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Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law

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ABSTRACT

This Article addresses how a lawyer may ethically engage in a transnational practice given the current structure of state-by-state bar admission. Part II examines the ethical pitfalls of a transnational practice, including an examination of applicable APA Model Rules of Professional Conduct. This section also addresses different tests for determining whether a lawyer has committed the unauthorized practice of law. Part III makes use of examples to illustrate the legal framework for determining whether a lawyer has committed the unauthorized practice of law. In Part IV, the author concludes by making suggestions for how to better address the ethical dilemma of transnational lawyers.

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I. INTRODUCTION

At the beginning of the twentieth century, U.S. law schools realized that the practice of law had moved beyond local, state-focused rules, and that the teaching of law required attention to developments on a national scale. At the beginning of the twenty-first century, law schools issue glossy brochures and magazines touting themselves as "global law schools" able to train the "global lawyer." These developments in legal education parallel developments in the practice of law in the United States. With greater emphasis on federal legislation in many areas of the law and harmonization of state law through "uniform" laws promulgated by the National Conference of Commissioners on Uniform State Law, as well as case law that relies heavily on the Restatements of the American Law Institute, lawyers regularly must look beyond the law

of their own state to provide competent legal counsel in both transactional and litigation matters. As private international law experiences the development of conventions and model laws designed to harmonize rules world-wide, this process is repeating itself on a global scale.

While the practice of law has moved from being local to national to international in scope, the regulation of the profession in the United States remains largely localized. Admission to the bar is governed by the state of admission, and a lawyer admitted in one state is a non-lawyer in another state for purposes of the application of rules dealing with the unauthorized practice of law. Even competent legal advice regarding federal law matters that are uniformly interpreted throughout the United States may be the unauthorized practice of law if rendered from a location outside the state of admission to a client from another state.

Dynamic changes in the practice of law, combined with the static system of regulation of that practice, produce significant problems for lawyers concerned with reconciling a transnational practice with local admission. Recent cases raise further questions about the relationship between the duty of competence and rules prohibiting the unauthorized practice of law. It may be unauthorized practice to advise a client in a state where the lawyer is not admitted, even if the advice is rendered competently, while the same advice given to a client from the lawyer's state of admission would not constitute unauthorized practice. While cases focus on the location of the lawyer and the client, it is also important to consider the law being applied. If we do so, however, what then is the result of the application of foreign country law by a lawyer admitted in a U.S. state? Lawyers with a transnational practice often must deal with rules of private international law found in treaties or with rules created by non-governmental organizations operating on a global basis. This practice raises the added question of whether existing ethical rules and case law provide guidance for the transnational lawyer representing multinational clients engaged in transactions throughout the world, and applying rules that require reference to documents and decisions from sources in multiple jurisdictions. These events further complicate the application of standards dealing with lawyer competence and with the unauthorized practice of law.

This Article will not attempt to catalogue or address all the ethical rules that may apply to the transnational practice of law. It will rather focus on the transactional lawyer and some of the issues faced in common contractual relationships that cross national borders. To some extent these issues are mitigated by the fact that other countries apply a more limited definition of the practice of law, and may be less likely to sanction a U.S. lawyer applying their law or representing their nationals as clients. As with other issues of transnational practice, however, a U.S. lawyer often is required to find guidance, and compelled to recognize limitations, from cases dealing with interstate practice within

our federal system. The ultimate goal of this article is to consider whether the realities of the practice of law today can be reconciled with the structure and rules governing those engaged in that practice.

II. MOVING INTO THE WORLD OF TRANSNATIONAL PRACTICE

Businesses in today's markets both want and fear transnational involvement. On the one hand, they want the extra profits and economies of scale that can come from global markets. At the same time they seek to avoid the increased uncertainty and risk resulting from the additional sets of rules that may apply to their conduct in those markets. Competent legal counsel is thus even more important in a cross-border transaction than in its domestic counterpart. This raises two fundamental questions regarding the lawyer's role in such a transaction: what is the benchmark by which we measure lawyer competence in such representation, and what is the threshold beyond which even the most competent lawyer should not pass in engaging in the practice of law outside his or her state of admission? The related question, by which we necessarily must judge our answers to the first two, is: what is the profession's obligation to a client involved in transnational transactions in terms of encouraging, allowing, and regulating competent provision of legal services?

A. *The Competent Transnational Lawyer*

1. Model Rule 1.1

The ABA Model Rules of Professional Conduct begin with the duty of competent representation:

> Rule 1.1 Competence
>
> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[1]

The placement of this Rule at the beginning of the Model Rules emphasizes the importance of the duty owed to the client. The focus of this duty indicates the fundamental importance of the interests of the client in the application of all of the Model Rules. The further fact that this duty can rarely be waived by the client[2] underscores its significance to the attorney-client relationship. Thus, by its very nature, this Rule provides the fundamental test in the interpretation of every other Model

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1. MODEL RULES OF PROF'L CONDUCT R. 1.1 (1999) [hereinafter MODEL RULES].
2. *Id.* R. 1.8(h).

Rule. No other Rule should be interpreted in a manner that would result in devaluation of the duty of competence or of its goal of proper representation of the client, nor should any rule be interpreted in a manner that accepts any other goal (*e.g.*, protection of the profession) over this one.

The duty of competent representation does not require that the lawyer know all the answers to a client's legal questions at the time representation is undertaken. "A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question."[3] Thus, it is wholly appropriate to develop new areas of competence through continued study and to associate with other lawyers to provide legal services on multiple issues. This process should allow satisfaction of the duty of competence through increased understanding of foreign law, as well as through association with a foreign lawyer when advice on foreign law is necessary.[4] The more difficult question is when a lawyer may rely on his or her own knowledge of foreign law in providing competent representation.

2. Knowledge of Foreign Law

In the case of *In re Roel*, the New York Court of Appeals stated that "[w]hen counsel who are admitted to the Bar of this State are retained in a matter involving foreign law, they are responsible to the client for the proper conduct of the matter, and may not claim that they are not required to know the law of the foreign State."[5] It is generally recognized that giving legal advice regarding foreign law does constitute the practice of law.[6] Thus, it would be possible to conclude that one who

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3. *Id.* R. 1.1, cmt. 2.

4. Modern decisions tend to allow a foreign lawyer to associate with a local lawyer for such purposes, even though the former is not a "lawyer" for purposes of application of the unauthorized practice rules of Model Rule 5.5. *See, e.g.*, Utah: State Bar Ethics Advisory Opinion Comm., Op. 96-14 (1997), 1997 WL 45139 (advising that a Utah lawyer may form a partnership with "individuals who are licensed to practice law in any jurisdiction within the United States or with persons qualified and authorized to engage in the functional equivalent of U.S. legal practice under the laws of a foreign country."); Ronald A. Brand, *Professional Responsibility in a Transnational Transactions Practice*, 17 J. L. & COM. 301, 323 (1998). *See also* The Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Formal Opinion No. 1995-3 (1995), *available at* http://www.abcny.org/eth1995b.htm (explaining that a person admitted to practice law only in a foreign country may be listed as an associate in a New York law firm's letterhead and other advertising "provided an appropriate disclaimer is included to set forth the jurisdictional limitations on his or her practice . . .").

5. *In re* Roel, 144 N.E.2d 24, 28 (N.Y. 1957).

6. *See, e.g.*, Bluestein v. State Bar of Cal., 529 P.2d 599, 606 (Cal. 1974) (explaining that "[t]he practice of law includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter

gives such advice must be admitted to practice, or be offering that advice through someone who is admitted in the jurisdiction in which the practice takes place.[7] This conclusion, however, is not always borne out in practice.

In *Degen v. Steinbrink*, chattel mortgages prepared by a New York law firm for property in New York, Connecticut, and New Jersey, were later found to be invalid for improper preparation and maintenance, thus leaving the client unprotected.[8] Noting that the firm had in fact practiced law in three states in one set of transactions, the court stated:

> When a lawyer undertakes to prepare papers to be filed in a state foreign to his place of practice, it is his duty, if he has not knowledge of the statutes, to inform himself, for, like any artisan, by undertaking the work, he represents that he is capable of performing it in a skillful manner. Not to do so, and to prepare documents that have no legal potency, by reason of their lack of compliance with simple statutory requirements, is such a negligent discharge of his duty to his client as should render him liable for loss sustained by reason of such negligence.[9]

In *Rekeweg v. Federal Mut. Ins. Co.*, an Indiana lawyer filed an action in Indiana based on Ohio law, but failed to draft a complaint that stated a proper claim for relief under Ohio law.[10] Because Ohio law clearly applied under the Indiana conflicts of law rules, the court followed the New York approach in *Degen*,[11] determining that a lawyer admitted only in Indiana can be found negligent for failure to know or ascertain another state's law, and that such failure is not a defense to a malpractice claim.[12]

Cases like *Roel*, *Degen*, and *Rekeweg* indicate that lack of knowledge of foreign state law will not be accepted as a defense to claims of liability for conduct causing injury to a client. These cases do not, however, tell us whether it is either appropriate conduct or the unauthorized practice of law to engage in representation requiring knowledge of foreign law without obtaining the assistance of foreign counsel. A Philadelphia Bar Association Professional Guidance Committee opinion gave less than a definitive answer to this question

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may or may not be depending [sic] in a court," and "[g]iving legal advice regarding the law of a foreign country thus constitutes the practice of law . . .").

7. AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 6 (4th ed. 1999) (explaining that "[a] lawyer's lack of experience in a particular area of law is no defense to a charge of incompetent representation; in such cases a lawyer must either work with experienced co-counsel or educate himself or herself appropriately . . . ."). *But see* Francis Meyrier, *Legal Opinions in Financial Transactions Involving Foreign Law*, 13 INT'L BUS. LAW. 410, 411 (Oct. 1985) (suggesting that French lawyers may properly give advice on U.S. law and U.S. lawyers may give advice on French law).

8. Degen v. Steinbrink, 195 N.Y.S. 810, 810-13 (N.Y. App. Div. 1922)..

9. *Id.* at 814.

10. Rekeweg v. Federal Mut. Ins. Co., 27 F.R.D. 431, 435 (N.D. Ind. 1961).

11. *Degen*, 195 N.Y.S. at 814.

12. *Rekeweg*, 27 F.R.D. at 436.

when asked "can a Pennsylvania lawyer represent clients residing in a foreign state in matters over which the foreign state's court would have exclusive jurisdiction."[13] The opinion noted that the request was not specific enough to provide a complete opinion, but did state that "[t]here is nothing uncommon about an attorney licensed in and located in Pennsylvania dealing with cases that arise under the statutes of various other states."[14] Although the opinion noted that, given the lack of specific delineation of the request, the Committee could not provide specific advice, it went on to state that,

> [S]hould the representation of the clients in your scenario be undertaken by an attorney working out of Pennsylvania, there does not appear to be an unauthorized practice of law problem in Pennsylvania which would prevent you from handling this matter. However, each jurisdiction defines the unauthorized practice of law differently, and the Committee urges you to determine whether the activity you are contemplating would violate the unauthorized practice of law prohibition in the foreign jurisdiction.[15]

Thus, the opinion suggests that while advising clients on foreign law may not violate ethical rules in the jurisdiction in which the advice is given, it might do so in the jurisdiction whose law is being applied.

Some guidance is found in an opinion requested by a Washington, D.C. firm representing lending institutions outside of Pennsylvania on whether legal services to the lenders in loan transactions secured by Pennsylvania property would constitute the unauthorized practice of law in Pennsylvania.[16] None of the firm's lawyers was licensed to practice in Pennsylvania. Considering Model Rules 1.1 and 5.5, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility carefully avoided any clear general authorization or prohibition of the conduct.[17] It did sum up its position, however, in the following language:

> A lawyer licensed in a foreign jurisdiction may travel to Pennsylvania to negotiate on a foreign client's behalf, where the lawyer does not purport to be a member of the Pennsylvania bar nor hold himself out as an expert in the laws of Pennsylvania. It should be noted, however, that the frequency of this practice and the location of the loan closing(s) may have a bearing on the result.[18]

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13. Philadelphia Bar Ass'n Prof'l Guidance Comm., Op. 91-36 (1991), 1991 WL 325881.

14. *Id.*

15. *Id.*

16. Pennsylvania Bar Ass'n Comm. Leg. Eth. Prof. Resp., Op. 90-02 (1990), 1990 WL 678970.

17. *Id.*

18. *Id.* at *2. There are, however, seemingly conflicting opinions of the Pennsylvania Bar Association Unauthorized Practice of Law Committee, for example, Op. 94-106 (1994) (explaining that "an out-of-state attorney who represents an out-of-state lending institution lending money to a Pennsylvania resident which loan is secured by a mortgage on Pennsylvania real estate but which financing settlement is held out-of-state is not engaged in the unauthorized practice of law in Pennsylvania."); Op. 94-105 (1994)

By focusing in part on the frequency of the practice of Pennsylvania law by the D.C. firm, the opinion indicated a sort of *pro hac vice* approach to transactional representation similar to the more formal system for litigation representation. This implied authorization for incidental transactions was limited, however, when the Committee noted that "the practice that has developed for competent counsel in many jurisdictions to opine regularly concerning the corporation law of Delaware has not yet grown to encompass Pennsylvania law,"[19] and that "there is, however, no identifiable standard which in all instances will provide guidance as to whether it is necessary, or simply wise to secure the opinion of local counsel in such matters."[20] Other decisions have relied on the frequency and significance of the incursion into the state where the question of unauthorized practice of law arises. They form part of the foundation for the connection between the duty of competent representation of the client and the unauthorized practice of law.

B. *Unauthorized Practice of Law in Cross-Border Transactions*

1. Model Rule 5.5

Rule 5.5 of the Model Rules provides as follows:

> Rule 5.5 Unauthorized Practice of Law
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> A lawyer shall not:
>
> (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
>
> (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.[21]

While this rule carries the heading "unauthorized practice of law," it does not provide a definition of that term. Instead, comment 1 to this Rule provides that

> The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal

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(explaining that "an out-of-state [sic] who appears in Pennsylvania at real estate settlements, whether representing the seller or the buyer and who provides them with advice on the effect of Pennsylvania Law on the legal aspects of the transaction is engaged in the unauthorized practice of law in Pennsylvania."); and Op. 94-101 (1994) (explaining that "if there are no rules which permit such admission, [a] Court or Commission is without the ability to authorize the out-of-state attorney to practice law before it"); *available at* http://www.pabar.org/opinions.shtml.

19. Penn. Bar Ass'n, *supra* note 16 at *3 (citing James J. Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos*, 28 BUS. LAW. 915, 937 (1973)).

20. *Id.*

21. MODEL RULES, *supra* note 1, R. 5.5.

> services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.[22]

Thus, what amounts to the unauthorized practice of law is to be determined by each jurisdiction through statutes and case law. The Rule 5.5 comment provides some guidance as to purpose, however, limiting any definition to an emphasis on the duty to the client. Whatever the definition may be, the purpose behind preventing unauthorized practice is the protection of the client. This is also the guiding principle behind the Rule 1.1 duty of competence.[23] The explanation of paragraph (b) in the comment would seem to apply equally to an out-of-state lawyer retained to provide advice on foreign law.

2. Incidental and Innocuous Practice in a State by a Foreign Lawyer

One of the most-cited cases on the issue of practice in one jurisdiction by a lawyer admitted only in another is *Appell v. Reiner*.[24] A New York lawyer represented a New Jersey resident in working out creditors' claims, including the claim of a New York City company that accounted for over fifty percent of the value of all claims.[25] When the lawyer brought suit to collect his fee, the client countered with the defense that collection for the unauthorized practice of law is prohibited.[26] The New Jersey Supreme Court acknowledged that only

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22. *Id.* cmt. 1.

23. *See* MODEL RULES, *supra* note 1, R. 1.1 and accompanying text. This goal is also the focus of the comments to the RESTATEMENT THIRD LAW GOVERNING LAWYERS § 3 (2000), which takes a progressive approach to the question of cross-border practice:

> Applied literally, the old restrictions on practice of law in a state by a lawyer admitted elsewhere could seriously inconvenience clients who have need of such services within the state. Retaining locally admitted counsel would often cause serious delay and expense and could require the client to deal with unfamiliar counsel. Modern communications, including ready electronic connection to much of the law of every state, makes concern about a competent analysis of a distant state's law unfounded. Accordingly, there is much to be said for a rule permitting a lawyer to practice in any state, except for litigation matters or for the purpose of establishing a permanent in-state branch office. Results approaching that rule may arguably be required under the federal interstate commerce clause and the privileges and immunities clause. The approach of the Section is more guarded. *However, its primary focus is appropriately on the needs of the client.*

Id. § 3, cmt. e (emphasis added). The Restatement further extends the client relationship justification of out-of-state practice to inside legal counsel for a corporation, supporting consistent practice in a state in which the lawyer is not admitted, "because the only concern is with the client-employer, who is presumably in a good position to assess the quality and fitness of the lawyer's work." *Id.* cmt. f.

24. Appell v. Reiner, 204 A.2d 146 (N.J. 1964).

25. *Id.* at 147.

26. *Id.*

lawyers admitted in New Jersey could practice law there, but recognized that, particularly in a geographic area where business dealings were often likely to cross state lines, some exceptions to a strict rule are necessary:

> [L]egal services to be furnished to New Jersey residents relating to New Jersey matters may be furnished only by New Jersey counsel. We nevertheless recognize that there are unusual situations in which a strict adherence to such a thesis is not in the public interest. In this connection recognition must be given to the numerous multistate transactions arising in modern times .... [I]t follows that there may be instances justifying such exceptional treatment warranting the ignoring of state lines. This is such a situation. Under the peculiar facts here present, having in mind the nature of the services to be rendered, the inseparability of the New York and New Jersey transactions, and the substantial nature of the New York claim, we conclude that plaintiff's agreement to furnish services in New Jersey was not illegal and contrary to public policy.[27]

The court made a distinction between a transactional practice and litigation services, indicating that representation in negotiations and similar non-court circumstances was more likely to be viewed favorably than would representation connected with litigation:

> It must be remembered that we are not here concerned with any participation by plaintiff in a court proceeding .... Under the peculiar circumstances here present, independent negotiations by members of different bars, even though cooperating to the greatest extent, would be grossly impractical and inefficient.[28]

Even in *Spivaks v. Sachs*, one of the leading cases refusing to allow collection of fees by an out-of-state lawyer, the New York Court of Appeals referred approvingly to the language of *Appell*:

> We agree with the Supreme Court of New Jersey . . . that, recognizing the numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York.[29]

Like *Appell*, other cases allowing the collection of fees, as well as cases refusing to find unauthorized practice, have dealt with limited, "incidental and innocuous" incursions into legal practice within the non-admission state. Thus, in *El Gemayel v. Seaman*, a Lebanese lawyer could give assistance to New York residents on Lebanese law, when all of his contacts were by telephone and mail other than a visit to New York after the completion of his legal services.[30] Similarly, in *Freeling v. Tucker*, an Oklahoma lawyer's representation of an heir in an Idaho probate proceeding was "incident to the disposition of a particular matter isolated from his usual practice in the state of his residence," and

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27. *Id.*
28. *Id.*
29. Spivak v. Sachs, 211 N.E.2d 329, 331 (N.Y. 1965) (citing *Appell*, 204 A.2d 146).
30. El Gemayel v. Seaman, 533 N.E.2d 245, 249 (N.Y. 1988).

did not amount to unauthorized practice.[31] And in *Goldstein v. Muskat*, an Illinois lawyer who attended a first meeting with an estate's Wisconsin lawyer, and engaged in further consultations by phone and mail on probate and tax matters, was not engaged in unauthorized practice in Wisconsin.[32]

Other courts focus less on the extent of the local practice than on the need in a modern society to allow multijurisdictional representation for the client's benefit. In *In re Estate of Waring*, a New York firm had a long relationship with the decedent and the decedent's business, represented the decedent's estate in tax and other matters, but was associated with a local New Jersey firm for court representation and preparation of the New Jersey inheritance tax filings.[33] The New Jersey court allowed the collection of fees by the New York firm, stating:

> Multistate relationships are a common part of today's society and are to be dealt with in commonsense fashion. While the members of the general public are entitled to full protection against unlawful practitioners, their freedom of choice in the selection of their own counsel is to be highly regarded and not burdened by "technical restrictions which have no reasonable justification."[34]

The court ultimately determined that the New York firm "properly participated in the handling of the estate and so restricted its activities as to avoid any fair charge that it was wrongfully practicing law in New Jersey."[35]

The question these cases raise is whether the frequency and significance of the incursion into another state through limited practice there relates to the question of competency of the lawyer to engage in such practice. If our test is the duty of competence owed to the client under Model Rule 1.1, is a lawyer more or less likely to be acting competently if he or she applies that state's law (in that state) only on an infrequent basis. Some commentators have connected this question to the existence of jurisdiction over the out-of-state lawyer advising on that state's law.[36] On the one hand, if the conduct is limited and isolated,

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

32. Goldstein v. Muskat, 114 Wis. 2d 596, 338 N.W.2d 528 (Wis. Ct. App. 1983). *See also* Cowen v. Calabrese, 41 Cal. Rptr. 441, 442-43 (Cal. Ct. App. 1964) (holding that an Illinois lawyer who came to California to advise a California client, after being contacted at his Illinois office, could recover fees for work on a federal bankruptcy matter in California, where his only practice in California was in federal court); Brooks v. Volunteer Harbor No. 4, 123 N.E. 511, 512 (Mass. 1919) (holding that a Maine lawyer could recover fees for work for a Massachusetts client performed in Massachusetts, where he had informed the client that he was not locally admitted and would have to retain local counsel).

33. *In re* Estate of Waring, 221 A.2d 193 (N.J. 1966).

34. *Id.* at 197.

35. *Id.* at 199.

36. Robert E. Lutz, *Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners*, 16 FORDHAM INT'L L.J. 53, 60 (1992-93):

> When undertaking representation that involves advice on the law of a foreign country, U.S. lawyers should be wary that foreign countries may consider such

with clear statements to the client that the lawyer is not licensed to practice the law of the state in question, and disclaimers as to the ability to render opinions on the law of that state, then the lawyer may be free of claims of malpractice and unauthorized practice. At the same time, however, such conditions may render the representation less than fully useful to the client. In many cases, practical considerations such as jurisdiction in the state whose practice rules are violated may prevent this issue from being directly addressed.[37]

More recently, cases have begun to focus on issues other than the intensity of the incursion into the state in which the question of unauthorized practice arises. These cases allow distinctions to be made based on four factors: (1) the state in which the lawyer involved is admitted to practice law; (2) the location of the client; (3) the law being applied in the particular transaction; and (4) the location of the lawyer when providing the services. The following discussion addresses these factors, beginning with a closer look at the basic Model Rule dealing with the unauthorized practice of law.

3. Determining the Relevant Factors

a. Acknowledging the Need for Cross-Border Representation

Whether existing case law provides real guidance on what constitutes the unauthorized practice of law by an out-of-state lawyer is

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advice the unlicensed "practice of law." As a practical matter, it is normally the lawyer's home jurisdiction that is most likely to bring a disciplinary action against the member lawyer. Nevertheless, given the reach of some long-arm jurisdictional statutes as well as the extraterritorial reach of some lawyer regulation codes, legal services in one country that somehow relate to a transaction in another may subject a lawyer to the courts and laws of a foreign country.

Id. *See also* Meyrier, *supra* note 8, at 411:

[A] French lawyer would not act unlawfully under the laws of France if he gave, say, a New York law opinion, since (a) the practice of law, as such, whether French or foreign, is not regulated in France even though the practice of law within any of the regulated professions (*i.e.*, as *avocat*, *conseil juridique* or *notaire*) is and (b) U.S. law would not preclude a non-resident lawyer from opining on U.S. law; even if U.S. law purported to make this unlawful, the extraterritorial effect of such a prohibition would be questionable.

Id.

37. *See, e.g.*, Mayes v. Leipziger, 674 F.2d 178 (2d Cir. 1982) (holding that a New York long-arm statute did not result in jurisdiction over a California lawyer and his firm in New York, where the lawyer never came to New York, and an instituted representation of a New York client by sending letters and making phone calls from California to the client's New York lawyer).

open to question.[38] As indicated above, a rather long line of twentieth century cases provides no clear statements. Those cases do, however, provide consistent statements regarding the need for lawyers to be able to provide cross-border representation. Thus, as early as 1965, the New York Court of Appeals stated that, given "the numerous multi-state transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York."[39] The decision in which this statement was first made held that a California lawyer could not collect a fee for services rendered in New York to a New York resident relating to a Connecticut divorce, because those activities constituted the illegal practice of law in New York.[40] In comparison, when all of a lawyer's contacts with the client in New York were by telephone from outside New York, except for a visit to New York following the successful completion of his legal services, that lawyer did not engage in unlawful practice in New York.[41] While the distinction between these two cases may be easily accepted—one involved a lawyer licensed in one state who went to another state, set up an office there, obtained a listing in the local telephone directory, listed that office as his place of business on his stationery and professional cards, and represented clients in the courts of that jurisdiction; the other involved a lawyer who advised only on foreign law from a foreign location—finding the exact location of the dividing line is not so easy.[42]

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38. *See generally* Carol A. Needham, *Permitting Lawyers to Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know It?* 84 MINN. L. REV. 1315, 1339-52 (2000) (discussing what is included in "the practice of law").

39. *El Gemayel*, 533 N.E.2d at 248 (quoting *Spivak*, 211 N.E.2d at 331).

40. *Spivak*, 211 N.E.2d at 331.

41. *El Gemayal*, 533 N.E.2d at 249.

42. For cases denying payment of legal fees based on findings of unauthorized practice, *see e.g.*, Martin & Martin v. Jones, 541 So. 2d 1 (Ala. 1989) (estopping a Mississippi law firm not licensed in Alabama from enforcing a client's promise to pay his fee for legal services rendered in Alabama); McRae v. Sawyer, 473 So. 2d 1006, 1009 (Ala. 1985) (refusing to honor a Mississippi attorney's lien against Alabama clients for representation in litigation in Alabama courts, even though the Mississippi lawyer had associated with a local firm); Perlah v. S.E.I. Corp., 612 A.2d 806, 808 (Conn. Cir. Ct. 1992) (holding that a lawyer admitted only in New York could not collect fees for representation of Connecticut client, involving preparation of documents for the acquisition of a New York corporation by the client's investment group); Taft v. Amsel, 180 A.2d 756 (Conn. Super. Ct. 1962) (preventing a New York attorney from recovering compensation for legal services rendered primarily in Connecticut for Connecticut residents, involving creation of interstate transportation business); Chandris, S.A. v. Yanakakis, 668 So. 2d 180 (Fla. 1995) (denying a Massachusetts lawyer, residing in Florida, fee for representation of a Greek seaman in Jones Act claim for damages on the high seas); Lozoff v. Shore Heights, Ltd., 362 N.E.2d 1047, 1048-49 (Ill. 1977) (denying a Wisconsin lawyer not admitted in Illinois recovery of legal fees for representing an Illinois client in the sale of Illinois real estate to other Illinois parties); Shapiro v. Steinberg, 440 N.W.2d 9. 12 (Mich. Ct. App; 1989) (denying a lawyer licensed in Massachusetts, who was District Legal Counsel for the Army Corps of Engineers in Michigan, recovery of fees for legal services in connection with a wrongful death case in

Additional judicial acknowledgments of the need for cross-border representation include statements that "[m]ultistate relationships are a common part of today's society and are to be dealt with in commonsense fashion,"[43] and that strict adherence to rules prohibiting the unauthorized practice of law by out-of-state attorneys would be "grossly impractical and inefficient."[44]

b. A Focus on the State in Which the Lawyer Delivers Legal Services: The Significance of the *Birbrower* Test

The case bringing the most recent discussion is *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, in which the California Supreme Court stated, "we recognize the need to acknowledge

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Michigan, but finding that the attorney could recover for "work of a preparatory nature, such as research, investigation of details, assemblage of data, and similar activities"); Spivak, 211 N.E.2d at 331 (California lawyer could not collect a fee for services rendered in New York to a New York resident relating to a Connecticut divorce); Ranta v. McCarney, 391 N.W.2d 161, 166 (N.D. 1986) (denying collection by Minnesota lawyer who had assisted in sale of business of North Dakota client, where lawyer was not admitted to practice in North Dakota but had provided legal services to at least 20 North Dakota clients and had a branch office in North Dakota). For cases involving disciplinary sanctions for similar "unauthorized" out-of-state practice, see Unauthorized Prac. of Law v. Bodhaine, 738 P.2d 376, 377 (Colo. 1987) (granting an injunction against practice in Colorado by a Colorado resident who was licensed to practice only in California); *In re* Kennedy, 605 A.2d 600 (D.C. 1992) (providing a nine-month suspension to a Washington D.C.-admitted lawyer who had been disciplined for unauthorized practice in Maryland); Brookens v. Comm. on Unauthorized Practice of Law, 538 A.2d 1120 (D.C. 1988) (imposing a fine on lawyer admitted in Wisconsin and Pennsylvania, but not in Washington, D.C., who maintained offices in Washington, D.C. and appeared on behalf of others in cases in Superior Court, U.S. District Court and D.C. Court of Appeals); Fla. Bar v. Savitt, 363 So. 2d 559 (Fla. 1978) (settling of Florida Bar action to enjoin New York firm from opening Miami office without supervising partner who was admitted in Florida); *In re* Carter, 426 S.E.2d 897, 898-99 (Ga. 1993) (disciplining Georgia lawyer for representing a divorce client in Alabama without being admitted to practice there, where he misrepresented the status of the matter to the client, withdrew without notifying or taking steps to protect the client, and did not refund any portion of his fee); Kennedy v. Bar Ass'n of Montgomery County, Inc., 561 A.2d 200, 213 (Md. 1989) (enjoining lawyer admitted to Washington D.C. Court of Appeals and U.S. District Court for the District of Maryland from continuing practice through law office in Maryland); *In re* Roel, 144 N.E.2d 24 (N.Y. 1957) (sanctioning Mexican citizen and lawyer who had never become member of New York bar, but "maintained offices in the city of New York for a considerable period of time," from which he arranged Mexican divorces); *In re* Ellis, 504 N.W.2d 559 (N.D. 1993) (upholding six-month suspension where lawyer admitted only in North Dakota represented clients in Minnesota without associating with local counsel, prepared false documents in order to obtain bank loan to client to pay her fee, and abandoned client when opposing counsel objected to such representation); Ginsburg v. Kovrak, 139 A.2d 889 (Pa. 1958) (enjoining lawyer not admitted in Pennsylvania from maintaining Pennsylvania office even though the lawyer's practice was limited to the practice of federal tax law); S.C. Med. Malpractice Joint Underwriting Ass'n v. Froelich, 377 S.E.2d 306, 308 (S.C. 1989) (granting an injunction against lawyer admitted in Illinois, but not in South Carolina, who actively participated in medical malpractice litigation in South Carolina and federal courts).

43. *Waring*, 221 A.2d at 197.

44. *Id.* (quoting *Appell*, 204 A.2d at 148).

and, in certain cases, accommodate the multistate nature of law practice."[45] The New York law firm seeking to collect its fee "performed substantial work in California," for a California corporation, in connection with a dispute arising out of an agreement governed by California law.[46] Most—perhaps all—of this work was related to the preparation for representation of the California client before an arbitral tribunal under the rules of the American Arbitration Association, and in the resulting settlement of claims short of actual arbitration.[47] The court focused on the California statute prohibiting the unauthorized practice of law, which states that "[n]o person shall practice law in California unless the person is an active member of the State Bar."[48] Finding no doubt that the New York law firm had engaged in the "practice of law," the question was whether it had done so "in California."[49] The court acknowledged that "[m]ere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California,'" and stated that "[t]he primary inquiry is whether the unlicensed lawyer engaged in *sufficient activities in the state*, or created a *continuing relationship with the California client* that included legal duties and obligations."[50] Nonetheless, the court determined that compensation was to be denied only for that portion of the services provided "in California."[51] The New York firm

> may be able to recover fees under the fee agreement for the limited legal services it performed . . . in New York to the extent they did not constitute practicing law in California, even though those services were performed for a California client. Because [the statute on unauthorized practice of law] applies to the practice of law in California, it does not, in general, regulate law practice in other states.[52]

The *Birbrower* court focused on (1) the location of the client, (2) the applicable law, and (3) the location of the performance of the services, with primary emphasis on the last of these three elements. Though clearly indicating that it found this analysis compelled by the language of the statute, the court set up rather incongruous possibilities. Thus, the same representation of a California client in the application of California law would be the unauthorized practice of law if done by a New York lawyer in California, but may not be if done by the same lawyer in New York.

While the *Birbrower* result may be grounded in the language of the California statute, it seems to have little or no relationship to the

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45. *Birbrower*, 949 P.2d at 10.
46. *Id.* at 3.
47. *Id.*
48. CAL. BUS. & PROF. CODE § 6125 (West Supp. 1998).
49. *Birbrower*, 949 P.2d at 5.
50. *Id.* (emphasis added).
51. *Id.* at 13.
52. *Id.* at 11.

purpose of assuring competent legal advice to the California client. If the advice is competent when rendered in New York, how is it that the same advice becomes less competent when delivered from a location within California? If, as noted above, the focus of Model Rule 5.5 on the unauthorized practice of law is the same as that of Model Rule 1.1—the duty of competence owed to the client—then the concern should be whether the representation is competently rendered, regardless of *where* it is rendered. Particularly in an age of instantaneous real and virtual delivery of services from any point on the globe, any focus on *where* the lawyer delivers services is only likely to lead to irrelevant legal fictions applied for the purpose of determining *where* the electronic transmission of those services occurs.

The *Birbrower* decision does apply the factors most courts have considered in cases involving the unauthorized practice of law. It is correct that unauthorized practice by a lawyer cannot occur unless it is "in" a state other than the state of admission. The lawyer is always authorized to practice law in the state of admission. The real question is when should practice "in" another state constitute the unauthorized practice of law. If the local definition of the "unauthorized practice of law" hinges only on where the lawyer is located, then the rule fails to take into account the duty of competent representation owed to the client and risks confirming arguments that the rule exists only to protect the economic interests of the local bar.

It is possible to consider the degree of connection of each of (1) the client, (2) the applicable law, and (3) the location of the delivery of the services to the state of admission as well as to the other state in question. The problem is that, by focusing on the language of the California statute, and then pursuing a "plain meaning" analysis, the *Birbrower* court arguably gave greatest weight to the third of these factors, which is the least important, at least if the review of each is to be related to the ability to provide competent legal representation.[53]

If statutes regulating the unauthorized practice of law are distinguished simply by the location of the lawyer at the time of service, then the argument that such statutes exist only to protect competing lawyers who are locally admitted holds great weight. If, on the other hand, the purpose of such statutes is to protect the client from those not competent to practice law, the focus must necessarily be on the impact on the client (California legislatures and courts logically should protect California clients) and on the applicable law (the California bar examination tests potential lawyers on California law, while the New

53. The court did acknowledge that "[p]hysical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive." *Id.* at 5. However, after noting that presence can be "by telephone, fax, computer, or other modern technological means," the court rejected "the notion that a person *automatically* practices law 'in California' whenever that person practices California law anywhere, or 'virtually' enters the state by telephone, fax, e-mail, or satellite." *Id.* at 6.

York bar examination does not). What, though, of the multinational corporation client with operations in multiple U.S. states and multiple foreign countries? And what of transactions governed by international law, or at least by some form of transnational law or set of rules?

c. A Focus on the Location of the Client: *Estate of Condon,* and the ABA Commission on Multijurisdictional Practice

When the California Supreme Court decided *Birbrower*, it also sent another case back to the Court of Appeals to be vacated and reconsidered. In *Estate of Condon*, a California decedent, Evelyn Condon, was survived by a son and a daughter, each of whom was appointed a co-executor.[54] The son, Michael Condon, lived in Colorado, and retained to represent him in his role as executor the Colorado firm that had prepared his mother's will and other documents relating to her estate plan.[55] Michael Katz, the lawyer at the Colorado firm who provided the representation, was not a member of the California State Bar.[56] He provided over 315 hours of non-tax-related services on behalf of the Colorado co-executor of the California estate.[57] Of that work, only 10 hours were rendered while Katz was physically present in California.[58] When the California co-executor challenged Katz's petition for fees as payment for the unauthorized practice of law, the California Court of Appeals held that Katz did not violate section 6125 of the Business and Professions Code,[59] and was entitled to payment.[60]

Following the California Supreme Court's opinion in *Birbrower*, the *Condon* court defined the question before it as, "whether an out-of-state law firm, not licensed to practice law in California, violated section 6125 when it performed legal services by either physically or virtually entering California on behalf of a Colorado client who was an executor of a California estate."[61] In determining whether the Colorado firm "practiced law" "in California," the *Condon* court interpreted the *Birbrower* test to focus not so much on the location of the lawyer when providing the services as on the location of the client.[62]

> Implicit in the [*Birbrower*] court's formulation of the rule is the ingredient that the client is a "California client," one that either resides in or has its principal place of business in California . . . .
>
> In the real world of 1998 we do not live or do business in isolation within strict geopolitical boundaries. Social interaction and the conduct of

54. Estate of Condon, 65 Cal. App. 4th 1138, 1140 (Cal. Ct. App. 1998).
55. *Id.* at 1140-41.
56. *Id.* at 1140.
57. *Id.* at 1141 n.2.
58. *Id.*
59. CAL. PROF. & BUS. CODE § 6125 (West Supp. 2001).
60. *Condon*, 65 Cal. App. 4th at 1142.
61. *Id.* at 1143 (footnote omitted).
62. *Id.* at 1145.

> business transcends state and national boundaries; it is truly global. A tension is thus created between the right of a party to have counsel of his or her choice and the right of each geopolitical entity to control the activities of those who practice law within its borders.[63]

The *Condon* court focused on language in the *Birbrower* decision dealing with the language and purpose of section 6125 to find that the statute was not meant to protect anyone other than local (California) clients against the unauthorized practice of law. Thus, "[w]hether an attorney is duly admitted in another state and is, in fact, competent to practice in California is irrelevant in the face of section 6125's language and *purpose*."[64] Thus, the court found it "obvious that . . . the client's residence or its principal place of business is determinative of the question of whether the practice is proscribed by section 6125."[65]

By focusing on the location of the client, the *Condon* court applied a test as formalistic as the location-of-the-lawyer-when-rendering-services test of the *Birbrower* court. It may be that both applications of the California statute were correct, given the language of that statute. Nonetheless, the *Condon* court explicitly extended the formalism and language of *Birbrower* to determine that whether a foreign attorney is competent in California law "is irrelevant."[66] While this reasoning may be correct for the purposes of interpreting section 6125 of the California Business and Professions Code, it should not be correct for the purposes of determining unauthorized practice generally. Taking the focus off the question of competence removes the question of unauthorized practice from the fundamental duty of competent representation and violates the basic test suggested at the beginning of this article.

The American Bar Association has created a Commission on Multijurisdictional Practice to study the concerns raised by cases such as *Birbrower* and *Condon*.[67] In a memorandum issued in late 2000,[68] the Chair of that Commission, consistent with *Estate of Condon,* took the position that a lawyer representing a client from his or her home state is not engaged in unauthorized practice,

> [e]ven if the lawyer must construe the law of another state or foreign country. A lawyer in Illinois whose in-state client asks about a legal problem in Indiana or in France, and who is competent to advise on

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63. *Id.* at 1145-46.

64. *Id.* at 1146 (quoting *Birbrower*, 949 P.2d at 8).

65. *Id.*

66. *Id.*

67. ABA Website, http://www.abanet.org/cpr/mjp-home.html (containing information on the Commission on Multijurisdictional Practice).

68. Memorandum to Bar Leaders from Harriet E. Miers, Chair Commission on Multijurisdictional Practice, Nov. 1, 2000, http://www.abanet.org/cpr/mjp-gillers_final_article.html. Like the *Condon* decision, the ABA Memorandum puts the focus clearly on the location of the client, describing a spectrum that begins on one end with the lawyer and client from the same state, and extends to "the other end of the spectrum, [with] a lawyer who creates a permanent physical presence (*i.e.*, hangs out a shingle) in a state in which he or she is not admitted, or who holds himself or herself out as admitted in a state in which he or she is not admitted." *Id.*

> Indiana or French law, is licensed to do so from his Illinois office. That is why the *Birbrower* . . . lawyers could get paid for work performed in their home state[].[69]

This position was supported by citation to *Estate of Condon*, and to the Hawaii decision in *Fought & Co., Inc. v. Steel Engineering & Erection, Inc.*[70] A closer look at *Fought*, however, leads to another connection relied upon by the Hawaii court.

d. A Focus on Competent Representation: The *Fought* Interpretation of *Birbrower*

In *Fought & Co., Inc. v. Steel Engineering & Erection, Inc.*, the Hawaii Supreme Court considered an application for statutory fees for the Oregon general counsel who had provided assistance in litigation on behalf of an Oregon client.[71] The Hawaii statute provides that it is:

> unlawful for any person, firm, association, or corporation to engage in . . . the practice of law, . . . except and to the extent that the person, firm, or association is licensed or authorized so to do by an appropriate court, agency, or office or by a statute of the State or the United States[.][72]

The court found first that the Oregon counsel was engaged in "the practice of law" as considered under the statute.[73] It then determined that the question of whether the services covered "were rendered 'within the jurisdiction'" of the State of Hawaii was one of first impression.[74] Citing *Birbrower* for the proposition that "the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice,"[75] the court stated:

> [T]he transformation of our economy from a local to a global one has generated compelling policy reasons for refraining from adopting an application so broad that a law firm, which is located outside the state of Hawai'i, may automatically be deemed to have practiced law "within the jurisdiction" merely by advising a client regarding the effect of Hawai'i law or by "virtually entering" the jurisdiction on behalf of a client via "telephone, fax, computer, or other modern technological means."[76]

At this point, the *Fought* court found no unauthorized practice to exist, providing a rationale tied to the duty of competence found in Model Rule 1.1:

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69. *Id.*
70. Fought & Co., Inc. v. Steel Eng'g & Erection, Inc., 951 P.2d 487 (Haw. 1998).
71. *Id.*
72. HAW. REV. STAT. ANN. §§ 605-14 (Michie 1995).
73. *Fought*, 951 P.2d at 496.
74. *Id.*
75. *Id.* (quoting *Birbrower*, 949 P.2d at 6).
76. *Fought*, 951 P.2d at 497 (quoting *Birbrower*, 949 P.2d at 6).

> [A] commercial entity that serves interstate and/or international markets is likely to receive more effective and efficient representation when its general counsel, who is based close to its home office or headquarters and is familiar with the details of its operations, supervises the work of local counsel in each of the various jurisdictions in which it does business. Undoubtedly, many Hawaii corporations follow the same practice.
>
> A blanket rule that prohibited the taxation of fees for the services by extrajurisdictional legal counsel who assist local counsel in the conduct of litigation, who are themselves domiciled in different jurisdictions, would be an imprudent rule at best. At a minimum, this rule would be to increase the total cost of legal representation and magnify the difficulty of controlling multijurisdictional litigation. Moreover, such a rule might also create an incentive for ethical violations, inasmuch as Hawaii Rules of Professional Conduct (HRPC) Rule 1.1 mandates that "[a] lawyer shall provide competent representation to a client." In many instances involving complex litigation among parties domiciled in different jurisdictions, competent representation undoubtedly *requires* consultation with legal counsel licensed to practice in another jurisdiction. To prohibit an award of fees for these services would only undermine the policies underlying HRS §§ 605-14 and 605-17, which were enacted to protect the public against incompetence.[77]

The Hawaii court found no unauthorized practice "within the jurisdiction" of Hawaii, and thus no restriction on the collection of statutory fees.[78] Its rationale, however, differed from that in *Birbrower*, *Condon*, and the ABA Multijurisdictional Commission memorandum as a result of the clear reliance on Model Rule 1.1 and the focus on the duty of competent representation of the client. This factor played no explicit role in *Birbrower* or *Condon*, as reflected by the statement in each finding "irrelevant" whether the out-of-state attorney was "competent to practice in California."[79]

III. TRANSNATIONAL PRACTICE AND COMPETENT REPRESENTATION OF THE CLIENT: WHEN IS OUT-OF-STATE PRACTICE UNAUTHORIZED PRACTICE?

While states undoubtedly have the power to regulate the practice of law under the United States constitutional system, that power should be exercised consistent with appropriate goals and not simply to protect the local profession.[80] Thus, while the California court's application of the

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77. *Id.*
78. *Id.* at 497-98.
79. *Birbrower*, 949 P.2d at 8; *Condon*, 76 Cal. App. 4th at 1145.
80. *See, e.g.*, Leis v. Flynt, 439 U.S. 438, 442 (1979):

> Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. The States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers.

unauthorized practice of law statute in *Birbrower* may be an appropriate exercise of judicial restraint in the interpretation of particularly restrictive statutory language, the result indicates at least the need for a legislative reexamination of the rule. If the test of whether conduct is or is not an unauthorized practice of law must hinge on the place in which the services are rendered, or even on the location of the client, then the relationship to the goal of competent representation can become rather attenuated.

In the discussion above, the important factors in determining whether there is unauthorized practice of law in a multijurisdictional context are: (1) the state in which the lawyer involved is admitted to practice law; (2) the location of the client; (3) the law being applied in the particular transaction; and (4) the location of the lawyer when providing the services.[81] The first of these, by definition, will always exist in a multijurisdictional unauthorized practice analysis, but will never be controlling in the result. Thus, determining whether unauthorized practice exists must be guided by reference to one or more of the other three factors, and perhaps by its relation to the state of admission. As already noted, *Birbrower* focused on the location of the lawyer, and *Condron* focused on the location of the client. The above discussion suggests that neither of these serves as a satisfactory factor for determining in all cases whether there exists the unauthorized practice in multijurisdictional representation. The *Fought* case adds reference to the relevant fundamental test: the impact on the ability to provide competent representation of the client.[82] This test is general in nature, though, and begs the question of what factors are most relevant to determining whether the test is met. Set forth below are hypothetical examples of common cross-border transactions, offered to test the application of the client location, lawyer location, and applicable law factors in determining whether there exists unauthorized practice of law. This review of possibilities is offered neither to justify an existing thesis regarding correct results, nor to develop such a thesis. It is offered merely to demonstrate problems and inconsistencies with existing approaches to the relevant issues. While this may be intellectually less than satisfying, it does indicate the complexity of the problem given the current structure of the ethical rules.

Id. But see Laurel Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (raising the issue of whether the power to license and regulate lawyers is exclusively a state power).

81. *See supra* p. 1146.

82. *Fought*, 951 P.2d at 495-97.

A. *Example 1*

> Joe Lawyer, admitted to practice in Pennsylvania, with his office in Pittsburgh, represents a Pittsburgh client selling widgets to a buyer in Munich. The contract drafted by Joe Lawyer includes the following clause:
>
> > This contract shall be governed by the laws of the State of Pennsylvania, excluding the United Nations Convention on Contracts for the International Sale of Goods. Any dispute arising out of this contract shall be submitted exclusively to the courts of the State of Pennsylvania.

Joe Lawyer, admitted in Pennsylvania, is practicing Pennsylvania law, in Pennsylvania, for a Pennsylvania client. The relevant factors can be summarized as follows:

state of admission	=	Pennsylvania
applicable law	=	Pennsylvania
location of conduct	=	Pennsylvania
location of client	=	Pennsylvania

Clearly there is no unauthorized practice of law problem.

B. *Example 2*

> Hilda Rechtsanwalt, admitted to practice in Munich, represents a Pittsburgh client selling widgets to a buyer in Munich. The contract, drafted by Hilda Rechtsanwalt in Pittsburgh, includes the following clause:
>
> > This contract shall be governed by the laws of the State of Pennsylvania, excluding the United Nations Convention on Contracts for the International Sale of Goods. Any dispute arising out of this contract shall be submitted exclusively to the courts of the State of Pennsylvania.

Hilda, admitted in Germany, is practicing Pennsylvania law, in Pennsylvania, for a Pennsylvania client. This combination is represented as follows:

state of admission	=	Germany
applicable law	=	Pennsylvania
location of conduct	=	Pennsylvania
location of client	=	Pennsylvania

Clearly there is an unauthorized practice of law problem, at least if we accept the analysis of a majority of the cases.

The question, then, is what adjustments from either end of the spectrum cause the line between authorized and unauthorized practice to be crossed. Most cases available in the United States involve inbound situations in which the lawyer is from outside the state in which the unauthorized practice of law rule is applied. The same analysis can be applied, however, to outbound situations, determining whether the unauthorized practice occurs in the other state.

C. *Example 3*

> Joe Lawyer, admitted to practice in Pennsylvania, with his office in Pittsburgh, represents a Pittsburgh client selling widgets to a buyer in Munich. Joe goes to Munich, where he negotiates all aspects of the contract for the sale of widgets to the Munich buyer, including the following clause:
>
> > This contract shall be governed by the laws of the State of Pennsylvania, excluding the United Nations Convention on Contracts for the International Sale of Goods. Any dispute arising out of this contract shall be submitted exclusively to the courts of the State of Pennsylvania.

Joe Lawyer, admitted in Pennsylvania, is practicing Pennsylvania law, for a Pennsylvania client, but he is doing it in Germany. This combination of factors is represented as follows:

state of admission	=	Pennsylvania
applicable law	=	Pennsylvania
location of conduct	=	Germany
location of client	=	Pennsylvania

Is there, or should there be, an unauthorized practice of law problem? Does the mere change of Joe's location convert the *authorized* practice of the law in Example 1 into the unauthorized practice of that law? It would seem not, even if a strict reading of *Birbrower* (focusing on the location of the attorney when the services are rendered) might imply a problem. This example is in line with *Condon*. It provides a focus on the location of the client, as well as an emphasis on the applicable law, and thus clearly ties Joe to the state in which he is admitted to practice. Joe is every bit as competent to practice the law of his admission state when he is in Munich as when he is in Pittsburgh. Normal transnational business relations require that Joe be able to go to the location of the buyer on behalf of his client and negotiate the contract in a manner that best protects his client's interests.

D. *Example 4*

> Joe Lawyer, admitted to practice in Pennsylvania, with his office in Pittsburgh, represents a Munich client who has come to Pittsburgh to buy widgets from a Pittsburgh seller. The contract drafted by Joe Lawyer includes the following clause:
>
> > This contract shall be governed by the laws of the State of Pennsylvania, excluding the United Nations Convention on Contracts for the International Sale of Goods. Any dispute arising out of this contract shall be submitted exclusively to the courts of the State of Pennsylvania.

Joe Lawyer, admitted in Pennsylvania, is practicing Pennsylvania law, in Pennsylvania, but now for a German client. This combination of factors is represented as follows:

state of admission	=	Pennsylvania
applicable law	=	Pennsylvania
location of conduct	=	Pennsylvania
location of client	=	Germany

Is there, or should there be, an unauthorized practice of law problem? The *Condon* focus on the location of the client might suggest a problem, *if* Joe were applying the law of a state other than that of his admission. The mere change of Joe's client from local to foreign should not by itself convert authorized practice to unauthorized practice. Nor should it move the matter outside the scope of the duty of competent representation. German clients deserve the same quality of representation in Pennsylvania that is available to Pennsylvania clients.

While regulation of the profession may protect local citizens, even though both *Birbrower* and *Condon* explicitly found that the California statute was intended to protect only California clients,[83] such statutes reasonably should protect all possible clients, regardless of their nationality or place of business. If the goal of the rules of practice is to provide competent representation to the client, then local lawyers must be allowed to represent foreign clients in the application of local law. Otherwise competent representation of such clients would not be possible. It is important to note at this stage, however, that this analysis changes the focus from the location of the client (as in *Condon*) to the applicable law. It may be that unauthorized practice is avoided if *either* the client is located in, or the applicable law is that of, the state in which the lawyer is admitted to practice. Additional examples help provide further focus.

E. *Example 5*

> Joe Lawyer, admitted to practice in Pennsylvania, with his office in Pittsburgh, represents a Pittsburgh client selling widgets to a buyer in Munich. As part of the negotiations conducted in Pittsburgh, the parties agree to the following clause in the contract:
>
> > This contract shall be governed by the laws of Germany, excluding the United Nations Convention on Contracts for the International Sale of Goods. Any dispute arising out of this contract shall be submitted exclusively to the courts of Germany.

Now Joe Lawyer, admitted in Pennsylvania, is representing a Pennsylvania client, but he is advising on a contract governed by German law. This combination of factors is represented as follows:

state of admission	=	Pennsylvania
applicable law	=	Germany
location of conduct	=	Pennsylvania
location of client	=	Pennsylvania

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83. *See supra* notes 45-64 and accompanying text.

If the *Birbrower* approach is followed, then the question becomes whether Joe Lawyer is practicing German law in Germany. Joe has never set foot in Germany as a result of the transaction. If the test of unauthorized practice hinges on *where* Joe practices law, or where his client is located, then he clearly is safe. On the other hand, if the focus is on *what law* Joe is practicing, then the issue is different; Joe may know nothing about German law. If this is the case, then he is not competent to render legal advice on the transaction. He may have helped create a contract that imposes obligations on his client far different from those that would exist under Pennsylvania law.

Choice of forum and choice of law clauses are commonly negotiated terms in transnational contracts, and the simple approach is to choose the law and courts of one party or the other. If Joe has been involved in all aspects of the negotiations, and the last clauses agreed upon in rather difficult negotiations are the choice of forum and choice of law clauses, must he then decline further representation of his client? Does Model Rule 1.1 now require at least that he either become familiar with German law or obtain German co-counsel to advise on the implications of the relevant clauses? The Restatement, in its comments to the Section 3 rules on where a lawyer may practice, supports the ability of a lawyer to give advice on foreign law when competent to do so:

> [A] lawyer *conducting activities in the lawyer's home state* may advise a client about the law of another state, a proceeding in another state, or a transaction there, including conducting research in the law of the other state, advising the client about the application of that law, and drafting legal documents intended to have legal effect there. There is no per se bar against such a lawyer giving a formal opinion based in whole or in part on the law of another jurisdiction, but a lawyer should do so only if the lawyer has adequate familiarity with the relevant law.[84]

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84. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 cmt. e (2000) (emphasis added). Section 3 of the Restatement reads as follows:

> **Jurisdictional Scope of the Practice of Law by a Lawyer**
>
> A lawyer currently admitted to practice in a jurisdiction may provide legal services to clients:
>
> (1) at any place within the admitting jurisdiction;
>
> (2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency; and
>
> (3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) or (2).

Id. § 3

This comment adds that "it would be inappropriate for a lawyer to set up an office for the general practice of nonlitigation law in a jurisdiction in which the lawyer is not admitted."[85] Like *Birbrower*, it provides a primary focus on the location of the conduct. In determining where on the spectrum of activities the threshold of unauthorized practice lies, the Restatement comment suggests a test based on whether the activities in the foreign state "arise out of or otherwise reasonably relate to the lawyer's practice in a state of admission," then provides a list of factors to be considered in determining what might meet this reasonable relationship test.[86] After doing so, however, it then suggests that "[t]he customary practices of lawyers who engage in interstate law practice is one appropriate measure of the reasonableness of a lawyer's activities out of state."[87] It is not clear whether a lawyer whose conduct is not reasonable when judged by the multiple factors listed can prove otherwise by demonstrating customary practice consistent with that conduct.

F. *Example 6*

> Joe Lawyer, admitted to practice in Pennsylvania, with his office in Pittsburgh, represents a Pittsburgh client selling widgets to a buyer in Munich. Joe drafts the contract for the transaction, which includes the following clause:
>
> > This contract shall be governed by the laws of the State of Pennsylvania, excluding the United Nations Convention on Contracts for the International Sale of Goods. Price-delivery terms included in any documents which make up a part of this contract shall be governed by the Incoterms 2000, as created by the International Chamber of Commerce. Any dispute arising out of this contract shall be submitted exclusively to the courts of the State of Pennsylvania.

Now, Joe Lawyer, admitted in Pennsylvania, is practicing Pennsylvania law, in Pennsylvania, for a Pennsylvania client. He also is practicing a set of rules created by a non-governmental organization headquartered in Paris, France. This set of factors can be represented as follows:

state of admission	=	Pennsylvania

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85. *Id.*

86. This list includes:

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

Id.

87. *Id.*

applicable law	=	Pennsylvania & ICC Incoterms
location of conduct	=	Pennsylvania
location of client	=	Pennsylvania

Should the application of a non-governmental set of rules make a difference? One approach is to recognize that incorporation of the Incoterms is simply an alternative to including multiple pages in the contract that the parties (*i.e.*, their lawyers) could have written out themselves. Thus, for all practical purposes this is no different than having a longer contract otherwise governed by Pennsylvania law. This carries some logic, but the same could be said of the contract in Example 5 governed by German law. The parties could have drafted into the contract a set of pages setting out the same rules as exist in German law. What then is the role of a choice of law clause in relation to the unauthorized practice of law question? Is a lawyer "practicing" the law of a given state simply as a result of inclusion of a choice of law clause in a contract pointing to the laws of that state? If so, does the fact that this practice does not occur "in" that state really make a difference? What should be the determining factor in assessing the conduct of the lawyer?

G. *Example 7*

> Joe Lawyer, admitted to practice in Pennsylvania, with his office in Pittsburgh, represents a Pittsburgh client selling widgets to the government of the sovereign state of Ruritania. Joe drafts the contract for the transaction, which includes the following clause:
>
> > This contract shall be governed by international law where applicable, and in all other events by the laws of the State of Pennsylvania, excluding the United Nations Convention on Contracts for the International Sale of Goods. Any dispute arising out of this contract shall be submitted exclusively to the courts of the State of Pennsylvania.

Joe Lawyer, admitted in Pennsylvania, is now practicing in Pennsylvania, for a Pennsylvania client, but he is practicing Pennsylvania law *and* international law. This combination of factors is represented as follows:

state of admission	=	Pennsylvania
applicable law	=	Pennsylvania & International Law
location of conduct	=	Pennsylvania
location of client	=	Pennsylvania

While international law normally deals with the relationships between states, and not between private parties, it is well-settled that in agreements between a state and a private party, the contract may

include a clause choosing international law.[88] International law includes rules dealing with state responsibility to nationals of other states, and those rules may be applicable in such a transaction. It is also clear in the United States that domestic courts can (and must) determine and apply international law where it applies.[89]

Is Joe now practicing law he is not admitted to practice? When he took the bar examination in Pennsylvania, there were no questions on international law. Then again, admission to practice in the other state involved likely would not involve any test of competence in international law either. Should a court faced with a claim of unauthorized practice somehow test Joe's knowledge of international law? There is no official organ that certifies anyone to practice international law before the courts of any state, or any other tribunal.[90] How do (or should) we deal with this type of situation? Is it merely a question of competence under Model Rule 1.1, or does it also implicate Rule 5.5 on the unauthorized practice of law?

H. *Example 8*

> Joe Lawyer, admitted to practice in Pennsylvania, with his office in Pittsburgh, represents a Pittsburgh client selling widgets to a buyer in Munich. The contract drafted by Joe Lawyer includes the following clause:
>
> > This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods and, to the extent said Convention does not cover the issue in question, by the laws of the State of Pennsylvania. Any dispute arising out of this contract shall be submitted exclusively to the courts of the State of Pennsylvania.

Now Joe Lawyer is practicing in Pennsylvania, for a Pennsylvania client. The law is found in an international convention, but under

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88. *See, e.g.*, F.A. MANN, STUDIES IN INTERNATIONAL LAW 191-95 (1973), *quoted in* Award on the Merits in Dispute Between Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic, 17 I.L.M. 1, 14 (1978) ("the fact that one party is not a State should not prevent the contract from being submitted to public international law.").

89. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 163 (1895)

> International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations, but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

Id.

90. Herbert Briggs, who argued four cases before the International Court of Justice, had no law degree and was not admitted to any bar. Stephen M. Schwebel, Comment, *Herbert W. Briggs (1900-1990)*, 84 AM. J. INT'L L. 531 (1990).

Article VI of the U.S. Constitution it is the supreme law of the land,[91] and thus the law of Pennsylvania. This combination of factors is represented as follows:

state of admission	=	Pennsylvania
applicable law	=	CISG and Pennsylvania
location of conduct	=	Pennsylvania
location of client	=	Pennsylvania

Under Article 6 of the U.N. Sales Convention,[92] even though parties may opt out of the Convention's rules by agreement, a mere choice of Pennsylvania law would not accomplish this goal because of the impact of Article VI of the U.S. Constitution. The Sales Convention, in Article 7, requires that those applying the Convention have "regard . . . to its international character and to the need to promote uniformity in its application."[93] Thus, proper application of the Sales Convention may require an understanding of how its provisions have been interpreted in the courts of other contracting states. If cases exist interpreting the relevant Sales Convention provisions in Germany, Italy, and Mexico, must Joe Lawyer be conversant with those cases or risk violating the duty of competence under Rule 1.1? The answer probably is yes.[94] If Joe Lawyer is not conversant with those cases, is he engaging in the unauthorized practice of law? Probably not. A *Condon* analysis would provide a shield because he is representing a client from the state in which he is admitted to practice and practicing within that state. Thus, existing case law,[95] as well as the position of the *Restatement*[96] and the ABA Commission on Multijurisdictional Practice,[97] support the position that he is not engaging in the unauthorized practice of law.

I. *Example 9*

> Joe Lawyer, admitted to practice in Pennsylvania, with his office in Pittsburgh, represents a Pittsburgh client selling widgets to a buyer in Munich. Joe drafts the contract for the transaction, including the following clause:
>
> > This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods. Any dispute arising out of this contract shall be submitted exclusively to the courts of Germany.

---

91. U.S. CONST. art. VI, § 1, cl. 2.

92. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, art. 6, U.N. Doc. A/CONF.97/18, Annex 1, English Version *reprinted in* 52 Fed. Reg. 6264 (1987) and 19 I.L.M. 671 (1980) [hereinafter U.N. Convention on Contracts].

93. U.N. Convention on Contracts, art. 7(1), 19 I.L.M. at 673.

94. Harry M. Flechtner, *Another CISG Case in the U.S. Courts: Pitfalls for the Practitioner and the Potential for Regionalized Interpretations*, 15 J.L. & COM. 127, 132 (1995).

95. *See supra* notes 54-60 and accompanying text.

96. *See supra* notes 84-87 and accompanying text.

97. *See supra* notes 67-68 and accompanying text.

This situation involves a Pennsylvania lawyer, representing a Pennsylvania client, from a Pennsylvania office. The law being applied emanates from an international convention, but is the law of both Pennsylvania and of Germany. This set of factors is represented as follows:

state of admission	=	Pennsylvania
applicable law	=	CISG (to be interpreted by German courts)
location of conduct	=	Pennsylvania
location of client	=	Pennsylvania

The venue selection clause will result in the interpretation and application of the CISG in Germany. At least until a dispute arises and representation before a German court is required, this situation should be no different than the application of the Sales Convention in a U.S. court (except to the extent that differing local or regional interpretations of the Sales Convention may develop).[98]

Example 9A. Consider Example 9 further, assuming that Joe Lawyer conducts all of the activity related to the transaction in Munich. Now we have a Pennsylvania lawyer, representing a Pennsylvania client, but doing it in Munich and applying German law (although that law may be the same as Pennsylvania law). This set of factors is represented as follows:

state of admission	=	Pennsylvania
applicable law	=	CISG (to be interpreted by German courts)
location of conduct	=	Germany
location of client	=	Pennsylvania

Does this change the analysis at all? If the ultimate test is competent representation, it should not matter that Joe is in Pennsylvania or Munich when he provides the services to the Pennsylvania client. In today's world of easy travel, it is also quite possible that the events could occur in either place.

Example 9B. Again consider the same facts, adding that the client is from Munich. Now we have a Pennsylvania lawyer, representing a German client, in Germany, and applying law that may be the same in both Germany and Pennsylvania. This set of factors is represented as follows:

state of admission	=	Pennsylvania
applicable law	=	CISG (to be interpreted in Germany)
location of conduct	=	Germany
location of client	=	Germany

This gets us to the *Birbower* combination of factors. But the change from the last paragraph (a different client) does little to affect the level

98. *See* Flechtner, *supra* note 94, at 134-37.

of competence of the lawyer or of the quality of the representation provided. Under *Condon*, if the location of the client is the "determining factor,"[99] then this change should matter. But does it change the quality of the representation in a manner that justifies this conclusion if examples 9 and 9A lead to opposite conclusions?

J. *Example 10*

There is a final situation worth considering that takes into account the common use of arbitration clauses in international commercial contracts. This example also allows discussion of further elements of the *Birbrower* decision:

> Joe Lawyer, admitted to practice in Pennsylvania, with his office in Pittsburgh, represents a Pittsburgh client selling widgets to a buyer in Munich. Joe drafts the contract for the transaction, including the following clause:
>
> > This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods. Any dispute arising out of this contract shall be submitted to arbitration under the rules of the International Chamber of Commerce, with the arbitration to be held in Paris, France.

This example is the same as example 9, except that now, instead of submission to the German courts, we have agreement to submit to arbitration in Paris.

state of admission	=	Pennsylvania
applicable law	=	CISG (ICC arbitration in Paris)
location of conduct	=	Pennsylvania
location of client	=	Pennsylvania

At the transaction stage, this may create no problems, so long as Joe can demonstrate competence in the Sales Convention and so long as the choice of ICC arbitration in Paris is not for some reason a negligent decision.

In *Birbrower*, the services performed by the New York law firm on behalf of the California client, in California, applying California law, were primarily services in preparation for arbitration proceedings that ultimately were not required.[100] The court, however, treated arbitration in California as no different than litigation in California.[101] It is interesting to note, however, that a California statute specifically provided a different answer if the arbitration had been international,[102]

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99. *Condon*, 65 Cal. App. 4th at 1142; *see supra* note 63 and accompanying text.
100. *Birbrower*, 949 P.2d at 7.
101. *Id.* at 9.
102. *Id.* at 7; CAL. CIV. PROC. CODE §§ 1297.11-1299.9 (West 2001) (providing an exception to the unauthorized practice of law statute for arbitration and conciliation of international commercial disputes).

and that the California legislature responded to the *Birbrower* decision by providing a *pro hac vice* type of exception for domestic arbitration, limited to attorneys admitted to practice elsewhere in the United States.[103]

The statutory change in California is an appropriate recognition of the importance of arbitration in commercial disputes. When arbitration is selected in a transnational contract, a common approach is to select a neutral forum for the arbitration simply to avoid giving either party the "home court advantage." If doing so then requires that local counsel in that forum be retained, should a dispute arise, some of the basic benefits of arbitration are lost, and the lawyers familiar with the transaction on behalf of each of the parties are rendered unable to provide representation before a tribunal for which they can select both the procedural rules and the substantive law. Thus, arbitration justifies different considerations in the application of both the duty of competent representation and the question of unauthorized practice of law.

IV. CONCLUSION

A review of recent state court decisions on multijurisdictional practice and the unauthorized practice of law indicates a lack of guidance in determining factors that may help avoid potential problems. A lawyer practicing within his or her own state of admission seems safe, regardless of whether it is home state or foreign law that is being applied, and regardless of the location of the client. Even a lawyer making minor incursions into a foreign state seems safe when acting on behalf of a client from his or her home state, once again regardless of the law being applied. The problem comes with a lawyer practicing foreign law, in the foreign state, on behalf of a foreign client. Short of this ultimate situation, we must await further legislative and judicial development of the law. Several observations are possible, however. They include the following:

1) The focus of any inquiry about multijurisdictional practice should be on the competent representation of the client.

2) A formalistic focus on the location of the client or of the lawyer when providing services should not control the disciplinary regulation of the lawyer.

3) A focus on the applicable law properly raises the question of competence and should be an important factor in determining whether unauthorized practice has occurred.

4) A lawyer who can prove competence should be able to practice foreign law at least when representing clients from the lawyer's state of admission.

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103. CAL. CIV. PROC. CODE § 1282.4 (West 2001).

5) Lawyers must be able to practice internationally; the harmonizing effect of private international law conventions will enhance the likelihood of lawyer competence in such practice.

6) When dispute resolution occurs before tribunals without sovereign authority that are chosen by the parties, the location of the tribunal should not matter in judging the conduct of the lawyer.

As further development in this area occurs, there is a need for decisions more clearly focused on the purpose of the law being applied. Both the *Birbrower* and *Condon* decisions explicitly state that the California statute is designed to protect only California clients from the unauthorized practice of law, and thus has no application to a situation where a client from outside of California might be in need of protection.[104] The Hawaii court in *Fought*, on the other hand, suggests a relationship between the question of unauthorized practice and the Model Rule 1.1 duty of competent representation, even as applied to a client from another state.[105] In either event, it does seem that if it is the client that is being protected by the rule, then the ultimate question is whether the lawyer is competent to provide the counsel in question. If only local clients are protected, then the analysis is simplified and, consistent with *Birbrower* and *Condon*, a court can dismiss charges of unauthorized practice against foreign lawyers representing clients from their home states. This approach only avoids any direct examination of the question of competent representation, however, and risks the appearance that the real purpose of the rule is to protect the local bar from competition. It also does not extend easily to the mobile or multinational client who relies on a single lawyer or law firm.

Perhaps the aspect of multijurisdictional representation least illuminated by existing decisions is the relationship of unauthorized practice rules to the law being applied by the lawyer in question. Thus, in *Condon*, the Colorado lawyer applying California law did not engage in unauthorized practice (in California), so long as he did so only for a Colorado client. Similarly, the ABA Commission on Multijurisdictional Practice considers a lawyer admitted in one state to be "licensed" to practice the law of any other state or country (so long as he or she is competent to advise on the law of that state or country) from an office in the state of admission.[106] This approach provides comfort to the multijurisdictional lawyer who never leaves his home office, but that seems a bit unrealistic in today's world. The idea that a lawyer is likely to be more competent to practice the law of a foreign state if he or she never goes to the foreign state is at best counter-intuitive.

It remains difficult to determine a single factor, or any coordinated combination of factors, that provides guidance in determining the existence of unauthorized practice in the multijurisdictional context. It

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104. *Birbrower*, 949 P.2d at 5; *Condon*, 65 Cal. App. 4th at 1144-46.
105. *Fought*, 951 P.2d at 497.
106. *See supra* note 68 and accompanying text.

may be that transnational lawyers are safer in this regard because of the more limited definition of practice of law outside the United States. It is easy, however, to find discomfort in rules applied on the basis simply of the location of the lawyer providing the services or the location of the client, especially if one is interested in the relationship between the question of unauthorized practice and the lawyer's basic duty of competent representation of the client. When representation extends to areas of law not tested by any state in permitting admission to the bar, including international and transnational law, we are left at best with *ad hoc* determinations of competence.