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I. INTRODUCTION

In a prestigious journal devoted to transnational law, the intramural concerns of American lawyers cannot claim pride of place. Nonetheless, it is difficult to see how we can clear the way for lawyers to move from nation to nation if we cannot move from state to state. Charity, as they say, begins at home. Either we are insular and protectionist or we are not. We cannot have it both ways.

As Prince Bismark noted, however, "Politics is the art of the possible." Like it or not, American lawyers are stuck with a system of state-based regulation for the foreseeable future. Even if Congress had the power to override state supreme court regulation of lawyers,[1] there is no political will to make such a change. And for many purposes, state-

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1. *Compare* Sperry v. Florida, 373 U.S. 379, 387-402 (1963) (federal law preempts state prohibitions against patent agent practice), *with* Kroll v. Finnerty, 242 F.3d 1359, 1364-66 (Fed. Cir. 2001) (federal law does not preempt state bar discipline of trademark lawyer).

based lawyer regulation has worked, and will continue to work, well. Trust account violators, for example, are readily and appropriately prosecuted from coast to coast.[2]

Nonetheless, as Professor Brand has noted, there are obvious cracks in the system that will likely produce increasingly inappropriate results unless the state-based unauthorized-practice rules are modified. This modification will require three things: (1) a relaxation of the state unauthorized-practice rules as applied to lawyers from other states; (2) a broadening or clarification of authority so that bar counsel in a jurisdiction in which a lawyer is practicing but is not licensed can discipline that lawyer; and (3) greater resources for, and greater cooperation between, bar disciplinarians in different jurisdictions.

II. STATE UNAUTHORIZED-PRACTICE RULES AND THE LOGIC OF CONTROLS

One cannot reach the multiple inconsistent objectives with a single regulatory control. In effect, one needs at least as many controls as one has objectives.

Historically speaking, we have had only one set of unauthorized-practice rules—in other words, only one instrument—but are now seeking to apply them to very different sets of problems. These include: (1) problems posed by nonlawyers who pretend to be lawyers; (2) problems posed by nonlawyers who do not pretend to be lawyers but who may perform work that requires legal skills that they lack; and (3) problems posed by out-of-state lawyers who may be competent in their own jurisdictions but may not be familiar with potentially significant local laws and customs. "One size fits all" will not work. We need different rules for different situations.

We also need to get beyond short-sighted protectionism. In both New York and New Jersey, for example, passing the state bar exam and appointing an in-state agent for service of process is not enough to be an active member of the state's bar. A lawyer must also have a bona fide office in the state.[3] As a means of making New York and New Jersey lawyers feel better about the rate at which they may eat each other's lunches, this may make some emotional sense. From a client-oriented or market-oriented perspective, however, this is nothing more than a barrier to entry—a toll that increases the cost of competition between lawyers and thereby restricts the choices and increases the prices that consumers of legal services and the overall economy must pay. By contrast, Oregon, Washington, and Idaho have just adopted a three-

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2. *E.g., In re* Berlowitz, 723 N.Y.S.2d 778 (N.Y. App. Div. 2001); *In re* Lantz, 2000 WL 557402 (Cal. Bar Ct. Apr. 24, 2000).

3. *E.g., In re* Opinion 33, 733 A.2d 478, 480-81 (N.J. 1999); Lichtenstein v. Emerson, 656 N.Y.S.2d 180, 183 (N.Y. Sup. Ct. 1997).

state compact that will, effective January 1, 2002, allow lawyers in good standing that are admitted to practice in one state to be more or less automatically admitted to practice in one or both of the other states.[4] This bold step reflects a recognition of overlapping laws and legal cultures as well as legitimate lawyer and client needs.

This is not to say, however, that full reciprocal cross-admissions are the only or even necessarily the best answer. Suppose, for example, that the leading national or international expert in a field of law is officed in and licensed only by State X. Must that lawyer file for admission in every state, as well as the District of Columbia, in which he or she presently has or may ever have a single client? The cost of filing papers and paying annual bar dues in fifty-one or even half that many jurisdictions would itself appear to be an unnecessary barrier to entry. And although it is always possible that there will be a locally required variation or qualification to any particular legal advice that such a national or international "expert" might not catch, there is nothing about in-state licensing per se that ensures that such variations or qualifications will be caught. In a world in which most law schools generally teach national principles of law and in which bar exams largely test applicants on the same basis, it is experience in a given practice area—not the passage of multiple state bar exams or multiple admissions on waiver—that provides critical client protection on specific issues of local law. This is why many groups have called for the establishment of "safe harbors" that would allow a lawyer practicing in a state on a temporary or transitory basis to have some degree of freedom of action without the need for full admission and the payment of full bar dues.[5]

III. CLARIFICATION OF JURISDICTION

A lawyer that is licensed in a state is, of course, subject to discipline in that state. Many disciplinarians seem to believe, however, that they do not have jurisdiction to discipline non-locally-admitted lawyers. Others feel that even if they theoretically have the jurisdiction to do so, it would be a waste of resources because there is little or nothing that they can actually do to the nonlicensed lawyer.

This must change. Lawyers that practice in multiple states must be subject to discipline wherever they practice, just as they are subject to the criminal and traffic laws of another state when they visit that state.

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4. Ethics Northwest, Inc., *State Bar Multijurisdictional Practice Studies*, *at* http://www.crossingthebar.com/StateBarMJPStudies.htm (last modified Aug. 29, 2001).

5. Judicial Council of California, *New Report Proposes Changes in Rules on Out-of-State Lawyers*, News Release No. 49, *at* http://www.courtinfo.ca.gov/newsreleases/NR49-01.htm (last modified Aug. 29, 2001).

Although a state in which a lawyer is only temporarily present may choose in the exercise of discretion not to prosecute, it must somehow have a disciplinary option backed up by the threat of potential reciprocal discipline.

IV. ADDITIONAL RESOURCES

Arguable lack of jurisdiction is not the only reason that disciplinarians do not pursue non-local lawyers. They also lack the resources. Bar disciplinarians typically have their hands full, and their budgets fully occupied, going after local malfeasors. They also believe that pursuing local malfeasors is the best way for them to protect the citizens of their states.

The only way to overcome this problem is to provide additional resources for lawyer discipline. Perhaps these additional resources can be provided in part through the payment of reciprocal registration or "safe harbor" fees. Even if not, however, the lawyers in any given state stand to benefit from more consistent enforcement of their state's rules and from the abilities that they themselves would gain to extend their practices into other states.

V. CONCLUSION

It is easy enough to say, as many of us did in college term papers, that more research on this vitally important topic is necessary. It is also obvious that there will be no theoretically perfect answer to every theoretically or realistically plausible question. There will necessarily be arbitrary decisions and lines drawn, but we must not let the perfect become the enemy of the good.

The lack of a workable national practice system will limit our integration into the global legal community. In addition, our raison d'être as lawyers is based on respect for the rule of law. Our present unauthorized-practice rules do not comport with what many lawyers are doing. This breeds disrespect for the law and tends to place our most conscientious lawyers—those who abide by rules simply because they are rules—at a disadvantage. To put things differently, we must use it or lose it. State unauthorized-practice rules should not be the Prohibition of the new millennium.