Reforming Lawyer Mobility—Protecting Turf or Serving Clients?

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ABSTRACT

In this Article, we describe in detail the current problems with the regulation of lawyer mobility in the United States and the compelling reasons that a fundamental change in the present approach is required. We contend that the current rules regarding multijurisdictional practice by licensed lawyers impede the ability of clients to achieve more efficient and cost effective legal services, are unnecessary to protect the interests of clients, and undermine the integrity of the overall regulatory structure by articulating requirements that as a practical matter cannot be complied with. Drawing on lessons from Australia and Canada, both common law countries with a long tradition of regulation of the legal profession at the state/provincial levels, we offer a proposal for the recognition of rights of practice of all American lawyers engaged in federal or interstate matters in all American jurisdictions. This proposal, if adopted, would enable clients to use counsel of their choice on a nationwide basis. Such a change is critical if American lawyers are to remain responsive to the legitimate expectations and demands of their clients and true to the highest standards of professionalism.

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INTRODUCTION

It is the contention of this Article that the current rules restricting the ability of American lawyers to engage in the practice of law on a nationwide basis are no longer rational or workable, are contrary to the best interests of clients, and are unnecessary to protect the public from harm. Whatever the justifications of such a system at a time when the fastest means of communication was on the back of a horse and when almost all legal matters were "local" by nature and impact, they are no longer persuasive in a nationwide market where lawyers' services routinely have impacts across state lines and where information moves at the speed of light.

In support of these conclusions, in the sections that follow we examine how the existing structure of lawyer regulation came about, and the problems that now arise in trying to conform the day-to-day practices of modern lawyers to the complex, overlapping, and inconsistent rules of the numerous states and other jurisdictions that comprise the United States. We proceed to describe why fundamental change is needed in the system, and review the objections that have traditionally been raised to liberalizing current rules. We then describe the positive experiences in Australia and Canada—both common law countries that, like the United States, regulate the practice of law primarily at the state or provincial level—in reforming the rules governing lawyer mobility and in implementing a more rational approach to the regulation of legal practice on a nationwide basis. Finally, we suggest a way forward for implementing similar changes in the United States.

We begin, however, with a brief look at the historical reasons that the American legal profession evolved as it did.

I. A BRIEF HISTORY OF THE REGULATION OF LAWYERS IN THE UNITED STATES

In his much-celebrated book *Undaunted Courage*, which recounts the history of the Lewis and Clark Expedition, Stephen Ambrose illuminates the cultural, political, and philosophical ideas that dominated American society when Thomas Jefferson became President in 1801. Those ideas were shaped and limited in important ways by certain fundamental facts that had existed for so long that most people regarded them as permanent and unchangeable. Not the least of these involved the inherent limitations on communications resulting from the vast distances encompassed by the North American continent. As Ambrose wrote:

> A critical fact in the world of 1801 was that nothing moved faster than the speed of a horse. No human being, no manufactured item, no bushel of wheat, no side of beef (or any beef on the hoof, for that matter). No letter, no information, no idea, order, or instruction of any kind moved faster. Nothing

> had ever moved faster, and, as far as Jefferson's contemporaries were able to tell, nothing ever would.
>
> Since the birth of civilization, there had been almost no changes in commerce or transportation . . . . The Americans of 1801 had more gadgets, better weapons, a superior knowledge of geography, and other advantages over the ancients, but they could not move goods or themselves or information by land or water any faster than had the Greeks and Romans.[1]

The reality of the limitations of geography and distance that Ambrose described influenced almost all aspects of early American life, including the development of American law. As Professor Lawrence Friedman noted in *A History of American Law*, early efforts by the old established bars of the original colonies to keep the legal profession small and elite through rigorous admissions standards following the American Revolution largely collapsed, in no small part because of the diverse legal needs of a vast and rapidly expanding country of individual entrepreneurs.[2] As Professor Friedman put it:

> Theories of Jacksonian democracy have been used to explain why the bar let down its bars on admission. But basic social facts pushed the profession in the same direction. Government control of occupations was, in general, weak and diffuse. Geographical and social mobility was high. There were many jurisdictions; no one of them could really define standards for itself; and the weakness of one was the weakness of all . . . . Besides, a factotum profession, within the grasp of ambitious men of all sorts, was socially useful. The prime economic fact of American life . . . was mass ownership of land and (some bits of) capital. It was a society where many people, not just the noble and the lucky few, needed some rudiments of law, some forms or form-books, some know-how about the mysterious ways of courts or governments. It was a society, in short, that needed a large, amorphous, open-ended [legal] profession.[3]

As a consequence, control of the American legal profession remained highly localized and dispersed through the first hundred years or so following the Revolution.[4] Although control of bar admission subsequently shifted to the state level in all U.S. jurisdictions, the tradition of local control—and, equally important, the absence of uniform national standards—remains the norm for the regulation of American lawyers.[5] We contend that such a balkanized approach to the regulation of the legal profession, including particularly the restrictions

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1. STEPHEN E. AMBROSE, UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON, AND THE OPENING OF THE AMERICAN WEST 52–53 (1996).

2. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 315–18 (2d ed. 1985).

3. *Id.* at 317–18.

4. In many states, admission to the bar was originally determined at the county level, sometimes with the proviso that admission to a single county bar entitled a lawyer to practice in all of the courts of the state. *Id.* at 316.

5. *See* 1 GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 1.17, at 1-31 to -34 (3d ed. Supp. 2012).

imposed by individual states on the free movement of lawyers across the nation in the rendering of services to their clients, is no longer rational or workable.

II. THE CURRENT PROBLEMS WITH THE REGULATION OF LAWYER MOBILITY IN THE UNITED STATES

The problems with the current approach to the regulation of lawyer mobility in the United States were exemplified by the 1998 decision of the California Supreme Court in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*.[6] In that case, a New York law firm was engaged by a California company to assist it in a business dispute scheduled for arbitration in California. The record indicated that some of the preparatory work in the case was performed by Birbrower lawyers in New York, that the lawyers communicated regularly with their California client by telephone, and that the firm's lawyers visited with their client several times in California and represented the client in negotiations in that state. After the dispute was settled prior to arbitration, the client refused to pay Birbrower for its services on grounds that the legal services had been performed in California and none of the firm's lawyers were licensed to practice in that state.

To the consternation of both academic and practicing lawyers across the country, the California Supreme Court ruled that the Birbrower lawyers had engaged in the unauthorized practice of law in California and that, as a consequence, the client was excused from paying the portion of the firm's legal fees related to services that had been rendered in that state. Significantly, the court held that, under the facts in the case before it, it would have made no difference if the New York lawyers had associated with local California counsel and that the Birbrower lawyers could be deemed to have been practicing in California *even if they had never been physically present there.*

In the wake of the *Birbrower* ruling, the American Bar Association (ABA) established a Commission on Multijurisdictional Practice that proposed, after extensive deliberations, substantial amendments to ABA Model Rule 5.5 to address the problem of lawyers practicing "temporarily" in jurisdictions where they were not otherwise admitted to practice.[7] The amended Rule 5.5, as adopted by the ABA House of Delegates in August 2002, provides in relevant part as follows:

> Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law
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> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
>
> (b) A lawyer who is not admitted to practice in this jurisdiction shall not:

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6. 949 P.2d 1 (Cal. 1998).
7. *See* 2 HAZARD ET AL., *supra* note 5, § 46.2, at 46-4 to -7 (3d. ed. Supp. 2013).

> (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
> (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
>
> (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
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> (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
> (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
> (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or
> (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. . . .

The new Rule 5.5 was clearly designed to address explicitly some of the key issues arising from the *Birbrower* case,[8] and it does represent a significant improvement from previously existing rules. However, serious issues remain.

A. THE REVISED RULE 5.5 HAS NOT BEEN UNIFORMLY ADOPTED

To be effective, the revised Rule 5.5 needed to be adopted, using essentially the same language, in virtually all of the states. Unfortunately, that has not happened. Although the revised rule has been adopted in some form by forty-three states,[9] the adopted versions differ, sometimes in significant ways.

The most common variation is a requirement for a tighter nexus between the matter on which an out-of-state lawyer is working and his or her home state than

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8. It might be noted that, within a year following the *Birbrower* decision, the California Legislature effectively overturned the ruling by amending the Code of Civil Procedure to permit out-of-state lawyers to participate in arbitrations in California if they file a certificate of good standing with an in-state arbitrator. *See* CAL. CIV. PROC. CODE § 1282.4 (West 2015).

9. As of this writing, the seven states that have not adopted any version of Rule 5.5 include Hawaii, Kansas, Mississippi, Montana, Texas, West Virginia, and Wyoming. California has technically not adopted any form of Rule 5.5, but it has addressed the issue of lawyer mobility in its own rules. *See, e.g.*, CAL. R. CT. 9.47, 9.48.

is apparently required in the "reasonably related" language of Model Rule 5.5. In seven states—Connecticut,[10] Kentucky,[11] Maine,[12] North Carolina,[13] South Carolina,[14] Tennessee,[15] and Virginia[16]—the matter must not only be "related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice," but must also involve services being provided to an *existing* client of the lawyer, and in all of these states but Connecticut, the representation of the existing client must be in a jurisdiction in which the lawyer is licensed to practice. In addition, Connecticut has modified the "reasonably related" language of Rule 5.5 to be "substantially related."[17] California specifies that a "material aspect" of the matter has to occur in a jurisdiction other than California and in which the lawyer seeking protection of the rule is licensed to practice law.[18] And Nevada provides that an out-of-state lawyer must be

> acting with respect to a matter that is incident to work being performed in a jurisdiction in which the lawyer is admitted, provided that the lawyer is acting in . . . [Nevada] on an occasional basis and not as a regular or repetitive course of business in . . . [Nevada].[19]

Most onerous is the requirement imposed by New Jersey that the matter being undertaken by an out-of-state lawyer must be

> with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in . . . [New Jersey] is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.[20]

Other variations from Model Rule 5.5 include requirements in at least five states—Florida,[21] New Jersey,[22] Nevada,[23] South Carolina,[24] and South Da-

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10. CONN. RULES OF PROF'L CONDUCT R. 5.5(c)(4) [hereinafter CONN. RULES].
11. KY. SUP. CT. R. 3.130 (5.5).
12. ME. RULES OF PROF'L CONDUCT R. 5.5(c)(4).
13. N.C. RULES OF PROF'L CONDUCT R. 5.5(c)(2).
14. S.C. RULES OF PROF'L CONDUCT R. 5.5(c)(4).
15. TENN. RULES OF PROF'L CONDUCT R. 5.5(c)(4).
16. VA. RULES OF PROF'L CONDUCT R. 5.5(d)(4)(iv) [hereinafter VA. RULES].
17. CONN. RULES R. 5.5(c)(4).
18. CAL. R. CT. 9.48.
19. NEV. RULES OF PROF'L CONDUCT R. 5.5(b)(4) [hereinafter NEV. RULES].
20. N.J. RULES OF PROF'L CONDUCT R. 5.5(b)(3)(v) [hereinafter N.J. RULES].
21. *See* RULES REGULATING FLA. BAR R. 1-3.11 (as related to out-of-state lawyers engaged in arbitration proceedings in Florida).
22. *See* N.J. RULES R. 5.5(c)(6).
23. *See* NEV. RULES R. 5.5(a).
24. *See* S.C. APP. CT. R. 404 (designating the Clerk of the Supreme Court as agent for the service of process for out-of-state lawyers appearing *pro hac vice*).

kota[25]—that out-of-state lawyers working temporarily in their jurisdictions complete some sort of notification or registration process, sometimes designating in-state agents for service of process or submitting to state tax regimes. In Virginia, out-of-state lawyers are required to make certain disclosures to in-state clients,[26] and Arizona goes one step further by requiring that in-state clients provide "informed consent" to the out-of-state lawyer's activities.[27] In New Mexico, if a transactional matter involves any issues specific to the law of that jurisdiction, an out-of-state lawyer temporarily practicing in New Mexico must associate with a licensed in-state lawyer.[28]

B. THE REVISED RULE 5.5 FAILS TO ADDRESS SOME KEY ISSUES

Apart from the lack of uniformity in the adoption of the revised Model Rule 5.5 by the several states, the revised rule addresses some but by no means all of the multijurisdictional practice issues confronting today's practicing lawyers on a daily basis. Hence, even if the rule had been adopted in the same form by all of the states, significant issues would remain, as shown by the following examples:

- A lawyer who commutes to work across state lines and in the evenings and on weekends works remotely using technology from her home (in a state where she is not admitted) is presumably engaged in the unauthorized practice of law, even under the revised Rule 5.5, because her presence is not temporary (she has a "systematic and continuous presence") even if none of her clients are located in the state where she lives. In other words, she is "practicing" in the state where she resides just because she is sitting there when she works remotely.
- A lawyer in State A is requested by a new client in State B to negotiate a business transaction in State C. Even assuming that State C has adopted the revised Rule 5.5, the lawyer remains at risk of engaging in unauthorized practice in State C because it could be argued that his activities in that state do not "arise out of or are reasonably related to" the lawyer's practice in State A, because the new client is in State B. The risk would be even higher if State C were one of the seven states noted above that have limited the applicability of section (c) of Rule 5.5 to matters involving *existing* clients.
- A lawyer who advertises on the internet—perhaps using only social media like LinkedIn—could be found to be engaged in the unauthor-

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25. *See* S.D. RULES OF PROF'L CONDUCT R. 5.5(c)(5) (requiring out-of-state lawyers to obtain a South Dakota sales tax license and to pay South Dakota sales taxes).

26. VA. RULES R. 5.5(d)(3).

27. ARIZ. RULES OF PROF'L CONDUCT ER 5.5(f) [hereinafter ARIZ. RULES].

28. N.M. RULES OF PROF'L CONDUCT R. 16-505(F)(2).

ized practice of law in another state in which she is not licensed to practice.[29] Many states, while taking care not to penalize the act of advertising on the internet itself, nonetheless expressly penalize lawyers who accept clients from their states who respond to internet advertising.[30]

- A real estate developer client in State A asks its law firm in State B to handle all of the company's commercial leases in states throughout the country, to include the negotiation, drafting, and final execution of all necessary documents. Even in states that have adopted the revised Rule 5.5, firm lawyers not admitted to practice in those states could be regarded as engaged in unauthorized practice because the activities might not be deemed to be "arising out of or . . . reasonably related to" the firm's practice in State B.[31]

Some of these "gaps" in coverage in Model Rule 5.5 are of course exacerbated by modifications in the language of the rule as adopted in various states (as described above). Also, all of the temporary practice "safe harbors" included in section (c) of Rule 5.5 remain subject to the general restriction set out in section (b) of the rule that an out-of-state lawyer (even one permitted to practice temporarily in the regulating state under section (c)) may not establish "systematic and continuous presence" in the regulating state for the practice of law. Comment 4 to the rule demonstrates the potential breadth of this latter restriction by noting that "[p]resence may be systematic and continuous even if the lawyer is not physically present here." Needless to say, in a digital age when lawyers routinely practice "virtually" in many jurisdictions, the cautionary language of section (b) gives ample cause for both uncertainty and concern. Indeed, at least one state, Indiana, has added a comment to its version of Model Rule 5.5 warning out-of-state lawyers that "advertising in media specifically targeted to Indiana residents or initiating contact with Indiana residents for solicitation purposes could be viewed as 'systematic and continuous presence'" in Indiana, thus vitiating the applicability of the temporary practice rule.[32]

To date, only two states, Arizona and New Hampshire, have expressly recognized that it is not the unauthorized practice of law to practice law remotely—i.e., digitally—when sitting in the state but actually using technology

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29. As noted below, the Comments to Rule 5.5 state that a lawyer's presence in another state "may be systematic and continuous even if the lawyer is not physically present there." MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. 4 (2016) [hereinafter MODEL RULES].

30. *See* S.C. APP. CT. R. 418 (providing that out-of-state lawyers who advertise in South Carolina can face unauthorized practice sanctions, including needing to refund all legal fees obtained from clients as a result of the advertising).

31. As noted below, this is not merely a hypothetical possibility. This was, in fact, the result in New Jersey, a state that was one of the first to adopt a version of the revised Rule 5.5. *See* N.J. Comm. on the Unauthorized Practice of Law, Op. 49 (2012).

32. IND. RULES OF PROF'L CONDUCT R. 5.5 cmt. 4.

to practice in another jurisdiction where the lawyer is licensed and in good standing.[33]

What these "gaps" and ambiguities of meaning reflect, of course, is the fact that the temporary practice provisions of Model Rule 5.5 are a compromise resulting from years of debate within the legal profession in general and the ABA in particular over the type of multijurisdictional practice (if any) that should be permitted in the United States. As one commentator has described it:

> It is a compromise between lawyers and regulators who wanted multistate practice to be governed much in the manner of drivers' licenses—a driver licensed in one state can drive in any state—and those who wanted to minimize, wherever possible, the amount of in-state legal work that an out-of-state lawyer could perform without seeking general or *pro hac vice* admission to the local bar. As a compromise between these extremes, Rule 5.5(c) bears some resemblance to the proverbial camel as a horse designed by a committee.[34]

C. THE PENALTIES IMPOSED FOR VIOLATIONS OF RULE 5.5 CAN BE SEVERE

While one might have thought that the widespread adoption of the revised Model Rule 5.5 would have moderated aggressive enforcement against perceived unauthorized practice violations by lawyers from sister states, for many jurisdictions that has not proved to be true. While it is important to note that imposition of penalties has not been common—particularly considering the frequency with which the rule is violated—it remains the case that penalties for violation can be quite severe and that at least some states appear willing to impose them. Set out below are a variety of ways in which states have continued to penalize lawyers from other states for alleged unauthorized practice—using examples almost all of which post-date the adoption of the revised Model Rule 5.5.

1. USE OF CRIMINAL PENALTIES

The most draconian risks faced by lawyers accused of engaging in unauthorized practice involve the threat of criminal prosecution. For example, in March 2004, a district attorney in North Carolina filed misdemeanor charges for

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33. *See* ARIZ. RULES ER 5.5(d) ("A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction may provide legal services in Arizona that exclusively involve federal law, the law of another jurisdiction, or tribal law."); Order (No. R-15-0018) (Ariz. Aug. 27, 2015) (amendment to ER 5.5 of the Arizona Rules of Professional Conduct); N.H. RULES OF PROF'L CONDUCT R. 5.5(d) ("A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that: . . . (3) relate solely to the law of a jurisdiction in which the lawyer is admitted."); Order (N.H. Oct. 17, 2016) (amendment to Rule 5.5 of the New Hampshire Rules of Professional Conduct).

34. 2 HAZARD ET AL., *supra* note 5, § 46.8, at 46-21 (3d ed. 2010 Supp.).

unauthorized practice against two Georgia lawyers and their law firm because they had represented a North Carolina university in an internal investigation in 2002–2003.[35] Although they were engaged precisely because of their expertise in the arcane area of college sports law, the Georgia lawyers were charged with violating section 84-4 of the North Carolina General Statutes, which prohibits (with limited exceptions) the practice of law by any person not licensed by the state bar of North Carolina.[36] Curiously, this prosecution was brought despite the fact that North Carolina was one of the first states to adopt the revised Model Rule 5.5, permitting temporary practice in North Carolina by lawyers from other states, the state's version of the rule having gone into effect on March 1, 2003.[37]

North Carolina is not alone in prescribing criminal penalties for the unauthorized practice of law. In New York, for instance, a person who engages in unauthorized practice[38] may be charged with a misdemeanor[39] or, in certain cases, with a Class E felony.[40] So, while criminal charges are not often brought against lawyers allegedly engaged in unauthorized practice, they are certainly not out of the question.

2. CIVIL DAMAGES

In addition to criminal penalties for unauthorized practice, at least one state allows plaintiffs the opportunity to sue lawyers and law firms in private civil

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35. *See Georgia Law Firm, Lawyers Are Indicted for Unauthorized Practice in North Carolina*, [20 Current Reports] Law. Man. on Prof. Conduct (ABA/BNA) 203 (Apr. 21, 2004).

36. The statute provides, in pertinent part, that:

> [e]xcept as otherwise permitted . . . it shall be unlawful for any person or association of persons, except active members of the Bar of . . . North Carolina admitted and licensed to practice as attorneys-at-law, to appear as attorney or counselor at law in any action or proceeding before any judicial body.

N.C. GEN. STAT. § 84-4 (2011). As is common among unauthorized practice statutes, exceptions are made for law students, certain not-for-profit in-house counsel, attorneys admitted *pro hac vice*, etc.

37. *See* N.C. STATE BAR ASS'N, LAWYERS' HANDBOOK 125–26 (2003).

38. Unauthorized practice in New York occurs when one actually practices law, appears to practice law, or holds oneself out as licensed to practice law, through advertising or otherwise, "without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath." N.Y. JUD. LAW § 478 (McKinney 2013).

39. "[A]ny person violating section four hundred seventy-eight . . . of this article, shall be guilty of a misdemeanor." N.Y. JUD. LAW § 485. Recall *supra* note 38 that section 478 refers simply to the violation of statutorily defined unauthorized practice, irrespective of any damages resulting therefrom.

40. A person engaging in unauthorized practice is guilty of a felony rather than a misdemeanor where he or she:

> (1) falsely holds himself or herself out as a person licensed to practice law in this state, a person otherwise admitted to practice law in this state, or a person who can provide services that only attorneys are authorized to provide; and
> (2) causes another person to suffer monetary loss or damages exceeding one thousand dollars or other material damage resulting from impairment of a legal right to which he or she is entitled.

N.Y. JUD. LAW § 485-a.

actions for the tort of engaging in unauthorized practice. In *Fogarty v. Parker, Poe, Adams & Bernstein LLP*, the Supreme Court of Alabama ruled that a lawyer and her law firm licensed to practice in another state may be sued by private individuals for engaging in unauthorized practice, notwithstanding any statutory carve-outs that limit causes of action for malpractice against in-state "legal service providers."[41]

3. NULLIFYING ACTS OF UNAUTHORIZED PRACTICE

While the consequences of engaging in unauthorized practice are usually directed against the offending lawyers and their law firms, sometimes the clients of such lawyers also suffer. Some state unauthorized practice statutes provide safe harbors for both attorneys' "preparatory efforts" while awaiting *pro hac vice* admission and for non-substantive services that non-lawyers may traditionally perform. However, when two out-of-state attorneys filed a motion for reconsideration on behalf of their corporate client in a workers' compensation case, the North Dakota Supreme Court found that they had stepped over the line of the unauthorized practice safe harbor.[42] The court held that the filing of the motion for reconsideration was more than a "purely mechanical service" that "could have been filed by a person who lacked the license to practice law."[43] As a result, the court voided the reviewing agency's decision and reinstated the workers' compensation award, thereby effectively nonsuiting the client of the out-of-state lawyers.

4. PROFESSIONAL DISCIPLINE IN THE HOST STATE AND RECIPROCAL DISCIPLINE IN THE HOME STATE

Civil and criminal penalties are by no means the only negative consequences that may face attorneys found to have engaged in the unauthorized practice of law. While disbarment is traditionally a penalty reserved for an attorney disciplined by the state in which he is admitted, unauthorized practice in foreign state jurisdictions can also lead to disbarment.

Disbarment as a penalty is generally limited to those attorneys who have maintained a "systematic and continuous presence" in the state in which their practice is unauthorized. Such were the circumstances for a lawyer admitted in New York and Pennsylvania, who for years—as part of a business relationship with a Delaware accountant—practiced estate planning for Delaware clients from his office in Pennsylvania. In its decision in *In re Kingsley*,[44] the Delaware Supreme Court disbarred the attorney, noting that of particular import was his

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41. 961 So. 2d 784, 789 (Ala. 2007).

42. Carlson v. Workforce Safety & Ins., 765 N.W.2d 691, 704 (N.D. 2009).

43. *Id.* at 701 (internal quotation omitted); *see also* Blume Constr., Inc. v. State, 872 N.W.2d 312 (N.D. 2015).

44. 950 A.2d 659, 2008 WL 2310289, at *4 (Del. June 4, 2008).

knowledge that his activities were in violation of state law governing unauthorized practice. In particular, the attorney had received formal written notice of his unauthorized practice, yet had continued to serve his Delaware clients.[45] By the time his activities in Delaware were terminated, he had prepared estates for some seventy-five Delaware clients over a two-year period.[46]

Disbarment in a host state is, however, not the end of the matter. Most states require that lawyers report professional discipline imposed in other states,[47] and reciprocal discipline is usually imposed almost automatically.[48] Thus, a lawyer disbarred in a state where he had never been admitted will later face almost certain automatic disbarment in his actual state of admission.[49]

5. PROFESSIONAL DISCIPLINE IN THE HOME STATE

Even absent a prosecution for engaging in unauthorized practice in another state, lawyers may still face discipline in their home states for engaging in such activities in another jurisdiction. In 2005, in *In re Bolte*, the Wisconsin Supreme Court publicly reprimanded a member of its state bar for advising and assisting a client in recovering nearly two million dollars in previously unpaid royalties for mineral rights in Colorado.[50] The case is remarkable for the fact that, as the court noted, the lawyer had explicitly advised the client that:

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45. *Id.* at *4, *9.

46. *Id.* at *2, *5, *9.

47. The requirements for reporting discipline imposed in other states are found, for example, in New York respectively at N.Y. COMP. CODES R. & REGS. tit. 22, § 603.3(d) (1st Dep't) (repealed 2016); N.Y. COMP. CODES R. & REGS. tit. 22, § 691.3(e) (2d Dep't) (repealed 2016); N.Y. COMP. CODES R. & REGS. tit. 22, § 806.19(b) (3d Dep't) (repealed 2016); and in N.Y. RULES OF PROF'L CONDUCT R. 8.3. Similar rules are in place in other states. *See, e.g.*, MASS. SUP. JUD. CT. R. 4:01 (2016) (§§ 16(1), 16(6)); ILL. SUP. CT. R. 763; ILL. RULES OF PROF'L CONDUCT R. 8.3; VA. SUP. CT. R. 1A:4(7); VA. RULES R. 8.3.

48. The imposition of reciprocal discipline, and the reporting requirements, are generally set out in court rules. See, for example, N.Y. COMP. CODES R. & REGS. tit. 22, § 603.3(a) (repealed 2016), which sets out the rule subjecting attorneys to reciprocal discipline in the First Judicial Department in New York:

> Any attorney to whom this Part shall apply, pursuant to section 603.1 of this Part who has been disciplined in a foreign jurisdiction, may be disciplined by this court because of the conduct which gave rise to the discipline imposed in the foreign jurisdiction. For purposes of this Part, foreign jurisdiction means another state, territory or district.

The other Judicial Departments in New York have almost identical rules, see N.Y. COMP. CODES R. & REGS. tit. 22, § 691.3 (2d Dep't) (repealed 2016); N.Y. COMP. CODES R. & REGS. tit. 22, § 806.19 (3d Dep't) (repealed 2016); or a rule to similar effect, N.Y. COMP. CODES R. & REGS. tit. 22, § 1022.22 (4th Dep't).

49. The normative rule for the imposition of reciprocal discipline is that it will be imposed as a matter of comity as between the states unless the lawyer in question can show a lack of due process in the original, underlying disciplinary proceeding, or that the discipline was with respect to conduct that is not disciplinable in the state seeking to impose reciprocal discipline. *See, e.g.*, *In re* Green, 308 A.D.2d 72, 75 (N.Y. App. Div. 1st Dep't 2003) (citing *In re* Gifis, 259 A.D.2d 105, 107 (N.Y. App. Div. 1st Dep't 1999)); *see also In re* Feldman, 140 A.D.2d 880, 880 (N.Y. App. Div. 3d Dep't 1988) (disbarring attorney in New York after disbarment ordered by New Jersey court, under the theory that the ends of justice would best be served by imposing the same punishment in both jurisdictions).

50. 699 N.W.2d 914, 922 (Wis. 2005).

> [W]hile he was a lawyer, he was not licensed to practice in Colorado. He explained that he could not appear in court and that she would have to hire a lawyer to pursue any legal redress. The referee stated: "[i]t is clear from the evidence that it was [the client] who pursued [the lawyer's] services and that [the lawyer] was initially reluctant to become involved."[51]

Even though the client had not been harmed, the lawyer was nevertheless disciplined for his actions in representing the client in Colorado because he had not been admitted in that state.[52]

6. DENIAL OF LEGAL FEES

Apart from the potential for criminal prosecution, civil liability, professional discipline, and causing actual harm to their clients, lawyers found to have engaged in unauthorized practice also risk not being able to collect their fees. This was, of course, the case in *Birbrower*,[53] but the most extraordinary example of the principle is the case of *In re Ferrey*.[54] In that matter (actually decided shortly before the adoption of the revised Rule 5.5), the Supreme Court of Rhode Island—in a case where a lawyer had been successful on behalf of his clients—granted attorney Ferrey's application for statutory legal fees for the period during which he had been admitted *pro hac vice*, but denied fees for his admittedly extensive preparatory work on the same matter prior to his *pro hac vice* admission on the grounds that, until his admission, he had been engaging in unauthorized practice.

7. USE BY STATE COURTS OF UNAUTHORIZED PRACTICE RULES AS A DETERRENT TO OUT-OF-STATE LAWYERS

Unfortunately, despite the widespread adoption of the revised Rule 5.5, some state courts continue to use the rules against unauthorized practice as a deliberate deterrent to the ability of out-of-state lawyers to engage in reasonable multijurisdictional practice. A prime example is New Jersey.

Although New Jersey was among the first states to adopt the revised Rule 5.5 (albeit in a much narrower version than proposed by the ABA), in October 2012, the Committee on the Unauthorized Practice of Law appointed by the Supreme Court of New Jersey issued Opinion 49 on "Multijurisdictional or Crossborder Practice," which addressed the unauthorized practice of law in the commercial real estate context. In the opinion, the Committee chose to define unauthorized practice as broadly as possible so as to prevent a client's selected national counsel from performing in New Jersey the normal range of services provided by such

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51. *Id.* at 916.
52. *Id.* at 922.
53. *See* Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 10 (Cal. 1998).
54. 774 A.2d 62 (R.I. 2001).

counsel in other states across the country. In particular, the Committee noted that, while it could not prevent out-of-state lawyers from advising their client regarding the leases for the client's shopping malls located in New Jersey (so long as they did so from outside the state), it would constitute the unauthorized practice of law in New Jersey for such lawyers to draft the leases or even to come to New Jersey to supervise the execution of the leases. The opinion stands as a particularly egregious example of the deliberate use of unauthorized practice rules to protect the turf of in-state lawyers, even where clients are harmed by the unnecessary cost of engaging in-state lawyers and by deprivation of the advice and assistance of counsel of their choice.

* * *

From the foregoing cases and examples, it is clear that the rules governing lawyer mobility and multijurisdictional practice in the United States continue to be a serious problem. While the revised Model Rule 5.5 promulgated in 2002 has been helpful in addressing some of the issues, it has fallen well short of the optimistic predictions voiced at the time of its adoption. In the next section, we turn to the reasons that a more fundamental solution to the problems associated with the current regulation of lawyer mobility is required.

III. COMPELLING REASONS FOR REVISING THE U.S. APPROACH TO LAWYER MOBILITY

It has now been sixteen years since the promulgation of the revised Model Rule 5.5. While the adoption of the rule in some form by a significant majority of the states has certainly been beneficial, it has not solved the problem of lawyer mobility in the United States. Indeed, as described above, serious problems remain and, with the continuing rapid evolution of the legal marketplace, they are likely to become more severe.

A. THE CURRENT APPROACH IMPEDES THE RIGHT OF CLIENTS TO ACHIEVE INCREASED EFFICIENCY AND COST EFFECTIVENESS IN THE DELIVERY OF LEGAL SERVICES

At least since 2008 (if not earlier), commercial clients in the U.S. legal market have been increasingly insistent that lawyers and law firms provide more value for the dollars they receive. By "value," clients have generally meant that they expect their lawyers to deliver services more efficiently, more cost effectively, and more predictably than ever before.[55] And, with the shifts in relative economic

55. *See* CTR. FOR THE STUDY OF THE LEGAL PROFESSION, GEORGETOWN UNIV. LAW CTR. & PEER MONITOR, THOMSON REUTERS, 2016 REPORT ON THE STATE OF THE LEGAL MARKET 9 (2016), https://www.law.georgetown.edu/news/upload/2016_PM_GT_Final-Report.pdf [https://perma.cc/WVA3-3EPK].

power in the marketplace since 2008, clients are now clearly in the driver's seat to reward those lawyers and law firms that are able to meet their expectations and to punish those that are not. As many observers have noted, the market for legal services in the United States has clearly shifted from a seller's to a buyer's market.[56] This shift in client expectations is plainly reflected in the mounting insistence of clients that the overall costs of legal services be reduced.[57]

In this market climate, it is particularly anomalous that the prevailing rules of practice of the legal profession should maintain impediments to client desires to achieve such efficiencies and cost reductions. Not only do current practices make it more difficult for clients to use counsel of their choice across state borders, but in many instances clients are permitted to do so only by incurring the additional expense and administrative burden of retaining "local counsel" in matters where the addition of such local lawyers is both unnecessary and unwanted.

Perhaps the general requirement for use of local counsel could have been justified in an era when most legal matters were in fact "local," when substantive law differed markedly from one state to another, when it was sometimes challenging to research out-of-state law and practice, and when transportation and communications technology were limited. Today, however, circumstances are dramatically different. As one leading commentator has described:

> [L]awyers—even solo practitioners in small towns far from state boundaries—increasingly have practices that require them to consider the law of other states, if not other countries . . . . To require clients to hire multiple lawyers in cross-border transactions, for example, or in litigation in which even a single witness lives in another state, would be prohibitively expensive and could further erode the public's respect for the law and for lawyers.
>
> Similarly, many legal matters involve considerations of federal law, which is largely uniform throughout the country. Other matters involve substantially or entirely identical state statutes, such as the Uniform Commercial Code. Ethical standards for law practice have become more and more uniform as well, as the *Model Rules of Professional Conduct* have been adopted in most jurisdictions; . . . .
>
> Finally, although there are differences in the law from state to state and even from city to city, modern electronic research tools make it much easier for a lawyer to learn the laws and practices of other jurisdictions than it was in the prior print-based era . . . .[58]

In a market climate of growing client insistence that lawyers perform their services more efficiently and cost effectively, it is increasingly difficult for the

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56. *See id.*

57. In recent years, cost concerns have led clients across the market to disaggregate matters, retain more work in house, rely more heavily on non-traditional service providers, and move "down market" for many kinds of legal matters. *See id.*

58. 2 HAZARD ET AL., *supra* note 5, § 46.5, at 46-12 (3d ed. 2010 Supp.).

legal profession to defend artificially-imposed impediments that frustrate clients' legitimate expectations, particularly where such restrictions can no longer be justified as necessary consumer protections.

B. THE CURRENT APPROACH IS UNNECESSARY TO PROTECT THE INTERESTS OF CLIENTS

In most U.S. jurisdictions, the temporary practice of an out-of-state lawyer without proper authorization is regarded as the "unauthorized practice of law" (UPL), just as if the activities of the out-of-state lawyer had been undertaken by a layperson without legal training or experience.[59] While this result may make sense in a strictly literal way—since neither the out-of-state lawyer nor the unlicensed layperson has been "authorized" to practice law in the regulating state—it cannot be otherwise justified.

Even accepting that UPL rules may provide beneficial consumer protections where untrained laypersons are concerned,[60] such a case is very hard to make where trained and licensed lawyers are involved, even if such lawyers are from out of state. As previously noted, much of U.S. law practice today involves issues of federal law or of substantially similar state law, where any substantive or procedural differences in the law of any particular jurisdiction can be easily and quickly discerned through modern computerized research tools. All lawyers admitted to practice in the United States today have basic research skills and experience that should enable them to find and apply the law in any other U.S. jurisdiction. Moreover, in an age of increasing lawyer specialization, it is clearly true that lawyers trained and experienced in particular substantive areas of the law are likely to be more competent to handle matters in their fields of specialization, even in states where they are not licensed, than are non-specialist lawyers physically located in such states. An experienced real estate lawyer from New York, for example, is more likely to be able competently to handle a complex real estate financing project in Chicago than a family law practitioner who happens to be licensed in Illinois.

In the United States today, forty-one states and the District of Columbia permit the admission of out-of-state lawyers to practice in their jurisdictions on motion and without the requirement that they pass the local bar examination under some circumstances.[61] This fact in itself underscores the point that lawyers in all U.S. jurisdictions are competent professionals who need not demonstrate specialized knowledge about the substantive law or procedures of a particular state in order

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59. *Id.* at 46-11 to -12.

60. It should be noted that the efficacy of UPL rules in achieving effective consumer protection objectives is not universally accepted. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 828–34 (1986).

61. *See State Implementation of ABA MJP Policies*, AM. BAR ASS'N (Apr. 20, 2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf [https://perma.cc/T4R6-FPG4].

to practice there in a way that serves the best interests of their clients. The same point is confirmed in practices across the country relating to *pro hac vice* admission of out-of-state litigators.[62]

Unfortunately, it may be that the primary motivation for many of the restrictions on lawyer mobility has less to do with protections for clients than with protection for local lawyers from out-of-state competition. And as to that motivation, we heartily agree with the commentator who observed that "[i]f the UPL rules are intended to protect clients, clients should have some say as to how much protection they want. And if the rules are designed in part to protect lawyers from competition, then lawyers should not be allowed unilaterally to determine the extent of their own protection."[63]

C. THE CURRENT APPROACH CREATES RULES THAT ARE IMPOSSIBLE TO COMPLY WITH

In his "Chair's Introduction" to the published version of the *Model Rules of Professional Conduct* in 2002, Delaware Chief Justice Norman Veasey, speaking on behalf of the ABA's Commission on Evaluation of the Rules of Professional Conduct, noted:

> At the end of the day, our goal was to develop *Rules* that are comprehensible to the public and provide clear guidance to the practitioner. Our desire was to preserve all that is valuable and enduring about the existing *Model Rules*, while at the same time adapting them to the realities of modern law practice and the limits of professional discipline. We believe our product is a balanced blend of traditional precepts and forward-looking provisions that are responsive to modern developments . . . .[64]

Unfortunately, as regards the issue of lawyer mobility, the current rules fall well short of the laudatory goals articulated by the Chief Justice. We submit that the failure of the revised Rule 5.5 to address the kinds of issues that we previously identified[65] (thus failing to provide the "clear guidance" that its drafters intended) makes it all but impossible for lawyers to conform their conduct to the *Model Rules*' requirements in a number of very common circumstances. This raises problems not only for individual lawyers, but also for the firms in which they practice.

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62. *See* Stephen Gillers, *A Profession, If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It,* 63 HASTINGS L.J. 953, 993–94 (2012). As Professor Gillers notes, "[p]ro hac vice admission means we have long had a high comfort level with a lawyer's cross-border practice in host-state forums and with non-home-state law." *Id.* at 994.

63. 2 HAZARD ET AL., *supra* note 5, § 46.3, at 46-9 (3d ed. Supp. 2010).

64. E. Norman Veasey, *Chair's Introduction*, AM. BAR ASS'N COMM'N ON EVALUATION OF THE RULES OF PROF'L CONDUCT (Aug. 2002), http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preface/ethics_2000_chair_introduction.html [https://perma.cc/NP46-34G9].

65. *See* Part II.A.

Under Model Rule 5.1, partners and other lawyers exercising managerial authority in a law firm are required to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the *Rules of Professional Conduct*."[66] A lawyer is also made responsible for another's violation of the *Model Rules* if

> the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.[67]

The unfortunate truth is that today most law firm leaders—and particularly law firm general counsel and others responsible for risk management—are fully aware that lawyers in their firms are probably in at least technical violation of the rules governing multijurisdictional practice in one or more states every single day. An extraordinary decision, which was handed down while this Article was already in the editing process, exemplifies both the universality of the practice of law across state lines, and at least one court's absolute refusal to recognize the realities of law practice in the digital age. In the case of *In re Charges of Unprofessional Conduct in Panel File No. 39302*,[68] a Colorado-admitted lawyer, without ever setting foot in Minnesota, exchanged approximately two dozen emails with a Minnesota lawyer in order to intercede on behalf of his parents-in-law against whom the Minnesota lawyer was trying to enforce a $2,368.13 judgment.[69] The Minnesota Supreme Court upheld the professional discipline in Minnesota of the Colorado lawyer on these facts, holding that "engaging in e-mail communications with people in Minnesota may constitute the unauthorized practice of law in Minnesota, in violation of Minn. R. Prof. Conduct 5.5(a), even if the lawyer is not physically present in Minnesota."[70]

It is hard even to conjecture the tiny proportion of practicing lawyers in 2016 who do *not* send emails on behalf of clients to persons in other states on a daily, if not hourly basis. And yet, if someone complains—in the case cited above, the Minnesota lawyer who was trying to collect the judgment and with whom the Colorado lawyer had communicated—apparently such communication may be treated as the disciplinable unauthorized practice of law. And yet, as a practical matter, there is little that can be done to address the problem, given the inherent failure in the rules themselves. The result is an unhealthy situation in which large numbers of practitioners effectively ignore the rules while a few unlucky ones from time to time face disciplinary proceedings, denial of fees, or worse. Such a

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66. MODEL RULES R. 5.1(a).
67. MODEL RULES R. 5.1(c)(2).
68. *See* 884 N.W.2d 661 (Minn. 2016).
69. *Id.* at 664–65.
70. *Id.* at 663.

result clearly undermines both the authority of the rules themselves and the respect that should be accorded to them across the profession.

In a detailed article on how technology and the rapidly changing marketplace for legal services call into question our traditional models for regulating the legal profession, Professor Stephen Gillers addressed this broader problem:

> The question I ask is how the regulatory framework should be altered to accommodate the forces of change while protecting what is precious in the lawyers' world, our core values and especially the assurance of our clients' trust. My thesis is that these forces cannot be stopped, though they can be slowed and they can be pushed underground. Rules refusing to recognize the conduct these forces encourage may lead to sanctions against the occasional lawyer or nonlawyer who is snared in the high beam of a regulator's patrol car. But many others will speed along on back roads undetected. That is not healthy for the law or the nation.[71]

We agree with Professor Gillers' conclusion and consequently believe that there is an urgent need to solve the problems of multijurisdictional practice in the United States once and for all. Before turning to our proposed solution, however, we think it is instructive to consider how the same issue has been addressed in two other countries—Australia and Canada—that are similar to the United States in terms of their legal traditions and their constitutional structures.

IV. REFORM OF THE RULES ON LAWYER MOBILITY IN AUSTRALIA AND CANADA

Rules governing the rights of multijurisdictional practice by lawyers have changed significantly in many countries in recent years. The most dramatic change has probably been in Europe where lawyers located anywhere in the European Union (EU) now have broad rights of audience and practice in all other EU countries.[72] For our purposes, however, it is perhaps more relevant to focus on recent reforms in two countries— Australia and Canada—that are very much like the United States. Both Australia and Canada are predominantly common law jurisdictions,[73] and they are both structured on a federal constitutional model. Moreover, in both countries—as in the United States—the legal profession has historically been "self-regulating," with the primary focus being at the state or provincial levels.

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71. Gillers, *supra* note 62, at 971.

72. *See* Council Directive 77/249/EEC, art. 2, 1977 O.J. (L 78) 17 (EU); Council Directive 98/5, art. 1, 1998 O.J. (L 77) 36 (EC).

73. The only exception is, of course, the Province of Québec in Canada.

A. REGULATION OF LAWYER MOBILITY IN AUSTRALIA

Australia—although significantly smaller than the United States in terms of population (with about 23.5 million people)—has a number of commonalities with the United States that make it a relevant choice for comparison regarding lawyer mobility. Australia is a federal common law country; in Australia, the federation is a commonwealth consisting of six states and two territories,[74] and the states are empowered to regulate the legal profession. The legal services sector includes over 100,000 lawyers and contributes more than ten billion dollars annually to the national economy.[75] It is, however, fairly concentrated, with the legal services market in the states of New South Wales and Victoria encompassing seventy-two percent of Australia's lawyers.[76]

1. REGULATION OF THE LEGAL PROFESSION AND HISTORIC RESTRICTIONS ON LAWYER MOBILITY

As in the United States, the legal profession in Australia is regulated at the state and territorial levels and not by the federal government; indeed, the federal Parliament lacks the power to create laws to regulate lawyers.[77] Reflecting its British heritage, the Australian legal profession is divided into solicitors and barristers.[78] In New South Wales, Victoria, and Queensland, a lawyer is required to practice as either a solicitor or a barrister through application for a practicing certificate from either the state law society or bar association.[79] In the remaining jurisdictions—South Australia, Tasmania, Western Australia, the Northern Territory, and the Australian Capital Territory—lawyers can be admitted as both solicitors and barristers.[80]

The traditional restrictions on lawyer mobility arose from the inherent jurisdiction of the state and territorial courts to determine the professional

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74. *See Australian Constitution*.

75. *Legal Services, Australia: Summary of Operations 2007–08*, AUSTL. BUREAU OF STATISTICS (June 24, 2009), http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8667.0Main+Features32007-08 [https://perma.cc/639D-XZKR].

76. *See* DEP'T OF JUSTICE & REGULATION, ANNUAL REPORT 2014–15, at 32 (2015), http://assets.justice.vic.gov.au/justice/resources/d2a58cac-e746-4942-a6be-9e4edc28db85/djr_annualreport2015.pdf [https://perma.cc/HEZ3-UUAY].

77. Reid Mortensen, *Australia: The Twain (and Only the Twain) Meet—The Demise of the Legal Profession National Law*, 16 LEGAL ETHICS 219, 219 (2013) [hereinafter Mortensen, *Australia*].

78. *See generally* Reid Mortensen, *Becoming a Lawyer: From Admission to Practice Under the Legal Profession Act 2004 (Qld)*, 23 U. QUEENSL. L.J. 319 (2004).

79. For example, see the *Legal Profession Act 2007* (Qld), s 37. Section 37(2) provides that the local roll must include the roll of solicitors and the roll of barristers.

80. For example, in Western Australia, lawyers may practice as both barrister and solicitor, as noted in the *Legal Profession Act 2008* (WA), s 3; under the definition of "admission to the legal profession," this means admission by a Supreme Court as a barrister, or a solicitor, or a barrister and solicitor, or a solicitor and barrister under this Act. In other words, lawyers may practice as either a "solicitor" or a "barrister," or as both a "solicitor and barrister."

standards of their lawyers and to impose discipline for breaches of those standards as noted in case law. *Queensland Law Society Inc v Smith* notes the source of the inherent disciplinary jurisdiction of the Queensland Supreme Court: The Supreme Court's powers are comprised of a number of sources including the Charter of Justice of 1823, as well as jurisdiction power and authority that is the same as the courts of common law and chancery in England.[81] This jurisdiction also included the "inherent disciplinary jurisdiction over solicitors as being officers of the court."[82]

One important method for restricting lawyers from one jurisdiction from practicing in another was limiting the ability of lawyers not admitted in a particular jurisdiction from collecting fees for their work performed there; for example, section 38(1) of the Queensland Law Society Act 1952 states:

> No solicitor shall on or after 1 July 1931, act or practice as a solicitor unless—
> (a) The solicitor has obtained from the secretary in proper form a certificate which is then in force to the effect that the solicitor is on the roll of the court as a solicitor thereof and entitled to practice as a solicitor . . . .[83]

Section 39(1) provides that persons practicing without a certificate shall be guilty of an offense and liable to summary conviction for contempt of court and the imposition of a monetary fine:

> Every person who directly or indirectly acts or practises as a solicitor or conveyance—(a) without having at the time a certificate then in force issued to him by the secretary . . . shall be guilty of an offence, and shall be liable on summary conviction to a penalty not exceeding $500 and in addition thereto shall be guilty of a contempt of the Court and shall be liable to be punished accordingly.[84]

Section 44 provides that, if a lawyer does participate in proceedings in any court without having previously obtained a practicing certificate, he or she will not be able to recover any fee, reward, or disbursement relating to such work.[85]

This latter restriction can also be found in section 209(2) of the Queensland Supreme Court Act 1995 that stipulates: "A person who is not a lawyer is not entitled to claim or recover or receive directly or indirectly a sum of money or other remuneration for appearing or acting on behalf of another person in the Supreme Court."[86]

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81. *Queensl Law Soc'y Inc v Smith* [2000] QCA 109, para 6.
82. *Id.*
83. *Queensland Law Society Act 1952* (Qld), s 38(1) (repealed 2007).
84. *Queensland Law Society Act 1952–1985* (Qld), s 39 (repealed 2007).
85. *Queensland Law Society Act 1952* (Qld), s 44 (repealed 2007).
86. *Queensland Supreme Court Act 1995* (Qld), s 209(2) (repealed 2011).

Case law has also contributed to the limits placed upon those who may carry out the functions of a lawyer; the leading case on the exclusive role of legal practitioners to give legal advice is *Cornall v Nagle*.[87] Phillips J, in that case, held that where the giving of legal advice was concerned, the public is to be protected from the untrained and the unqualified, with the result that the task will ordinarily be regarded as the exclusive province of professionals who are trained and duly qualified.[88]

2. Pressure for Change from Outside the Legal Profession

Today, lawyers in Australia may practice freely across state and territorial borders without concern about the traditional restrictions on multijurisdictional practice.[89] This change—implemented through legislation passed by each of the individual state and territorial parliaments across the country[90]—came about as a result of a lengthy process beginning in the early 1990s, and was driven initially by pressure from outside the legal profession itself.[91] As described below, however, it took until the mid-2000s to enact that legislation.

In October 1992, as part of a National Competition Policy Review, Australian Prime Minister Paul Keating appointed Professor Frederick G. Hilmer to chair a committee to review trade practices legislation and to make recommendations for the development of a new national competition policy.[92] The result was a comprehensive report on national competition that was issued by Professor Hilmer's committee in 1993.[93] The terms of reference for the report included that it should give effect to the principle that Australia should "develop an open,

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87. *Cornall v Nagle* (1995) 2 VR 188. Other case law that considers the ability of lawyers to recover costs when they are not duly admitted in a particular court include: *Maggbury Pty Ltd v Hafele Austl Pty Ltd [No. 2]* [2001] QSC 78; *Cannon Street Pty Ltd v Karedis* [2006] QCA 541; *Theden v Nominal Defendant* [2008] QCA 71.

88. *Cornall v Nagle* (1995) 2 VR 188. For a further analysis of the exclusive role of the provision of legal advice, see Mark Byrne & Reid Mortensen, *The Queensland Solicitors' Conveyancing Reservation: Past and Future Development—Part I*, 28 U. QUEENSL. L.J. 251, 263 (2009) [hereinafter Byrne & Mortensen, *Queensland Solicitors' Conveyancing Reservation Part I*].

89. *See* Gino Dal Pont, *Regulation of the Queensland Legal Profession: The Quinquennium of Change*, 28 U. QUEENSL. L.J. 183 (2009).

90. *See Legal Profession Act 2006* (ACT); *Legal Profession Act 2004* (NSW), *superseded by Legal Profession Uniform Law Application Act 2014* (NSW); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (Qld); *Legal Practitioners (Miscellaneous) Amendment Act 2013* (SA); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2004* (Vic), *superseded by Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession Act 2008* (WA).

91. The pressures for change to the legal profession have been based upon external economic arguments put forward as part of the review of trade practices legislation and development of national competition policy by Professor Hilmer, who was commissioned by the Australian Government to prepare a report on his findings. *See generally* FREDERICK G. HILMER, NAT'L COMPETITION POLICY REVIEW COMM., NATIONAL COMPETITION POLICY (1993) [hereinafter HILMER REPORT].

92. *See generally id.*

93. *Id.*

integrated domestic market for goods and services by removing unnecessary barriers to trade and competition . . . ."[94]

The Hilmer Report acknowledged that Australia was a single integrated market and that the economic significance of state and territorial boundaries had become less important with developments in transportation and communications that enabled even small firms to carry on trade and commerce throughout the country.[95] The report also noted that, although trade policy reforms had had the effect of increasing international trade competitiveness, the professions had been protected from such competition, as well as from domestic competition.[96] The report pointed out that the development of a new national competition policy provided an opportunity to extend reforms to achieve more national consistency and to bypass the costs associated with addressing industry-specific, local regulatory arrangements on a case-by-case basis.[97]

With respect to the legal profession, the Hilmer Report noted that some opportunities for increased competition had already resulted from reforms like the relaxation of restrictions on advertising and some lessening of the monopoly over conveyancing.[98] At the same time, there had been general acceptance that the professions should not be regarded as coming within the meaning of "trade and commerce" as defined by the Australian Constitution, although there had been some variation among the states and territories regarding that characterization.[99] That distinction, it might be noted, has been rejected in the United States.[100]

The Hilmer Report did note that, in its submission made to the Hilmer committee, the Australian Council of Professions did not object to national competition principles as reflected in existing legislation being applied to the professions, so long as professional associations retained the ability to determine and enforce entry requirements and practice standards.[101] Such respect for individual professional associations became a key element in the reforms ultimately adopted.[102]

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94. *Id.* at 361.

95. *Id.* at xvii.

96. *Id.* at xviii.

97. *Id.* at xvii–iii.

98. *Id.* at 13 (citing LAW REFORM COMM'N OF VICT., NO. 47 ACCESS TO THE LAW: RESTRICTIONS ON LEGAL PRACTICE (May 1992); ATTORNEY-GEN.'S DEP'T, THE STRUCTURE & REGULATION OF THE LEGAL PROFESSION: ISSUES PAPER (1992)).

99. *See R v Small Claims Tribunal* [1973] Qd R 490, 491 (Austl.); *see* Timothy Gerard McGrath, *Apocalypse Now: Lawyers and the TPA*, 22 QUEENSL. L. SOC'Y J. 35, 37 (1992). A number of cases have held that certain professional services were offered in "trade and commerce" for purposes of Part V of the Trade Practices Act. *Bond Corp Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215, 215 (Austl.).

100. *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 786–88 (1975).

101. *See* HILMER REPORT, *supra* note 91, at 134.

102. *See* NAT'L LEGAL PROFESSION REFORM PROJECT, CONSULTATION REGULATION IMPACT STATEMENT 12 (2010).

3. THE LEGAL PROFESSION'S MOVE TOWARD MULTIJURISDICTIONAL PRACTICE

The move toward the adoption of multijurisdictional practice for Australian lawyers arose out of the drive for an expanded and more uniform national competition policy as described above. The process of change was reflected in three major reforms—the process of mutual recognition of occupations (including but not limited to the professions) that began in 1992, the Legal Profession Model Law Project that began in 2006, and the Legal Profession National Law Reform Project that was launched in 2009. Each of these is described below.[103]

a. Mutual Recognition

The first step toward reform of the rules governing lawyer mobility in Australia came through assent to mutual recognition of occupations, as reflected in legislation passed in each of the states and territories.[104] The purpose of the legislation was to enable the states and territories to enter into a scheme for the mutual recognition of all regulatory standards for goods and occupations adopted in Australia.[105] Such mutual recognition was an initiative arising out of a series of Special Premiers Conferences conducted over an eighteen-month period with the objective of achieving an historic reconstruction of intergovernmental relations.[106] The "principal aim" was to "remove the needless artificial barriers to interstate trade in goods and the mobility of labor caused by regulatory differences among Australian states and territories."[107] Mutual recognition was "expected to greatly enhance the international competitiveness of the Australian

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103. Increased lawyer mobility has been only one objective among many in efforts in Australia to move toward a more competitive legal profession, one that is better prepared to deal with the opportunities and challenges growing out of increased internationalization of the market for legal services. *See generally* Joe Catanzariti, President, Law Council of Austl., Speech at the Opening of Law Summer School 2013, Univ. of W. Austl., The Future of the National Legal Profession (Feb. 22, 2013), https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/TheFutureoftheNationalLegalProfession.pdf [https://perma.cc/U3K4-MDCX] [hereinafter Catanzariti Speech]; John Briton, Legal Servs. Comm'r (Queensl.), Speech at St. Vincents' 48th Annual Queensland Law Society Symposium, National Legal Profession Reform and the Regulation of the Future (Mar. 27, 2010), https://www.lsc.qld.gov.au/__data/assets/pdf_file/0015/106080/national-legal-profession-reform-and-the-regulation-of-the-future.pdf [https://perma.cc/XP88-CVKE]. Such additional efforts include recognition of incorporated legal practices and multidisciplinary partnerships, as well as recognition of foreign lawyers entering into commercial association with local practitioners. Discussion of these topics is beyond the scope of this Article, but they provide the context for the broader considerations of national competitiveness within which the issue of lawyer mobility has arisen.

104. "Occupations" for these purposes included "professions." *See, e.g.*, *Mutual Recognition Act 1992* (Qld) pt 1 div 4 sub-div 1.

105. *See, e.g.*, *id.* s 3. Similar purpose provisions are provided in all state and territory legislation.

106. John Kain et al., *Australia's National Competition Policy: Its Evolution and Operation*, PARLIAMENT OF AUSTL. (June 2001, updated June 3, 2003), http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/ncpebrief [https://perma.cc/43XH-BZ84]. The Special Premiers Conference in which mutual recognition was discussed occurred in 1991. *Id.*

107. *See* Queensl., *Parliamentary Debates*, Legislative Assembly, 12 Nov. 1992, 640 (Wayne Goss, Premier, Minister for Economic & Trade Dev.) (Austl.).

economy and to be a major step forward in the achievement of micro-economic reform."[108]

A major principle of mutual recognition was that:

> If someone is assessed to be good enough to practice a profession or an occupation in one state or territory, then they should be able to do so anywhere in Australia. A person who is registered in one jurisdiction will only need to give notice, including evidence of their home registration to the relevant registration authority in another jurisdiction to be entitled immediately to commence practice in an equivalent occupation in that second state or territory. No additional assessment [would] be undertaken by the local registration or licensing body to assess the person's capabilities or expertise. Local registration authorities [would] be required to accept the judgment of their interstate counterparts of a person's educational qualifications, experience, character or fitness to practice . . . . [T]he occupations a person seeks to move between from one state to another have to be substantially equivalent and have to be subject to statutory registration arrangements . . . . [E]veryone would agree that in Australia the existing regulatory arrangements of each state or territory generally provide a satisfactory set of standards. Thus, on implementation of mutual recognition, [in] no jurisdiction will . . . there be an influx of inadequately qualified practitioners in registered occupations.[109]

Mutual recognition thus meant that a legal practitioner in one state should be able to apply to have his or her practicing certificate recognized in another state. Unfortunately, however, there were operational differences that complicated lawyer mobility—for example, differences relating to professional indemnity insurance and classes of practicing certificates, the requirements in some states that government lawyers hold practicing certificates, and the provisions in some states that legal services such as conveyancing could be carried out by non-practitioners.[110] These differences "fettered the free movement of legal practitioners,"[111] notwithstanding the adoption of the mutual recognition principles.

b. The Legal Profession Model Law Project

Moves toward national uniformity of the legal profession in Australia continued in 1994 with the Law Council of Australia[112] producing a paper entitled *Blueprint for the Structure of the Legal Profession: A National Market*

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108. *Id.*

109. *Id.* at 641.

110. *See generally* Mark Byrne & Reid Mortensen, *The Queensland Solicitors' Conveyancing Reservation: Past and Future Development, Part II,* 29 U. QUEENSL. L.J. 245 (2010); Byrne & Mortensen, *Queensland Solicitors' Conveyancing Reservation Part I*, *supra* note 88, at 251.

111. Catanzariti Speech, *supra* note 103, at 4.

112. The Law Council of Australia is the national body representing sixteen state and territorial legal professional bodies, as well as a large law firm group. The Executive, which is elected at the Law Council's annual general meeting every year, consists of five representatives of the Law Council's constituent bodies.

for Legal Services (Blueprint).[113] In it the Council set out an agenda aimed at reforming the legal profession in Australia "with the objective of removing constraints on the development of a national market in legal services and developing other efficiency enhancing reforms."[114]

The Blueprint was prepared with the cooperation and support of each of the legal professional bodies in Australia (all of which were members of the Law Council).[115] As a result, the document reflected broad agreement on the following general principles and objectives:

> 1. [N]ational competition policy principles apply to the legal profession;
>
> 2. [L]awyers admitted in any State or Territory of Australia are able to practise law throughout Australia;
>
> 3. [E]xisting constraints which prevent a lawyer's right to practise without restriction throughout Australia are removed in order to facilitate the development of a national market in legal services;
>
> 4. [R]ecognition that the independence of the legal profession is dependent upon the profession's right to self-regulation;
>
> 5. [T]he system of regulation of the legal profession is implemented by uniform state and territory legislation;
>
> 6. [T]he self-regulation of the legal profession is subject to an external and transparent process of accountability to ensure that the rules of the professional bodies are not inconsistent with national competition policy principles;
>
> 7. [T]he protection of consumers of legal services through comprehensive education and training of the legal profession and the development of a uniform standard of client care; and
>
> 8. [P]roper information is available for consumers of legal services as to quality and cost of legal services.[116]

Of particular importance to the development of the Blueprint was the need to ensure that uniform requirements were established for practical legal training

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About the Law Council of Australia, LAW COUNCIL OF AUSTL., http://www.lawcouncil.asn.au/lawcouncil/index.php/about-the-law-council-of-australia?id=11 [https://perma.cc/FT9T-EAM3] (last visited Nov. 8, 2016).

113. LAW COUNCIL OF AUSTL., BLUEPRINT FOR THE STRUCTURE OF THE LEGAL PROFESSION: A NATIONAL MARKET FOR LEGAL SERVICES (1994) [hereinafter BLUEPRINT].

114. *Id.* at 3.

115. *Id.* The Law Council of Australia includes the following members: Australian Capital Territory Law Society; Australian Capital Territory Bar Association; Law Society of New South Wales; New South Wales Bar Association; Law Society Northern Territory; Northern Territory Bar Association; Queensland Law Society; Bar Association of Queensland; Law Society of South Australia; South Australian Bar Association; Tasmanian Independent Bar; Law Society of Tasmania; Law Institute of Victoria; the Victorian Bar; Law Society of Western Australia; Western Australian Bar Association; and Law Firms Australia. *See Constituent Bodies & Directors,* LAW COUNCIL OF AUSTL., http://www.lawcouncil.asn.au/lawcouncil/index.php/about-the-law-council-of-australia?id=13 [https://perma.cc/LXP9-WE2J] (last visited Nov. 8, 2016).

116. BLUEPRINT, *supra* note 113, at 3–4.

pre- and post-admission. Such training—which includes institutional instruction, on-the-job training, or a combination of both—is designed to provide practitioners with an understanding of and competence in areas of legal ethics, professional responsibility, and trust accounting.[117] The Blueprint also addressed Post Admission Supervised Work, requiring that a person admitted to practice law complete a period of two years of restricted practice.[118]

Further, legal practitioners seeking an unrestricted right to practice were encouraged (where possible) to complete a practice management course including topics like the financial mechanics of legal practice; costing and pricing of legal services; technology for legal practice; management, including staff, time, and conflict management; practice evaluation, including assessing the feasibility of starting up a sole practice or entering into a partnership; trust and controlled money management; and professional standards, including risk management procedures.[119] Finally, the Blueprint noted "that it is incumbent on all lawyers to remain current with issues of law and legal practice through informal and formal continuing legal education."[120] Insofar as practicable, professional associations were directed to facilitate access for all lawyers to effective and relevant education and training programs for their professional development.[121]

In July 2001, the Standing Committee of Attorneys-General (SCAG), which includes federal, state, and territorial attorneys general from Australia as well as New Zealand, discussed the need for a more uniform approach to the regulation of the legal profession and agreed that their officers should develop proposals for a model law for consideration by government ministers.[122] In developing the model law, three different types of provisions were designated:

> 1. Core Uniform (CU)—core provisions that are to be adopted in each State and Territory, using the same wording as far as practicable.
>
> 2. Core Non Uniform (CNU)—core provisions that are to be adopted in each State and Territory, but the wording of the model provisions need not be adopted.
>
> 3. Non-Core (NC)—States and Territories can choose the extent to which they will adopt these provisions.[123]

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117. *See id.* at 6–7. The Blueprint also required legal education in professional areas, including work and file management, legal writing and drafting, interviewing, negotiation and dispute resolution, legal analysis and research, and advocacy. Practical legal training also required coverage of practice areas, including criminal and civil litigation, wills and estate management, commercial and corporate practice, and property practice.

118. *Id.* at 8.

119. *Id.* at 12.

120. *Id.*

121. *Id.* at 13.

122. *See generally* Mortensen, *Australia*, *supra* note 77.

123. Scott McLean, *Evidence in Legal Profession Disciplinary Hearings: Changing the Lawyers' Paradigm*, 28(2) U. QUEENSL. L.J. 225 (2009); *see* LEGAL PROFESSION: MODEL LAWS PROJECT MODEL BILL (2d ed. Aug. 2006) [hereinafter MODEL BILL]; *see also* Dal Pont, *supra* note 89, at 184.

The purpose of the model law was to create the basis for "uniform" legislative approaches,[124] rather than "identical legislation."[125] This approach was seen as having a better chance of achieving commonality across the Australian jurisdictions.[126] More important than identical legislation to the Law Council of Australia was the motivation of encouraging competition for greater choice and benefits for consumers, enabling an integrated delivery of legal services nationally, streamlining state and territory regulations to allow lawyers to practice easily within Australia, and enabling Australian law firms to compete nationally and internationally.[127]

This focus on achieving a uniform legislative approach rather than identical legislation resulted in some key differences that have diluted the degree of uniformity in the bills ultimately enacted across the country, for example, in the approach to disciplinary proceedings, which were considered "non-core."[128]

In 2004, SCAG released a draft Model Bill aimed at harmonizing the laws across jurisdictions.[129] In August 2006, a revised version of the Model Bill was released.[130]

As finalized, the Model Bill removed significant barriers to interstate legal practice to allow greater competition in the provision of legal services. As set out in the explanatory notes to the Queensland version of the statute, the benefits of the Model Bill were described as including

> nationally consistent standards for admission to the legal profession; recognition of interstate practicing certificates; a strengthening of complaints and disciplinary processes . . .; nationally consistent trust account requirements; nationally consistent costs disclosure requirements; nationally consistent criteria for the assessment of costs; nationally agreed inter-jurisdictional fidelity fund arrangements; new business structure options for legal practices, namely, incorporated legal practices and multidisciplinary practices; and nationally agreed regulatory arrangements for foreign lawyers.[131]

The Model Bill provided for a system of lawyer mobility through its definitions of an "Australian lawyer," a "local lawyer," and an "interstate lawyer"

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124. BLUEPRINT, *supra* note 113, at 4–5.

125. *See* Dal Pont, *supra* note 89, at 184.

126. *See id.*

127. *See id.* at 184–85.

128. *See* McLean, *supra* note 123, at 234.

129. Tim Bugg, President, Law Council of Austl., Speech at the ACLA National Conference, The National Profession—Past, Present and Future, Nov. 3, 2006, at 4, https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/speeches/20061103TheNationalProfession-past,presentandfuture.pdf [https://perma.cc/EAQ9-JV44]; *see The Model Legal Profession Bill*, LAW COUNCIL OF AUSTL., http://www.lawcouncil.asn.au/lawcouncil/lca-divisions?id=150 [https://perma.cc/B2P3-356L] (last visited Nov. 27, 2016).

130. *See generally* MODEL BILL, *supra* note 123.

131. *Legal Profession Bill of 2007* (Qld) explanatory notes (Austl.).

(as well as a definition of "foreign lawyers" and their entitlement to practice).[132] "Eligibility" provisions in the Model Bill recognized similar academic qualifications and practical legal training, while "suitability" requirements ensured that admission would only be permitted to a person who is a "fit and proper person to be admitted."[133] Where lawyers were previously practicing as either solicitors and/or barristers, the Model Bill provided for "legal practitioners," including an "Australian legal practitioner,"[134] a "local legal practitioner,"[135] and an "interstate legal practitioner."[136] There was also recognition of the "home jurisdiction"[137] in which an Australian legal practitioner's or an Australian-registered foreign lawyer's most current practicing certificate or registration was granted.[138] Information moving among jurisdictions concerning admission and practicing certificates was provided for through requirements for notification to corresponding authorities.[139] Importantly, the inherent jurisdiction of each supreme court was protected by the legislation.[140]

All jurisdictions in Australia have now incorporated the Model Bill into their Legal Profession Acts, South Australia being the last to do so in 2013.[141] With the action of South Australia, lawyer mobility and multijurisdictional practice throughout Australia became a reality.

c. Subsequent Developments: The Legal Profession National Reform Project 2009

In February 2009, the Council of Australian Governments (COAG)[142] reasoned that, although the Model Law Project had achieved greater uniformity across the country in terms of regulating the legal profession, there remained further opportunity for reform.[143] The COAG consequently appointed the

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132. MODEL BILL, *supra* note 123, at ch 1 s 2 schs 1–2 (defining a "lawyer" simply as a person admitted into the Supreme Court of the jurisdiction in question).

133. *See id.* at ch 2 s 3 schs 3–4.

134. *Id.* at s 1.2.3.

135. *Id.*

136. *Id.*

137. *Id.* at s 1.2.5.

138. *Id.* at ch 1 s 2 sch 5.

139. *Id*. at ch 2 s 6 schs 4–16.

140. *See Legal Profession Act 2007* (Qld) s 13 (Austl.).

141. *See Legal Profession Act 2006* (ACT); *Legal Profession Act 2004* (NSW), *superseded by Legal Profession Uniform Law Application Act 2014* (NSW); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (Qld); *Legal Practitioners (Miscellaneous) Amendment Act 2013* (SA); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2004* (Vic), *superseded by Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession Act* 2008 (WA).

142. The Council of Australian Governments was formed in 1992. Its members include the Prime Minister of Australia (who serves as Chair), the Premiers of the six states, the First Ministers of the two territories, and the President of the Australian Local Government Association. *See generally COAG Members*, COUNCIL OF AUSTRALIAN GOV'TS, https://www.coag.gov.au/coag-members [https://perma.cc/U7MT-7F7Q] (last visited Nov. 8, 2016).

143. Catanzariti Speech, *supra* note 103.

National Legal Reform Taskforce to make recommendations and propose draft legislation for further consideration.[144] In particular, COAG saw the Taskforce as an opportunity to enhance the clarity and accessibility of consumer protection.[145]

The Taskforce started its consultation process with the release of seven discussion papers in late 2009.[146] The result was a proposed new framework for national regulation of the legal profession that was embodied in a draft national Uniform Law designed around the following concepts:

- The creation of a national legal profession regulatory framework;
- The establishment of an Australian legal profession;
- A reduction in the regulatory burden for Australian legal practitioners and law practices;
- Enhanced consumer protection; and
- Maintenance of the independence of the legal profession.[147]

The Uniform Law was intended to provide for a national legal profession and a national legal services market through simplified uniform legislation and regulatory standards.[148] It was meant to ensure that legal practitioners could move freely among Australian jurisdictions and that law practices could operate on a national basis, thus increasing the competitiveness of Australian law firms and facilitating the development of an international legal services market.[149]

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144. *Legal Profession National Law 2011* (COAG) s 1.1.3 (Austl.) ("The objectives of this Law are to promote the administration of justice and an efficient and effective Australian legal profession, by: (a) providing and promoting national consistency in the law applying to the Australian legal profession; and (b) ensuring lawyers are competent and maintain high ethical and professional standards in the provision of legal services; and (c) enhancing the protection of clients of law practices and the protection of the public generally; and (d) empowering clients of law practices to make informed choices about the services they access and the costs involved; and (e) promoting regulation of the legal profession that is efficient, effective, targeted and proportionate; and (f) providing a co-regulatory framework within which an appropriate level of independence of the legal profession from the executive arm of government is maintained.").

145. *See id*.

146. The Taskforce's Discussion Papers are available at the *National Legal Profession Reform: Document Library*, N.S.W. GOV'T, JUSTICE DEP'T, http://www.justice.nsw.gov.au/for-students-legal-profession/national-legal-profession-reform/document-library#Taskforcepapers [https://perma.cc/UC3B-XZED] (last visited Jan. 22, 2017). The seven National Legal Profession Reform Taskforce Papers relate to the following sub-topics: Fidelity Cover, Trust Accounting, Professional Indemnity Insurance, Business Structures, Legal Costs, National Legal Services Ombudsman, and Regulatory Framework.

147. *See Legal Profession National Law 2011* (COAG) s 1.1.3 (Austl.); *see also The Regulatory Framework: A National Legal Profession*, N.S.W. GOV'T, JUSTICE DEP'T, at 1–2 (Sept. 16, 2009), http://www.justice.nsw.gov.au/Documents/LPR_Documents/pdf/National+Legal+Profession+Reform+Taskforce+paper+-+regulatory+framework+-+16+September+2009.pdf [https://perma.cc/PDK2-LGP4].

148. Catanzariti Speech, *supra* note 103, at 6–7.

149. *Id*. at 14; *see also* COAG REFORM COUNCIL, NATIONAL PARTNERSHIP AGREEMENT TO DELIVER A SEAMLESS NATIONAL ECONOMY 2008–09, at 319, http://webarchive.nla.gov.au/gov/20140212065028/http://www.coagreformcouncil.gov.au/reports/competition-and-regulation/national-partnership-agreement-deliver-seamless-national-economy [https://perma.cc/GEB9-LST3].

The state of Victoria was chosen as the host jurisdiction for the proposed legislation and New South Wales was selected to host the two new regulatory bodies created under the Uniform Law—the Legal Services Council and the Commissioner for Uniform Legal Services Regulation (who was also to act as the Chief Executive Officer (CEO) of the Legal Services Council).[150] Together, the two new parties were to set the policy framework for the new scheme and refine the way it operates by issuing guidelines and directions to local regulatory authorities to make sure the law operates consistently across jurisdictions, and by advising the attorneys-general of the need for any potential amendments.[151]

The key problem with the proposed Uniform Law is that, to date, it has been adopted in only two states, New South Wales and Victoria.[152] The model legislation was intended to bring about the creation of a national regulatory framework. Toward the end of the development of the model legislation, however, the remaining states and territories withdrew their support.[153] A primary concern of the dissenting jurisdictions appeared to be the costs associated with the proposed scheme and the withdrawal of federal funding to support the project.[154]

Notwithstanding the refusal of most states to participate, however, the Uniform Law has successfully created a legal services market across New South Wales and Victoria, an area that encompasses almost three-quarters of Australia's lawyers.[155] The Uniform Law now regulates the legal profession across these two jurisdictions, governing matters such as practicing certificate types and conditions,[156] maintenance and auditing of trust accounts,[157] continuing professional development requirements,[158] complaint handling processes,[159] billing arrangements,[160] and professional discipline issues.[161] Moreover, the pressures for a national regulatory scheme still exist, most notably through the lobbying efforts

150. *Bilateral Agreement on Legal Profession Uniform Framework 2013* (NSW–Vic) ch 4 s 1 schs 2–3.

151. *See id.* ch 5 (Maintenance of consistency and amendment of the Framework).

152. *See Legal Profession Uniform Law Application Act 2014* (NSW); *Legal Profession Uniform Law Application Act 2014* (Vic).

153. *See* Media Release, Jarrod Bleijie, Queensland Not Signing Up to National Legal Profession Reform (Oct. 3, 2012).

154. *See* Chase Deans, *National Legal Profession Reform*, ETHOS: OFFICIAL PUB. OF THE L. SOC. OF THE AUSTL. CAP. TERR., no. 227, at 10–11 (Mar. 2013).

155. *A New Framework for Practicing Law in New South Wales*, LAW SOC'Y OF N.S.W. (July 1, 2015), http://www.lawsociety.com.au/ForSolictors/professionalstandards/Ruleslegislation/nationalreform [https://perma.cc/HKF5-AGK6].

156. *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 ch 2 pt 2.2 (Austl.).

157. *Id.* sch 1 ch 4 pt 4.2.

158. *Id.* sch 1 ch 3 pt 3.3 div 3. Refer in particular to section 52, which creates a statutory condition of holding a practicing certificate that includes "continuing professional development."

159. *Id*. sch 1 ch 5 pt 5.2–5.3.

160. *Id.* sch 1 ch 4 pt 4.3, div 3–5, 7.

161. *Legal Profession Uniform Law Application Act 2015* (Vic) sch 1 ch 5 (Austl.).

of a new organization, "Law Firms Australia."[162] That group has commented that they "are confident that once people begin to see the advantages of the uniform rules in [New South Wales] and Victoria we will be able to persuade them to get on board."[163] Continuing, they observed:

> 70 per cent of the lawyers in this country are now regulated by a uniform set of rules and laws, but we have some way to go to persuade the other states and territories that it is important for the profession to be regulated with some consistency across the country.[164]

4. Experience Since Mobility Reform

Complete lawyer mobility across state and territorial borders now exists in Australia. It does not exist in a single national framework but rather through legislation passed by individual states and territories.[165] Whether Australia will ultimately move toward a national model for the regulation of the legal profession remains to be seen, but substantial progress has obviously been made in assuring that Australian lawyers can now practice anywhere in their country without being constrained by arbitrary and antiquated rules. That said, there has been some commentary on the successes (and gaps) in the Model Law Program, focusing on topics such as admission to practice and professional discipline.

a. Admission to Practice

Some commentators have noted that it is important "that there should be a substantial commonality of approach in assessing eligibility for admission,"[166] and that "impressions of widely varying treatment on admission depending on jurisdiction, apart from promoting forum shopping, are likely to be detrimental to the confidence the public can legitimately feel regarding ethical standards within the profession."[167] A more uniform approach to admission would avoid the starkly varied results in *Law Society of Tasmania v Richardson*[168] and *Re AJG*.[169]

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162. Chris Merritt, *Large Law Firm Group Changes Name to Law Firms Australia,* AUSTRALIAN, July 17, 2015.

163. *Id.*

164. *Id.*

165. *See* Mortensen, *Australia*, *supra* note 77; *see also Legal Profession Act 2006* (ACT); *Legal Profession Act 2004* (NSW), *repealed by Legal Profession Uniform Law Act 2014* (NSW); *Legal Profession Act 2006* (NT); *Legal Profession Act 2007* (Qld); *Legal Practitioners (Miscellaneous) Amendment Act 2013* (SA); *Legal Profession Act 2007* (Tas); *Legal Profession Act 2004* (Vic), *repealed by Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession Act 2008* (WA).

166. Dal Pont, *supra* note 89, at 189.

167. *Id.*

168. *Law Soc'y of Tasmania v Richardson* [2003] TASSC 9.

169. *In Re AJG* [2004] QCA 88.

> In the former [case], an applicant who made a conscious decision *not to disclose* a finding of academic misconduct and displayed no remorse for that omission received no disciplinary condemnation, whereas in the latter an applicant who *disclosed* a not dissimilar finding of academic misconduct while expressing contrition was denied admission for a time.[170]

A similar inconsistent result was evident in the way two different jurisdictions handled the case of a single applicant for admission in *Re Del Castillo,*[171] where the Australian Capital Territory Full Court was inclined to deny admission to an applicant who did not disclose an acquittal for murder and who had previously lied both to the police and his lawyer, and the New South Wales Court of Appeal's disinclination to discipline the same applicant.[172]

b. Professional Discipline

The Australian legal system is based on an adversarial model in both criminal and civil law. There is an exception, however, for supreme courts when exercising their inherent jurisdiction in the professional discipline of officers of the court.[173] The purpose of such disciplinary proceedings is to protect the reputation of the legal profession, and also to uphold community confidence in the rule of law.[174] One significant benefit of the Model Law Project has been the movement toward uniformity of definitions of "unsatisfactory professional conduct" and "professional misconduct" for disciplinary purposes in the various jurisdictions across Australia.[175] Consistency among "jurisdictions as to conduct capable of generating a disciplinary consequence increases the likelihood of a consistent disciplinary response to equivalent forms of misconduct, and with it, public confidence in the maintenance of consistent professional standards."[176] Unfortunately, however, the adoption of uniform rules of evidence in disciplinary proceedings was treated as a "non-core" provision in the Model Bill, with the result that outcomes can still vary from one jurisdiction to another.[177] For example, facts that could be admissible in Queensland (where disciplinary proceedings are not bound by the rules of evidence) and lead to disciplinary sanctions may not be admissible in New South Wales or Victoria (where such

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170. Dal Pont, *supra* note 89, at 189.

171. *See Re Del Castillo* [1998] ACTSC 131.

172. *See Prothonotary v Del Castillo* [2001] NSWCA 75.

173. *See* McLean, *supra* note 123, at 230.

174. *Id.* at 229.

175. *See, e.g.*, *Legal Profession Act 2007* (Tas) ss 420 (defining "unsatisfactory professional conduct"); *id.* ss 421 (defining "professional misconduct").

176. Dal Pont, *supra* note 89, at 191.

177. See MODEL BILL, *supra* note 123, at 1, in which the use of the abbreviations is applied throughout the Bill.

proceedings are bound by the rules of evidence).[178]

5. IMPROVED RELATIONSHIPS AMONG PROFESSIONAL AND REGULATORY BODIES

Perhaps one of the most noteworthy results of the Australian adoption of lawyer mobility reform has been the development of closer working relationships among professional and regulatory bodies.[179] These relationships have resulted in agreements[180] among the various organizations that have responsibility for the issuance of practicing certificates and the bringing of disciplinary proceedings. Specifically, these agreements require all such bodies to inform each other of decisions respecting the removal of lawyers from the rolls of legal practitioners. In Queensland, for example, a recent decision made clear that state regulatory bodies are bound to report the removal of a practitioner from the roll to all other states and territories in Australia, including the High Court of Australia.[181]

B. REGULATION OF LAWYER MOBILITY IN CANADA

With a population of some 35.2 million, Canada is roughly a tenth the size of the United States, although the country itself is significantly larger in area. Constitutionally, Canada is a federation consisting of ten provinces and three territories. There are currently over 125,000 lawyers in Canada who are licensed members of law societies that exist in each jurisdiction.[182] Similar to the United States, the regulation of the legal profession is handled at the provincial (or territorial) level, with each law society exercising broad jurisdiction conferred under provincial statutes. These statutes stress that the key role of each law society is the protection of the public interest.[183] For over twenty-five years, all of

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178. *See generally* MODEL BILL, *supra* note 123, ch 6 (noting that all clauses are denoted as "Not Core" and can therefore vary between states).

179. *See, e.g.*, *Legal Profession Act 2007* (Tas) div 11 s 406 (requiring claims to be forwarded to a corresponding authority where there are issues); *id.* s 408 (providing for cooperation with other authorities, including the law societies). These provisions ensure the integrity of the applications for practicing certificates that are made cross-jurisdictionally.

180. *See, e.g.*, *Legal Profession Act 2007* (Qld) pt 2.6 s 96 (notifying other jurisdictions about removal from local roll). These provisions are mirrored in all jurisdictions throughout Australia.

181. *Legal Servs Comm'r v Johnston* [2015] QCAT 480 (bringing charges for a failure to exercise competence and diligence, making false representations, and trust account breaches).

182. FED'N OF LAW SOC'YS OF CAN., MEMBERSHIP STATISTICAL REPORT (2013), http://docs.flsc.ca/STATS2013ReportFINAL.pdf [https://perma.cc/4F83-33TW].

183. Legal Profession Act, S.N.S. 2004, c 28, s 4(1) (N.S. Can.); Legal Profession Act, S.B.C. 1998, c 9, s 3 (B.C. Can.); Legal Profession Act, R.S.P.E.I. 1988, c L-6.1, s 4 (P.E.I. Can.); Legal Profession Act, C.C.S.M. c L107, s 3(1) (Man. Can.); Legal Profession Act, R.S.Y. 2002, c 134, s 3 (Yukon Can.); Professional Code, C.Q.L.R. c C-26, s 23 (Que. Can.); Law Society Act, R.S.O. 1990, c L.8, s 4(2). This is also stressed by the courts in approaching matters of professional regulation of the legal profession. Law Soc'y of B.C. v. Lawrie, 1987 CanLII 2443, para. 14 (Can. B.C. S.C.); Law Soc'y of B.C. v. Lawrie, 1991 CanLII 659 (Can. B.C. C.A.); Att'y Gen. of Can. v. Law Soc'y of B.C., 1982 CanLII 29 (Can. S.C.C.); Great West Life Assur. Co. v. Royal Anne Hotel Co., 1986 CanLII 980, para. 33 (Can. B.C. C.A.); Fast Trac Bobcat & Excavating Serv. v. Riverfront Corp. Ctr. Ltd., 2002 B.C.S.C. 1399 (CanLII), para. 61–63.

Canada's law societies have worked together under the aegis of a national coordinating group—the Federation of Law Societies of Canada—to lower barriers to practice by lawyers from different provinces.

1. REGULATION OF THE LEGAL PROFESSION AND HISTORIC RESTRICTIONS ON LAWYER MOBILITY

The multijurisdictional practice of law in Canada is governed by a system founded upon the legislation, rules, and by-laws that govern the legal profession in each province and territory, as well as two inter-jurisdictional agreements.[184] In the early years of settlement, the lack of local lawyers led to fairly liberal attitudes towards lawyers transferring from other jurisdictions.[185] Ontario in 1797 welcomed any qualified lawyer from other parts of Canada, or even England, as long as they undertook to live there.[186] Louis Riel, a Métis leader and politician who was the founder of Manitoba, was tried for high treason for leading the North-West rebellion against Canadian encroachment on Métis lands. He was defended at his trial in Regina, in what was to become Saskatchewan, by a team of lawyers from Québec and Ontario.[187] After unsuccessful appeals to the

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184. *See generally Canadian Law*, *in* THE NEW OXFORD COMPANION TO LAW 172–75 (Oxford Univ. Press 2008); Michael Deturbide & Elizabeth J. Hughes, *Canada*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 132–36 (Jan M. Smits ed., 2d ed. 2012); Laurel S. Terry, *Trends in Global and Canadian Lawyer Regulation*, 76 SASK. L. REV. 145, 158 (2013); Paul McLaughlin, Chair, Nat'l Ethics Grp., Fed'n of Law Soc'ys of Can., Presentation to the A.B.A. Commission on Multi-Jurisdiction Practice: Should We Build Walls or Gates? (Feb. 16, 2001), http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice/mjp_comm_lsa.html [https://perma.cc/5L28-WFU7] [hereinafter McLaughlin Speech].

185. Harry W. Arthurs & Richard Weisman, *Canadian Lawyers: A Peculiar Professionalism*, *in* LAWYERS IN SOCIETY: THE COMMON LAW WORLD 123, 135 (Richard L. Abel & Philip Simon Coleman Lewis eds. 1988). For Western Canada, see John M. Law & Roderick J. Wood, *A History of the Law Faculty*, 35 ALTA. L. REV. 1, 1 (1996); RICHARD A. WILLIE, THESE LEGAL GENTLEMEN: LAWYERS IN MANITOBA 1839–1900, at 49–51 (Legal Research Instit. of the Univ. of Man. 1994). For a Northern example of the reliance that remote areas placed on lawyers qualified elsewhere, see Burt Harris, *Fighting Spirits: The Yukon Legal Profession, 1898–1912*, *in* 11 ESSAYS IN THE HISTORY OF CANADIAN LAW 457, 491 (Hamar Foster & John McLaren eds., Univ. of Toronto Press 1995); WILLIE, *supra*.

186. An Act for the Better Regulating the Practice of Law, 1797, 37 Geo. III, c. 13, s. V (Can. U.C.), https://bnald.lib.unb.ca/sites/default/files/UC.1797.ch%2013.pdf [https://perma.cc/8V85-2U65]; William Renwick Riddell, *When the Court of King's Bench Broke the Law*, 40 CANADIAN L. TIMES 549, 551 (1920).

187. Lewis H. Thomas, *A Judicial Murder—The Trial of Louis Riel*, *in* THE SETTLEMENT OF THE WEST 37–59 (Howard Palmer ed., 1977); Lewis H. Thomas, *Riel, Louis*, *in* 11 DICTIONARY OF CANADIAN BIOGRAPHY (Univ. of Toronto/Université Laval 1982), http://www.biographi.ca/en/bio/riel_louis_1844_85_11E.html [https://perma.cc/VKF4-5682] ("François-Xavier Lemieux, a successful criminal lawyer [in Québec], was one of those who defended Riel, along with Charles Fitzpatrick [Québec], Thomas Cooke Johnstone [Ontario and later Manitoba], and James Naismith Greenshields [Québec] . . . ."); *see* THE DOMINION ANNUAL REGISTER AND REVIEW 1885, at 157 (Henry J. Morgan ed., 1886); THE QUEEN VS. LOUIS RIEL REPORT (Queen's Printer, Ottawa 1886), https://archive.org/details/queenvslouisriel00cana [https://perma.cc/F2B6-V7DB]. *See generally* JOSEPH BOYDEN, EXTRAORDINARY CANADIANS: LOUIS RIEL AND GABRIEL DUMONT (Penguin Books 2013); Assemblée Nationale du Québec, François-Xavier LEMIEUX (NEVEU), ASSNAT.QC (May 2009), http://www.assnat.qc.ca/fr/deputes/lemieux-(neveu)-francois-xavier-4169/biographie.html [https://perma.cc/BQ7D-D455]; James Nais-

Court of Queen's Bench of Manitoba and to the Judicial Committee of the Privy Council, Riel was hanged. At that time, there "were few barriers to transferring between jurisdictions."[188] "[R]eciprocity prevailed between the provinces until transfer fees began to create a barrier in the early twentieth century."[189] But, by the start of the last century, protectionist barriers started to be erected by local lawyers through examinations on local laws accompanied by sizeable transfer fees.[190] Before 1994, lawyers who came from outside a particular province had to obtain a permit to provide legal services there on a temporary basis.[191] Permanent mobility (transfer) required transfer examinations[192] and, in certain circumstances, articling (that is, an apprenticeship of up to a year working in a local law firm).[193]

One of the authors of this Article became aware of the extent of these former barriers to practice when he had the opportunity to work with a retired Chief Justice of the High Court of Ontario, James McRuer.[194] The judge had been admitted to the bar before the Great War and was still working at the age of eighty-five. Back in the 1930s, he had been one of the country's most distinguished antitrust lawyers. The statute regulating competition and antitrust, the Combines Investigation Act, was a federal statute enacted under the federal authorities' criminal law power.[195] The elderly judge recounted that he had once been retained to prosecute a major tobacco company that had been charged with illegal price-fixing. The tobacco company was based in Alberta and the criminal trial was set to take place in Edmonton.

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mith Greenshields, *Répertoire du patrimoine culturel du Québec*, PATRIMOINE-CULTUREL.GOUV, http://www.patrimoine-culturel.gouv.qc.ca/rpcq/detail.do?methode=consulter&id=11957&type=pge#.Vf_EvkrK70 [https://perma.cc/FK3X-7BB7].

188. CHRISTOPHER MOORE, THE LAW SOCIETY OF UPPER CANADA AND ONTARIO'S LAWYERS 1797–1997, at 161 (1997).

189. *Id.*

190. *See generally* Maurice Laprairie Q.C., *The Regulatory Framework*, *in* CANADIAN LEGAL PRACTICE—A GUIDE FOR THE 21ST CENTURY §§ 1.1, 1.31–1.36, at 1-9 to -10 (Adam M. Dodek ed., 2016). For one province's concern with uniformity of transfer fees, see Colloquy, *Quarterly Convocation Synopsis*, 1 SASK. B. REV. & LAW SOC'Y GAZETTE 39, 43 (1947).

191. *See* R. v. Law Soc'y of Sask., 1984 CanLII 2682 (Can. Sask. C.A.); Emilio S. Binavince, *The Impact of the Mobility Rights: The Canadian Economic Union—A Boom or a Bust?*, 14 OTTAWA L. REV. 340, 363 (1982); AM. COLL. OF TRIAL LAWYERS, CROSS BORDER LITIGATION MANUAL 18–19 (2010), http://www.advocates.ca/assets/files/pdf/publications/Cross-Border-Litigation-Manual.pdf [https://perma.cc/XK22-8S5J].

192. For an example of an attempt to standardize such requirements, see Special Comm., Conference of Governing Bodies of the Legal Profession in Can., *Uniform Standards as to Reciprocal Arrangements for the Transfer of Barristers and Students from a Common-Law Province to Another*, 15 SASK. B. REV. & LAW SOC'Y GAZ. 21, 22 (1950) (under the chairmanship of Dean V.C. MacDonald).

193. This was held to be an acceptable requirement. Casey v. Law Soc'y of Nfld., 1986 CarswellNfld. 162, para. 20–21 (Can. Nfld. T.D.) (WL).

194. PATRICK BOYER, A PASSION FOR JUSTICE: THE LEGACY OF JAMES CHALMERS MCRUER 84 n.11 (Univ. of Toronto Press 1994). McRuer (1890–1985) was described as Canada's most influential non-politician lawyer. MOORE, *supra* note 188, at 284.

195. Combines Investigation Act, R.S.C. 1927 c 26.

Although the judge was recognized as one of the leading antitrust counsels in the country, he was not a member of the Alberta Bar. Consequently, he explained to the Federal Justice Minister that he would be unable to appear for the prosecution. The Minister stressed that they wanted him to appear, and would do whatever was necessary to make that happen.

So the judge left his family, got on the train for a three-day journey across the prairies and close to the Rocky Mountains, based himself in the Macdonald Hotel for three months, and started studying to take local examinations to ensure his competence.[196] He had to pass examinations on wills and estates and real estate conveyancing, even though the trial he was appearing in concerned a federal statute with which he was fully familiar, and the evidentiary and procedural rules in the criminal trial were identical across the country. The Alberta Law Society appointed Gordon Steer (later Chief Justice of Alberta) as examiner. Two hours before the examination, Steer called up McRuer and said, "Well, I have another appointment, the examination is over. You passed."[197] The sole interest served by subjecting McRuer to this farce was the protection of the members of the local bar who specialized in antitrust law.[198]

Pure protectionism could not last, however, and a variety of measures were put in place over time to permit occasional appearances in court by lawyers like the former Chief Justice.[199] Unfortunately, these depended on discretionary decisions by law societies, which meant that they could not be consistently relied upon.[200] Nonetheless, they were better than flat prohibitions.

At the same time, it is important to note that even in the era of strict control over multijurisdictional practice, there were exceptions justified by the lack of lawyers in remote communities. One such exception involved the extraordinarily named[201] mining community of Flin Flon that straddles the borders of Manitoba

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196. *See* Legal Profession Act, R.S.A. 1922, c 206, s 34.

197. BOYER, *supra* note 194, at 84.

198. In an earlier antitrust prosecution, *R. v. Simington*, 1926 CarswellBC 167 (Can. B.C. S.C.) (WL), McRuer had been treated with more kindness by the British Columbia Law Society, which waived an examination requirement for counsel from other provinces under the Legal Professions Act, R.S.B.C. 1924, c 136, s 37(3)(b)(2), though it did charge him a courtesy fee that was equivalent to three months' wages of an average worker (C$12,500 in contemporary dollars).

199. Laprairie, *supra* note 190, § 1.30, at 1-8; *see, e.g.*, LAW SOC'Y OF SASK. RULES R. 65 (1989) [hereinafter SASK. RULES]. For examples of grants of temporary admission, see LAW SOCIETY OF UPPER CANADA ANNUAL REPORT 1986, at 7 [hereinafter LAW SOCIETY ANNUAL REPORT]; LAW SOCIETY ANNUAL REPORT 1987, *supra*, at 8; LAW SOCIETY ANNUAL REPORT 1988, *supra*, at 9; LAW SOCIETY ANNUAL REPORT 1989, *supra*, at 5; LAW SOCIETY ANNUAL REPORT 1991, *supra*, at 11; LAW SOCIETY ANNUAL REPORT 1992, *supra*, at 8; LAW SOCIETY ANNUAL REPORT 1993, *supra*, at 7; LAW SOCIETY ANNUAL REPORT 1994, *supra*, at 7.

200. *See* Laprairie, *supra* note 190, § 1.30, at 1-8, § 1.36, at 1-10; *see, e.g.*, SASK. RULES R. 70; Legal Profession Act, S.S. 1990, c L-10.1 s 10(i), 30 (Can. Sask.).

201. Flin Flon was named after a science fiction character. *See* J.E. PRESTON MUDDOCK, THE SUNLESS CITY (1905), http://flinflonheritageproject.com/wp-content/wppa-depot/pdfs/TheSunlessCity.pdf [https://perma.cc/GAU9-9693].

and Saskatchewan.[202] Its population of just over 6,000 is split between the two provinces, but all are served by Manitoba lawyers in the north end of town.[203] To tell the Saskatchewan residents that they must use a licensed Saskatchewan lawyer would deny them access to legal services, as the nearest lawyers in Prince Albert are a four-and-a-half-hour drive away. Similarly, the town of Lloydminster[204] is split between the provinces of Saskatchewan and Alberta, and each province tolerates lawyers from either side of town practicing in their local courts.[205] Lastly, Canada's capital, Ottawa, borders the Ottawa River. To its north is the city of Gatineau in the French-speaking province of Québec. While Gatineau has roughly thirty percent of Ottawa's population, it has only eleven percent as many lawyers.[206] So in areas like criminal law where the law and procedure are the same in both cities,[207] French-speaking defense counsels from Ottawa from time to time used to appear in criminal trials in Gatineau.[208] These three situations were always tolerated as exceptional anomalies to structural barriers to cross-border practice between provinces.

2. CONSTITUTIONAL PRESSURES FOR MOBILITY REFORM

It took a number of years for these barriers to multijurisdictional practice to start crumbling, but the key factor was the adoption in 1982 of a new national Constitution, including a Charter of Rights and Freedoms. Before the Charter came into effect, there was no constitutional mechanism for challenging restrictions on practice imposed by local law societies, including, for example, a citizenship requirement that blocked an American student from becoming a

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202. The Flin Flon Extension of Boundaries Act, S.M. 1989–90, c 73, and its parallel law in Saskatchewan, Statutes of Saskatchewan, R.S.S. 1952 c 62, provided a mechanism for extending the laws of Manitoba and Saskatchewan to the community, as needed.

203. *See* CANADIAN LAW LIST, at F-154 (Thomson Reuters, Toronto, 2016); *Lawyer Directories*, LAW SOC'Y OF SASK., https://lss.alinityapp.com/WebClient/registrantdirectory.aspx [https://perma.cc/QLM8-DFG2] (last visited Dec. 31, 2016); *Lawyer Directories*, LAW SOC'Y OF MANITOBA, http://www.lawsociety.mb.ca/lawyer-lookup [https://perma.cc/6EKD-CBNN] (last visited Dec. 31, 2016).

204. *See* The Lloydminster Charter, Alta. Reg. 212/2012 (Can. Alta.); The Lloydminster Charter, O.C. 595/2012 (Can. Sask.).

205. When the Law Society of Alberta attempted to prohibit interprovincial law firms (a move found to be unconstitutional by the Supreme Court of Canada in *Black v. Law Soc'y of Alta*., [1989] 1 S.C.R. 591 (Can.)), it expressly exempted Lloydminster firms from the restrictions. *See* Black v. Law Soc'y of Alta., 1984 CanLII 1197 (Can. Alta. Q.B.). The Law Society of Saskatchewan elected as its President in 2013 Miguel Martinez, a resident of Lloydminster, Alberta, who practiced in Lloydminster, Saskatchewan. *See* Alexander Delorme, *New president for Law Society of Saskatchewan,* MERIDIANBOOSTER (Dec. 15, 2013), http://www.meridianbooster.com/2013/12/15/new-president-for-law-society-of-saskatchewan [https://perma.cc/MQK9-QP8Q].

206. CANADIAN LAW LIST (2016 ed.); LAWYER DIRECTORIES (Can. Law Book 2016).

207. This is because, in Canada, criminal law and criminal procedure fall under federal jurisdiction.

208. Telephone calls and email with two Treasurers of the Law Society of Upper Canada (elected heads of the Bar) and a former Batonnier of the Barreau du Québec (elected head of the Bar) (Feb. 2, 2016 & Feb. 16, 2016). The websites of two Ottawa French-speaking criminal lawyers, http://www.nsplaw.ca/ [https://perma.cc/KP7K-V4P6] (last visited Dec. 31, 2016) and www.castletrudel.com [https://perma.cc/D6PL-V34E] (last visited Dec. 31, 2016), show that their experience includes appearances in Gatineau.

lawyer in Alberta.[209] But the adoption of the Charter of Rights and Freedoms changed all of that.

Section 6(2) of the Charter states:

> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (a) to move to and take up residence in any province; and
>
> (b) to pursue the gaining of a livelihood in any province.
>
> (3) The rights specified in subsection (2) are subject to
>
> (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence . . . .[210]

What this provision did was establish the constitutional basis for arguments that restrictive barriers to multijurisdictional practice should be dismantled. Very shortly after this provision came into force, two lawyers used the Constitution to argue that it had given them the right to practice outside their home province. Six months after the Charter of Rights was enacted,[211] an Ontario lawyer sought a declaration that he was entitled to appear on a temporary basis in a Québec court considering a variety of securities offenses, despite not being a member of the Québec Barreau.[212] The Chief Justice of the Cour Supèrieure rejected the application, saying that restrictions did not discriminate on the basis of residence, but on the basis of considerations relating to the good administration of justice—that being a member of another province's bar, the applicant could not meet the standards of knowledge and competence of local members of the Barreau. But in doing so, the Chief Justice differentiated between permissible and protectionist measures[213]:

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209. Dickenson v. Law Soc'y of Alta., 1978 CanLII 638, para. 16 (Can. Alta. S.C.).

210. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.). Two leading Canadian scholars have argued that this section is, in fact, a damp squib:

> [T]he Charter has not significantly dismantled the barriers to the mobility of labour, goods, services, and capital in [Canada]. Section 6, it has been argued, does not apply to corporations, allows discrimination on interregional bases, exempts affirmative action programs aiding the economically disadvantaged (which may allow governments to protect ailing industrial sectors), and allows discrimination on the basis of non-residence if the government can also advance a legitimate reason for the discrimination.

Michael Trebilcock & Tanya Lee, *Economic Mobility and Constitutional Reform*, 37 U. TORONTO L.J., 268, 310 (1987); *see* Trebilcock & Lee, *supra*, at 268–317; Albert Breton, *Mobility and Federalism*, 37 U. TORONTO L.J. 318, 318–26 (1987).

211. Since Québec had excluded itself from the constitutional reforms that included the Charter, the issue was highly charged politically.

212. Malartic Hygrade Gold Mines Ltd. v. Québec, 1982 CanLII 2870 (Can. Que. C.S.).

213. The French text from the judgment is taken from *Malartic Hygrade Gold Mines Québec Ltd. c. Québec*, 1982 CarswellQue 870, para. 53, 54 (Can. Que. C.S.) (WL); *see also Malartic Hygrade*, 1982 CanLII 2870 (providing English translation).

> [Les différences dans la législation en vigueur, en particulier] à un pays aussi vaste que le Canada peuvent justifier une province d'imposer à la mobilité des avocats certaines restrictions fondées, par exemple, sur leur connaissance préalable du système de droit en vigueur dans cette province. On aurait mauvaise grâce de ne pas voir là un souci d'assurer l'intérêt général contre les méfaits que pourrait engendrer l'incompétence.
>
> [Differences in the prevailing law, particularly] in a country as large as Canada, may justify the situation where a province imposes certain restrictions on the mobility of lawyers based, for example, on their prior knowledge of the legal system in force in that province. It would be unrealistic not to see here a concern for ensuring the general interest against malpractice which might be caused by incompetence.
>
> Mais on peut concevoir d'autres restrictions qui naîtraient d'une moins noble motivation et qui, fondées—sans l'avouer—sur le seul intérêt économique, par exemple, tendraient à exclure d'une province les avocats d'une autre province par le seul fait de leur résidence dans cette autre province. Le Charte ne tolère pas cette espèce de restriction et le principe de la liberté de circulation doit alors prévaloir.
>
> But there could be other restrictions born of less noble motivation and which, based—covertly—only on economic interest, for example, would tend to exclude lawyers from one province from going to another province only by reason of their residence in that other province. The Charter does not tolerate this type of restriction and the principle of mobility rights must always prevail.

In English Canada, Andrew Roman, the founding General Counsel of the Public Interest Advocacy Centre, was approached by two Saskatchewan residents who wanted wheelchair access to a cinema and guide dog access to a hospital and believed that they had been denied the protection of human rights laws on the basis of disability. They approached Mr. Roman, who sought temporary admission to the Saskatchewan bar to appear in the Saskatchewan courts, on a pro bono basis to argue their disability rights. He argued that "the Saskatchewan Law Society has gone beyond its powers when it limits a lawyer's place of practice, because the society is supposed to protect the public and 'not their own pocketbooks.'"[214] The Law Society commenced a complicated chess game of requirements requiring Roman to take examinations on Saskatchewan statutes and pay significant transfer fees, despite the limited nature of his mandate. It is difficult, reviewing the delays, adjournments, and scheduling complexities, to avoid the conclusion that Mr. Roman's admission, if it occurred, would have been so seriously delayed as to make him unable to take the pro bono cases. Twice he sought judicial review, and his application was rejected on the basis of mootness, given that the substantive hearings had already taken place. Twice he appealed to the Court of Appeal and twice the gates were shut against him. Roman was told

214. *Charter Violated in Saskatchewan by Society: Lawyer*, GLOBE & MAIL TORONTO, June 9, 1982.

by local friends in the Bar that he would need to have both the time and the money to take the case to the Supreme Court of Canada before he stood any chance of success.[215] It took a further six years for Canada's top court, the Supreme Court of Canada, to recognize the impact of section 6(2) of the Charter of Rights and Freedoms.

As previously noted, the statutes setting up the law societies stress that their mandate is the protection of the public interest, and not to safeguard the prerogatives of the legal profession. In Manitoba, for example, the statute says explicitly that the society's mandate is to "uphold and protect the public interest in the delivery of legal services with competence, integrity and independence."[216] So, while the legal profession is self-governing, the prime concern is the public interest. This statutory directive has been reinforced by a series of decisions of the Supreme Court of Canada[217] that recognize the importance of the roles played by the legal profession.

Uniquely in the common law world, the Supreme Court of Canada has established such clear principles for the law of the legal profession that reading only professional conduct rules will not illustrate how Canadian lawyers are expected to behave. In the last thirty years, for example, the Supreme Court has:

- Blessed the construction of institutional ethical screens to manage confidentiality concerns for lawyers changing firms.[218] These are now used extensively to manage conflicts of interest;[219]

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215. Roman's application is reported at *Andrew Roman Application*, LAW SOC'Y OF SASK. PRAC. J., Aug. 1982, at 7, 10. For the history of Roman's judicial review, see R. *ex. rel.* Roman v. Law Soc'y of Sask., 1982 CarswellSask 829 (Can. Sask. Q.B.) (WL); R. *ex rel.* Roman & Law Soc'y of Sask., 1983 CarswellSask 828 (Can. Sask. C.A.) (WL); Saskatchewan v. Law Soc'y of Sask., 1983 CarswellSask 601 (Can. Sask. C.A.) (WL); Roman v. Law Soc'y of Sask., 1984 CarswellSask 507 (Can. Sask. C.A.) (WL). The underlying cases are reported at: Peters & Sask. Human Rights Comm'n v. Univ. Hosp. Bd., 1981 CanLII 2471 (Can. Sask. Q.B.); Peters & Sask. Human Rights Comm'n v. Univ. Hosp. Bd., 1983 CanLII 2066 (Can. Sask. C.A.); Saskatchewan (Human Rights Comm'n) v. Canadian Odeon Theatres Ltd., 1981 CanLII 2469 (Can. Sask. Q.B.); Canadian Odeon Theatres Ltd. v. Human Rights Comm'n (Sask.) & Huck, 1985 CanLII 183 (Can. Sask. C.A.), *leave denied*, Canadian Odeon Theatres Ltd. v. Saskatchewan (Human Rights Comm'n), [1985] S.C.C.A. 129 (June 3, 1985) (S.C. Can.). Note that exactly three years elapsed between Roman's application and the final hearing on the merits of the underlying pro bono case, during which the courts consistently held that the issue was moot.

216. Legal Profession Act, C.C.S.M. c L107, s 3(1) (Can. Man.); *see also* Legal Profession Act, S.N.S. 2004, c 28, s 4(1) (Can. N.S.); Legal Profession Act, S.B.C. 1998, c 9, s 3 (Can. B.C.); Legal Profession Act, R.S.P.E.I. 1988, c L-6.1, s 4 (Can. P.E.I.); Legal Profession Act, R.S.Y. 2002, c 134, s 3 (Can. Yukon); Professional Code, C.Q.L.R. c C-26, s 23 (Can. Que.); Law Society Act, R.S.O. 1990, c L.8, s 4(2) (Can. Ont.).

217. The jurisdiction of the Supreme Court of Canada is much wider than that of the U.S. Supreme Court, since appeals from all courts in the country can ultimately end up there if the issue is considered to be one of national interest. This means that in many areas of private law, including contracts, professional malpractice, conflicts of interest, and fiduciary obligations, a single court has the power to set the governing principles for the entire country.

218. *See* MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235, 1264 (Can.).

219. *See* TASK FORCE ON CONFLICTS OF INTEREST, CANADIAN BAR ASS'N, CONFLICTS OF INTEREST: FINAL REPORT, RECOMMENDATIONS & TOOLKIT (2008), http://www.cba.org/Publications-Resources/Resources/Ethics-and-

- Confirmed that the attorney-client privilege is so important to the justice system that it enjoys a quasi-constitutional status;[220]
- Liberalized lawyer advertising restrictions and reminded legal regulators that constraints on competition in the legal marketplace must have public interest justification;[221]
- On the same logic, struck down barriers to forming national law firms;[222]
- Struck down citizenship restrictions on admission to practice law;[223]
- Rejected the issuance of warrants for the search of lawyers' offices and developed general principles for police to follow in such cases;[224] and
- Held that equity partners are not employees who can invoke age discrimination laws to attack mandatory retirement.[225]

Individually, these actions of the nation's highest court may seem unremarkable, but it would be highly unlikely for these kinds of law-practice-related issues to reach the United States Supreme Court. Taken together, they signify the Canadian Supreme Court's recognition that the integrity of the legal profession is critical to the integrity of the justice system. Thus, the Court has inched closer to connecting the independence of the bar to those principles of fundamental justice constitutionally protected in Canada's Charter of Rights and Freedoms.

The Court has consistently reminded legal regulators that their role is not to protect the prerogatives of the legal profession, but to advance the public interest. Two recent quotations make the point. The Supreme Court of Canada said in *Finney v. Barreau du Québec*[226]:

Professional-Responsibility/Solicitor-Client-Privilege/Conflicts-of-Interest-Final-Report,-Recommendation [https://perma.cc/23VH-TH7B].

220. *See* R. v. McClure, [2001] 1 S.C.R. 445, 455, 458, 459, 461, 467 (Can.).

221. The early pre-Charter case of *Att'y Gen. of Can. v. Law Soc'y of B.C.,* [1982] 2 S.C.R. 307, 366 (Can.), upheld the prohibitions, but *Ford v. Québec (Att'y Gen.)*, [1988] 2 S.C.R. 712, 766–67 (Can.), adopts the dissent of Henry J. in *Re Klein & Law Soc'y of Upper Can.*, 1985 CanLII 3086, para. 26, 27 (Can. Ont. H.C.J.), which held restrictions on lawyer advertising unconstitutional.

222. *See* Black v. Law Soc'y of Alta., [1989] 1 S.C.R. 591, 635 (Can.); Laprairie, *supra* note 190, §§ 1.32–1.34, at 1-9.

223. Andrews v. Law Soc'y of B.C., [1989] 1 S.C.R. 143, 183 (Can.).

224. *See* Lavallee, Rackel & Heintz v. Canada, [2002] 3 S.C.R. 209, 256 (Can.); Maranda v. Richer, [2003] 3 S.C.R. 193, 216 (Can.).

225. McCormick v. Fasken Martineau DuMoulin LLP, [2014] 2 SCR 108, 132 (Can.).

226. [2004] 2 S.C.R. 17, 21 (Can.). Earlier jurisprudence had stressed the same principle. *See* Law Soc'y of B.C. v. Lawrie, 1987 CanLII 2443, para. 14 (Can. B.C. S.C.); Law Soc'y of B.C. v. Lawrie, 1991 CanLII 659 (Can. B.C. C.A.); *see also* Law Soc'y of Man. v. Pollock, 2007 M.B.Q.B. 51 (CanLII), para. 19–20 (Can. Man. C.A.), *affirmed on appeal*, 2008 M.B.C.A. 61 (CanLII). Other cases also emphasized the goal of protecting the public. Att'y Gen. of Can. v. Law Soc'y of B.C., [1982] 2 S.C.R. 307 (Can.); Great West Life Assur. Co. v. Royal Anne Hotel Co., 1986 CanLII 980, para. 30 (Can. B.C. C.A.); Fast Trac Bobcat & Excavating Serv. v. Riverfront Corp. Ctr. Ltd., 2002 B.C.S.C. 1399 (CanLII), para. 61–63.

> An independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian society . . . . [O]ur tradition of allowing the legal profession to regulate itself can largely be attributed to a concern for protecting that independence and to lawyers' own staunch defence of their autonomy. In return, the delegation of powers by the State imposes obligations on the governing bodies of the profession . . . .[227]

And in the *Mangat* case, the same court stressed:

> Provincial law societies or bars are entrusted with the mandate of governing the legal profession with a view towards protecting the public when professional services are rendered. In exchange for a monopoly on the exercise of the profession and in accordance with the primary purpose of protecting the public in its dealings with lawyers, the bar must establish criteria for jurists to qualify as members, rules of discipline and mechanisms to enforce them, the contours of professional liability, a system of professional insurance, and guidelines and rules on the handling of trust funds.[228]

Three cases established the principle that barriers to law society membership and legal practice must pass constitutional scrutiny. The first challenged citizenship restrictions on admissions to the legal profession.[229] The case involved a British permanent resident and an American law student, both of whom wanted to be admitted to the British Columbia bar.[230] They met all the qualifications except that of Canadian citizenship.[231] The Supreme Court of Canada had to assess whether citizenship requirements breached equality rights as guaranteed by the Charter of Rights and Freedoms,[232] or could be justified under the section of the Charter that permits reasonable limits on constitutional rights that can be demonstrably justified in a free and democratic society.[233]

The Court held that rules that prohibited non-citizens from being admitted to the bar, without consideration of educational and professional qualifications or other attributes or merits, infringed fundamental guarantees of equality before the law.[234] Legislating citizenship as a necessary condition to be admitted to practice law harbored the potential for undermining the essential values of a free and democratic society committed to equality before the law. The restrictions could

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227. Finney v. Barreau du Qué., [2004] 2 S.C.R. 17, 21 (Can.).

228. Law Soc'y of B.C. v. Mangat, [2001] 3 S.C.R. 113, 140 (Can.).

229. Andrews v. Law Soc'y of B.C., [1989] 1 S.C.R. 143, 145 (Can.).

230. *Id.* at 159.

231. *Id.*

232. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, no 15 (U.K.).

233. There was a decision on the motion to state a constitutional question by the Chief Justice of Canada on January 28, 1987. *See Docket*: *Law Soc'y of B.C. v. Andrews*, SUP. CT. OF CAN., http://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=19955 [https://perma.cc/HS3V-TNJH].

234. *Andrews*, [1989] 1 S.C.R. at 183.

not be justified as reasonable limits protected by the Charter's justification section.[235]

The Supreme Court, in *Black v. Law Society of Alberta,*[236] next liberalized inter-provincial practice, by striking down restrictions on lawyers' ability to operate national firms and provide legal services across the country.[237] Up to that point, the rules of the Law Society of Alberta prohibited lawyers in Alberta from entering into a partnership with anyone who was not an active member ordinarily resident in that province.[238] A second rule prohibited lawyers in Alberta from being partners in more than one firm.[239] The validity of these rules was contested before the Supreme Court on the basis that they infringed constitutional guarantees of mobility rights.[240]

The Court noted that the mobility rights provisions in the Constitution protected the rights of residents to move around the country, to live wherever they wished, and to pursue a livelihood without regard to provincial boundaries.[241] While the Court recognized that the law society could regulate the legal profession, it could not do so simply by pointing to a provincial boundary to justify discriminatory distinctions—to do so would derogate from constitutional rights to be treated equally across the country.[242] The Court by a three to two majority struck down the Alberta Law Society rules on the basis that they discriminated by residence, prohibiting Alberta lawyers and lawyers from outside the province from associating to practice law.[243] The Court recognized the legitimate interest in regulating local competence and ethical behavior, but found that provincial residency restrictions were disproportionate to this objective.[244] The Court felt the law society could regulate interprovincial firms in a way that did not drastically affect mobility rights.[245] As one of the justices, La Forest J., stated, the mobility rights provision "guarantees not simply the right to pursue a livelihood, but more specifically, the right to pursue the livelihood of choice to

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235. *Id.* at 158 (Wilson, J.), 204 (La Forest, J.).

236. [1989] 1 S.C.R. 591 (Can.). Just six months before the Supreme Court of Canada decision, a challenge to the British Columbia restrictions on inter-jurisdictional firms had been successful on the same basis as *Black*. *See* Martin v. British Columbia (Att'y Gen.), 1988 CarswellBC 917, para. 67–69 (Can. B.C. S.C.) (WL); Alexander J. Black, *Canadian Lawyer Mobility and Law Society Conflict of Interest*, 18 FORDHAM INT'L L.J. 118, 122, 123 n.20 (1994) [hereinafter Black, *Canadian Lawyer Mobility*].

237. Black v. Law Soc'y of Alta., [1989] 1 S.C.R. 591, 634–35 (Can.); *see* Ronald J. Daniels, *Growing Pains: The Why and How of Law Firm Expansion*, 43 U. TORONTO L.J. 147, 194 (1993).

238. *See Black*, [1989] 1 S.C.R. at 599. This section was enacted in February 1982, two months after the formation of an interprovincial law firm involving Alberta members.

239. *Id.*

240. *Id.* at 597.

241. *Id.* at 612.

242. *Id.* at 621.

243. *Id.* at 625.

244. *Id.* at 633.

245. *Id.*

the extent and subject to the same conditions as residents."[246]

Faced with the court's decision, the law societies collectively set up a task force, under the aegis of the Federation of Law Societies, to develop a response that balanced the competing interests. That effort led, four years later, to the mobility reforms.[247]

The third case that chipped away at the prerogatives of the law societies in regulating the profession was *Law Society of British Columbia v. Mangat*,[248] which concerned an immigration consultant who was the subject of an unauthorized practice prosecution. Mangat had been a lawyer in Punjab, India, but was not qualified in Canada.[249] Canada's Immigration Act, however, authorized non-lawyers to appear on behalf of clients before federal immigration tribunals.[250] The courts thus had to assess the apparent conflict between that federal law and provincial statutes that gave exclusive authority to the Law Society to regulate all types of legal services in British Columbia, including arguably the power to stop Mangat from appearing.[251] The Supreme Court held that under Canada's constitutional interpretation doctrines, the federal Immigration Act carved out an area of practice where non-lawyers would not breach unauthorized practice prohibitions, and hence Mangat's appearance in immigration tribunals could not be prohibited by the Law Society of British Columbia.[252] As a result of this decision, a number of federal initiatives have taken place to attempt to regulate immigration consultants, though the results have been somewhat checkered.[253]

Subsequent courts have reviewed additional rules on multijurisdictional practice and generally chipped away at excessive restrictions. Requiring lawyers to have three years seniority before permitting them to move to practice outside their province was struck down as a restriction not relevant to protecting the

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246. *Id.* at 617–18.

247. *See* FED'N OF LAW SOC'YS OF CAN., 1994 INTER-JURISDICTIONAL PRACTICE PROTOCOL (1994) [hereinafter 1994 FLSC PROTOCOL]; LAW SOC'Y OF UPPER CAN., INTER-JURISDICTIONAL MOBILITY COMM., REPORT TO CONVOCATION 6 (2006), http://www.lsuc.on.ca/media/convjune06_tribunals_ij_mobility.pdf [https://perma.cc/C78C-QZNM] [hereinafter REPORT TO CONVOCATION 2006].

248. [2001] 3 S.C.R. 113 (Can.).

249. *Id.* at para. 2.

250. Immigration Act, R.S.C. 1985, c I-2, ss 30, 69(1) (Can.).

251. *See Mangat,* [2001] 3 S.C.R. at para. 23, 25, 47, 52, 67–72.

252. *Id.* at para. 24–74.

253. *See* Canadian Soc'y of Immigration Consultants v. Canada (Citizenship & Immigration), [2011] F.C. 1435 (Can.); Canadian Soc'y of Immigration Consultants v. Canada (Citizenship & Immigration), [2012] F.C.A. 194 (Can.); Canadian Soc'y of Immigration Consultants v. Minister of Citizenship & Immigration, 2012 CanLII 82009 (Can. S.C.C.) (leave to appeal denied); Fridriksdottir v. Canadian Soc'y of Immigration Consultants, [2011] F.C. 910 (Can.); G. BRUCE DOERN, MICHAEL J. PRINCE & RICHARD J. SCHULTZ, RULES AND UNRULINESS: CANADIAN REGULATORY DEMOCRACY, GOVERNANCE, CAPITALISM, AND WELFARISM 193 (McGill–Queen's Univ. Press, 2014).

public interest.[254] Occasional fees imposed on lawyers from other provinces have been found to be acceptable,[255] but excessive fees raise effective barriers and are more likely to be struck down.[256] A law society cannot require a lawyer to maintain a permanent office in a province.[257] Requiring that an out-of-province lawyer pay an insurance levy applied to provincial lawyers practicing in a particular practice area does not breach the constitution[258]—and transfer examinations as such have been found not to breach constitutionally guaranteed rights.[259] Faced with the case law, the legal profession's leaders had no choice but to embrace reform.

3. ANTITRUST PRESSURES FOR MOBILITY REFORM

Apart from the constitutional pressures for reform exerted by the courts, in the mid-2000s, Canada's antitrust authorities started looking at barriers to practice within the legal profession.[260] In an earlier decision,[261] the Supreme Court of Canada had established that the legal profession was subject to competition and antitrust laws, and rejected an argument that law was a regulated industry, which would establish a jurisdictional barrier to antitrust oversight. In 2007, the federal antitrust regulator, the Competition Bureau, published an inquiry into the professions in the course of which it assessed whether any of the legal profession's regulatory practices impeded competitive markets, and thus were not justified in the public interest.[262] They looked at potential or actual restrictions on competition, including:

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254. Richards c. Barreau du Que., 1992 CarswellQue 1958 (Can. Que. C.S.) (WL); Black, *Canadian Lawyer Mobility*, *supra* note 236, at 121–26 (discussing *Richards*). More limited restrictions were upheld in *P.E.I. v. Walker*, [1993] P.E.I.J. 111 (Can. C.A.) and *O'Neill v. Law Soc'y of N.B.*, 1993 CanLII 6586 (Can. N.B. Q.B.). *See also* Funk v. Law Soc'y of P.E.I., 1986 CarswellPEI 41 (Can. P.E.I. S.C.) (WL).

255. *See* R. v. Allen, 2016 CanLII 3349 (Can. A.B. Q.B.); Allen v. Alberta, 1987 CanLII 3996 (Can. A.B. Q.B.); *Canadian Soc'y of Immigration Consultants*, [2011] F.C. 1435.

256. Casey v. Law Soc'y of Nfld., 1986 CarswellNfld. 162 (Can. Nfld. T.D.) (WL).

257. Ford v. Sask. Land Surveyors Ass'n, 1992 CanLII 7927 (Can. Sask. Q.B.), *aff'd*, Ford v. Sask. Land Surveyors Ass'n, 1993 CanLII 6608 (Can. Sask. C.A.).

258. Tapper v. Law Soc'y of Upper Can., 1998 CanLII 2322, para 6–8 (Can. Ont. C.A.).

259. *See O'Neill*, 1993 CanLII 6586; Black, *Canadian Lawyer Mobility*, *supra* note 236, at 133–34 (discussing *O'Neill*).

260. COMPETITION BUREAU, SELF-REGULATED PROFESSIONS—BALANCING COMPETITION AND REGULATION (2007), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02523.html [https://perma.cc/23YT-THJM] [hereinafter SELF-REGULATED PROFESSIONS]; EDWARD IACOBUCCI & MICHAEL TREBILCOCK, CONCLUSION ON MOBILITY SELF-REGULATION AND COMPETITION IN ONTARIO'S LEGAL SERVICES SECTOR: AN EVALUATION OF THE COMPETITION BUREAU'S REPORT ON COMPETITION AND SELF-REGULATION IN CANADIAN PROFESSIONS (2008); Edward Iacobucci & Michael Trebilcock, *The Competition Bureau's Report on Competition and Self-Regulation in the Canadian Legal Profession: A Critical Evaluation*, 23 CANADIAN COMPETITION REC. 92 (2009).

261. *See* John D. Wilson & Christopher J. Wydrzynski, *Competition in the Market for Legal Services after* Jabour, 22 U.W. ONT. L. REV. 95, 96–98, 109–14 (1984).

262. *See* SELF-REGULATED PROFESSIONS, *supra* note 260. The study was followed up four years later with a Post Study Assessment. *See* SELF-REGULATED PROFESSIONS: POST-STUDY ASSESSMENT, COMPETITION BUREAU (Nov. 5, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03407.html [https://perma.cc/SCN7-

- Entry, accreditation and mobility,
- Scope of practice—restrictions on the ability of related professions to offer similar or identical services,
- Business structures,
- Fee schedules, and
- Advertising.[263]

The 2007 report concluded that "[f]rom a competition standpoint, complete mobility of lawyers across Canada is optimal."[264] It endorsed the National Mobility Agreement (described below), which would facilitate the movement of lawyers between jurisdictions to ensure complete temporary and permanent mobility throughout Canada.[265]

Although further investigations have not proceeded in the decade since the 2007 report, the fact that a competition watchdog had examined their practices served as a wake-up call to the law societies and prompted additional considerations of reform. The law societies were keenly aware that in England, the Law Society of England and Wales had faced similar inquiries into its practices, including the handling of public complaints, and had been so criticized by the inquiries that Parliament had stripped the legal profession of self-regulation.[266] Instead, a number of independent regulatory bodies (primarily the Legal Services Board and the Solicitors Regulation Authority) had taken over the role of setting professional standards and policing the legal profession.[267] The Law Society lost its powers of self-regulation and became effectively a trade association. While Canada's federal system would make it much more difficult to

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KXSA]. For earlier work, see MINISTRY OF THE ATT'Y GEN., THE REPORT OF THE PROFESSIONAL ORGANIZATIONS COMMITTEE (Ont. 1980); Peter Aucoin, *Public Accountability in the Governing of Professions: A Report on the Self-Governing Professions of Accounting, Architecture, Engineering and Law in Ontario* (Prof'l Orgs. Comm., Working Paper No. 4, 1978).

263. *See* SELF-REGULATED PROFESSIONS, *supra* note 260.

264. *Id.* at 67.

265. *Id.*

266. Judith L. Maute, *Global Continental Shifts to a New Governance Paradigm in Lawyer Regulation and Consumer Protection: Riding the Wave*, *in* ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS: REIMAGINING THE PROFESSION 11, 19 (Reid Mortensen, Francesca Bartlett & Kieran Tranter eds., 2010); Paul D. Paton, *Between a Rock and a Hard Place: The Future of Self-Regulation—Canada Between the United States and the English/Australian Experience*, 2008 J. PROF. LAW. SYMP. 87, 91, 96–104; Judith L. Maute, *Bar Associations, Self-Regulation and Consumer Protection: Whither Thou Goest*, 2008 J. PROF. LAW. SYMP. 53, 73–84; John Pearson, *Canada's Legal Profession: Self-Regulating in the Public Interest?*, 92 CANADIAN B. REV. 555, 581–84 (2015).

267. *See* Legal Services Act 2007, c. 29, ss. 20, 28–30 (Eng.). *See generally* Laurel S. Terry, Steve Mark & Tahlia Gordon, *Adopting Regulatory Objectives for the Legal Profession*, 80 FORDHAM L. REV. 2685 (2012); Laurel Terry, The Global "Landscape" of Lawyer Regulation (including U.S. Developments), Handout for the 2015 International Conference of Legal Regulators (2015), http://docs.flsc.ca/INTLegalReg-Laurel_Terry_Regulation_Landscape_for_ICLR.pdf [https://perma.cc/JE4W-59TD].

strip the law societies of their historic role, the Competition Bureau's inquiry was clearly a warning shot across the bow.

4. PRESSURES FROM TRADE LIBERALIZATION AGREEMENTS FOR MOBILITY REFORM

The trade liberalization discussions, which culminated in 1994 in the North American Free Trade Agreement among the United States, Canada, and Mexico,[268] included provisions dealing with the temporary entry of professionals, including lawyers.[269] In light of these developments, the Federation of Law Societies of Canada was required to develop procedures to recognize so-called foreign legal consultants, who practiced the law of their home jurisdictions while present in Canada.[270] While there have not been many such foreign legal consultants,[271] the scheme worked well, ensuring adequate protection of the public interest. So, when the Supreme Court of Canada laid down the constitutional challenge to residency restrictions on the legal profession, the Federation of Law Societies of Canada already had experience negotiating multi-party agreements dealing with practitioners from outside the jurisdiction in question.

Canadian governments also entered into an Agreement on Internal Trade in 1994 to facilitate the mobility of people, investments, and services across Canada.[272] That Agreement mandated that barriers to cross-border business should be demolished unless they served a public purpose.[273] Liberalizing mobility restrictions for the legal profession simply took that principle to heart. Chapter 7 of the internal trade agreement stipulated that those qualified in one

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268. *See* North American Free Trade Agreement Implementation Act, S.C. 1993, c 44 (Can.); North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289, at app. 1603.A.1 (1993).

269. NAFTA includes a chapter on legal services, which sets out a process for moving towards the establishment of mutual foreign legal consultancy regimes. This has not yet been implemented, however. *See* INT'L BAR ASS'N, CANADA INTERNATIONAL TRADE IN LEGAL SERVICES (2014), http://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/ITILS_Canada.aspx [https://perma.cc/Z385-2W5T].

270. *See generally* LAW SOC'Y OF UPPER CANADA, INTER-JURISDICTIONAL MOBILITY COMM., REPORT TO CONVOCATION (2002), http://www.lsuc.on.ca/media/convnov02_mobilityrpt.pdf [https://perma.cc/V8NY-7YJZ]; Brian J. Wallace, *Cross-Border Legal Practice: The Canadian Perspective*, 53 PROF. LAW. SYMP. 62 (1998); Brian J. Wallace & Keith Hamilton, *Practicing Law Internationally*, N.S. L. NEWS, June 1995; Brian J. Wallace & Keith Hamilton, *Practicing Law Internationally*, 53 ADVOCATE (VANCOUVER) 231, 232 (1995) (the text of the Model Law is reproduced at 234).

271. This has not proved a popular route to practice. There are currently only 309 foreign legal consultants in the entire country. *See* FED'N OF LAW SOC'YS OF CAN., 2014 STATISTICAL REPORT, http://docs.flsc.ca/2014-Statistics.pdf [https://perma.cc/STA5-M8AH].

272. AGREEMENT ON INTERNAL TRADE 1994 (Can.), http://www.ait-aci.ca/wp-content/uploads/2015/08/AIT-Original-with-signatures.pdf [https://perma.cc/SWN8-DCLD] [hereinafter AGREEMENT ON INTERNAL TRADE 1994]; *see* G. BRUCE DOERN & MARK MACDONALD, FREE TRADE FEDERALISM—NEGOTIATING THE CANADIAN AGREEMENT ON INTERNAL TRADE (Univ. of Toronto Press 1999); Black, *Canadian Lawyer Mobility*, *supra* note 236, at 158; Alexander J. Black, Case Comment, *Mobility of Lawyers: Necessary Qualifications: Professional Organisations:* Law Society of Alberta v. Black*:* Richards c. Barreau du Québec*:* O'Neill v. Law Society of New Brunswick, 74 CAN. BAR. REV. 120, 140–41 (1995) [hereinafter Black, Case Comment].

273. AGREEMENT ON INTERNAL TRADE 1994, *supra* note 272, art 100, 101.

jurisdiction must have access to similar employment in other Canadian jurisdictions.[274] Professions are subject to these requirements, which bound provincial and territorial governments to agree to accredit those licensed in another jurisdiction, without any requirement for additional training, experience, examinations, or assessments.[275] A regulatory authority, such as a law society, could impose requirements that were substantially the same as those imposed as part of its normal licensing process, including fees, insurance, providing evidence of good character, or demonstrating knowledge of the measures applicable to the practice of the profession in a jurisdiction, provided that they were no more onerous than those demanded of local practitioners.[276]

5. THE LEGAL PROFESSION'S MOVE TOWARD MULTIJURISDICTIONAL PRACTICE

Responding in part to all of the pressures described above, the Federation of Law Societies of Canada, in the early 1990s, launched a process of negotiations among its member societies to consider ways in which rules governing lawyer mobility might be reformed.[277] At the outset, desirable goals were defined and basic principles were agreed upon.[278] The August 2002 National Mobility Agreement set out the principles upon which mobility reforms were based:

> The signatories recognize that
>
> - they have a duty to the Canadian public and to their members to regulate the inter-jurisdictional practice of law so as to ensure that their members practice law competently, ethically and with financial responsibility, including professional liability insurance and defalcation compensation coverage, in all jurisdictions of Canada,
> - differences exist in the legislation, policies and programs pertaining to the signatories, particularly between common law and civil law jurisdictions, and
> - it is desirable to facilitate a nationwide regulatory regime for the inter-jurisdictional practice of law to promote uniform standards and procedures, while recognizing the exclusive authority of each signatory within its own legislative jurisdiction.[279]

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274. *Id.* art 701.

275. *Id.* art 706, 708.

276. CONSOLIDATED AGREEMENT ON INTERNAL TRADE 2015, art 706(3)–(4) (Can.), http://www.ait-aci.ca/wp-content/uploads/2015/08/AIT-Original-with-signatures.pdf [https://perma.cc/956M-ZFWD].

277. Laprairie, *supra* note 190, §§ 1.36–1.38, at 1-10 to -11; *see* 1994 FLSC PROTOCOL, *supra* note 247, at 158–65; REPORT TO CONVOCATION 2006, *supra* note 247, at 6.

278. FED'N OF LAW SOC'YS OF CAN., NATIONAL MOBILITY AGREEMENT (2002), https://flsc.ca/wp-content/uploads/2014/10/mobility1.pdf [https://perma.cc/9SH4-P758] [hereinafter NATIONAL MOBILITY AGREEMENT 2002].

279. *Id.*

One notable component was the concept of reciprocity. Initially, the law societies were willing to open their borders to practice by lawyers from other provinces only to the extent that the other provinces granted reciprocal rights.[280] As it became clear, however, that virtually all provinces were willing to embrace a new regulatory regime, the reciprocity issue became moot and was effectively dropped.[281] Confidence grew as the negotiating teams from the various provinces became familiar with one another and as personal relationships replaced past suspicions.

The negotiating process was also helped by the fact that all of the law societies required their members to carry professional malpractice insurance of at least one million dollars, unless they were employed by governments or corporations and not providing legal services to the general public or business entities.[282] The principle agreed was that the insurance policy of a lawyer's "home jurisdiction" would respond to claims.[283] It was also agreed that a temporary lawyer would have to meet the professional standard of care of lawyers practicing in the location in which he or she was temporarily providing legal services and that "dabblers" would be discouraged.[284] Concerns about qualifications of temporary lawyers were lessened by the small number of Canadian law schools (twenty-three),[285] the consistency in legal education standards among the schools, and the fact that their degrees had been treated as equivalent for some time.[286]

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280. Laprairie, *supra* note 190, § 1.37, at 1-10. Reciprocity was historically the norm in transfer rights. *See* MOORE, *supra* note 188, at 127–30, 260–61; Peter M. Sibenik, *Doorkeepers: Legal Education in the Territories and Alberta 1885–1928*, 13 DALHOUSIE L.J. 419, 433 (1990). It remained in the early inter-jurisdictional agreements. *See* McLaughlin Speech, *supra* note 184; LAW SOC'Y OF SASK., *Frequently Asked Questions—Mobility*, at 2, https://www.lawsociety.sk.ca/media/17075/MobilityFAQ.pdf [https://perma.cc/HK3K-85L4] (last visited Nov. 5, 2016) [hereinafter LAW SOC'Y OF SASK., FAQs]; LAW SOC'Y OF UPPER CAN., INTER-JURISDICTIONAL MOBILITY COMM., REPORT TO CONVOCATION 7 (2001), http://www.lsuc.on.ca/media/convnov_interjuris.pdf [https://perma.cc/P8BJ-GP8J] [hereinafter REPORT TO CONVOCATION 2001].

281. *Cf.* REPORT TO CONVOCATION 2001, *supra* note 280, at 7; NATIONAL MOBILITY AGREEMENT 2002, *supra* note 278.

282. *See* LAW SOC'Y OF SASK., FAQs, *supra* note 280, at 4; Lawyers' Prof'l Indemnity Co., *How the New Mobility Agreement Affects You and Your Insurance Coverage*, LAWPRO MAG., Summer 2003, http://www.lawpro.ca/LawPRO/mobility.pdf [https://perma.cc/8NDT-PM37] [hereinafter Lawyers' Prof'l Indemnity Co.]; REPORT TO CONVOCATION 2001, *supra* note 280, at 6.

283. A separate agreement established a fund to compensate clients who were the victims of defalcations by lawyers practicing under the scheme, although, to date, it does not appear that such an arrangement has been needed.

284. *See* FED'N OF LAW SOC'YS OF CAN., NATIONAL MOBILITY AGREEMENT, at art 21, 27 (2013), http://flsc.ca/wp-content/uploads/2014/10/mobility2.pdf [https://perma.cc/G39M-V8Q2] [hereinafter NATIONAL MOBILITY AGREEMENT 2013]. *See generally* Tolofson v. Jensen, [1994] 3 S.C.R. 1022, 1049–50 (holding that Canadian courts ought to apply the law of the place where the activity occurs rule as a rule for defining obligations and consequences in tort actions); Canadian Lawyers Ins. Ass'n, *Loss Prevention Bulletin*, at No. 149 (Jan. 2003), http://www.clia.ca/eng/docenglish/LossPrevention/lpb34.pdf [https://perma.cc/AC2G-BEWM].

285. *Council of Canadian Law Deans*, http://www.ccld-cdfdc.ca/index.php/law-schools [https://perma.cc/A2VE-MCWT] (last visited Nov. 5, 2016).

286. Until recently, Canada has had no need for accrediting bodies like the American Bar Association.

In a book published two years ago, one of the authors summarized how thinking progressed during the negotiating process:

> For those who negotiated mobility for lawyers, this took over a decade, starting with small, tentative steps that weren't threatening. They made reciprocity fundamental. In the years of negotiations, regulators got more comfortable with counterparts from other provinces and learned how similar standards and processes were. Canada has similar legal education, licensing processes, and ethical rules across the country. Today, the regulators are increasingly thinking of Canada as a single national market. And importantly, clients do not think law is local. They believe a lawyer is a lawyer is a lawyer. Regulators, it seems, are increasingly following suit.[287]

a. The First Step to Reform: The Inter-jurisdictional Practice Protocol

In 1994, all of the common law provincial law societies signed the Inter-jurisdictional Practice Protocol,[288] with the Barreau du Québec signing the agreement in 1996.[289] The remote northern territories did not sign at that time.[290] Under the Inter-jurisdictional Practice Protocol that was regarded as a temporary measure, members of participating provinces were allowed to practice temporarily without a permit in reciprocal jurisdictions on a maximum of ten legal matters, for no more than twenty days in a twelve-month period (provided certain conditions were met).[291] This arrangement, which included a framework for the protection of the public, was commonly referred to as the "10-20-12" regime.[292] Under this system, those wanting to transfer permanently to another province were required to confirm that they had read required local law materials.[293]

In 2001, the law societies of Western Canada agreed to expand the ability to practice temporarily without a permit to a maximum of six months out of any

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287. Simon Chester, *Canada: The Road to Reform*, *in* PAUL A. HASKINS, THE RELEVANT LAWYER: REIMAGINING THE FUTURE OF THE LEGAL PROFESSION 197, 201 (2015) (based upon interviews with those involved in the negotiating process, Professor Vern Krishna and Sophia Sperdakos, Chair and staff member, National Mobility Committee, Federation of Law Societies of Canada, June 2015 and February 2016).

288. 1994 FLSC PROTOCOL *supra* note 247.

289. *See* LAW SOC'Y OF ALTA., *History*, http://www.lawsociety.ab.ca/membership/mobility/information/history.aspx [https://perma.cc/T9JK-DN5F] (last visited Nov. 16, 2016) [hereinafter LAW SOC'Y OF ALTA., *History*]; 1994 FLSC PROTOCOL *supra* note 247; *see also* Regulation Respecting the Issuance of Special Permits of the Barreau du Québec, C.Q.L.R. c B-1, r 8.

290. *See* Law Soc'y of Yukon, *Territorial Mobility Agreement Notice*, http://www.lawsocietyyukon.com/mobility.php [https://perma.cc/L5YT-RWNY] (last visited Nov. 16, 2016).

291. FED'N OF LAW SOC'YS OF CAN., INTER-JURISDICTIONAL PRACTICE COMM., THE INTER-JURISDICTIONAL PRACTICE OF LAW 55 (1990); REPORT TO CONVOCATION 2001, *supra* note 280, at 7–8; NAT'L MOBILITY TASK FORCE OF THE FED'N OF LAW SOC'YS OF CAN., A FRAMEWORK FOR NATIONAL MOBILITY 4 (2002) [hereinafter A FRAMEWORK FOR NATIONAL MOBILITY 2002].

292. A FRAMEWORK FOR NATIONAL MOBILITY 2002, *supra* note 291, at 4.

293. *Id.* at 21.

twelve-month period (provided certain conditions were met).[294] This came to be known as the "6 in 12" system, which lapsed when all of the Western jurisdictions implemented the National Mobility Agreement (described below) in its place.[295] The Western modification of the Inter-jurisdictional Practice Protocol was important, however, in helping to break down lingering reservations among the provinces about embracing full reform. In 2001, the Law Societies conducted a detailed comparative survey,[296] which reviewed rules on Admissions, Credentials, Educational Requirements, Good Character, Transfer Rules, Occasional Practice Rules, Foreign Legal Consultants, Professional Liability Insurance, Defalcation Insurance and Compensation Funds, Trust Accounting, Retention of Records, Requalification and Refresher Programs, Practice Review, Spot and Focused Audits, and Specialist Certification.

b. Adoption of the National Mobility Agreement

In December 2002, the Law Societies of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, Newfoundland and Labrador, and the Barreau du Québec, signed the National Mobility Agreement.[297] Under the National Mobility Agreement, members of participating provinces can practice without a permit in other National Mobility Agreement jurisdictions for up to one hundred days per year (provided certain conditions are met).[298] With permission of the CEO or Executive Director of a law society, a common-law lawyer in good standing may also exceed that one hundred days or continue to practice pending permanent transfer to a new jurisdiction.[299] If a lawyer seeks a practice certificate in a new jurisdiction but cannot meet the strict requirements for such a permit—for example, if the lawyer has a discipline record—she or he can still apply for a permit to practice temporarily.[300]

Under the National Mobility Agreement, if a lawyer establishes an economic nexus with another province, the lawyer must go through permanent mobility procedures.[301] Economic nexus is established by actions inconsistent with a temporary basis for providing legal services.[302] This includes providing legal services beyond the permitted number of days, opening a law office, becoming a

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294. McLaughlin Speech, *supra* note 184.

295. *See id.*

296. FED'N OF LAW SOC'YS, INTER-JURISDICTIONAL MOBILITY TASK FORCE, *Results of National Survey: Summary*, at 1 (2001), http://www.lsuc.on.ca/media/convnov_interjuris.pdf [https://perma.cc/4Z57-8CPZ].

297. Laprairie, *supra* note 190, § 1.40, at 1-11; NATIONAL MOBILITY AGREEMENT 2002, *supra* note 278. New Brunswick and Prince Edwards Island subsequently signed the Agreement and had fully implemented it by 2006.

298. *See* LAW SOC'Y OF SASK., FAQs, *supra* note 280, at 4.

299. *See id.* at 5.

300. *See* NATIONAL MOBILITY AGREEMENT 2002, *supra* note 278, at 9.

301. *See, e.g.*, LAW SOC'Y OF SASK., FAQs, *supra* note 280, at 6–7.

302. *See* NATIONAL MOBILITY AGREEMENT 2002, *supra* note 278, at 9; Law Soc'y of Upper Can., *Mobility and Inter-Jurisdictional Frequently Asked Questions*, http://www.lsuc.on.ca/For-Lawyers/About-Your-Licence/

provincial resident, operating a trust account, or holding oneself out as qualified to practice local law.[303]

Uniquely, in the western province of Alberta, special provisions automatically enroll a corporate counsel who is working in Alberta and is qualified in another Canadian province or territory to become an Alberta lawyer, as long as she or he acts exclusively on behalf of the corporate employer and its subsidiaries or affiliates.[304] This overcomes the problem faced by corporate counsel who are required to transfer to a different office in another province in which they are not qualified, even though their work is virtually the same in both locations.

The National Mobility Agreement has effectively resolved the issues related to lawyer mobility in Canada's common law provinces. There are, however, special arrangements that pertain to the northern territories and to Québec.

c. Canada's Remote Northern Territories and the National Mobility Agreement

The one barrier to full lawyer mobility that remains in effect is in Canada's three remote northern territories: Yukon, the Northwest Territories, and Nunavut. Together these territories have a population that represents less than a third of one percent of Canada's total population. Yet their combined geographic area is larger than India. Distances are vast and lawyers few. For example, Nunavut, which is three times larger than Texas, has only thirty-five resident lawyers in private practice.[305]

The Territorial Mobility Agreement was adopted in 2006 by the Federation of Law Societies of Canada to address the unique characteristics of the law societies in the three remote northern territories, and the challenges presented by legal practice in the far north.[306] It was recognized that simply permitting southern lawyers to fly in and skim off the best work in the territories would harm lawyers committed to those communities without any countervailing public benefit.[307] Consequently, the Territorial Mobility Agreement allows the territorial law societies to participate in national mobility as reciprocating governing bodies with respect to permanent mobility (or transfer of lawyers from one jurisdiction to another), without requiring them to participate in the temporary mobility

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Mobility-and-Inter-jurisdictional-Frequently-Asked-Questions [https://perma.cc/Z2QW-TKJ6] (last visited Nov. 16, 2016); Besser v. Besser, 2009 CanLII 37933, para. 15 (Can. Ont. S.C.).

303. *See* NATIONAL MOBILITY AGREEMENT 2002, *supra* note 278, at 9.

304. Legal Profession Act, R.S.A. 2000, c L-8, s 42 (Can.).

305. Fed'n of Law Soc'ys of Can., *Membership (2014 Statistical Report)*, http://docs.flsc.ca/2014-Statistics.pdf [https://perma.cc/XG26-DJCX].

306. Laprairie, *supra* note 190, § 1.41, at 1-12; *see* FED'N OF LAW SOC'YS OF CAN., TERRITORIAL MOBILITY AGREEMENT 3–4 (2013), http://www.lawsocietyyukon.com/forms/territorial_mobility_agreement.pdf [https://perma.cc/75QR-V2NK] [hereinafter TERRITORIAL MOBILITY AGREEMENT 2013].

307. Personal communications in February 2012 with the Presidents of the Law Societies of the Northwest Territories and Nunavut, and the President of the Federation of Law Societies of Canada, in Yellowknife.

provisions.[308] Lawyers from the *southern* provinces of Canada seeking to practice in any of the three territories are required to pay a single appearance fee (which is roughly the same as the annual territorial bar dues) and have the option, under full permanent mobility principles, of joining a territorial law society without having to pass qualifying examinations.[309]

d. The Special Situation of Québec

One Canadian province, Québec, which contains a quarter of Canada's population, follows a civil law tradition, with the working language of the courts being French.[310] These two facts limit the potential use of the new mobility regime by English-speaking common-lawyers wishing to practice in Québec.[311]

Québec has not formally ratified the National Mobility Agreement but did adopt the prior Inter-jurisdictional Practice Protocol.[312] Consequently, its lawyers[313] are governed in their practice outside Québec by the IPP, which (as previously noted) permits them to work without a permit on ten legal matters for no more than twenty days in twelve months, although the CEOs or executive directors of the law societies of the provinces in which they are working may grant permission to do so for a more extended period.[314]

The failure of Québec to ratify the more expansive National Mobility Agreement arose from a very unusual political controversy involving appointments to the Supreme Court of Canada.[315] The Supreme Court of Canada, set up

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308. *See* Chwyl v. Law Soc'y of Nun., 2014 N.U.C.J. 9 (Can. nunavuumi iqkaqtuijikkut, Nun. C.J.).

309. *See* Law Soc'y of the Nw. Territories, *Lawyer Mobility*, http://www.lawsociety.nt.ca/membership/mobility/ [https://perma.cc/L2QC-G6EB] (last visited Nov. 16, 2016); FED'N OF LAW SOC'YS OF CAN., TERRITORIAL MOBILITY AGREEMENT (2011), http://lawsociety.nu.ca/wp-content/uploads/2011/08/2011-Territorial-Mobility-Agreement.pdf [https://perma.cc/29LD-DHNQ]; TERRITORIAL MOBILITY AGREEMENT 2013, *supra* note 306. The agreements are discussed in *Chwyl*, 2014 N.U.C.J. at 24.

310. *See* Denis Le May, *The Québec Legal System: An Overview*, 84 LAW. LIBR. J. 189, 189, 193 (1992); F.P. Walton, *The Legal System of Québec*, 33 CAN. L. TIMES 280, 280 (1913); F.P. Walton, *The Civil Law and the Common Law in Canada*, 11 JURID. REV. 282, 297 (1899); F.P. Walton, *The Legal System of Québec*, 13 COLUM. L. REV. 213 (1913); R.W. Lee, *The Report to the Canadian Bar Association on Legal Education*, 38 CAN. L. TIMES 257, 259, 264 (1918); Proulx v. Québec (Att'y Gen.), [2001] 3 S.C.R. 9, 11 (Can.); Que. Ministry of Justice, *Rappel Historique* (May 9, 2016), http://www.justice.gouv.qc.ca/francais/ministere/histori.htm [https://perma.cc/6VER-JGLL].

311. Lee, *supra* note 310, at 258–59; *see* Black, Case Comment, *supra* note 272, at 125.

312. Laprairie, *supra* note 190, § 1.40.1, at 1-11; *see* LAW SOC'Y OF ALTA., *History*, *supra* note 289; 1994 FLSC PROTOCOL, *supra* note 247, at 8; *see also* Regulation Respecting the Issuance of Special Permits of the Barreau du Québec, C.Q.L.R., c B-1, r 8 (Can.).

313. These consist of advocates, who are members of the Barreau du Québec, and notaries (responsible for wills, estates, and land sales), who are members of the Chambre des Notaires.

314. For history of the Agreements, see LAW SOC'Y OF ALTA., *History*, *supra* note 289; *see also* LAW SOC'Y OF SASK., FAQs, *supra* note 280; REPORT TO CONVOCATION 2001, *supra* note 280, at 3; 1994 FLSC PROTOCOL, *supra* note 247, at 9.

315. *See* KENT ROACH, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE 422–24 (Rev. ed. 2016); Erin Crandall, *Defeat and Ambiguity: The Pursuit of Judicial Selection Reform for the Supreme Court of Canada*, 41 QUEEN'S L.J. 73, 98–99 (2015); Christopher Manfredi, *Conservatives, The Supreme Court*

by an Act of Parliament in 1875, consists of nine justices, three of whom were required to have ten years or more experience at the Québec Bar or as a judge in the Québec courts.[316] The justices hold office until they reach age seventy-five, when, unlike their U.S. counterparts, they must retire.[317] The Supreme Court has the final decision not only on constitutional questions but also on any case of civil and criminal law[318] coming from the provincial courts of appeal, which it considers to be of national importance.[319]

The Conservative government, which was in power at the national level from 2006 to 2015, endured a series of defeats when its legislation on tough on crime sentencing was struck down by the Supreme Court of Canada as violating Canada's Charter of Rights and Freedoms.[320] The government also suffered high profile losses on issues of assisted suicide,[321] prostitution,[322] and Senate reform.[323] Justices of the Supreme Court are nominated by the Prime Minister, and the Conservative Prime Minister Stephen Harper had long expressed a wish to limit the Supreme Court's progressive stance in the interpretation of constitutional rights[324]—the ability to nominate sympathetic individuals to the Supreme Court would help advance that aim.[325] On September 30, 2013, the Prime Minister of Canada announced the nomination of Justice Marc Nadon, a supernumerary judge of the Federal Court of Appeal, to the Supreme Court of Canada to occupy a seat vacated by the resignation of Justice Morris Fish, as one of the three judges appointed from Québec under section 6 of the Supreme Court

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of Canada, and the Constitution: Judicial-Government Relations, 2006–2015, 52 OSGOODE HALL L.J. 951, 971 (2015); John Geddes, *Rush to Judgment: Beneath the Legal Dispute over Marc Nadon's Supreme Court Eligibility Lies a Politically Fraught Mystery: Why Did Harper Wade into the Controversy in the First Place?*, MACLEAN'S, Jan. 27, 2014, at 16; Michael Plaxton & Carissima Mathen, *Purposive Interpretation, Québec, and the Supreme Court Act*, 22 CONST. FORUM 15, 15 (2013); Philip Slayton, *The Worst Appointment in History*, CANADIAN LAW. MAG., Jan. 2014, at 16; Oliver Fitzgerald, *Distant Echoes: Discussing Judicial Activism at Canadian and American Supreme Court Nomination Hearings*, 25 CONST. FORUM 37, 37 (2016).

316. Supreme Court Act, R.S.C. 1985, c S-26, s 6 (Can.); EUGENE FORSEY, HOW CANADIANS GOVERN THEMSELVES 31 (1980).

317. Supreme Court Act, R.S.C. 1985, c S-26, s 9(2) (Can.).

318. FORSEY, *supra* note 316, at 32.

319. *Id.*

320. *See* R. v. Nur, [2015] 1 S.C.R. 773, 786 (Can.).

321. *See* Carter v. Canada (Att'y Gen.), [2015] 1 S.C.R. 331, 334 (Can.).

322. *See* Canada (Att'y Gen.) v. Bedford, [2013] 3 S.C.R. 1101, 1104 (Can.).

323. *See* Reference re Senate Reform, [2014] 1 S.C.R. 704, 757–79 (Can.).

324. Haroon Siddiqui, *Stephen Harper and Charter Like Oil and Water*, THESTAR.COM (Apr. 18, 2012), http://www.thestar.com/opinion/editorialopinion/2012/04/18/stephen_harper_and_charter_like_oil_and_water.html [https://perma.cc/WAC9-CLXM]. As a private citizen, the Prime Minister had earlier been the unsuccessful plaintiff in a constitutional challenge called *Harper v. Canada (Att'y Gen.)*, [2004] 1 S.C.R. 827 (Can.).

325. Technically, this is done under section 4(2) of the Supreme Court Act by the Governor in Council by letters patent under the Great Seal, an expression which refers to the Federal Cabinet. By convention, however, the Prime Minister (who is the leader of the party in the House of Commons, which can command a majority because of the number of seats won in elections) makes the appointment.

Act.[326] Press reports described Justice Nadon as sympathetic to the Conservative government's policy positions, and skeptical about the extension of constitutional rights.[327]

The Supreme Court Act does not explicitly say that a judge from the Federal Court can be appointed to fill a Québec seat, and Justice Nadon had been a member of the Federal Court's trial and appeal divisions for the previous twenty years.[328] Before that he was a lawyer for twenty years specializing in maritime law, mostly based in Montréal.[329] His appointment was challenged as being illegal and the issue was referred to the Supreme Court of Canada on an expedited basis.[330] The Court ruled that to appoint Judge Nadon for a Québec seat on the top bench would be an unconstitutional change to the composition of the Supreme Court of Canada, which would require the unanimous approval of Parliament and the provinces. Hence, the Court ruled six to one that Judge Nadon was not legally qualified for the job.[331] It said that the purpose of the special appointment rules for Québec judges is "to ensure civil law expertise and the representation of Québec's legal traditions and social values on the Court, and to enhance the confidence of Québec in the Court."[332]

Why does this matter for lawyer mobility? Because the Québec government and its legal profession regulator, the Barreau of Québec, feared that the Nadon appointment had highlighted possible routes for the appointment to a Québec seat on the top court of someone who was neither a practicing Québec lawyer, nor a judge on one of Québec's courts.[333] Questions were raised about whether the

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326. Gov't of Can., News Release, *PM announces appointment of Justice Marc Nadon to the Supreme Court of Canada* (Oct. 3, 2013), http://news.gc.ca/web/article-en.do?nid=778249 [https://perma.cc/5KKD-2C33] [hereinafter Gov't of Can., News Release]; Order in Council P.C. 2013-1050 (Oct. 2, 2013).

327. *See, e.g.*, ROACH, *supra* note 315, at 423–24; Jeffrey Simpson, *Can justices find a reason to reject Marc Nadon?*, GLOBE & MAIL, Jan. 15, 2014, at 11; Sean Fine, *Harper's Nomination Continues Supreme Court's Shift to the Right*, GLOBE & MAIL (Sept. 30, 2013), http://www.theglobeandmail.com/news/national/harper-nominates-marc-nadon-for-supreme-court/article14602137/ [https://perma.cc/A4JH-D4B4].

328. *See* Andrea Janus, *Harper Nominates Québec Justice Marc Nadon for Supreme Court Seat*, CTV NEWS (Sept. 30, 2013), http://www.ctvnews.ca/politics/harper-nominates-quebec-justice-marc-nadon-for-supreme-court-seat-1.1476696 [https://perma.cc/4CKP-922B].

329. Gov't of Can., News Release, *supra* note 326.

330. The Prime Minister had earlier received favorable legal opinions about Judge Nadon's eligibility from two former justices of the Supreme Court of Canada, as well as the country's leading English-language constitutional law scholar. *See Memorandum from Hon. Ian Binnie* (Sept. 9, 2013), https://web.archive.org/web/20140207143000/http://pm.gc.ca/grfx/docs/20130930_Binnie_cp.pdf [https://perma.cc/V9GN-UMJK]; John Edmond, *The Nadon Reference: A Unique Challenge*, LAWNOW (June 30, 2015), http://www.lawnow.org/the-nadon-reference-a-unique-challenge/ [https://perma.cc/T2M5-TAYB].

331. Reference re Supreme Court Act, ss 5 & 6, [2014] S.C.R. 433 (Can.).

332. *See id.* question 1. For an extraordinary *rebuttal* to the implications of the Supreme Court's analysis for the competence of members of the Federal Court who came from the province of Québec, see Marc Noël, Chief Justice of the Fed. Court of Appeal, Speech to the Members of the Conseil du Barreau du Québec (Dec. 4, 2014), http://cas-cdc-www02.cas-satj.gc.ca/fca-caf/pdf/Speech-Barreau-du-Quebec_eng.pdf [https://perma.cc/KE8G-KCD7].

333. The only reference to the geographic origin in the provisions dealing with appointment to the Supreme Court of Canada is the requirement that three members of the nine justices on the court must come from Québec:

mobility protocol could be used to rebrand a common-law lawyer as a Québec lawyer, and thus qualified for appointment to one of the Québec seats.[334] Québec has not yet formally signed the National Mobility Agreement and there are no signs it will do so quickly.

6. EXPERIENCE SINCE MOBILITY REFORM

Since there is no requirement to register when a lawyer is relying on the National Mobility Agreement to practice temporarily in another province, there are no statistics available to gauge the frequency with which lawyers are actually using the new protocol. Litigation counsel do appear regularly in appellate courts and tribunals outside their home jurisdictions, and employment lawyers practicing in provinces with similar labor laws to those in adjoining provinces do seem to provide more legal services there than in the past. There also appears to be more use of the National Mobility Agreement to enable cross-border practices

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specifically it states that "at least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of the Province of Québec or from among the advocates of that Province." Hugo Cyr, *The Bungling of Justice Nadon's Appointment to the Supreme Court of Canada*, 67 SUP. CT. L. REV. 73, 75 (2014) (quoting The Supreme Court Act, R.S.C. 1985, c S-26). However, by convention, Ontario (which has 38.5 percent of the national population to Québec's twenty-three percent) has an equivalent three justices appointed from among its lawyers and judges. Two justices by convention come from Canada's western provinces (which have thirty-two percent of the population in total)—and northern territories too, although there has never been such an appointment—and one from the four Atlantic provinces (which have 6.6 percent of the national population). *See* PETER W. HOGG, 1 CONSTITUTIONAL LAW OF CANADA § 8.3, at 8-7 (5th ed. Supp. 2015). For general discussions of the crisis, see Cyr, *supra*; *see also* Daryl Barton, *Analysis of Reference Re Supreme Court Act: The Implied Currency Requirement for Québec Seat Appointees to the Supreme Court*, CONST. F. CONSTITUTIONNEL 19 (2015).

334. For commentary in the Québec legal media, see Georges Lebel, *Le Code civil en peril*, LE DEVOIR (Apr. 26, 2013), http://www.ledevoir.com/societe/justice/376670/le-code-civil-en-peril [https://perma.cc/8PV4-63HB]; Nicolas Plourde, *La Mobilité des avocats canadiens : bénéfique et incontournable*, BARREAU DU QUÉBEC (Apr. 26, 2013), http://www.barreau.qc.ca/fr/actualites-medias/lettres-medias/2013/0426 [https://perma.cc/XTT9-8Y9P]; Céline Gobert, *Premier duel des candidats au bâtonnat*, DROIT INC. (Apr. 3, 2015), http://www.droit-inc.com/article15052-Premier-duel-des-candidats-au-batonnat [https://perma.cc/C7ZM-8L2K]; *Québec mal à l'aise avec l'entente acceptée par le Barreau*, L'ACTUALITÉ GOUVERNEMENTALE (Mar. 25, 2015), http://actualitegouvernementale.ca/article/qubec-mal—laise-avec-lentente-accepte-par-le-barreau [https://perma.cc/23T5-SVXQ].

> Les modifications ont été proposées au ministère de la Justice, à l'Office des professions, mentionne le bâtonnier. « Présentement il y a un pépin majeur qui fait en sorte que le ministère ne veut pas adopter pour l'instant les amendements législatifs proposés parce que ça ferait en sorte que les avocats d'autres provinces pourraient venir pratiquer au Québec, donc obtenir un permis d'exercice au Québec sans avoir fait leur droit civil ».
>
> The changes were proposed to the Ministry of Justice and the Office des professions, said the Batonnier, [Bernard Synnott]. "Currently there is a major glitch that ensured that the department is not adopting proposed legislative amendments at this time because it would ensure that lawyers from other provinces could practice in Québec, and get a license in Québec without knowing civil law."

Id.

in adjacent provinces with common traditions, like the Western provinces or Atlantic Canada.

That said, anecdotal evidence suggests that many lawyers remain somewhat wary of taking advantage of the new mobility rules, even in situations where the National Mobility Agreement could be helpful. On two recent occasions during continuing professional development programs in Ontario, one of the authors of this Article raised hypotheticals involving simple contract matters where a client asked about the enforceability of contract provisions in multiple provinces.[335] Surprisingly, over ninety percent of the audiences responding said that they would hire local counsel to advise in such circumstances, even if local counsel were simply asked to confirm their primary opinions.[336] The fact that the National Mobility Agreement would permit faster, cheaper service to the client did not appear to overcome inherent lawyer reluctance to practice outside their home provinces.[337] This result was confirmed in a subsequent survey of large firm partners in five provinces, responsible for closing opinions in commercial transactions. Again, only ten percent of the respondents said they would avail themselves of the National Mobility Agreement and avoid retention of local counsel.[338] Of course, these results could change over time, but it is interesting that Canadian lawyers seem to remain cautious about routinely engaging in at least some sorts of practice outside their own provinces.

One fear that has not materialized is harm to the clients. One of the factors that led to a slow, deliberate, gradual approach to reform was the worry that malpractice claims by out-of-province lawyers availing themselves of the rights conferred under the National Mobility Agreement would negatively affect the financial assumptions underlying the law society primary insurance policies: remember that Canadian provinces all require that all lawyers in private practice

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335. Note that, with the exception of a few consumer protection statutes, contract law in the common-law provinces of Canada is substantially the same across the country. The sale of goods law (the Canadian equivalent of Article 2 of the Uniform Commercial Code) is made uniform by a common Sale of Goods Act and the implementation across the country of the International Sale of Goods Act, which in turn implements the United Nations Convention on Contracts for the International Sale of Goods (the so-called Vienna Convention).

336. Audience polls conducted at three Law Society of Upper Canada programs: The Annotated Shareholder Agreement 2012; Entertainment & Media Law Symposium 2013; and 6th Annual Business Law Summit 2016. One of the audience surveys conducted at the Law Society of Upper Canada Entertainment and Media Law Symposium 2013 included a hypothetical involving three provinces, standard industry contracts, and a fee sensitive client. Nevertheless, the audience split, with sixty percent opting to hire local counsel, forty percent sending the file to a national firm with offices in the three provinces, and no one prepared to take advantage of the National Mobility Agreement to provide one-stop services for legal advice for the client.

337. *See, e.g.*, I. Berl Nadler, *Cross-Border and International Agreements*, DAVIES WARD PHILLIPS & VINEBERG LLP, at 4–12 (2012) https://www.dwpv.com//media/Files/PDF_EN/2014-2007/CrossBorder-and-International-Agreements.ashx [https://perma.cc/5MKF-8DCU] (evidencing reluctance shown by one senior business lawyer) (originally presented at Insight Conference International Business Agreements and Commercial Ventures 2012).

338. *See* Simon Chester, *Survey on National Mobility Agreement Presentation to Toronto Opinions Group* (May 6, 2015), https://prezi.com/z_0k1z3dwfsa/torog/ [https://perma.cc/KG2J-Q75Y].

maintain professional liability insurance at a minimum of one million dollars.[339] The expansion of mobility reforms beyond the initial tentative 2002 reforms, and the dropping of the reciprocity limitation depended upon the negotiating parties being satisfied that there was no such impact. It helped, of course, that lawyers who had a history of discipline issues or existing malpractice claims were excluded from the pool of lawyers who could take advantage of the mobility reforms.[340] In addition, stipulating that the *home* insurance policies of the lawyer's province of residence would respond to any claims meant that any impact would be felt by the insurer already providing coverage to the lawyer.[341] There are no available statistics detailing claims, but informal communications with primary insurers have revealed no history of significant claims. The malpractice worry has proved a red herring.

Mobility reform is a topic that is closely related to other regulatory trends, and the Canadian experience shows that cooperation in this area can lead to uniform or coordinated approaches in other aspects of professional regulation. As the President of the Federation of Law Societies of Canada put it in a recent speech:

> [O]ne key aspect stands out—the days are long behind us where regulating the legal profession is simply a provincial or territorial endeavour. It is a national project.
>
> Legal regulation in Canada is far different today than even 10 years ago. In the last 10 years, all law societies have decided to recognize the credentials, indeed the competence and integrity, of every member of the legal profession no matter where they were first admitted to the bar without any additional training or evaluation.
>
> So it begs the question—if any lawyer can move anywhere and have his or her licence recognized by any law society, is there any principled reason why the regulation of lawyers should be approached differently from one jurisdiction to the next? What should the average member of the public think?
>
> The answer to that question, of course, is no, there is no principled reason for any substantial variation in how the public is protected by legal regulators anywhere in Canada . . . .
>
> But be under no illusions—arriving at consistent approaches with our Canadian federation is hard work.[342]

Canada's experience may be instructive for American reformers, because the drivers towards reform have been operating on so many different planes

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339. *See* Lawyers' Prof'l Indemnity Co., *supra* note 282, at 20.

340. *See* REPORT TO CONVOCATION 2001, *supra* note 280, at 9; 1994 FLSC PROTOCOL, *supra* note 247, at 10. For an example of this, see LAW SOC'Y OF SASK., FAQs, *supra* note 280, at 3.

341. *See* Lawyers' Prof'l Indemnity Co., *supra* note 282.

342. *Notes for a Speech by Marie-Claude Bélanger-Richard, Q.C. to the Council of the Canadian Bar Association*, at 5–7 (Aug. 14, 2014), http://docs.flsc.ca/SpeechtoCBAAug142014.pdf [https://perma.cc/E638-NMWQ]; *see also* Fed'n of Law Soc'ys of Can., *President Says CBA Futures Report More Than "One Year Wonder,"* FED'N NEWS (Oct. 1, 2014), http://flsc.ca/president-says/ [https://perma.cc/D37P-HXWC].

(constitutional prompts, court decisions, trade agreements, the pressures of globalization, and antitrust concerns) and because the process of reform has been so measured. Over twenty years of careful negotiations took place. Indeed, looking at the innumerable tentative drafts and careful incremental reforms it is hard to avoid the conclusion that they would have been unsuccessful if an ambitious end goal of comprehensive lawyer mobility had been articulated at the outset. Instead, a slow process of measured negotiation, assessing achievements and setbacks as they happened, was vital to success. The chair of the Federation National Committee on Mobility summed up the lessons of the Canadian experience:

> What appeared to be radical in a federal system when we introduced the concept in 2001 now, in 2016, appears to be quite prosaic. From inception to signing of the final agreement took all of 18 years. We succeeded because there was a meeting of minds on the desirability of legal mobility if we were sincere in our eloquence that our primary responsibilities were to protect the public interest, and provide effective and efficient services to our clients. To that end, we met each challenge by ensuring that we satisfied all competency, insurance, and professional regulatory requirements to protect the public interest. The biggest unspoken challenge was to persuade the legal profession that mobility would not undermine their economic interests and, indeed, would promote it. In retrospect, that all appears to have been proven accurate. It is a frequent lesson in life that what is considered radical today will be prosaic within half a generation.[343]

Protectionist worries and narrow parochialism never manifested themselves in the negotiations, perhaps reflecting the courts' insistence that legal regulators' proper mandate was the protection of the public interest—this kept negotiators focused.

V. LESSONS LEARNED FROM THE AUSTRALIAN AND CANADIAN REFORM PROCESSES

Reflecting on the experiences of Australia and Canada in moving toward reform of their multijurisdictional practice rules, it is useful to focus on key lessons that might be of benefit to similar reform efforts in the United States.

First, it is important to note that the driving forces behind the reform initiatives in both Australia and Canada were broader concerns about national public policy and the expansion of protections for consumers of legal services. In Australia, these concerns reflected a national competition policy designed to make the country more competitive in international markets and a recognition that a more

343. Private correspondence on October 14, 2016 with Professor Vern Krishna, Ex-Treasurer of the Law Society of Upper Canada (elected head of the Bar) and Chair of the National Committee on Mobility, Federation of Law Societies of Canada.

flexible and mobile legal profession able to engage nationally and internationally was an important component of that effort. There was also a strong commitment, in this process, to assuring adequate consumer protections and to improving the administration of justice by eliminating overly burdensome regulations.

In Canada, reform was driven by a recognition that existing restrictions on lawyer mobility were essentially inconsistent with key constitutional principles embodied in Canada's Charter of Rights and Freedoms, as well as with commitments to trade liberalization reflected in both national and international agreements. There was also a concern that the restrictions involved anti-competitive behavior that impeded the free market for legal services and could not be justified as serving the public interest.

The constitutional and legal structures of the United States are, of course, different in many ways from those of both Australia and Canada, but it is nonetheless important that we also focus on the broader public policy implications of our current restrictions on multijurisdictional practice. We too must ask serious questions about the extent to which our current policies inhibit our competitiveness in international markets, impede the development of a more competitive national market for legal services, drive up the cost of legal services for consumers, and frustrate legitimate client demands and expectations. We must no longer allow the debate of these issues to be dominated—directly or indirectly—by primary concerns about protecting the traditional franchises of local lawyers.

Second, it is instructive to observe that, in both Australia and Canada, agreement on the principle of mutual recognition of rights of practice was an important first step in building trust among lawyers and law societies in different states/provinces. In Australia, it was the Mutual Recognition Acts adopted by the various states and territories in 1992 that led to the *Blueprint for the Structure of the Legal Profession: A National Market for Legal Services*—adopted by the Law Council of Australia in 1994—and ultimately to the mobility protocols in the late 2000s.[344] In Canada, it was the principle of reciprocity agreed to early in the negotiations undertaken by the Federation of Law Societies of Canada in the early 1990s that proved an important confidence-building measure, particularly as representatives of the various law societies came to know and trust one another.[345]

In the United States, there are a number of important reform measures that should be seriously considered by state bar associations to enable the U.S. legal profession to adapt to the challenges of the twenty-first century market for legal services. In his previously cited article, Professor Stephen Gillers

344. *See supra* notes 107–09, 113, 144 and accompanying text.
345. *See supra* Part IV.B.5.

lists eleven such measures,[346] and other commentators might add even more.[347] The problem with such a long list of potential reform measures is that the task of implementing them is so daunting as to discourage even the most optimistically minded reformers from even trying.

We suggest that a more productive—and potentially more successful—approach to reform might well be to start with a single concept that could, if broadly adopted, serve as a confidence-building measure to create a climate in which other reforms could then be pursued. Reflecting the experience of both Australia and Canada, we suggest that an ideal such concept could be mutual recognition of rights to practice, a concept that would seem foundational to most of the additional reform measures proposed by Professor Gillers.

And third, it is worth noting that, in both the Australian and Canadian experiences of mobility reform, the path to final success was long and arduous. In Australia, it took nineteen years to move from the issuance of the Blueprint by the Law Council of Australia in 1994 to the final adoption of implementing Legal Profession Acts in all of the states and territories in 2013.[348] In Canada, thirteen years elapsed between the Supreme Court's highlighting of the constitutional problems with barriers to multijurisdictional practice in 1989 and the adoption of the National Mobility Agreement by the common-law provinces in 2002.[349] And these lengthy periods of negotiation occurred notwithstanding that the numbers of jurisdictions involved in both countries were relatively modest (eight in the

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346. The eleven measures discussed by Professor Gillers include (i) creating a single bar examination with separate state scoring; (ii) permitting lawyers to physically relocate their practice from one jurisdiction to another without retaking the bar examination; (iii) permitting a lawyer admitted in any U.S. jurisdiction to practice virtually in any other jurisdiction within the scope of his or her competence; (iv) accommodating cross-border legal advertising, creation of a uniform rule identifying minimum standards and disclosure requirements; (v) permitting motion admission without requiring an office or minimum practice in the new jurisdiction; (vi) requiring lawyers to have malpractice insurance; (vii) creating a presumption that, unless lawyer and client agree otherwise, the conflict rules of the jurisdiction in which the client resides (or does business) govern the client's relationship with counsel; (viii) requiring internet providers of legal products to include appropriate disclosures and disclaimers prominently throughout their websites, promotional materials, and advertising; (ix) permitting nonlawyers to have equity interests and management authority in for-profit law firms; (x) easing temporary and permanent admission to practice in the United States for applicants with foreign law degrees; and (xi) increasing the likelihood of competent representation through devices like certifications in specialties. *See* Gillers, *supra* note 62, at 999–1021.

347. *See, e.g.*, Donna M. Bates, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 FORDHAM INT'L L.J. 823, 857 n.132 (2004); Christine R. Davis, *Approaching Reform: The Future of Multijurisdictional Practice in Today's Legal Profession*, 29 FLA. ST. U. L. REV. 1339, 1357–59 (2002); Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 708–16 (2002); Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 175–77, 178 (2004); Richard Granat, *Comment to Living in FL, Practice in MD and DC, $100M p/a for 30 Minutes Per Day*, LEGAL ETHICS FORUM (Aug. 28, 2009, 9:26 AM), http://www.legalethicsforum.com/blog/2009/08/living-in-fl-practice-in-md-and-dc-100m-pa-for-30-minutes-per-day.html#comments [https://perma.cc/R63Z-HWMZ].

348. *See supra* notes 112–13, 146, 161 and accompanying text.

349. *See supra* Part IV.B.5.

case of Australia[350] and thirteen in the case of Canada[351])—at least as compared to the United States.

Against this background—and particularly considering the experience with adoption by the states of Model Rule 5.5—we believe that it is simply impractical to wait for agreement and action by the fifty-six jurisdictions that make up the United States.[352] Accordingly, in the next section, we propose a solution to the problem of lawyer mobility that sidesteps this process.

VI. REFORM OF LAWYER MOBILITY IN THE UNITED STATES: A PROPOSED WAY FORWARD

In the previous sections, we have described the current problems with the regulation of lawyer mobility in the United States; the compelling reasons for revising our approach to lawyer mobility; and the reform of lawyer mobility rules in Australia and Canada, both—like the United States—common law countries with federal constitutional systems and traditions of lawyer regulation at the state/provincial level. In this section, we offer our proposal for reforming the rules governing multijurisdictional practice in the United States.

In offering our proposal as a way forward, we are mindful of the strong traditions in this country of self-regulation by the legal profession and of the primacy of regulation at the state level. Nonetheless, for practical reasons (mostly involving the sheer number of jurisdictions involved), we believe that the way forward must involve federal legislation. That said, our proposal is quite narrow and designed to both honor and preserve the traditional principle of primary regulation of the legal profession remaining at the state level.

Specifically, we propose that Congress should adopt a narrowly drawn statute that mandates mutual recognition of rights of practice by lawyers across state borders as described below:

(1) Acting under its constitutional authority to regulate interstate and foreign commerce[353] and its general legislative powers,[354] the Congress should mandate that:

- In all matters pending before the courts of the United States;
- In all matters involving federal law;
- In all matters involving international treaties;
- In all matters involving tribal law; and
- In all matters affecting interstate or foreign commerce;

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350. *See supra* note 74 and accompanying text.

351. *See supra* Part IV.B.

352. For these purposes, the United States includes the fifty states, the District of Columbia, and the territories of Puerto Rico, Guam, the Northern Mariana Islands, the U.S. Virgin Islands, and American Samoa.

353. U.S. CONST. art. I, § 8, cl. 3.

354. U.S. CONST. art. I, § 1.

any person licensed to practice law and in good standing in any United States jurisdiction will be deemed qualified to practice law in every other United States jurisdiction (whether or not specifically licensed there), subject only to the restrictions set out below.

(2) Any person who holds himself or herself out to the public as regularly practicing or as a practitioner licensed in a jurisdiction in which the practitioner is not licensed must comply with the qualification requirements of that jurisdiction, regardless of the broad practice rights described in paragraph (1) above.

(3) Any person who, pursuant to the practice rights described in paragraph (1) above, practices law in a jurisdiction in which he or she is not otherwise admitted to practice shall be subject to the disciplinary rules of such jurisdiction with respect to his or her activities in such jurisdiction, provided that the requirements imposed under such rules are no more onerous than requirements imposed on persons who are licensed to practice in such jurisdiction.

In formulating this proposal, we are mindful of several important considerations. First, we believe that there can be no reasonable question that the statute we propose would be constitutional. While the regulation of the legal profession in the United States has *by tradition* been left to the states, there is no legal constraint on Congress's ability to inject itself into the process, certainly not in the very limited way that we propose. As noted by one leading commentator: "The practice of law is increasingly national rather than local in scope, and the United States Congress no doubt has constitutional power (under the Commerce Clause) to enact a regime of national rather than state-by-state licensure."[355]

It is a well-settled law that Congress has the constitutional power to enact legislation that either directly or indirectly regulates the legal profession. Perhaps the leading case on this point is *Goldfarb v. Virginia State Bar,*[356] in which the Supreme Court held that a minimum-fee schedule published by a county bar association and enforced by the Virginia State Bar violated Section 1 of the Sherman Act,[357] the antitrust statute enacted by Congress pursuant to its powers under the Commerce Clause. Brushing aside arguments that the precise legal activity involved (a title examination required for the purchase of a home) lacked sufficient impact on interstate commerce, the Court clearly articulated the expansive scope of congressional power in such matters:

355. 2 HAZARD ET AL., *supra* note 5, § 46.5, at 46-12.
356. 421 U.S. 773, 791–92 (1975).
357. 15 U.S.C. § 1 (2012).

> As the District Court found, "a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia," and "significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia." Thus in the class action the transactions which create the need for the particular legal services in question frequently are interstate transactions. The necessary connection between the interstate transactions and the restraint of trade provided by the minimum-fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrower . . . . Thus a title examination is an integral part of an interstate transaction . . . . Given the substantial volume of commerce involved, and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected . . . .[358]

Other Supreme Court rulings have also confirmed the power of Congress to impose requirements on the legal profession. For example, in *United States v. Williams*, the Supreme Court noted Congress is "free to proscribe" rules relating to prosecutorial conduct in grand jury proceedings.[359] Congress has enacted similar legislation regulating the legal profession in debt-collection litigation[360] and for attorneys appearing before the Securities and Exchange Commission.[361] It is equally settled that acts of Congress concerning the legal profession supersede state law. In *Sperry v. Florida ex rel. Florida Bar*, the United States Supreme Court vacated an injunction order by the Florida Supreme Court that prohibited non-lawyers from practicing before the United States Patent Office.[362] The Florida Supreme Court relied upon a Florida statute concerning the unauthorized practice of law in upholding the lower court's injunction order.[363] In vacating the injunction, the U.S. Supreme Court found that federal statute

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358. *Goldfarb*, 421 U.S. at 783–85.

359. 504 U.S. 36, 55 (1992).

360. Heintz v. Jenkins, 514 U.S. 291, 294–95 (1995).

361. Lawson v. F.M.R., 134 S. Ct. 1158, 1181 (2014).

362. 373 U.S. 379, 404 (1963).

363. At the time of the decision, Section 2, Article II of the Integration Rule, Florida Bar, 31 F.S.A., provided:

> No person shall engage in any way in the practice of law in this state unless such person is an active member of the Bar, in good standing, except that a practicing attorney of another state, in good standing, who has professional business in a court of record of this state may, upon motion, be permitted to practice for the purpose of such business only, when it is made to appear that he has associated and appearing with him in such business an active member of the Bar.

That provision was amended in 1988 and 1992, and now provides: "Persons shall initially become a member of The Florida Bar, in good standing, only upon certification by the Supreme Court of Florida in accordance with the rules governing the Florida Board of Bar Examiners and administration of the required oath." RULES REGULATING FLA. BAR Bylaw 2-2.1. Unauthorized practice of law in Florida is now governed by RULES REGULATING FLA. BAR R. 4-5.5.

expressly permitted non-lawyers to practice before the Patent Office and pre-empted the Florida statute.[364] The Court reiterated its long-standing precept that "[n]o State law can hinder or obstruct the free use of a license granted under an act of Congress."[365]

Second, we realize that the broad mutual recognition approach that we propose will strike some observers as moving "too far too fast," and that they might prefer a more incremental approach that would retain more restrictions, for example, some version of the Canadian model of limiting temporary practice rights to only one hundred days per calendar year.[366] In our view, such restrictions (while evidently workable in Canada) would impose unnecessary administrative burdens and, in fact, would not solve the problem. It is not hard to imagine, for example, that a lawyer licensed to practice in the District of Columbia who lives in Maryland or Virginia and regularly works from home by computer almost every night and on weekends could easily run up against the one hundred-day limitation almost every year. And, in the end, what public interest is being served by holding such a lawyer in violation of the unauthorized practice rules? By contrast, the approach we propose is clear and clean: there would be no artificial limits on a lawyer's ability to engage in cross-border practice so long as he or she did not hold himself or herself out as a practitioner who regularly practiced or was licensed to practice in that jurisdiction.

And third, while the provision of paragraph (3) stating that a lawyer temporarily practicing in another jurisdiction should be subject to the disciplinary rules in that jurisdiction is perhaps unnecessary because it is arguably already covered in the *Model Rules*,[367] including it in the proposed federal statute serves to underscore that it is not the intent of the legislation to undermine the regulatory authority of state bars except in the limited way related to temporary practice by out-of-state lawyers. As drafted, the provision also makes clear that states would not be permitted to impose rules on out-of-state lawyers that are more burdensome than those applicable to in-state lawyers.

We believe that our proposal represents a reasonable and measured way forward in addressing a nagging and increasingly serious issue confronting U.S. lawyers and law firms. We are also hopeful that, if implemented, our proposal could serve as a confidence and trust building measure that would make it possible, over time, to pursue additional areas of needed reform. As regards issues of lawyer mobility, however, we strongly believe that the time to act is now. In concluding his previously cited article, Professor Gillers ends with this statement that—in the present context—we heartily endorse:

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364. *Sperry*, 373 U.S. at 385, 404.

365. *Id.* at 385 (quoting Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 566 (1851)).

366. *See supra* note 298 and accompanying text.

367. *See* MODEL RULES R. 8.5(a).

> Institutions and government will sometimes change rules to facilitate or encourage behavior deemed beneficial. More often, perhaps, they react to changes when and as appropriate. Reaction often will be the wiser course, so as to prevent precipitous action. What is not wise is intransigence when the gap between socially beneficial conduct and the rules that constrict the conduct grows large. We have entered such a period for the rules governing the legal marketplace, and it is in large part a product of changing technology and the cross-border activity of lawyers and clients. Reasonable people will disagree on when and how the profession and the courts should react to this gap. But doing nothing is not an option . . . .[368]

CONCLUSION

In the preceding sections, we have described in detail the current problems with the regulation of lawyer mobility in the United States and the compelling reasons that a fundamental change in our approach is required. Simply put, our current rules regarding multijurisdictional practice by licensed lawyers impede the ability of clients to achieve more efficient and cost effective legal services, are unnecessary to protect the interests of clients, and undermine the integrity of our overall regulatory structure by articulating requirements that as a practical matter cannot be complied with. Drawing on lessons from Australia and Canada, both common-law countries with a long tradition of regulation of the legal profession at the state/provincial levels, we have offered a proposal for the mutual recognition of rights of practice of lawyers in all American jurisdictions; a proposal that, if adopted, would enable clients to use counsel of their choice on a nationwide basis. Such a change is, in our view, critical if American lawyers are to remain responsive to the legitimate expectations and demands of their clients and true to the highest standards of professionalism.

368. Gillers, *supra* note 62, at 1021–22.