that have chosen to accredit private certifiers, as well as "seven national private ABA-approved certifiers").

223. See Barton, *supra* note 59, at 447, 447 n.67 (mentioning that certification may share some problems with licensure, but also solves problems licensure does not). *But see* FRIEDMAN, *supra* note 116, at 149 ("I personally find it difficult to see any case for which licensure rather than certification can be justified.").

224. See *supra* section I.A.

225. See *supra* section I.B.

226. See *supra* section I.C.

227. See *supra* section I.D.

the federal government can and should intervene.<sup>228</sup> Due to both practical and constitutional constraints, this intervention should be focused on authorizing only a portion of modern practice of law: the type of out-of-court practice that quintessentially defines the role of solicitors in other common-law jurisdictions.<sup>229</sup> Under such a model, the federal government could create a more competitive landscape for the licensing of out-of-court practice, eliminating significant burdens present in the current system without introducing a centralized bureaucracy for handling bar membership.<sup>230</sup>

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228. *See supra* sections II.A, II.B.

229. *See supra* section II.C, Part III.

230. *See supra* section IV.A.