

# Charting the “Middle” Way: Liberalizing Multijurisdictional Practice Rules for Lawyers Representing Sophisticated Clients

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Every U.S. jurisdiction has a set of multijurisdictional practice (MJP) rules that, collectively, limit the ability of lawyers to practice law outside their jurisdictions of licensure. These MJP rules are based upon an underlying assumption that lawyers represent local clients on matters of local law from their local law office. As numerous legal scholars have pointed out, such rules do not reflect the current state of the legal profession. Increasingly, clients are demanding legal services that take lawyers across state and even national boundaries, and improvements in technology are making it easier for lawyers to communicate with far-away clients, travel to other jurisdictions, and encounter foreign law. Despite the importance of MJP rules to lawyers' practices, few lawyers fully understand the requirements of MJP rules, in large part because the rules are confusing, inconsistently interpreted, and vary from state to state. As a result, lawyers are, as a practical matter, violating MJP rules every day—sometimes deliberately to accommodate their clients' national and global demand for legal services and sometimes inadvertently because of ambiguities in the rules themselves. Unfortunately for practicing lawyers, the consequences of violation can be severe. Lawyers can lose their licenses, be disbarred, or face heavy fines, for example.

Recognizing the disjunction between MJP rules and current legal practice, legal scholars have almost unanimously supported sweeping reform to afford lawyers greater freedom to practice law out of state. However, state legislatures, state bar associations, and state courts have met such enthusiasm for reform with hesitation and resistance, citing the need to protect the public from potentially incompetent out-of-state attorneys. For several decades, the MJP debate has stagnated, with legal scholars and states unable to agree on whether and how MJP rules should be revised. In an effort to advance the debate and offer a practical policy solution that addresses the concerns of both scholars and states, this Note proposes that MJP rules be liberalized to allow lawyers complete freedom to practice law outside their jurisdiction of licensure, *but only* when such lawyers are representing sophisticated clients who are able to evaluate and monitor the competence of a lawyer without the protection of MJP rules.

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Specifically, this proposal departs from existing MJP scholarship in at least two ways. First, it departs from the previous all-or-nothing approach adopted by MJP scholars. Previous MJP literature has concluded with either wholesale endorsement of liberalization or wholesale condemnation of liberalization. This Note sets forth a more nuanced approach that tailors the strictness of MJP rules to the sophistication of the client. Second, this Note departs from previous scholarship by applying to MJP rules David B. Wilkins' legal realist, "middle-level" approach for the professional regulation of lawyers. This approach attempts to provide a practical, workable solution that responds to the changing circumstances of the legal profession without sacrificing the important goal of protecting the public from incompetent lawyers. By adopting a middle ground between legal scholars and states, this Note offers mutually-satisfying MJP reform that will break the current stalemate between states and legal scholars.

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## I. INTRODUCTION

“Multijurisdictional practice” (MJP) refers to the extent to which lawyers may practice law in jurisdictions in which they are not licensed.<sup>1</sup> Currently, every U.S. state and the District of Columbia has MJP rules which operate, collectively, to severely limit a lawyer’s ability to practice in any state but the state of her licensure.<sup>2</sup> With relatively few exceptions, a lawyer licensed in New York, for example, may practice law *only* in New York. Despite the seeming simplicity of this baseline prohibition on the out-of-state practice of law, MJP rules in the United States are strict and confusing enough to catch even a conscientious lawyer off guard. For example, a lawyer may unwittingly violate MJP rules by “practicing law” in a foreign<sup>3</sup> jurisdiction when she e-mails or telephones a client located *in* a foreign state, e-mails or telephones a local client *from* a foreign state, advises on a transaction which implicates a foreign state’s law, or travels to a foreign state in connection with the representation of a client.<sup>4</sup> A lawyer may even unwittingly “assist” or “aid” another lawyer’s MJP violation.<sup>5</sup> Whether any particular activity constitutes a violation of MJP rules is “highly ambiguous, uncertain, and often unclear.”<sup>6</sup>

Unfortunately for lawyers, sanctions imposed for MJP violations can be severe. Potential penalties include civil injunctions, criminal or civil fines, civil contempt, restitution, cease and desist orders, loss of attorneys’ fees, disbarment

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1. See Susan Poser, *Multijurisdictional Practice for a Multijurisdictional Profession*, 81 NEB. L. REV. 1379, 1379 (2003). The phrase “multijurisdictional practice” is often used synonymously with “extrajurisdictional practice,” see, e.g., William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501 (2001), “transnational practice,” see, e.g., David S. Clark, *Transnational Legal Practice: The Need for Global Law Schools*, 46 AM. J. COMP. L. 261 (1998), “interjurisdictional practice,” see, e.g., Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665 (1995), and “multinational practice,” see, e.g., Ronald A. Brand, *Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law*, 34 VAND. J. TRANSNAT’L L. 1135 (2001).

It should be noted, however, that “multidisciplinary practice” (MDP) is *not* synonymous with multijurisdictional practice (MJP). While MJP refers to the extent to which lawyers ought to be able to practice law outside their jurisdiction of licensure, MDP refers to the extent to which *non-lawyer* professionals, such as accountants, investment bankers, and others ought to be able to practice jointly with lawyers in offering legal and financial services to the public. See George C. Nnona, *Multidisciplinary Practice Through Developing Country Lenses: The Imperatives of the Nigerian Regulatory Context*, 25 BERKELEY J. INT’L L. 346, 347 (2007).

2. See Carol A. Needham, *Splitting Bar Admission into Federal and State Components: National Admissions for Advice on Federal Law*, 45 U. KAN. L. REV. 453, 458 (1997).

3. This Note uses the term “foreign” to mean any jurisdiction other than the lawyer’s state of licensure, thus including both U.S. states and foreign nations.

4. See *infra* notes 86-92 & accompanying text.

5. See, e.g., N.Y. CODE OF PROF. RESP., DR 3-101 (McKinney 2008) (“A lawyer shall not aid a non-lawyer in the unauthorized practice of law.”); Office of Disciplinary Counsel v. Pavlik, 732 N.E.2d 985 (Ohio 2000) (holding that public reprimand was appropriate sanction for Ohio lawyer who inadvertently aided an out-of-state lawyer in a MJP violation).

6. Quintin Johnstone, *Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolutions*, 39 WILLIAMETTE L. REV. 795, 806 (2003).

or other ethical sanctions, adverse reputational effects, and even prison sentences.<sup>7</sup> Moreover, lawyers may face enforcement and sanctions by multiple parties<sup>8</sup> in multiple states.<sup>9</sup> Making matters even worse is the fact that courts and state bar associations impose sanctions on a strict liability basis; a good faith interpretation of an ambiguous MJP statute is no defense.<sup>10</sup>

Despite the severity of consequences resulting from MJP violations, few practicing lawyers have an in-depth understanding of MJP rules' requirements. Historically, lawyers have relied on common understandings of the profession's norms and acted consistently with past practices.<sup>11</sup> Unfortunately, these common understandings are often incorrect, leading to a high frequency of MJP violations.<sup>12</sup> Practicing attorneys violate MJP rules "habitually"<sup>13</sup> and on a "daily basis."<sup>14</sup> A leading MJP scholar famously coined the phrase "sneaking around" to refer to the frequent flouting of MJP rules.<sup>15</sup> Most scholars believe that some violations are deliberate, resulting from lawyers' perceptions that they are unlikely to get caught, while other violations are unintentional, resulting from ignorance and confusion over the exact requirements of MJP rules.<sup>16</sup>

Luckily for lawyers, historic enforcement of MJP rules has been weak and challenges have been infrequent.<sup>17</sup> Despite weak enforcement, however, the

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7. See *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998) (denying the collection of one million dollars of attorneys' fees for New York licensed lawyers' work done in connection with the representation of a California client in an arbitration proceeding in California), *superseded by statute*, CAL. CIV. PROC. CODE § 1282.4 (West 2007) (recognizing an exception to MJP rules for attorneys in arbitration proceedings); Susan D. Hoppock, *Enforcing Unauthorized Practice of Law Prohibitions: The Emergence of the Private Cause of Action and its Impact on Effective Enforcement*, 20 GEO. J. LEGAL ETHICS 719, 730 (2007); Am. Bar Ass'n, Standing Comm. on Client Prot., *2004 Survey of Unlicensed Practice of Law Committees* (2004), <http://www.abanet.org/cpr/clientpro/client.html#MJP>.

8. For example, some jurisdictions authorize multiple parties to enforce MJP rules, including states attorneys general, private individuals, state bar committees, state supreme court commissions, and local and county attorneys. See Am. Bar Ass'n, Standing Comm. on Client Prot., *supra* note 7.

9. Most commonly, a lawyer may face sanctions in both her jurisdiction of licensure and the jurisdiction in which she violated MJP rules. See Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 ARIZ. L. REV. 685, 697-98 (2002).

10. See 7 C.J.S. *Attorney & Client* § 37 (2008).

11. Bruce A. Green, *Assisting Clients with Multi-State and Interstate Legal Problems: The Need to Bring the Professional Regulation of Lawyers into the 21st Century* (2000), [http://www.abanet.org/cpr/mjp/mjp-bruce\\_green\\_report.html](http://www.abanet.org/cpr/mjp/mjp-bruce_green_report.html).

12. See generally Barrie Althoff, *Multijurisdictional Practice*, 2002 PROF. LAW. 83, 85 (noting the "disconnect between statutory prohibitions and present practices").

13. Wolfram, *supra* note 1, at 685-86.

14. Diane Leigh Babb, *Take Caution When Representing Clients Across State Lines: The Services Provided May Constitute the Unauthorized Practice of Law*, 50 ALA. L. REV. 535, 535 (1999).

15. See Wolfram, *supra* note 1, at 685.

16. See, e.g., Poser, *supra* note 1, at 1396 ("The fact is that lawyers are traveling all over the country practicing law, many either ignorant of, or simply in disregard of, the prohibition against [the unauthorized practice of law].").

17. See Barker, *supra* note 1, at 1502; accord Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 752 (1994); Hoppock, *supra* note 7, at 720-21. For example, of thirty-six U.S. jurisdictions questioned in an ABA survey, ten stated that enforcement was completely inactive or non-existent, and several

existing system of MJP rules remains and ought to remain a “matter of serious concern for many lawyers,” because MJP rules have direct and serious implications for the legal profession and individual lawyers’ livelihoods.<sup>18</sup>

First, the era of weak enforcement may be coming to an end. Several scholars have noted a recent trend toward greater enforcement, with courts increasingly relying on the literal language of MJP rules, as opposed to the common conventions that guide practicing lawyers’ actions.<sup>19</sup> Second, even if enforcement remains relatively weak, lawyers nonetheless “work under the cloud of possible action by an overzealous prosecutor or manipulative adversary.”<sup>20</sup> Perhaps most troubling is that enforcement is described as “sporadic,” “selective,” and generally unpredictable,<sup>21</sup> and all too often “depends upon the status or clout . . . of the party involved.”<sup>22</sup> Ironically, it may be the most conscientious and cautious lawyers who suffer most, by feeling a professional obligation to abide by MJP rules, even if unenforced, and erring too far on the side of caution.<sup>23</sup>

Finally, regardless of the level of enforcement, MJP rules ought to accord with

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others stated that enforcement was significantly limited by insufficient funding. See Am. Bar Ass’n, Standing Comm. on Client Prot., *supra* note 7.

18. Green, *supra* note 11.

19. See, e.g., Hoppock, *supra* note 7, at 730-31; see also Am. Bar Ass’n, Standing Comm. on Client Prot., *supra* note 7 (noting that more than half of responding U.S. jurisdictions expected more active enforcement in the future). For example, the California Supreme Court, in *Birbrower*, shocked the legal world when it denied the collection of over one million dollars in legal fees by a New York attorney for work performed in California in connection with an arbitration proceeding. See *Birbrower v. Superior Court*, 949 P.2d 1 (Cal. 1998), *superseded by statute*, CAL. CIV. PROC. CODE § 1282.4 (West 2007) (recognizing an exception to MJP rules for attorneys in arbitration proceedings); see also Gerard J. Clark, *The Two Faces of Multi-Jurisdictional Practice*, 29 N. KY. L. REV. 251, 256 (2002) (noting that although *Birbrower* was later overruled with respect to arbitration, the case nonetheless “ensures as a statement by the California Supreme Court about how it views out-of-state lawyers practicing in the nations [sic] most populous, richest and diverse state”). The unexpected *Birbrower* decision signaled to lawyers the beginning of a “judicial trend toward finding licensed lawyers guilty” of MJP violations, Pamela A. McManus, *Have Law License; Will Travel*, 15 GEO. J. LEGAL ETHICS, 527, 549 (2002), and created a “great deal of disruption,” Gillers, *supra* note 9, at 688; see also Mark D. Hinderks, *On the Proper State of Things: Multijurisdictional Practice for the Kansas Practitioner*, 74 J. KAN. B. ASS’N 20, 23 (Feb. 2004) (claiming that the case was “the great . . . alarm of 1998”); McManus, *supra*, at 549 (describing the case as the “shot heard round the bar” and “creating a shock-wave”); Elizabeth A. Wickerham, *Behind Bars: Are Corporate Counsel Captive to State Licensure?*, 44 WM. & MARY L. REV. 1913, 1915 (2003) (stating that the case was a “conceptual torpedo” that “stir[red] the pot”).

20. Gary A. Munneke, *Multijurisdictional Practice of Law: Recent Developments in the National Debate*, 27 J. LEGAL PROF. 91, 95 (2003).

21. See, e.g., Am. Bar Ass’n, *Amendments to ABA Model Rules of Professional Conduct (Multi-Jurisdictional Practice)*, 685 P.L.I. Order No. H0-0018, at 116 (2002); McManus, *supra* note 19, at 540.

22. McManus, *supra* note 19, at 540; see also Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1235 (2003) (acknowledging the possibility that “the connection between lawyers and judges . . . could result in conscious or unconscious favorable treatment of lawyers”).

23. See Green, *supra* note 11. Green also notes the potential costs to clients of overly cautious lawyers. By unnecessarily declining to represent a client for fear of MJP sanction, a lawyer deprives her client of his choice of counsel and creates the extra expense and inefficiencies of co-counsel. See *id.*

current practices. Keeping antiquated laws on the books may lead to public disrespect for the law. Particularly in the case of MJP, already negative public perception of lawyers<sup>24</sup> may be intensified by observing that lawyers—the supposed stalwarts of the rule of law—regularly display a blatant disregard of the law.<sup>25</sup>

Recognizing the importance of MJP and the clear need for reform, for the past several decades,<sup>26</sup> legal scholars have been calling for liberalization of MJP rules to provide lawyers with greater freedom to practice law outside their jurisdictions of licensure.<sup>27</sup> In support of liberalization, legal scholars point to the increasing nationalization and globalization of the legal profession, improvements in telecommunication and transportation technologies that make the physical location of lawyers and clients decreasingly important, and the ambiguity and lack of uniformity inherent in the current MJP rules.<sup>28</sup> The state rulemaking bodies have met the legal scholars' pleas for liberalization with nearly unanimous resistance.<sup>29</sup> In support of maintaining the status quo, states cite the importance of protecting the public from potentially incompetent lawyers.<sup>30</sup> So far, legal scholars and states have been unable to overcome this fundamental disagreement, and, as a result, the MJP debate has stagnated.

This Note seeks to reinvigorate the MJP reform movement by providing a solution that appeals to both sides of the debate. In doing so, it departs from previous MJP scholarship in at least two significant ways. First, prior scholarship has taken an all-or-nothing approach with regards to liberalization of MJP rules; scholars conclude with either wholesale condemnation or wholesale recommendation of liberalization.<sup>31</sup> By contrast, this Note proposes a more nuanced approach that endorses liberalization of MJP rules *only* with regard to those lawyers representing sophisticated and savvy clients—those clients who do not need the paternalistic protection of MJP rules to save them from hiring incompetent lawyers. Second, this Note departs from prior scholarship by looking to legal realism for a solution pragmatic enough to respond to the

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24. For example, Rhode found that sixty percent of Americans described attorneys as “greedy.” See DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 3-4 (2000).

25. See Soha F. Turfler, *A Model Definition of the Practice of Law: If Not Now, When? An Alternative Approach to Defining the Practice of Law*, 61 WASH. & LEE L. REV. 1903, 1926 (2004); see also Peter R. Jarvis, *Small World After All or Ball of Confusion? Some Thoughts on National Multijurisdictional Practice*, 34 VAND. J. TRANSNAT'L L. 1169, 1172 (2001) (“Our raison d'être as lawyers is based on respect for the rule of law. Our present unauthorized-practice rules do not comport with what many lawyers are doing. This breeds disrespect for the law . . .”); Munneke, *supra* note 20, at 95 (“What does it say about [lawyers'] commitment to ethical practice when [they] ignore the very rules created to regulate the practice?”).

26. For an important early article framing the MJP debate, see Samuel J. Brakel & Wallace D. Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699 (1975).

27. See *infra* Part III.A.

28. See *infra* Part III.A.1-2.

29. See *infra* Part III.B.

30. See *infra* Part III.B.1.

31. See *infra* Part IV.

concerns of both legal scholars and states, thus allowing the MJP debate to move beyond its current state of stagnation. This proposal draws from and is consistent with David B. Wilkins' legal realist framework for the professional regulation of lawyers,<sup>32</sup> in that it designs rules governing lawyer behavior in a way that is both (1) purposive, demonstrating greater allegiance to the public purposes of those rules, and (2) "middle-level" contextual, accounting for relevant differences between, for example, the type of client the lawyer represents.<sup>33</sup>

Part II of this Note provides an overview of the current state of MJP rules. Part III describes in greater detail the scholarly MJP debate and the states' response. Part IV explains and defends a "middle-level," legal realist approach to MJP, which would liberalize MJP rules only with regard to lawyers representing sufficiently sophisticated clients.

## II. THE CURRENT STATE OF MJP RULES IN THE UNITED STATES

Every U.S. state and the District of Columbia has adopted a statute which prohibits lawyers not licensed within the state from practicing law there.<sup>34</sup> The interlocking effect of these statutes is to prohibit lawyers from practicing anywhere in the United States except for the states in which they are licensed. Although this baseline rule of absolute prohibition is softened by a variety of exceptions in some states, it nonetheless remains true that lawyers can practice law outside their states of licensure only on a very limited basis and often only after satisfying burdensome requirements.

One such "exception" to the baseline rule is not really an "exception" at all; a lawyer can simply be licensed in multiple jurisdictions. Gaining full bar admission to a state is the safest way to avoid violating MJP rules, but it is also the most burdensome. In many states to which the lawyer seeks full admission, she must submit to the same requirements as if she were not already licensed elsewhere. This can be quite daunting. Taking a bar examination—whether it's a lawyer's first time or fifth—is time-consuming and expensive, often requiring time off work for preparation, the cost of an exam preparation course, and multiple fees paid to the state for administration of the exam. Significantly, passing the bar a second time can be psychologically stressful, since "[f]ailure

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32. See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990).

33. See *id.* at 505-19.

34. These statutes are called "unauthorized practice of law" (UPL) statutes and technically prohibit both out-of-state lawyers and non-lawyers from practicing in-state. See, e.g., CAL. BUS. & PROF. CODE § 6125 (West 2003) (stating that "[n]o person shall practice law in California unless the person is an active member of the State Bar").

It is also worth noting that several global jurisdictions also have a baseline prohibition against the practice of law by those not licensed in that country. See Abel, *supra* note 17, at 748 (describing the UPL statutes of France, Belgium, Luxembourg, Singapore, and Japan); Owen Bonheimer & Paul Supple, *Unauthorized Practice of Law by U.S. Lawyers in U.S.-Mexico Practice*, 15 GEO. J. LEGAL ETHICS 697 (2002) (discussing the UPL restriction of Mexico).

would suggest that the lawyer has been practicing incompetently all along.”<sup>35</sup> Once admitted, maintaining licensure in several jurisdictions can also be costly, requiring fees, paperwork, and continuing education classes. As a result of these burdens, there is a general consensus that obtaining multiple state licenses is not a feasible solution for most lawyers wishing to practice out-of-state; it is simply impracticable to gain admission to every U.S. jurisdiction, or even to gain admission to many.<sup>36</sup>

Second, some states permit a lawyer already licensed in another state to gain full bar admission through the “admission on motion” procedure.<sup>37</sup> This permits a lawyer who is a member and in good standing of the bar of another U.S. state to become a full member of a state’s bar without taking another bar exam.<sup>38</sup> The “admission on motion” procedure does little to erode the baseline prohibition against the out-of-state practice of law, however. First, a state that permits such admission generally requires an element of reciprocity from other states (i.e., “I’ll admit your lawyers without a bar exam if you admit my lawyers without a bar exam”).<sup>39</sup> Therefore, a lawyer licensed in any given state may have the opportunity to gain “admission by motion” to only one or two additional states. Second, even though admission by motion is less burdensome than full bar admission, it is still not easy and typically requires the same maintenance fees, paperwork, and continuing education as does full bar admission.<sup>40</sup> Finally, many states do not have admission on motion procedures at all.<sup>41</sup>

Third, a U.S. lawyer may seek permission from the court of another state to appear *pro hac vice*, which entitles the attorney to appear before a specific court for a specific case.<sup>42</sup> To gain *pro hac vice* admission, an out-of-state attorney must show that she is in good standing with the bar of another U.S. state, usually pay a small fee, and be sponsored by a local lawyer.<sup>43</sup> Most states have enacted a *pro hac vice* exception, and although the exception is not without its limitations,

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35. Wolfram, *supra* note 1, at 680.

36. *Id.*

37. See Ryan W. Hopkins, *Will the General Agreement on Trade in Services Necessitate Federal Involvement in Lawyer Regulation? Some Constitutional Implications of Regulating the Global Lawyer*, 66 U. PITT. L. REV. 653, 662-63 (2005). The “admission on motion” procedure is sometimes referred to as “reciprocity admission.” Wolfram, *supra* note 1, at 680. See generally Jennifer L. Binkley, *Admission on Motion: Current Practices and Rules*, B. EXAMINER (Nov. 2000), [http://www.ncbex.org/uploads/user\\_docrepos/690400\\_Binkley.pdf](http://www.ncbex.org/uploads/user_docrepos/690400_Binkley.pdf) (detailing the admission on motion procedure).

38. See Binkley, *supra* note 37.

39. See *id.*

40. For example, lawyers can be admitted by motion to Indiana only if they practice “predominantly” in Indiana. See *Scariano v. Justices of the Supreme Court*, 38 F.3d 920, 925-29 (7th Cir. 1994) (upholding Indiana’s “predominant practice” rule as not unconstitutional under the Equal Protection Clause and dormant Commerce Clause).

41. Wolfram, *supra* note 1, at 681.

42. See Peter S. Margulies, *Protecting the Public Without Protectionism: Competence and Pro Hac Vice Admission to the Practice of Law*, 7 ROGER WILLIAMS U. L. REV. 285, 285 (2002).

43. Clark, *supra* note 19, at 262.

most litigators consider it useful.<sup>44</sup> However, the *pro hac vice* exception does not allow transactional lawyers to practice out-of-state, and there is no comparable rule for non-courtroom legal practice.<sup>45</sup>

Fourth, an attorney from a foreign nation may be able to gain admission to practice in a U.S. state if the state has enacted a “foreign legal consultant” (FLC) statute. Once admitted, FLCs are entitled to give legal advice regarding the laws of jurisdictions other than those in the United States. Usually, they are limited to giving advice on the laws of their “home” country (i.e., their country of licensure), although a few allow FLCs to give advice on international or third country law.<sup>46</sup> In order to gain admission as an FLC, a number of criteria must be satisfied. New York’s FLC statute, as the first FLC statute, is representative.<sup>47</sup> New York admits a foreign lawyer to practice if she enjoys good standing in her home country, has practiced the law of that country for at least three of the last five years, passes the character and fitness test, is over twenty-six years old, and intends to practice as a legal consultant and maintain an office in New York for that purpose.<sup>48</sup> The FLC is limited, however; she may not appear before a court, give legal advice on the laws of New York or the United States, hold herself out as a member of the New York bar, or prepare any document or instrument involving the transfer of real estate, trusts, wills, or estates, or marital or parental relations.<sup>49</sup> Clearly, the FLC exception is limited in its ability to provide lawyers with greater freedom to practice throughout the United States. As noted, a lawyer is eligible for FLC status only if she meets a number of stringent criteria, and she is limited in the type of law she may practice. Also, because most FLC statutes require residency, a foreign lawyer may gain FLC admission only to a single state. Finally, the FLC laws are of no help to U.S. lawyers. In fact, several scholars have expressed a concern that states make it easier for a foreign-licensed lawyer to practice in the United States than for a U.S. lawyer to practice in the United States.<sup>50</sup>

Fifth, several states have enacted statutes based on the Restatement (Third) of the Law Governing Lawyers and the American Bar Association’s *Model Rules of Professional Conduct*. The *Restatement*, for example, allows a lawyer to practice outside of her jurisdiction of licensure “to the extent that the lawyer’s activities arise out of or are otherwise reasonably related to the lawyer’s practice” in her

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44. See Barker, *supra* note 1, at 1503 (“Litigation representations, in which *pro hac vice* admission is available, present only modest problems.”).

45. See *id.* at 1502.

46. See Carol Needham, *The Licensing of Foreign Legal Consultants in the United States*, 21 *FORDHAM INT’L L.J.* 1126, 1129-30 (1998).

47. See Hopkins, *supra* note 37, at 666-67.

48. N.Y. CT. RULES § 521.1 (McKinney 2008).

49. *Id.* § 521.3.

50. See, e.g., Needham, *supra* note 46.

jurisdiction of licensure.<sup>51</sup> The American Bar Association (ABA) Model Rule 5.5 similarly allows an out-of-state lawyer to provide legal services in any jurisdiction “on a temporary basis” that are undertaken with the supervision of a local lawyer, are “reasonably related” to a trial or an alternative dispute resolution proceeding, or are “reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.”<sup>52</sup> These exceptions, to the extent that states have adopted them, are important but nonetheless limited. Perhaps most significant is the lack of clarity and predictability over what such statutes permit. The comments to Rule 5.5, for example, acknowledge that there is no single test for determining if a lawyer is providing services on a “temporary” basis.<sup>53</sup> Therefore, to a cautious lawyer, such statutes provide relatively little freedom.

Finally, some jurisdictions also recognize a number of other specific exceptions. For example, California authorizes out-of-state lawyers to represent clients in arbitration,<sup>54</sup> and several jurisdictions have exceptions for in-house corporate counsel.<sup>55</sup> The specificity of such exceptions ensures that they do not substantially erode the baseline prohibition on the practice of law by out-of-state lawyers.

Therefore, despite these various exceptions, lawyers remain relatively restricted in their ability to practice law outside their states of licensure.

### III. THE MJP DEBATE

Legal scholars have almost unanimously advocated liberalizing MJP rules in light of the increasing demand for cross-border legal services and the need to simplify and clarify the current set of strict MJP rules. In responding to pressure to liberalize, states have acted slowly and cautiously, professing a concern that without strict MJP rules, members of the public could be seriously harmed by incompetent lawyers. Many scholars dismiss this concern as a guise for a self-interested desire to limit competition by out-of-state lawyers.

#### A. LEGAL SCHOLARS’ CALL FOR REFORM

Since the inception of the MJP debate, there has been a consensus among legal scholars that reform of MJP rules is necessary.<sup>56</sup> With few exceptions, legal scholars argue that MJP rules ought to be liberalized to allow lawyers greater

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51. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (2000).

52. Am. Bar Ass’n, *supra* note 21.

53. Daniel J. McAuliffe & Teresa Voss, *Transactions Go Global: Can Lawyers Follow? An Update on Multijurisdictional Practice and the Unauthorized Practice of Law*, 12-3 ABA SEC. OF BUS. L. (2003), <http://www.abanet.org/buslaw/blt/2003-01-02/mcauliffe.html>.

54. See Am. Bar Ass’n, *supra* note 21, at 113.

55. See, e.g., McManus, *supra* note 19, at 542.

56. See, e.g., Green, *supra* note 11; Munneke, *supra* note 20, at 100.

freedom to practice law throughout the United States.<sup>57</sup> Scholars vary over what constitutes the ideal level of liberalization, with some arguing for complete deregulation of MJP<sup>58</sup> and others calling for more moderate reform that would allow lawyers to practice out of state only in limited circumstances.<sup>59</sup> Legal scholars favor liberalization for two primary reasons: (1) the effect of nationalization, globalization, and technology advances on the legal profession; and (2) the need for simpler, more transparent MJP rules.

### 1. NATIONALIZATION, GLOBALIZATION, AND TECHNOLOGY

One reason legal scholars cite in favor of liberalization is the need to make MJP rules consistent with and responsive to the demands of today's legal practice, which is increasingly nationalized, globalized, and connected by new technologies.<sup>60</sup>

The "reality now is that most lawyers do not limit their practice to one state and to the laws of one state."<sup>61</sup> As economies become more and more interwoven, clients are demanding complex legal services that cross state and national boundaries.<sup>62</sup> Recently, it was estimated that the global trade in legal services reached four hundred billion dollars, with the United States carrying roughly forty percent of that market (about one hundred ninety-two billion dollars).<sup>63</sup> Most scholars believe that the current cross-border practice "barely scratches the surface of what is to come."<sup>64</sup>

The increasing nationalization and globalization of the legal profession is occurring on a number of different levels. For one, many clients are engaging in

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57. To name just a few scholars who argue for liberalization: Abel, *supra* note 17; Barker, *supra* note 1; Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715 (1995); Gillers, *supra* note 9; McManus, *supra* note 19; Poser, *supra* note 1; Wolfram, *supra* note 1. As an example of the rare exception of a legal scholar who argues for the status quo, see, for example, Jennifer Kucklick Watson, *Protecting the Public Through the Legal Licensing System*, 1 FLA. COASTAL L.J. 547 (2000).

58. See, e.g., Abel, *supra* note 17 (arguing for wholesale deregulation).

59. See, e.g., Am. Bar Ass'n, *supra* note 21 (defending MODEL RULES OF PROF'L CONDUCT R. 5.5 (2007) [hereinafter MODEL RULES], which allows for only "temporary" out-of-state practice).

60. See, e.g., Brand, *supra* note 1, at 1136; Robert E. Lutz et al., *Transnational Legal Practice Developments*, 39 INT'L LAW. 619, 619 (2005); Turflier, *supra* note 25, at 1942-43; Stephen M. Worth, *The Transnational Practice of Law: Staggering Growth in Spite of Economic and Regulatory Barriers to Entry*, 7 GONZ. J. INT'L L. 5 (2003-2004).

61. Poser, *supra* note 1, at 1383; see also Wickerham, *supra* note 19, at 1914 ("[T]he practice of law crosses more state borders than at any time in United States history.").

62. See Randall S. Thomas et al., *Megafirms*, 80 N.C. L. REV. 115, 127 (2001).

63. Alison Hook, Head of Int'l Law Soc'y of Eng. & Wales, *Sectoral Study on the Impact of Domestic Regulation on Trade in Legal Services*, Presentation at the OECD & World Bank Sixth Services Experts Meeting: Domestic Regulation and Trade in Professional Services, at 11 (Feb. 15-16, 2007), available at [http://webdomino1.oecd.org/COMNET/ECH/SSEM.nsf/viewHtml/pdf/\\$file/Legal%20Services\\_web.pdf](http://webdomino1.oecd.org/COMNET/ECH/SSEM.nsf/viewHtml/pdf/$file/Legal%20Services_web.pdf).

64. See, e.g., Laurel S. Terry, *A Case Study of the Hybrid Model for Facilitating Cross-Border Legal Practice: The Agreement Between the American Bar Association and the Brussels Bars*, 21 FORDHAM INT'L L.J. 1382, 1384 (1998).

transactions that require advice on the laws of multiple foreign states or countries.<sup>65</sup> In addition, many law firms are expanding their physical presence by opening new offices in foreign states and countries.<sup>66</sup> Finally, many lawyers are travelling to foreign states and countries to provide legal work for both foreign and local clients.<sup>67</sup> As one scholar aptly summarizes, the single-state practitioner—a lawyer dealing solely in local law, serving only local clients, and operating from a single local office—is now a “myth.”<sup>68</sup>

In recognition of the extent and importance of cross-border legal practice, several World Trade Organization (WTO) countries signed an international treaty in 1994 known as the General Agreement on Trade in Services (GATS).<sup>69</sup> This treaty aims to eliminate unnecessary and overly burdensome restraints on the cross-border trade of services—including legal services.<sup>70</sup> To achieve its goal, Article IV of GATS requires that licensing and qualification regulations for lawyers be administered in a reasonable, objective, and impartial manner and must not be “more burdensome than necessary to ensure the quality of the [legal] service.”<sup>71</sup> Many legal scholars use GATS as evidence of the “heightened awareness” of the globalization of the legal profession and the ever-increasing need for liberalization of MJP rules.<sup>72</sup> However, although legal scholars maintain the hope that GATS will be a catalyst for liberalization,<sup>73</sup> so far the treaty has had little impact. This is primarily because countries, including the United States, can exempt and have exempted their current regulations from compliance with GATS.<sup>74</sup>

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65. See Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 NW. J. INT'L L. & BUS. 487, 492-93 (2003) [hereinafter Silver, *Regulatory Mismatch*]; Carole Silver, *Globalization and the U.S. Market in Legal Services—Shifting Identities*, 31 LAW & POL'Y INT'L BUS. 1093 (2000) [hereinafter Silver, *Shifting Identities*].

66. See Massimo Gelo Grosso, *Managing Request—Offer Negotiation Under the GATS: The Case of Legal Services* 7 (OECD Trade Policy, Working Paper No. 2, 2004).

67. See Council for Trade in Services, *Background Note by the Secretariat: Legal Services, S/C/W/43*, at 25 (July 6, 1998).

68. See Wolfram, *supra* note 1, at 670.

69. General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1167 (1994) [hereinafter GATS].

70. GATT Secretariat, *Services Sectoral Classification List*, MTN.GNS/W/120 (July 10, 1991). For a comprehensive overview of GATS and its application to legal services, see Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001).

Although the North American Free Trade Agreement (NAFTA) also calls for the liberalization of MJP rules, see Jaime Cortés Rocha, *Transnational Practice of the Legal Profession in the Context of the North American Free Trade Agreement (NAFTA)*, 15 INT'L L. PRACTICUM 111, 112 (2002), most scholars believe that GATS will “superced[e] NAFTA as the principal change agent,” see, e.g., George A. Reimer, *A State of Flux: Trends in the Regulation of Multijurisdictional Practice of Law*, 64 OR. ST. B. BULL. 19, 26 (2004).

71. See GATS, art. IV.

72. See Donald H. Rivkin, *Transnational Legal Practice*, 33 INT'L LAW. 825, 825 (1999).

73. See, e.g., Hopkins, *supra* note 37, at 653.

74. See Int'l Bar Ass'n, *GATS: A Handbook for International Bar Association Members* (2002).

Further contributing to the nationalization and globalization of legal services are communication and transportation technologies that make it easier for lawyers to travel to foreign jurisdictions and to communicate with clients in and from foreign jurisdictions. Technological innovations such as online databases, air transportation, fax machines, e-mail, and teleconferencing have hastened the arrival of the “eLawyering” era<sup>75</sup> and “loosened the ties of lawyers to particular jurisdictions, making the physical location of the lawyer, client, or hard-copy legal materials virtually irrelevant.”<sup>76</sup>

Given these dramatic changes in the legal profession, most legal scholars believe that the current MJP rules are “anachronistic and parochial”<sup>77</sup>—a “relic of a former world in which practicing law had smaller, local boundaries.”<sup>78</sup> These reformers advocate liberalization of MJP rules in order to better reflect the way in which legal services are actually demanded and delivered, rather than remaining stubbornly local in the face of widespread and irreversible change. MJP rules allowing lawyers to practice more freely throughout the nation and throughout the world, these scholars claim, would have several benefits. First, by according with what lawyers are actually doing, more liberal MJP rules would decrease the number of violations and minimize lawyers’ exposure to liability and potential sanctions.<sup>79</sup> Second, such reforms would better satisfy growing client demand for “integrated, efficient [legal] services” throughout the United States.<sup>80</sup> Finally, more liberal MJP rules would make the United States a stronger competitor in the global market for legal services and strengthen the ability of American clients to compete domestically and abroad in their businesses.<sup>81</sup>

## 2. AMBIGUITY AND LACK OF UNIFORMITY

Another common reason why legal scholars call for liberalization is the need to simplify MJP rules. Scholars generally agree that the current MJP rules are unnecessarily complicated, opaque, and varied, leading to confusion amongst even the best-intentioned attorneys over what constitutes a violation.<sup>82</sup>

Although every U.S. jurisdiction prohibits the “unauthorized practice of

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75. Allen W. Chiu, *The Ethical Limits of ELawyering: Resolving the Multijurisdictional Dilemma of Internet Practice Through Strict Enforcement*, 2004 UCLA J.L. & TECH. NOTES 1 (“The age of eLawyering has arrived.”).

76. Margulies, *supra* note 42, at 287.

77. Clark, *supra* note 19, at 263.

78. Silver, *Regulatory Mismatch*, *supra* note 65, at 490-91.

79. *See* Green, *supra* note 11.

80. Worth, *supra* note 60.

81. *See* Ann L. MacNaughton & Gary A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold?*, 47 LOY. L. REV. 665, 667-68 (2001); *accord* Grosso, *supra* note 66, at 7, 9.

82. *See, e.g.*, Green, *supra* note 11 (asserting that *none* of the UPL laws explain precisely what an out-of-state lawyer may or may not do); Johnstone, *supra* note 6, at 806 (“Much of the unauthorized practice of law is highly ambiguous, uncertain, and often unclear as to who is being prohibited from performing what kinds of legal

law,”<sup>83</sup> it is often far from clear exactly what constitutes the “unauthorized practice of law.” First, as a threshold matter, “practice of law” does not have a uniform meaning across states.<sup>84</sup> Even when states define “practice of law” similarly, courts in one state may apply that standard very differently—even inconsistently—from the courts in another state.<sup>85</sup> Therefore, some confusion arises from the simple fact that there are fifty-one different meanings of the “unauthorized practice of law.”

Second, even within a state, the unauthorized practice of law statutes can be ambiguous and lack specificity. In fact, some states do not even define the “practice of law” at all, leaving the cautious lawyer with nothing more than an “I know it when I see it” guess at what constitutes a violation.<sup>86</sup> The states that define what constitutes the “practice of law” often do so piecemeal from a number of different sources, including criminal statutes, civil statutes, administrative regulations, the state’s constitution, and court decisions,<sup>87</sup> requiring lawyers to do substantial and thorough research of a state’s MJP rules in order to fully protect themselves from liability.

Moreover, definitions of the “practice of law” are often phrased in vague and general terms. For example, some states define the “practice of law” as conduct that “demands the unique training and skills of an attorney.”<sup>88</sup> But in our law-dominated society, where “almost every significant financial decision has at least some legal element to it,”<sup>89</sup> how can a lawyer be sure which of those legal elements require the “unique training and skills of an attorney?”<sup>90</sup> Communication technologies raise additional questions. Insofar as out-of-state attorneys are prohibited from practicing law “in” a foreign jurisdiction, what constitutes “in?” For example, the California Supreme Court warned, in dicta, that “one may

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services.”); Silver, *Regulatory Mismatch*, *supra* note 65, at 520 (“The [MJP] rules are opaque, difficult to comprehend and, in some cases, impossible to apply in a way that offers transparency.”).

83. See *supra* note 34 & accompanying text.

84. See GEOFFREY C. HAZARD & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 46.3 (3d ed. Supp. 2003).

85. See Babb, *supra* note 14, at 535. For important cases in which courts held that an out-of-state lawyer violated MJP rules, see *Birbrower v. Superior Court*, 949 P.2d 1 (Cal. 1998), *superseded by statute*, CAL. CIV. PROC. CODE § 1282.4 (West 2007) (recognizing an exception to MJP rules for attorneys in arbitration proceedings); *Butler v. State*, 668 N.E.2d 266 (Ind. Ct. App. 1996); *Spivak v. Sachs*, 211 N.E.2d 329 (N.Y. 1965). For important cases in which courts held that an out-of-state lawyer did not violate MJP rules, see *Fought & Co. v. Steel Eng’g & Erection, Inc.*, 951 P.2d 487 (Haw. 1998); *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir. 1966); *Estate of Condon v. McHenry*, 76 Cal. Rptr. 2d 922 (Cal. Dist. Ct. App. 1998); *Fought & Co. v. Steel Eng’g & Erection, Inc.*, 951 P.2d 487 (Haw. 1998).

86. See Turfler, *supra* note 25, at 1908.

87. See Johnstone, *supra* note 6, at 806.

88. Hoppock, *supra* note 7, at 722.

89. HAZARD & HODES, *supra* note 84, § 46.4.

90. Generally, case law provides little guidance, because each case is decided on a highly contextualized basis with little application outside the case’s particular “facts and circumstances.” See David A. Gerregano, Annotation, *What Constitutes “Unauthorized Practice of Law” by Out-of-State Counsel*, 83 A.L.R. 5TH 497, § 2[b] (2000).

practice law in the state . . . although not physically present here by advising . . . by telephone, fax, computer, or other modern technological means.”<sup>91</sup> However, trying to determine the physical origin or destination of e-mails, for instance, may lead to “irrelevant legal fictions” and even more mayhem and uncertainty.<sup>92</sup>

Many legal scholars argue that liberalization would simplify MJP rules, increase transparency, and mitigate lack of uniformity. For example, complete deregulation would allow lawyers to practice anywhere in the United States without fear of sanction, thus providing a bright-line rule that eliminates confusion. Even less radical proposals, however, may minimize confusion by setting fewer traps for the unwary lawyer. A rule that allowed lawyers to practice out-of-state “temporarily,” for example, would not completely mitigate confusion but would provide a safe-harbor for at least some minimal legal activities performed in a foreign jurisdiction (such as a brief phone call). Therefore, in order to clarify MJP rules, many legal scholars favor liberalization.

#### B. THE STATES’ RESISTANCE TO LIBERALIZATION

States have been slow to respond to legal scholars’ calls for reform.<sup>93</sup> No state has endorsed total deregulation of the legal profession.<sup>94</sup> In fact, several states have made little or no changes in their MJP rules since the advent of the MJP debate decades ago.<sup>95</sup> Some of these states have set up committees to examine the issue and give the appearance of responsiveness, but for the most part, delay has been the name of the game.<sup>96</sup>

The greatest liberalization has come from those states that have enacted a statute based on Model Rule 5.5, which allows lawyers to provide out-of-state legal services on a “temporary basis” if those legal services “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.”<sup>97</sup> Even this change, however, is representative of the larger pattern of hesitation and resistance on the states’ parts. First, most states delayed enacting the statute until several years after the ABA’s initial endorsement of the

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91. *Birbrower v. Superior Court*, 949 P.2d 1, 5 (Cal. 1998), *superseded by statute*, CAL. CIV. PROC. CODE § 1282.4 (West 2007) (recognizing an exception to MJP rules for attorneys in arbitration proceedings).

92. See Ryan W. Hopkins, *Liberalizing Trade in Legal Services: The GATS, the Accountancy Disciplines, and the Language of Core Values*, 15 *IND. INT’L & COMP. L. REV.* 427, n.179 (2005).

93. See Munneke, *supra* note 20, at 101 (noting that “bar licensing authorities” often argue for maintaining the status quo).

94. Am. Bar Ass’n, *State Implementation of the ABA MJP Policies* (updated Apr. 9, 2008), <http://www.abanet.org/cpr/mjp/recommendations.pdf>.

95. See *id.*

96. See *id.*

97. MODEL RULES R. 5.5(c)(4).

rule.<sup>98</sup> Second, many legal scholars consider Rule 5.5 to be a relatively mild response to many of the more radical calls for total deregulation of MJP. Finally, many states enacted only a limited and more restrictive form of Rule 5.5.<sup>99</sup> For example, Connecticut approved a rule that applies a stricter standard than Rule 5.5, allowing temporary practice only for those legal services “substantially related [to] the services provided to an existing client.”<sup>100</sup> Connecticut also imposes further restrictions, allowing temporary practice only if the lawyer registers, pays a fee, and is licensed in a state that provides reciprocal treatment to Connecticut-licensed lawyers.<sup>101</sup>

There are two competing explanations for why states have been so hesitant to embrace the reforms that many legal scholars advocate. One explanation takes the states at their word; they are concerned about protecting the public from incompetent attorneys. The other explanation accuses the states of acting in their own self-interest to protect their lawyers from out-of-state competition.

#### 1. CONCERN FOR PROTECTION OF PUBLIC FROM INCOMPETENT LEGAL REPRESENTATION

The traditional justification given by states in defense of the status quo is the need to protect the public from incompetent lawyers.<sup>102</sup> “Competence” is considered one of the core values of the American legal profession,<sup>103</sup> and a state has an interest in guaranteeing that lawyers practicing within its borders satisfy a certain minimum level of competence. A state might have two distinct but related concerns about the competence of out-of-state lawyers.<sup>104</sup> The first is the concern that an out-of-state lawyer is simply incompetent to practice law in any state because the bar admission procedures in another state have been too lax.<sup>105</sup> The second is that an out-of-state lawyer may be competent to practice in her own state of licensure, but not competent to practice elsewhere because of a lack of knowledge and expertise on other states’ laws.<sup>106</sup> By simultaneously controlling its own admissions procedures for lawyers (e.g., the bar examination) and prohibiting the practice of law by out-of-state lawyers, a state can address both of

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98. See Am. Bar Ass’n Comm’n on Multijurisdictional Practice, Report to the House of Delegates (2002), <http://www.abanet.org/cpr/mjp/home.html> (Report 201B).

99. See *id.*

100. See Am. Bar Ass’n, *supra* note 94.

101. See *id.*

102. See MODEL RULES R. 5.5 (stating that the purpose of the rule is to protect “the public against the rendition of legal services by unqualified persons”); Benjamin Hoorn Barton, *Why Do We Regulate Lawyers? An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 435 (2001); Gerregano, *supra* note 90, § 2[a].

103. MODEL RULES R. 1.1.

104. See Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services*, 16 MICH. J. INT’L L. 941, 952 (1995).

105. See *id.*

106. See *id.*

these competence concerns by ensuring a minimum level of both general legal skills and specific knowledge of the state's case and statutory law.<sup>107</sup> By guaranteeing a minimum level of competence, a state is able to protect its citizens, who may be uninformed and unable to adequately determine the competence of lawyers on their own, from extremely incompetent legal representation.<sup>108</sup>

## 2. ECONOMIC PROTECTIONISM

Many legal scholars who favor liberalization have suggested that this public protection rationale is disingenuous—a mere pretext for economic protectionism of the legal profession. In other words, these scholars argue that states are not worried about protecting the public; they are worried about protecting in-state lawyers from competition by out-of-state lawyers.

In support of their claim that states' real motivation is economic protectionism, these scholars question the effectiveness of MJP rules in protecting the public from incompetent lawyers.<sup>109</sup> For example, some scholars point to the lack of concrete harm caused by out-of-state lawyers.<sup>110</sup> There is little empirical evidence demonstrating that out-of-state lawyers inflict any greater harm on clients than local lawyers.<sup>111</sup> Even the harm to clients from *non-lawyers*—which is almost certainly greater than the harm from out-of-state *lawyers*<sup>112</sup>—appears to be small. For example, one study found that only eleven percent of reported unauthorized practice of law cases against non-lawyers involved “specific allegations of harm.”<sup>113</sup>

The reason the harm from out-of-state lawyers is not likely to be significant, these scholars suggest, is that state licensure is not an accurate proxy for competence in the first place.<sup>114</sup> In-state lawyers can be incompetent on the laws of their state of licensure, and out-of-state lawyers can be competent on the laws of another state.

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107. See Am. Bar Ass'n, *supra* note 21, at 110.

108. See Jonathan B. Wilson, *Is Lawyer Licensing Necessary?*, May 19, 2006, <http://www.pointoflaw.com/feature/archives/2006/05/is-lawyer-licen-1.php>.

109. See, e.g., McManus, *supra* note 19, at 544-45 (arguing that “licensure does not ensure competency”); Poser, *supra* note 1, at 1394 (“[T]here is no concrete evidence that restricting multijurisdictional practice is a way to protect the public. Multijurisdictional practice is in no way an invitation to incompetence.”).

110. See, e.g., Needham, *supra* note 2, at 469 (“A more specific articulation of the precise harms that may befall consumers of legal services must be developed.”).

111. See Munneke, *supra* note 20, at 107.

112. See, e.g., Hoppock, *supra* note 7, at 736 (arguing for a bifurcated enforcement system that penalizes the unauthorized practice of law by non-lawyers more heavily than that by out-of-state lawyers, on the rationale that the harm from non-lawyers is likely greater).

113. See Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 34 (1981).

114. See Larry Ribstein, *Lawyer Licensing: There Must Be a Better Way*, May 22, 2006, <http://www.pointoflaw.com/feature/archives/2006/05/lawyer-licensin-1.php>.

For instance, some in-state lawyers may be incompetent because “entry standards are remarkably poor indicators of any particular competence to actually practice law . . . . Law school and bar passage guarantees a minimum of intelligence and ardor, but little in the way of concrete skills.”<sup>115</sup> Moreover, many scholars have noted that even if “entry regulations,” such as bar examinations, adequately test for competence in the first place, they nonetheless fail to account for “conduct regulation,” which would ensure *continued* competence as the laws of a state change and new lawyering skills become important.<sup>116</sup>

Conversely, out-of-state lawyers may be competent to practice law in another state. Lawyers frequently develop expertise and knowledge that extends beyond the geographical boundaries of their states of licensure.<sup>117</sup> For example, an out-of-state lawyer who specializes in corporate law is likely more competent to advise a board of directors on their fiduciary duties than an in-state lawyer who specializes in environmental litigation.<sup>118</sup> This is because the real value of a corporate lawyer is not her familiarity with the entire body of a particular state’s law but rather her experience using law strategically to help clients achieve their business objectives; this experience “enables [corporate lawyers] to export complex transactions and adopt them to local legal systems.”<sup>119</sup> Furthermore, if an out-of-state lawyer is not familiar with a particular state’s law, she can look it up—just like most in-state lawyers probably do.<sup>120</sup> Law schools throughout the nation teach the same basic research skills, and good lawyers are often defined by their ability to research and apply the law, not by their ability to memorize it. Legal search engines such as LexisNexis and Westlaw greatly facilitate this process by providing access to any state’s law, regardless of the lawyer’s physical location.<sup>121</sup>

Because MJP rules are not particularly effective in fulfilling their supposed purpose of protecting the public, many scholars argue that states must have another, hidden motive for disfavoring liberalization. This hidden motive, they claim, is economic protectionism—protecting the legal profession from competition by out-of-state lawyers. Representative of this view is Professor Charles W. Wolfram, who writes:

The reasons given for the restrictions [on the practice of law by out-of-state lawyers] are largely pious eyewash. The real motivation, one strongly suspects, has to do with cutting down on the economic threat posed for in-state

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115. Barton, *supra* note 22, at 1236-37.

116. See, e.g., Barton, *supra* note 102, at 433.

117. See Silver, *Regulatory Mismatch*, *supra* note 65, at 489.

118. See Milton C. Regan, Jr., *Professional Responsibility and the Corporate Lawyer*, 13 GEO. J. LEGAL ETHICS 197, 197 (2000) (noting the “specialization of lawyers in corporate practice”).

119. Silver, *Shifting Identities*, *supra* note 65, at 1096.

120. See McManus, *supra* note 19, at 544-45; see also Wolfram, *supra* note 1, at 674 (“[T]he fact that law applicable to a client’s situation is foreign is no excuse for not being competent in it.”).

121. See Daly, *supra* note 57, at 734.

lawyers—those who make the in-state rules on local practice—by competition with out-of-state lawyers.<sup>122</sup>

In support of their position, scholars draw attention to the “shameful and embarrassing history”<sup>123</sup> of bar admissions and MJP restrictions, which were instituted in response to elitism and outright bigotry. Elite lawyers lobbied for strict limitations on out-of-state lawyers’ ability to practice in-state as a result of their desire to protect themselves against an influx of competition from new law school graduates, many of whom were immigrants.<sup>124</sup>

The irony of using public protection as a guise for economic protectionism is that by doing so, states are actually harming the public. According to these scholars, the serious and concrete harms caused by economic protectionism far outweigh the exaggerated and imagined benefits of strict MJP rules.<sup>125</sup> There are at least three distinct harms from economic protectionism. First, it results in higher prices for legal services. By controlling entry into the market, in-state lawyers have an effective monopoly on legal services, allowing them to charge a price above the competitive price.<sup>126</sup> By making it more expensive to hire lawyers, some individuals are unable to afford legal representation at all, forced instead to resort to “self-help,” which might be even worse than having incompetent representation.<sup>127</sup> As Ribstein quips, “I’m reminded here of a study showing that regulation of electricians increased electric shocks to do-it-yourselfers.”<sup>128</sup>

Second, economic protectionism harms the public by leading to lower quality legal services. Disallowing competition by out-of-state lawyers diminishes the otherwise powerful incentives for in-state lawyers to be “more responsive to the

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122. Wolfram, *supra* note 1, at 679; *see also* SYDNEY M. CONE III, INTERNATIONAL TRADE IN LEGAL SERVICES § 3.1 (1996) (“Not infrequently, the local legal profession, in the name of protecting ‘the public,’ has done a mighty fine job of protecting itself.”); Poser, *supra* note 1, at 1390-91 (“A state that adopts a rule permitting multijurisdictional practice benefits lawyers from every other state but its own.”).

123. McManus, *supra* note 19, at 535.

124. *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976).

125. *See, e.g.*, Anthony E. Davis, *Multijurisdictional Practice by Transactional Lawyers: Why the Sky Really Is Falling*, 11 No. 2 PROF. LAW. 1 (Winter 2000); George C. Leef, *Lawyer Fees Too High? The Case for Repealing Unauthorized Practice of Law Statutes*, 20 REG.: CATO REV. BUS. & GOV’T. (Winter 1997), <http://www.cato.org/pubs/regulation/regv20n1/reg20n1c.html>.

126. *See* John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 92-93 (2000); Frank H. Stephen & James H. Love, *Regulation of the Legal Profession* (1999), <http://www.scribd.com/doc/239528/Regulation-of-the-Legal-Profession>.

127. *See* Barton, *supra* note 102, at 441-42; Christopher Curtan, *The American Experience with Self-Regulation in the Medical and Legal Professions*, in REGULATION OF PROFESSIONS: A LAW AND ECONOMICS APPROACH TO THE REGULATION OF ATTORNEYS AND PHYSICIANS IN US, BELGIUM, THE NETHERLANDS, GERMANY, AND THE UK 47 (Michael Faure et al. eds., 1993).

128. Ribstein, *supra* note 114.

needs of clients” and to increase their “capabilities, knowledge, and service.”<sup>129</sup>

Finally, economic protectionism potentially denies clients the freedom to choose their own lawyer—a “fundamental precept of the American legal system.”<sup>130</sup> For example, MJP rules may force a client to hire an in-state lawyer over an out-of-state lawyer with whom she has a prior history of representation and an established relationship of trust and confidence. Courts have long acknowledged that this freedom of choice is not to be taken lightly. For example, the New Jersey Supreme Court stated that “[Clients’] freedom of choice in the selection of their counsel is to be highly regarded and not burdened by ‘technical restrictions which have no reasonable justification.’”<sup>131</sup> Moreover, hiring two (or more) lawyers—an in-state and an out-of-state lawyer—creates inefficiencies and repetition.<sup>132</sup> Both lawyers will have to be brought up to speed on the client’s situation, perform somewhat overlapping research on the issue, and charge the client twice for these similar services.<sup>133</sup>

#### IV. THE “MIDDLE” WAY: A LEGAL REALIST SOLUTION

Currently, the MJP debate is stagnated. Both sides—the legal scholars and the states—simply talk past one another, failing to provide any mutually satisfying solutions. To the extent that strict MJP rules fail to respond to the nationalization and globalization of the legal profession and clarify the current set of MJP rules, legal scholars are dissatisfied, and to the extent that liberalized MJP rules do not account for public protection, the states are dissatisfied.

In order to move the debate forward, any workable solution must take account of both sides’ concerns. Legal scholars have convincingly argued that reform is necessary. However, while states admittedly may have mixed motives in maintaining the MJP status quo, legal scholars’ accusations that states are acting in bad faith, feigning a concern for the public, do not make the states’ public protection objection to liberalization any less valid. Therefore, both as a practical matter (to garner state support for MJP reform) and as a theoretical matter (to create MJP rules that do, in fact, adequately protect the public), any successful MJP reform must respond to the need to protect the public from incompetent lawyers. In order to harmonize these two competing goals of liberalization and public protection, this Note departs from the all-or-nothing approach to MJP rules endorsed by previous legal scholarship. Rather than argue for liberalization in all

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129. See Chapman & Tauber, *supra* note 104, at 954.

130. See MacNaughton & Munneke, *supra* note 81, at 683.

131. Estate of Waring v. Sykes, 221 A.2d 193 (N.J. 1966); see also Margulies, *supra* note 42, at 290 (suggesting that permitting clients to secure their choice of counsel “promotes values of human autonomy at the heart of our political and legal system”).

132. The ABA acknowledges that the costs of such inefficiencies are “real, not merely hypothetical.” See Am. Bar Ass’n, *supra* note 21, at 117.

133. See Hinderks, *supra* note 19, at 20.

cases or in no cases, this Note argues for liberalization in some cases—those cases in which liberalization is possible without sacrificing public protection.

More specifically, this Part proposes that lawyers be permitted to practice freely throughout the United States, without MJP restrictions, only in connection with their representation of *sophisticated* clients. Lawyers representing *unsophisticated* clients, on the other hand, would have to abide by the current MJP restrictions. This approach is consistent with a legal realist framework for the regulation of the legal profession, because it is both (1) purposive, in that it is consistent with the purpose of MJP rules to ensure competence of lawyers; and (2) middle-level contextual, in that it tailors MJP rules to relevant contextual differences between clients.

This legal realist approach to MJP rules has several benefits. First, it is appealing on a practical level. Because it simultaneously responds to the concerns and arguments of both legal scholars and states, it provides an opportunity to advance the MJP debate and effect real MJP reform. Second, it is appealing on a theoretical level, because it achieves the benefits of liberalization without sacrificing public protection. Sophisticated clients are informed enough and protected enough to decide for themselves whether a particular lawyer is competent or not and therefore do not need MJP rules' assurance that a particular lawyer is competent.

#### A. MORE SOPHISTICATED CLIENTS JUSTIFY MORE LIBERAL MJP RULES

In order for a proposal to properly take account of the concern over protecting the public from incompetent lawyers, it is important to first understand that concern. Those who believe that strict MJP rules are necessary to protect the public implicitly assume two facts: (1) that the legal market is subject to serious information asymmetries, and (2) that incompetent lawyers can inflict irreversible or irremediable harms upon clients.<sup>134</sup> To the extent that these assumptions are not applicable to a particular client, strict MJP rules are not justified (and therefore liberalization is defensible). Generally speaking, the more sophisticated the client, the less likely these assumptions are to be correct.

If there are significant information asymmetries in the market for legal services, strict MJP rules are justified in order to protect clients—and lawyers. With regard to clients, if a client lacks the information to judge, *ex ante*, which lawyers will likely provide him with quality legal representation, strict MJP rules protect him by guaranteeing a minimum level of competence of all the lawyers available for hire. With regards to clients *and* lawyers, strict MJP rules prevent a

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134. See Barton, *supra* note 102, at 435.

“market for lemons.”<sup>135</sup> In a market for lemons, consumers are willing to pay high prices for high-quality legal services, but because consumers lack the information necessary to predict high quality *ex ante*, consumers will assume that the services they are purchasing are “average” and thus be willing to pay for only “average”-quality legal services. As a result, the price of legal services will be driven down, and high-quality lawyers will be driven from the market, creating a domino effect that ultimately leaves only the lowest-quality lawyers in the market.<sup>136</sup> This adversely affects those consumers willing to pay for high-quality legal services, as well as those high-quality lawyers driven from the market.

To the extent that there are *not* significant information asymmetries, however, strict MJP rules are not justified and liberalization is appropriate. Without information asymmetries, clients do not need MJP rules’ assurance that a lawyer is competent; clients can simply use the information available to decide for themselves who is competent and who is not. The higher the quality lawyer, the higher the price, thereby ensuring that clients will “get what they paid for.”<sup>137</sup>

The assumption that information asymmetries exist applies with the most force to unsophisticated clients. The quintessential unsophisticated client is an individual who is not wealthy enough to invest a lot of money in the search for a lawyer, has little or no legal education or knowledge, and is hiring a lawyer for the first time. These characteristics are often interrelated. For example, an individual is far more likely than a corporation or other entity to be hiring a lawyer for the first time. In fact, one-third of all individuals who hire legal services do so only once, and only ten percent hire more than three lawyers in their lifetime.<sup>138</sup>

These relatively unsophisticated clients may lack information necessary to select a competent lawyer.<sup>139</sup> In searching for a lawyer, they may lack the information (or the ability to obtain information) about a particular lawyer’s competence, practice area expertise, or likelihood of rendering quality services.<sup>140</sup> Moreover, once the lawyer is hired, these individuals may lack information that would enable them to evaluate the quality of legal services

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135. The economic phenomenon known as the “market for lemons” was first identified and described by George A. Akerlof in *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECONOMICS 488 (1970). The classic example of the market for lemons is the market for used cars. *Id.*

136. See Frank H. Stephen & Christopher Burns, *Liberalization of Legal Services*, Institute for Law, Economy and Global Governance, <http://www.seco.admin.ch/themen/00374/00459/02061/index.html?lang=de&download=NHZLpZig7t,lnp6I0NTU042l2Z6ln1acy4Zn4Z2qZpnO2Yuuq2Z6gpJCEdHt8gGym162dpYbUzd,Gpd6emK2Oz9aGodetmqaN19XI2IdvoaCVZ,s->. It should be noted that in a *true* market for lemons, a no-trade equilibrium would be reached eventually. However, the phrase “market for lemons” still may be used to describe something short of that. See Akerlof, *supra* note 135.

137. See Barton, *supra* note 102, at 435.

138. Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 540 (1994).

139. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 829 (1992).

140. See *id.*

performed.<sup>141</sup> This is particularly problematic with the market for legal services, because unlike the market for other goods, individual clients may not know quality when they see it; a good legal outcome does not necessarily signal a competent lawyer, and a negative legal outcome does not necessarily signal an incompetent lawyer.<sup>142</sup> Making individual clients even more vulnerable is the fact that such informational asymmetries may put such clients at a bargaining disadvantage with their “expert” lawyers.<sup>143</sup> In light of the significant information asymmetries faced by unsophisticated individual clients, strict MJP rules may be justified, by guaranteeing that any lawyer hired will have a minimum level of competence.

By contrast, sophisticated clients do not suffer from serious information asymmetries. The epitome of a sophisticated client is often a multinational corporation, financial institution, government entity, or a large association or organization, including certain limited liability companies, limited partnerships, and partnerships.<sup>144</sup> First of all, these clients are often well-advised. Most corporations have in-house counsel fully capable of determining the likely competence of a lawyer *ex ante*, monitoring the conduct of lawyers throughout their employment, evaluating the quality of legal services provided *ex post*, and reviewing legal bills to ensure fair pricing.<sup>145</sup> Moreover, these clients may interact frequently with one another, sharing and rapidly circulating information and feedback about which lawyers are particularly adept and which lawyers fall short.<sup>146</sup> As a result, lawyers will have extra incentive to be on their best behavior once hired, because they will be aware of reputational effects that arise from dealing with clients who exchange information about the quality of their legal services.<sup>147</sup> Second and importantly, these clients are often “repeat players” who hire lawyers on a regular or continual basis,<sup>148</sup> many enjoying long-standing relationships with law firms.<sup>149</sup> Therefore, if the client is unhappy with the competence of the lawyer, it will simply take its business elsewhere in the future.<sup>150</sup> Finally, when the client is particularly sophisticated, bargaining power is likely to favor the client—not the lawyer.<sup>151</sup> Because market forces operate

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141. *See id.*

142. *See* Wilson, *supra* note 108.

143. *See* Cramton, *supra* note 138, at 540.

144. *See* Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 139 (2001).

145. *See* Abel, *supra* note 17, at 751.

146. *See id.*

147. *See* Stephen & Love, *supra* note 126, at 989.

148. *See id.*

149. This is particularly true of major investment banks. *See* Silver, *Shifting Identities*, *supra* note 65, at 1096.

150. *See* Margulies, *supra* note 42, at 310.

151. *See* Cramton, *supra* note 138, at 539 (“[L]arge-firm corporate lawyers wield relatively little influence over their powerful, informed, and wealthy clients.”).

well and with few information asymmetries, liberalization of MJP rules is appropriate with regards to sophisticated clients. The client—not the state—is in the best position to judge the probable competence of a lawyer. In fact, such sophisticated clients are “generally at least as adept at assessing the quality of legal services as are law firms themselves.”<sup>152</sup> One scholar eloquently summarized: “It is disingenuous to argue that strict qualifications are needed to protect the likes of Mitsubishi Bank and IBM, as the consumers of legal services, from incompetent lawyers.”<sup>153</sup>

The second of these assumptions asserts that to the extent that incompetent legal representation may cause irreparable harm to clients, strict MJP rules are appropriate as *ex ante* guarantees of competence, thus acting as a preventive measure. However, if the clients’ harm from incompetence can be remedied with monetary damages, *ex post* liability controls, such as malpractice suits, are preferable to *ex ante* guarantees of competence.<sup>154</sup> This is because MJP rules impose only costs and no gains if any harm from incompetence can be eliminated after the fact.

This second assumption also applies with the most force in the case of unsophisticated individual clients. First, for individual clients, *ex post* liability controls may be inadequate, because individual clients often are not experienced enough with purchasing legal services to know when they have been the victims of malpractice.<sup>155</sup> Second, *ex post* liability suits may be unaffordable for the typical individual client. In order to justify a suit, the probable damages must be sufficiently large and certain. Individuals may have smaller damage awards and little money to spend on litigation.<sup>156</sup> Third and finally, monetary damages may not adequately compensate individual clients for harm caused. For such clients, “the cost of sampling an attorney’s services (and the possible consequential damages if the attorney proves to be unskilled) could be disastrously high.”<sup>157</sup> This may be particularly true for the type of litigation more often engaged in by less sophisticated individuals—i.e., “personal plight” litigation, such as criminal prosecutions, custody battles, physical injury suits, and threatened loss of employment or property.<sup>158</sup> These suits are high-stakes and may affect an individual profoundly, both financially and emotionally. For example, an adverse judgment for an individual client may lead to financial ruin or life in prison or

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152. Silver, *Regulatory Mismatch*, *supra* note 65, at 510.

153. John Haley, *The New Regulatory Regime for Foreign Lawyers in Japan: An Escape from Freedom*, 5 UCLA PAC. BASIN L.J. 1, 14 (1986).

154. See Barton, *supra* note 102, at 435.

155. See Wilkins, *supra* note 139, at 831.

156. See *id.*

157. See Wilson, *supra* note 108.

158. See Cramton, *supra* note 138, at 545-46.

even capital punishment. Such harms are potentially “impossible to correct.”<sup>159</sup>

In contrast, sophisticated clients may be less likely to suffer irreversible harm as a result of incompetent lawyering and therefore more likely to be adequately compensated with monetary damages. First, because they are well-advised, they are more likely to know when they have been represented incompetently.<sup>160</sup> Second, unlike individuals, sophisticated corporate clients are more likely to have probable damage awards high enough to justify bringing a malpractice claim and the money with which to fund that claim.<sup>161</sup> Moreover, because they can credibly threaten malpractice suits, they are more likely than less sophisticated individual clients to extract a favorable settlement.<sup>162</sup> Finally, monetary damages may often be sufficient for corporate sophisticated clients who, by definition, cannot be affected “personally” by such harms.<sup>163</sup> Furthermore, a well-advised and wealthy client can buy insurance to cover the risks of incompetent legal representation.<sup>164</sup>

Last of all, as a practical matter, it is worth noting that it is often the most sophisticated clients that are demanding cross-border legal services in the first place. Most of the demand for lawyers to work out of state comes from corporate clients, large banks, and other large institutional clients who do complex business transactions on a national and global basis.<sup>165</sup> For example, merger and acquisition (M&A) transactions—one of the biggest drivers of cross-border work—typically require lawyers to travel out of state and to advise on the laws of several jurisdictions.<sup>166</sup> For instance, a financing document might be governed by New York law, an underlying contract by French law, and a security offering by Russian law.<sup>167</sup> Furthermore, most law firms who open out-of-state offices do so to serve corporate clients, often in major financial centers such as New York and London.<sup>168</sup>

In summary, the two circumstances under which strict MJP rules are justified—information asymmetries and irremediable harm—are not present in the case of well-advised, wealthy, sophisticated, repeat clients such as corporations—those most likely to be in need of cross-border legal services. The two circumstances are, however, likely to be present in the case of uninformed, not

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159. See *id.*; see also Barton, *supra* note 102, at 440 (“[S]ome potential harms, notably those involved in criminal defense work, are potentially irremediable and may justify regulation.”).

160. See Abel, *supra* note 1, at 751.

161. See Wilkins, *supra* note 139, at 832.

162. See *id.*

163. See Barton, *supra* note 102, at 440.

164. See *id.*

165. See Council for Trade in Services, *supra* note 67, at 6-8; Thomas et al., *supra* note 62, at 127; Worth, *supra* note 60.

166. See David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transactional Arenas*, 44 CASE W. RES. L. REV. 407, 437-38 (1994).

167. See Silver, *Regulatory Mismatch*, *supra* note 65, at n.6.

168. See Abel, *supra* note 1, at 743.

wealthy, unsophisticated, one-shot clients such as individuals. Therefore, liberalization of MJP rules is appropriate in the case of sophisticated clients, but not unsophisticated clients.

#### B. A LEGAL REALIST PROPOSAL EMPHASIZING PURPOSIVISM AND CONTEXTUALISM

Other MJP scholars have pointed out the differences between sophisticated and unsophisticated clients.<sup>169</sup> However, the MJP scholarship thus far has nonetheless concluded with either a wholesale recommendation of liberalization for all clients or a wholesale condemnation of liberalization for all clients.<sup>170</sup>

Those who argue in favor of the status quo often acknowledge that sophisticated clients do not need the protection of strict MJP rules; but because some clients do need such protection, these scholars nonetheless conclude that strict MJP rules are justified for all client types. For instance, Wilson recognizes that “[t]hose corporations who purchase legal services from the AmLaw 100 probably would not notice a difference if lawyer licensing were eliminated,”<sup>171</sup> but concludes that strict MJP rules are nonetheless justified to protect the many legal consumers ill-equipped to evaluate the competence of attorneys—a goal whose importance overwhelms any potential benefits of liberalization.

Conversely, those who argue in favor of liberalization often acknowledge that unsophisticated clients do need the protection of strict MJP rules; but because a larger number of clients do not need such protection, these scholars nonetheless conclude that strict MJP rules are unjustified for all client types. For example, these scholars recognize that liberalization will harm a small percentage of clients, but emphasize that these clients make up only a tiny fraction of the total demand for legal services.<sup>172</sup> After all, highly sophisticated corporate clients consume more than half of all legal services in the United States.<sup>173</sup>

However, there is no reason that MJP rules cannot distinguish between

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169. No previous scholarship has argued, as I do, that the relative strictness of MJP rules ought to be tailored to client type. It should be noted, however, that at least one legal scholar has suggested that sanctions for violations of MJP rules ought to be harsher for lawyers violating MJP rules in order to represent individual clients than for lawyers violating MJP rules in order to represent corporate clients. *See, e.g.,* Wilkins, *supra* note 139. In other words, while I argue that MJP rules themselves ought to be less strict with regards to corporate clients, this scholar argues that the punishment for violations of MJP rules ought to be less strict with regards to corporate clients. *See id.*

170. For instance, Professor Abel recognizes the differences between the typical savvy corporate client and the typical unsophisticated individual client, but nonetheless argues for deregulation of the entire legal profession—not just with regards to the sophisticated clients. *See* Abel, *supra* note 1. For other examples, see Barker, *supra* note 1; Barton, *supra* note 22; Margulies, *supra* note 42.

171. Jonathan B. Wilson, *There Is a Better Way: Litigation Reform and Reinvigorated Lawyer Licensing* (May 22, 2006), <http://www.pointoflaw.com/feature/archives/2006/05/there-is-a-bett.php>.

172. *See, e.g.,* Clark, *supra* note 19, at 264.

173. James W. Jones, *Future Structure and Regulation of Law Practice: An Iconoclast's Perspective*, 44 ARIZ. L. REV. 537, 541-43 (2002).

relevant client differences. To the extent that the current MJP scholarship is based upon a “one-size-fits-all conception of the [legal] profession and its clientele,”<sup>174</sup> this Note departs from that scholarship. Rather, this Note proposes a more nuanced approach that tailors MJP rules to the sophistication of the client. Specifically, lawyers representing sophisticated clients ought to be permitted to practice throughout the United States, without any MJP restrictions, for any matters connected to their representation of sophisticated clients. Lawyers representing unsophisticated clients, by contrast, ought to be limited in their ability to practice law out of state, subject to the existing set of MJP regulations.

This approach is consistent with the legal realist framework created by David Wilkins specifically for rules regulating lawyer conduct.<sup>175</sup> This framework emphasizes two goals of any workable professional regulation. First, Wilkins advocates purposivism, arguing that professional regulation should be designed in a way that allows lawyers to fulfill the public purposes that those legal rules are designed to further. This proposal meets such a test. MJP rules are intended to ensure competence of lawyers.<sup>176</sup> As one scholar writes, “[t]he focus of any inquiry about multijurisdictional practice should be on the competent representation of the client.”<sup>177</sup> By tailoring MJP rules to relevant differences in a client’s ability to judge lawyer competence, this proposal is purposive.

Second, Wilkins emphasizes a “middle-level” approach that tailors professional regulation to relevant contextual differences. As one potential relevant contextual difference, Wilkins cites “client (for example, individual versus corporate)” distinctions.<sup>178</sup> In fact, he notes that client distinctions may be “the most important factor in determining a given lawyer’s status, work, and professional commitments,” and therefore, “must become part of the regulatory process.”<sup>179</sup> In determining whether a distinction such as client type is contextually relevant, Wilkins suggests looking to the purpose of the rule. Here, differences between sophisticated and unsophisticated clients are perhaps the most determinative factor in whether the client is able to correctly judge a lawyer’s competence without the protection of MJP rules. Therefore, this proposal also satisfies the contextualist prong of Wilkins’ legal realist framework.

By providing a pragmatic solution that potentially appeases both legal scholars and states, this legal realist approach offers the opportunity to move beyond the current stalemate toward long-awaited MJP reform.

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174. Silver, *Regulatory Mismatch*, *supra* note 65, at 8.

175. Wilkins, *supra* note 32.

176. See MODEL RULES R. 1.1.

177. Brand, *supra* note 1, at 1166.

178. See Wilkins, *supra* note 32, at 517.

179. *Id.* at n.215.

### C. RESPONSE TO AN ANTICIPATED OBJECTION: THE LINE-DRAWING PROBLEM

One might object to this proposal because it causes line-drawing difficulties. In order to determine whether a lawyer is violating MJP rules, one first must determine whether the lawyer is representing a sophisticated or unsophisticated client. Instead of minimizing the uncertainty and ambiguity already present in MJP rules, one might claim that this proposal would enhance it. Moreover, one might object that clients' relative sophistication is best conceptualized as a continuum from more to less sophisticated and thus cannot accurately be classified as a simple black-and-white dichotomy of either sophisticated or unsophisticated.

While this objection is understandable, the proposal described above would result in only a minimal amount of practical difficulties and uncertainty. First, any uncertainty could be mitigated by creating clear standards for lawyers that set out the factors considered in determining whether a client is sophisticated or not. Overall, a determination of whether a particular client is sophisticated should be driven by the policy of MJP rules: to protect clients from incompetent lawyers. This is consistent with the purposivist goal of Wilkins' legal realist framework, which designs professional regulation in a way that allows lawyers the freedom to exercise discretion in a way that furthers the goals of the rules.<sup>180</sup> Therefore, in deciding whether a particular client is sophisticated or not, lawyers (and courts evaluating lawyers' conduct) ought to ultimately ask the question: was this client of the type who needed the protection of MJP rules in these particular circumstances?<sup>181</sup> Factors in the analysis would include the client's legal knowledge and education, wealth, institutional status, access to and utilization of more knowledgeable and experienced advisors, experience in hiring lawyers, the type of litigation (e.g., personal plight versus non-personal plight), and possible outcomes of litigation (with an eye toward the ability of potential harm to be remedied monetarily).

Any resultant uncertainty would be preferable to the current uncertainty that arises when a lawyer represents *any* client.<sup>182</sup> Moreover, the law frequently confronts the problem of turning shades of gray into a black-and-white dichotomy. Admittedly, it would be more accurate to classify clients based on degree of sophistication, rather than simply making a judgment call whether they

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180. *See id.* at 505-06.

181. Such an analysis should be conducted by answering that question based on facts actually or constructively known at the time the lawyer was hired, rather than with a court's benefit of hindsight.

182. There will be a significant number of cases in which the sophistication of the client would not be in serious dispute. For example, a corporation, large financial institution, government entity, or other large and well-advised organization would, almost without exception, be sophisticated. Conversely, an individual hiring a lawyer for the first time with no particular legal knowledge or education would almost certainly be unsophisticated.

fall closer to the “sophisticated” end of the continuum or fall closer to the “unsophisticated” end of the spectrum. However, this is the nature—and beauty—of the “middle” approach.<sup>183</sup> The middle-level approach attempts to balance the advantages and disadvantages of a bright-line rule that is necessarily over- and under-inclusive with the advantages and disadvantages of a case-by-case approach that takes into account a limitless number of contextual differences. More specifically, this proposal sacrifices some predictability by foregoing a bright-line rule that would allow multijurisdictional practice without restriction for all clients, for example, and also sacrifices some accuracy by foregoing a sliding-scale approach that would adjust MJP rules’ strictness inversely with the client’s relative sophistication. However, by aiming somewhere in the “middle” of these two extremes, this proposal moves closer to the accuracy of a case-by-case approach than a bright-line rule without creating the significant unpredictability and analytical difficulties inherent in a sliding-scale, case-by-case approach.

## V. CONCLUSION

MJP reform is long overdue.<sup>184</sup> The MJP debate has persisted now for years, and lawyers are not in a (much) better place now than they were years ago.<sup>185</sup> One scholar analogizes the current state of MJP to the famous Chicken Little story, claiming that this time, the “sky really is falling.”<sup>186</sup> Over six years ago, a practicing attorney made the call for reform most compellingly:

We can no longer be content to let sleeping dogs lie or suggest that our system and clients aren’t harmed by the reality that every lawyer in America seems content to flaunt the [unauthorized practice of law] rules when it suits them . . . . The issue is not will there be change and will the change be good. The practice has dramatically changed and will never be as it once was. The change has occurred and must be addressed . . . . The only real question is “how.”<sup>187</sup>

This Note provides a fresh look on the question of “how,” and importantly, emphasizes the significance and urgency of the MJP issue for practicing attorneys. This reform proposal would liberalize MJP rules, allowing lawyers to

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183. *Id.* at 516.

184. In 2000, Green stated that “responding to [the problem of MJP] is a matter of some urgency for the bench and bar.” Green, *supra* note 11.

185. See, e.g., Norman M. Krivosha, *The Case for Multijurisdictional Practice of Law in the United States*, 2001 PROF. LAW. 45, 60 (“The time has come for the bar to recognize that the problem has existed for a long time and has been ignored to the detriment of our professionalism and the clients and society we purport to serve. Articles on the various aspects of the subject have been written for fifty years with little or no changes taking place.”).

186. Davis, *supra* note 125.

187. Krivosha, *supra* note 185, at 46.

practice anywhere in the United States, only with regard to those lawyers representing sophisticated clients who, unlike unsophisticated clients, do not need the protection and assurance that MJP rules are meant to provide. By simultaneously addressing the concerns of the legal reformists (to reflect the current demands of the legal practice and to clarify existing rules) and the states (to ensure protection of clients), this proposal offers a practical policy solution—a “middle” ground—that has the potential to end the stalemate once and for all.