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REGULATING IN-HOUSE COUNSEL: A CATHOLICON OR A NOSTRUM?

DANIEL A. VIGIL*

I. INTRODUCTION

What is and what is not the unauthorized practice of law has long been difficult, if not impossible, to define. Unauthorized practice of law committees and courts have frequently grappled with the issue. Specifically, are corporate in-house counsel participating in the unauthorized practice of law when they are assigned to work in a jurisdiction where they are not licensed? This issue has never been fully resolved.

The American Bar Association has sidestepped the issue, although it has had a number of opportunities to address it. The ABA Code of Professional Responsibility and the ABA Model Rules of Professional Conduct provide little guidance. They simply state that “[a] lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.”

In the absence of guidance from the ABA, states confronting the question have reached very different conclusions.

II. METHODOLOGY

In an attempt to explore this issue, a student at the University of Colorado Law School posed a hypothetical question to the chief justices

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1. One author explained the difficulty:

[S]ome 37 states make unauthorized practice a misdemeanor; others regard it as contempt of court. The most striking common feature of these prohibitions is their broad and largely undefined scope. A number of jurisdictions simply proscribe, without defining, the practice of law. Others employ a circularity scarcely less cryptic: The practice of law is what lawyers do.


2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5(a) (1992); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101(B) (1990).
of the fifty state supreme courts and the Chief Judge of the District of Columbia Court of Appeals:3

Is it the unauthorized practice of law for an attorney working for a corporation in your state, which has offices in other states, to furnish legal advice, draft documents, and/or interpret and give legal advice with respect to both state and federal law if s/he is not licensed in your state, but is licensed in another jurisdiction?

Representatives from thirty jurisdictions responded; twenty-one did not. Fifteen of those who did respond were unwilling or unable to answer the question posed. The other fifteen answered the question to some degree.4

Independent research was conducted regarding the jurisdictions that did not respond or responded without answering the hypothetical. The little amount of information that was discovered is discussed in this Article.

3. Though the letters containing the hypothetical were addressed to the chief justices of the various courts, many were forwarded to a more appropriate entity and responses were provided from various representatives of the 51 jurisdictions.

4. The 21 jurisdictions not responding were:
   
   Alaska  Mississippi  Pennsylvania  
   Arizona  Nevada  South Carolina  
   California  New Jersey  Texas  
   Idaho  New Mexico  Utah  
   Iowa  New York  Vermont  
   Kentucky  North Carolina  Virginia  
   Michigan  Ohio  Washington

The 15 jurisdictions responding but failing to answer the question were:

Arkansas  Louisiana  North Dakota  
Colorado  Maine  Oklahoma  
Connecticut  Maryland  Oregon  
Delaware  Montana  Wisconsin  
Hawaii  New Hampshire  Wyoming

The remaining 15 jurisdictions responded and answered the question to some degree. Those jurisdictions were:

Alabama  Indiana  Nebraska  
District of Columbia  Kansas  Rhode Island  
Florida  Massachusetts  South Dakota  
Georgia  Minnesota  Tennessee  
Illinois  Missouri  West Virginia
III. CURRENT STATE OF THE LAW

A. States Answering the Hypothetical Negatively

1. States That Submitted Written Responses

Representatives from three states, Alabama, Nebraska, and South Dakota, answered the hypothetical in the negative, indicating that they did not believe that the facts posited in the hypothetical constituted the unauthorized practice of law. Alabama's representative sent a letter in which he stated:

[I]t would not be the unauthorized practice of law for a non-licensed attorney to give legal advice to a corporation if employed on a full-time basis and not involving active participation in the courts. This opinion is consistent with advice rendered by this office over the past several years to corporate counsel. We have advised non-Alabama lawyers that they may be employed as corporate counsel and provide legal advice on corporate matters so long as they were full-time corporate employees and not involved in active litigation.5

His letter referred to a formal ethics opinion of the Disciplinary Committee in Alabama.6 The opinion suggests that making court appearances would not be permitted.

Nebraska's representative responded by merely writing, "[M]y sense is that the factual situation stated in your letter would not be considered to be the unauthorized practice of law."7

The representative from South Dakota indicated that South Dakota does not have any reported cases or statutes that would prohibit a corporation from utilizing the services of a staff attorney to conduct its legal affairs.8 However, he stated:

[T]he Consumer Protection Committee, which has responsibility for unauthorized practice of law matters within the State Bar, would be of the opinion that the general common law governs the question. We are of the view that the rule is that a corporation may use a staff attorney to conduct its own legal affairs, and that a staff attorney, so long as his or her practice is restricted to render-

7. Letter from Dennis G. Carlson, Counsel for Discipline, Nebraska State Bar Association, to Stacy L. Russell, Research Assistant (Sept. 22, 1992) (on file with author). The letter also stated, "[W]e have no case law or Advisory Opinions addressing this issue. . . ." Id.
ing legal services to his or her employer, and does not include making appearances in the Courts of the State of South Dakota, need not be licensed in any jurisdiction.9

2. States That Suggest a Negative Response

In New Jersey, the hypothetical would likely be answered in the negative. An opinion of the New Jersey Supreme Court Committee on the Unauthorized Practice of Law addressed an almost identical hypothetical question in 1975.10 The Committee wrote:

[I]t is the opinion of this Committee that a lawyer admitted in another state or the District of Columbia, not admitted to practice in New Jersey, employed by a person, firm, association or corporation in an office in New Jersey, is not engaged in the unauthorized practice of law as long as such lawyer:

1. Is employed solely by such employer.
2. Confines his legal activities only to the business of such employer and receives his entire compensation only from that employer.
3. Does not render legal services, for a fee or otherwise, to others, including other employees of his employer, and his employer makes no charge to others for his services.
4. Does not appear before any quasi-judicial body or in any court of this state on behalf of his employer . . . .11

Additionally, North Carolina would probably not consider the facts of the hypothetical to constitute the unauthorized practice of law. In 1990, the secretary to the State Bar of North Carolina wrote to a Connecticut lawyer in response to a question similar to the one posed for this Article. He wrote, "[T]his is to advise you that House Counsel does not have to be licensed in North Carolina . . . ."12

Likewise, the Rules of the Virginia Supreme Court define the practice of law in a way that excludes those advising and preparing legal instruments for a "regular employer."13 Therefore, in-house counsel are not likely to be viewed as engaging in the unauthorized practice of law.

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9. Id. (emphasis added).
11. Id. at 400.
13. VA. SUP. CT. R. pt. 6, § I(B)(1), (2).
Finally, the District of Columbia would probably answer the hypothetical in the negative. The Chair of the Court of Appeals Committee on Unauthorized Practice of Law wrote:

[I]n circumstances where an employee of a corporation who is a lawyer is providing legal services to the corporation as part of his/her employment responsibilities, and where the individual does not undertake to represent the corporation in contact with third parties, or the courts of the District of Columbia, s/he would not be holding him/herself out as a lawyer, and, as a consequence, s/he would not be engaged in the unauthorized practice of law . . . .


B. States Indicating No Formal Action Would Be Taken

Two states, Indiana and Rhode Island, did not answer whether the hypothetical fact pattern constituted the unauthorized practice of law. However, they did indicate that no punitive action would be taken in such a situation. Indiana’s Chief Justice wrote:

As far as I know, this Court has not decided whether a lawyer working under the circumstances you describe would be engaged in the unauthorized practice of law. I can tell you, however, that it has not been our practice to pursue disciplinary or criminal sanctions against lawyers working in such situations.15

Rhode Island’s Chairman of the Unauthorized Practice of Law Committee wrote:

The issue you posed is real, Rhode Island has no definitive answer.

. . . . . . .

. . . However, if the activities of the subject attorney for the corporate employer only affected the business of the corporate employer and not the general public, I do not believe that our Committee would aggressively pursue injunctive relief against those activities.16


Similarly, in California, it is likely that no formal action would be taken against the lawyer. However, California likely would consider the hypothetical fact pattern to be the unauthorized practice of law:

More than 8,000 of the 125,000 members of the State Bar of California work as in-house corporate counsel. In addition, corporate employers transfer out-of-state lawyers in and out of their law departments every day. But many of these lawyers are not members of the California bar. Are they engaged on a daily basis in the unauthorized practice of law? The answer is far from clear.\textsuperscript{17}

The California Business and Professions Code,\textsuperscript{18} California case law,\textsuperscript{19} and resolutions of the California Bar Association Board of Governors\textsuperscript{20} indicate that unlicensed corporate in-house counsel are indeed engaging in the unauthorized practice of law. Yet, neither David Bell, senior staff attorney of the California State Bar's Office of Professional Competence, nor the State Bar's Office of Trial Counsel can point to any disciplinary proceedings.\textsuperscript{21} In the mid 1980s, the Board of Governors' Committee on Professional Standards proposed a court rule creating "registered in-house counsel."\textsuperscript{22} Such counsel would have been authorized to advise their employers as to legal rights and obligations, prepare documents, and represent the employer in negotiations and transactions.\textsuperscript{23} Ultimately, the Board of Governors rejected the proposed rule.\textsuperscript{24} Thus, in California, although unlicensed in-house counsel most likely engage in the unauthorized practice of law, neither district attorneys nor the state bar are inclined to enforce the law.\textsuperscript{25}

\section*{C. States That Have Temporary or Limited Licenses}

Many states have temporary or limited licensing rules. Those states researched or those that provided written responses include Kansas, Ohio, Minnesota, Michigan, Kentucky, and South Carolina.

Kansas permits an attorney who is licensed in another jurisdiction and willing to work for a single employer in Kansas to obtain a tempo-

\begin{thebibliography}{9}
\bibitem{17} Richard A. Zitrin, \textit{In House Outlaws?}, \textit{Cal. Law.}, Dec. 1990, at 60, 60.
\bibitem{20} Zitrin, supra note 17, at 60.
\bibitem{21} Id.
\bibitem{22} Id. at 62.
\bibitem{23} Id. at 62-63.
\bibitem{24} Id.
\bibitem{25} Id. at 60.
\end{thebibliography}
rary license that remains valid so long as the temporary licensee is employed as required by the rule.\textsuperscript{26} The rule further requires that the temporary licensee apply for admission to the Bar of Kansas and intend to become a Kansas resident.\textsuperscript{27} In addition, the attorney must be employed full time by a person, firm, association, corporation, or accredited law school and must receive his or her entire compensation from that employer.\textsuperscript{28} Finally, the temporary licensee must fulfill many other requirements, not unlike those demanded of applicants to the bar of any state.\textsuperscript{29}

Minnesota's Supreme Court Rules permit an attorney licensed in another jurisdiction to obtain a temporary license when employed in Minnesota as an attorney for a "single corporation . . . , association, business or governmental entity whose lawful business consists of activities other than the practice of law or the provision of legal services."\textsuperscript{30} This license is valid for no more than twelve months.\textsuperscript{31}

Ohio's Supreme Court Rule requires an attorney who is licensed in another jurisdiction and who performs legal services in Ohio solely for an employer as a full-time employee, to file a certificate of registration and pay a fee.\textsuperscript{32} Likewise, Kentucky requires every attorney who is not a member of the Bar and who performs legal services solely for his employer, to file an application with the Supreme Court for a limited certificate of admission to practice law.\textsuperscript{33}

Michigan permits attorneys who are ineligible for admission without examination and employed by a corporation to apply to the Board of Law Examiners for a special certificate of qualification to practice law. If counsel should subsequently leave his or her employment, the special certificate automatically expires.\textsuperscript{34}

Finally, the Appellate Rules of South Carolina provide for the issuance of a limited certificate of admission to an attorney who is licensed and in good standing in another jurisdiction and who is employed in the legal department of a corporation in South Carolina.\textsuperscript{35} Those so admitted may not appear in court without otherwise being admitted pro hac

\begin{itemize}
\item \textsuperscript{26} KAN. SUP. CT. R. 706.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id.
\item \textsuperscript{30} MINN. SUP. CT. R. VI(A) (emphasis added).
\item \textsuperscript{31} MINN. SUP. CT. R. VI(D).
\item \textsuperscript{32} OHIO SUP. CT. R. VI, § 4(A).
\item \textsuperscript{33} KY. SUP. CT. R. 2.111(1).
\item \textsuperscript{34} MICH. CT. R. 5(d).
\item \textsuperscript{35} S.C. APP. CT. R. 405(a)(7).
\end{itemize}
vice, and they are subject to all duties and obligations of active members of the bar.36

D. Unique Provisions

Wyoming, Arizona, and New York have some unique provisions relating to the unauthorized practice of law. Wyoming’s rules allow a lawyer licensed in another jurisdiction to be admitted to practice in Wyoming on motion if certain conditions are met.37 One condition is that the lawyer must have engaged in the active practice of law for five of the seven years immediately preceding the date of application.38 Serving as counsel for a nongovernmental corporation is considered the active practice of law for the purpose of qualifying for admission on motion.39 By analogy, one may conclude that acting as in-house counsel is engaging in the practice of law in Wyoming. It is difficult to determine, however, if such practice is the unauthorized practice of law.

Also by analogy, one may conclude that acting as in-house counsel in Arizona is engaging in the practice of law. The general rule in Arizona is that no person shall practice law in Arizona or hold oneself out as one who may practice law without first being admitted to the bar in compliance with the Supreme Court Rules.40 Arizona has a pro hac vice exception, which allows full-time faculty to be admitted without examination and “emeriti” attorneys to participate in pro bono work under certain conditions without examination.41 For the purpose of defining the “active practice of law” to determine eligibility for the “emeriti” program, acting as in-house counsel is considered to be the active practice of law.42 Though acting as in-house counsel is the practice of law for the purpose of the emeriti rule, whether such practice in other contexts constitutes the unauthorized practice of law has not been resolved. Arizona may tacitly allow unlicensed in-house counsel to practice without fear of sanction.

New York also has a unique pro hac vice provision. It grants the Appellate Division discretion to allow applicants who meet certain requirements to “advise and represent” clients and participate in trial and

36. S.C. APP. CT. R. 405(b).
37. WYO. CT. R. 5(e).
38. Id.
40. ARIZ. SUP. CT. R. 31(a)(3).
41. ARIZ. SUP. CT. R. 39.
42. ARIZ. SUP. CT. R. 39(2)(a).
argument if the applicant is employed as corporate counsel. Authority to so act may be granted for no longer than eighteen months. Most pro hac vice rules allow the lawyer so admitted to participate in the trial and argument of one specific case. New York's rule goes much further by apparently allowing the lawyer to generally advise and represent clients while employed as corporation counsel.

E. States with a Direct Affirmative Answer

Representatives from Georgia, Illinois, Massachusetts, West Virginia, and Missouri answered the hypothetical question in the affirmative, indicating that they believed that the practice of law described in the hypothetical constituted the unauthorized practice of law. The Legal Counsel to the Attorney General from Massachusetts wrote:

In my judgment, the foreign lawyer in the hypothetical would be found by a Massachusetts court to have violated M.G.L. c. 221, § 46A, because on a long-term basis he furnishes legal advice, drafts documents, and interprets the law for his clients in Massachusetts, all acts which likely would fall within Massachusetts courts' interpretation of the practice of law.

In Georgia, a state statute makes the unauthorized practice of law unlawful. The Assistant General Counsel to the State Bar of Georgia wrote, "In direct response to your inquiry . . . the attorney licensed in another jurisdiction could not render the type of advice you speak of within the State of Georgia without violating the statute."

Prosecution for the unauthorized practice of law is not within the jurisdiction of the State Bar of Georgia because it is a criminal matter.

43. N.Y. Cr. Apps. R. 520.9(e)(3). The rule reads: "[I]n the discretion of the Appellate Division . . . to advise and represent clients and participate in the trial or argument of any case during the continuance of applicant's employment or association with . . . or during employment with a district attorney, corporation counsel . . . but in no event for longer than 18 months." Id.

44. COLO. R. Cirv. P. 221. The rule states that "[a]ny attorney and counselor at law in good standing from any other jurisdiction in the United States, may in the discretion of any court of record in this State, be permitted to participate before such Court in the trial or argument of any particular cause in which, for the time being, he is employed . . . ." Id. (emphasis added); see also TEX. ADMIN. R. 19(a) ("A reputable attorney, licensed in another state but not in Texas, who resides outside of Texas may seek permission to participate in the proceedings of any particular cause in a Texas court.") (emphasis added).


47. Letter from Jeffrey R. Davis, Assistant General Counsel, State Bar of Georgia, to Stacy L. Russell, Research Assistant (Nov. 16, 1992) (on file with author).
However, the Bar will prosecute and discipline lawyers who assist others in the unauthorized practice of law.\textsuperscript{48} Thus, it is safe to assume that Georgia lawyers working for a corporation and either supervising or working on projects with a lawyer not licensed in Georgia may be subject to discipline for assisting in the unauthorized practice of law.

The Executive Director of the West Virginia State Bar responded:

\begin{quote}
The definition in West Virginia of the practice of law includes those activities which were contained in your question. In order for a person to practice law in our state, they must either be admitted to practice in West Virginia or be associated with a West Virginia licensed lawyer-Pro Hac Vice . . . .\textsuperscript{49}
\end{quote}

As in many states, there is no direct authority regarding the issue in Illinois. However, its representative\textsuperscript{50} forwarded a brief memorandum stating that the facts of the hypothetical posed constituted the unauthorized practice of law.\textsuperscript{51} Similarly, Missouri's Chief Disciplinary Counsel, via telephone, answered the hypothetical question in the affirmative. He noted that Missouri has no case law regarding the question.\textsuperscript{52}

Tennessee's Chief Disciplinary Counsel forwarded several documents relevant to the hypothetical posed.\textsuperscript{53} In Tennessee, lawyers, if practicing law for a corporation or government agency, "would generally and ordinarily not only be entitled to be licensed, but will also be \textit{required} to be licensed."\textsuperscript{54} A license is required if the attorney engages in the "practice of law" or the "law business."\textsuperscript{55} As defined by statute, those terms encompass the activities posed in the hypothetical presented.\textsuperscript{56} Finally, ap-

\begin{itemize}
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Letter from Thomas R. Tinder, Executive Director, West Virginia State Bar, to Stacy L. Russell, Research Assistant (Dec. 1, 1992) (on file with author).
\item \textsuperscript{50} Letter from James J. Grogan, Chief Counsel, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, to Stacy L. Russell, Research Assistant (Nov. 16, 1992) (on file with author).
\item \textsuperscript{51} Memorandum from Corinne Kruse to James J. Grogan, Chief Counsel, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (Oct. 19, 1992) (on file with author).
\item \textsuperscript{52} Telephone Interview with John Howe, Chief Disciplinary Counsel of Missouri (Mar. 8, 1993).
\item \textsuperscript{53} Letter from Lance B. Bracy, Chief Disciplinary Counsel, Board of Professional Responsibility of the Supreme Court of Tennessee, to Stacy L. Russell, Research Assistant (Oct. 16, 1992) (on file with author).
\item \textsuperscript{54} Statement of Policy Concerning the Meaning of "Practice of Law" as used in Rule 7 of the Rules of the Tennessee Supreme Court, Tennessee Board of Law Examiners Op. 1, 28 (1984) (emphasis added). The Board's Opinion was ratified by the Supreme Court of Tennessee.
\item \textsuperscript{55} Id. at 5.
\item \textsuperscript{56} TENN. CODE ANN. § 23-3-101(a), (b) (1992).
\end{itemize}
plicants to the bar who have been working in Tennessee as employees or officers of corporations, or as employees of governmental agencies, without being licensed, may be denied admission to the bar if such applicants had engaged in the “practice” or “business” of law.\textsuperscript{57} Of course, a lawyer working for a corporation but not engaged in the “practice” or “business” of law need not be licensed.

Oklahoma has answered the question directly through a formal ethics opinion:

An attorney, resident in Oklahoma, admitted to practice in another State but not in Oklahoma, who is employed full time in rendering legal services to a corporation engaged in business in Oklahoma and who receives her entire compensation from the corporation, is engaged in the unauthorized practice of law.\textsuperscript{58}

\textbf{F. States with No Definite Answer, but Appear Affirmative}

Though not responding to our letter, it appears that Washington would answer the question in the affirmative. Its rules provide that “a person shall not appear in any of the courts of the State of Washington, or practice law in this state, unless that person has passed the Washington State bar examination.”\textsuperscript{59} The rules provide for three exceptions: practice \textit{pro hac vice}, indigent representation, and educational purposes.\textsuperscript{60} Thus, application of the maxim \textit{expressio unius est exclusio alterius}\textsuperscript{61} favors an affirmative answer. However, Washington has not defined the practice of law. If its definition would exclude the work of in-house counsel, the question would be answered in the negative.

According to Lori S. Holcomb, the Assistant Unlicensed Practice of Law Counsel for the Florida Bar, the issue has been given significant attention during the past few years. She wrote, “It has always been the position of the Standing Committee on Unlicensed Practice of Law that the conduct described in your letter constitutes the unlicensed practice of law. However, there is no case law on the subject.”\textsuperscript{62} Holcomb also noted that because the question was frequently discussed in Florida, “the Standing Committee held a public hearing in 1989 that resulted in the

\begin{footnotesize}
\begin{enumerate}
\item Tennessee Board of Law Examiners Op., \textit{supra} note 54, at 4-6.
\item \textsc{Wash. R. Admis. R.} 1(b).
\item \textsc{Wash. R. Admis. R.} 8(b), (c), (d).
\item This maxim means “the expression of one thing is the exclusion of another.” \textsc{Black's Law Dictionary} 581 (6th ed. 1990).
\item Letter from Lori S. Holcomb, Assistant UPL Counsel, Florida Bar, to Stacy L. Russell, Research Assistant (Dec. 1, 1992) (on file with author).
\end{enumerate}
\end{footnotesize}
appointment of a committee to promulgate a rule authorizing the conduct. The proposed rule was filed with the Supreme Court of Florida in 1990.63 In 1991, the court rejected the proposed rule, but its opinion left the door open to consideration of a different rule.64 The Florida Bar’s Board of Governors then approved a new rule and filed it with the court in January 1993.65 At the time of this writing, the court has made no decision regarding this proposed rule.

In 1989, Statewide Bar Counsel for the State of Connecticut wrote a letter to a Connecticut lawyer answering a similar hypothetical.66 It stated:

[T]he Statewide Grievance Committee considered your letter . . . and its accompanying correspondence. The Committee directed that you be advised solely that it is its opinion that the practice of law in Connecticut on behalf of a corporate employer by an individual not admitted to practice in this state would constitute the unauthorized practice of law in violation of Section 51-88 of the Connecticut General Statutes.67

Although the representative from Wisconsin could not render an opinion,68 he did return a copy of a Supreme Court Rule69 and a state statute.70 Reading the two, in pari materia, reveals that unlicensed inhouse counsel are almost certainly engaged in “practicing without a license,” for which one may be fined no more than $500 and imprisoned for no longer than one year.71

63. Id.
64. Id.
65. Id.
66. Letter from Michael L. Murray, Attorney at Law, to Clarine Nardi Riddle, Esq., Acting Attorney General, State of Connecticut (Aug. 16, 1989) (on file with author). Mr. Murray's letter asked whether he would have cause for concern if he agreed to and acted in accord with the following agreement in the state of Connecticut:

[Y]ou: (i) will regard yourself as functioning as an attorney for [the employer], engaged in the practice of law and subject to the New York Code of Professional Responsibility, irrespective of the location of your office or the place where the legal matters arise [and]; (ii) will preserve [the employer's] 'confidences' and 'secrets', from the inception of your current assignment and during the course of all future assignments as though the New York Code of Professional Responsibility were fully applicable . . . .

Id.
71. Id. § 757.30(1).
REGULATING IN-HOUSE COUNSEL

In Vermont, the practice of law without a license is prohibited and may be punished as contempt of court.\textsuperscript{72} Vermont’s Rules of Civil Procedure provide for a \textit{pro hac vice} exception,\textsuperscript{73} and the Rules of the Supreme Court provide an exception for law student interns.\textsuperscript{74} There appear to be no other exceptions. Thus, one can conclude that unlicensed in-house counsel are engaged in the unlicensed practice of law.

Colorado prohibits the unauthorized practice of law. Its prohibition is enforced through injunction and contempt.\textsuperscript{75} The Colorado Rules of Civil Procedure provide for admission \textit{pro hac vice}\textsuperscript{76} and provide an exception for law student practice.\textsuperscript{77} There is no exception for in-house corporate counsel. Therefore, unlicensed in-house counsel are most likely engaged in the unauthorized practice of law. However, there are no cases in which unlicensed in-house counsel have been enjoined from practice or held in contempt of court.

From the foregoing discussion, it is evident that states have approached the problem of unlicensed in-house corporate counsel with considerable diversity. Some states have not addressed the issue, while other states have opted for limited or temporary licensure. Some states are very liberal, allowing the unlicensed to practice without even the threat of sanction, while other states scrupulously enforce their restrictive rules. Clearly, the states lack uniformity.

IV. \textbf{ANALYSIS OF EXISTING LAWS}

Are any of the current approaches to the problem particularly sagacious? Is this an area that requires regulation for the betterment of the legal profession or for the protection of the public? If regulation is warranted, what kind would be most effective?

\textbf{A. What State Interests May Justify Regulation?}

Traditionally, enjoining the unlicensed practice of law has been justified upon the ground that the public needs to be protected from incompetent and perhaps unscrupulous law practitioners.\textsuperscript{78} This justification is

\begin{itemize}
\item \textsuperscript{72} VT. SUP. CT. ORDS. \& R., Annual Licensing of Attorneys, § 2.
\item \textsuperscript{73} VT. R. CIV. P. 79.1(e).
\item \textsuperscript{74} VT. SUP. CT. ORDS. \& R., Rules of Admission to the Bar of the Vermont Supreme Court, § 13.
\item \textsuperscript{75} COLO. R. CIV. P. 234, 238.
\item \textsuperscript{76} COLO. R. CIV. P. 221.
\item \textsuperscript{77} COLO. R. CIV. P. 226.
\item \textsuperscript{78} CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 829 (student ed. 1986). The author states the following:
\end{itemize}
rational. Those not trained in the law are, at least in theory, more likely to harm clients through malpractice and generally incompetent representation.

The traditional rationale fails, however, when applied to corporate in-house counsel. Corporate in-house counsel are trained in the law and are licensed in at least one jurisdiction. Furthermore, corporations can be expected to be more knowledgeable and sophisticated than the general public. Corporations do not need to be protected from incompetent counsel. As seasoned legal consumers, they are adept at evaluating the quality of the services provided.

One reason to require all lawyers practicing law within a state to be licensed in that state is to ensure that they practice law according to the state's ethical rules. Those not licensed are not subject to the jurisdiction of the state's disciplinary body and thus are not subject to discipline. This is a compelling reason to require at least some form of regulation. It is unreasonable to require some, but not all, practitioners to comply with the state's ethical rules. For example, Florida and New Jersey have unique rules that require a lawyer to reveal confidential information to prevent the client from committing any future crime. Should in-house counsel be excused from the reporting requirement merely because they are not licensed in the jurisdiction? Such a situation seems unacceptable.

Furthermore, in-house counsel not licensed in the state in which they practice may escape many of the duties and responsibilities imposed upon those who are licensed. For example, those licensed are subject to appointment by the court. One not licensed in the jurisdiction would not be subject to these court appointments.

Additionally, the ethical rules of every state impose some aspirational pro bono obligation. An unlicensed attorney would not be subject to this obligation. Furthermore, unlike a licensed attorney, an

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Lawyers have offered four justifications to explain the bar's fervor for pursuing unauthorized practitioners: protecting clients against harmful incompetence; protecting the legal system against the consequences of incompetence or lack of integrity by nonlawyers; providing the necessary framework for regulating lawyers; and, although rarely admitted, enhancing the economic position of lawyers.

Id.

81. E.g., Model Rules of Professional Conduct Rule 6.1 (1990) (stating that a lawyer should render public interest legal service); Model Code of Professional Responsibility EC 2-25 (1980) ("Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged.").
unlicensed attorney would not be required to pay dues to a bar association or to the supreme court. Many states also require lawyers to attend continuing legal education courses. In-house counsel would avoid this requirement as well.

Thus, allowing in-house counsel to practice without a license allows them to escape all of the duties and responsibilities imposed upon those who are licensed. Preventing in-house counsel a "free ride" is a compelling justification for some form of regulation.

Another reason to require all lawyers to be licensed in the state in which they are practicing is to prevent disputes concerning the lawyer's duty to the employer. For example, a lawyer licensed in New York and working as in-house counsel for IBM in Boulder, Colorado, has argued that conversations with his employer are not subject to the attorney-client privilege or an ethical duty of confidentiality. Because he was not a licensed attorney in Colorado, the attorney argued that no attorney-client relationship existed and that he was only a business adviser. This problem could also be solved through regulation of in-house counsel.

B. What Interests Are Served by Laissez Faire?

Unnecessary or unjustified regulation of the legal profession, of course, should be avoided. The American Bar Association Code of Professional Responsibility, still in force in twenty percent of the states, argues vehemently against "regulation that unreasonably imposes

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82. Dues are used to fund the disciplinary process, pro bono projects, and other activities of importance to the growth and development of the legal profession. Although the attorney may pay dues to the state where licensed, many, if not the majority of states allow those working outside the jurisdiction to become "inactive" and pay only a nominal fee. See, e.g., COLO. R. CIV. P. 227(1)(a) (The annual fee for an attorney on inactive status is $25.00.).

83. Susan R. Martyn, Lawyer Competence and Lawyer Discipline: Beyond the Bar?, 69 Geo. L.J. 705 (1981). "The bar has expressed a strong preference for continuing legal education, which is designed to provide a continual update of knowledge necessary to the ongoing process of legal representation. Nine states have made some form of continuing legal education mandatory." Id. at 725-26 (footnotes omitted); see also COLO. R. CIV. P. 260, Preamble, which states:

As society becomes more complex, the delivery of legal services likewise becomes more complex. The public rightly expects that practicing attorneys, in their practice of law, and judges, in the performance of their duties, will continue their legal and judicial education throughout the period of their service to society. It is the purpose of these rules to make mandatory a minimum amount of continuing legal education for practicing attorneys and judges.


territorial limitations upon the right of a lawyer to handle the legal affairs of his client." An older ABA Formal Opinion states:

Much of clients' business crosses state lines. People are mobile, moving from state to state. Many metropolitan areas cross state lines. It is common today to have a single economic and social community involving more than one state. The business of a single client may involve legal problems in several states.

The logic of the Code and the Opinion is sound. Competent lawyers licensed in a sister state should not be encumbered and burdened with unreasonable regulation.

V. WHAT REGULATION WOULD BE REASONABLE?

Requiring in-house counsel licensed in a sister state to take the bar examination in the state where the attorney is assigned to work seems unreasonable. Bar examinations are burdensome, time consuming, and expensive. States' interests do not justify the onerous burden of a bar examination when those interests can be protected by less burdensome means.

On the other hand, requiring the attorney to be admitted by motion, to apply for a limited license, or to register as a foreign in-house counsel seems reasonable. Admission by motion protects any legitimate state interests. Such admission subjects the attorney to the jurisdiction of the state's disciplinary body, requires the attorney to pay dues, subjects her to court appointment, clarifies the attorney's duties to the client, and makes the attorney, in all ways, accountable.

Similarly, limited licensing rules would pose a minimal burden on in-house counsel. Yet, most of the states' interests would be protected. Such a rule would allow in-house counsel to practice only on behalf of their corporate employer. The attorney would pay dues and be subject to discipline. However, the attorney could not appear in court, unless otherwise admitted pro hac vice, and would not be subject to court ap-

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86. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-9 (1980). The code states the following:

In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

Id.

pointment. Finally, the attorney's duties to his or her client would be clarified.

The least burdensome form of regulation is registration. It requires only that in-house counsel register with the supreme court and pay an annual fee. Under this type of regulation, the registrant would serve only the corporate employer, would not be subject to discipline and court appointment, and would not be allowed to appear in court. The registrant's duties to the corporate client would remain vague. Obviously, this alternative protects few of the states' interests. It would, however, enable states to at least determine the number of such practitioners and produce income necessary to support important activities.

VI. WHICH RULE IS MOST UTILITARIAN?

Of the alternative rules, the most salutary are those imposing only a minimal burden upon in-house counsel. Such rules protect the states' interest while not imposing an unreasonable burden on the lawyer. Limited licensing rules, like those adopted by North Dakota, Kansas, Kentucky, Michigan, Minnesota, and Ohio, are highly effective. They would protect the interests of all concerned without undue delay, expense, or burden.

VII. PROPOSED RULE: TEMPORARY LICENSE FOR IN-HOUSE COUNSEL

To facilitate the adoption of a uniform rule, I have drafted the following proposed model rule; the Minnesota\(^{88}\) and Kansas\(^{89}\) rules served as the paradigm for the proposed rule:

A. ELIGIBILITY. An attorney licensed in another state or the District of Columbia may apply and obtain a temporary license to practice law in (name of jurisdiction) when the applicant is employed in (name of jurisdiction) as an attorney solely for a single corporation, association, business, or governmental entity whose lawful business consists of activities other than the practice of law or the provision of legal services.

B. REQUIREMENTS. In order to qualify for the license, the applicant-attorney must file with the (name of entity) the following: (1) A complete application to practice law in (name of jurisdiction);
(2) A certificate of the highest court of the state of licensure certifying that the applicant-attorney is in good standing and that no charges of professional misconduct are pending;
(3) An affidavit from an officer, director, or general counsel of the applicant's employer attesting to the fact that the applicant-attorney is employed or will be employed as an attorney solely for said employer, that applicant-attorney is an individual of good moral character, and that the nature of the employment meets the requirements of section A of this Rule;
(4) An affidavit of the applicant-attorney attesting to the applicant-attorney's full time practice of law for at least ___ of the previous ___ years;
(5) A fee of $___.

C. LIMITATIONS. A license granted pursuant to this Rule shall authorize the attorney to practice solely for the designated employer. A license granted pursuant to this Rule (authorizes) (does not authorize) the attorney to appear in court.90

D. DUTIES AND OBLIGATIONS. A license granted pursuant to this Rule subjects the attorney to the jurisdiction of the (name of the jurisdiction's disciplinary entity) and obligates the attorney to abide by the (name of the jurisdiction's code of ethical conduct). A license granted pursuant to this Rule (does) (does not) subject the attorney to appointment by the court. A license granted pursuant to this Rule (does) (does not) obligate the attorney to meet continuing legal education requirements imposed by Rule (name the rule).

E. DURATION. This temporary license shall be valid for a period of no more than (name the period of months or years) from the date of issuance and shall terminate upon the occurrence of any of the following:
(1) The holder's admission to the bar of (name of the jurisdiction);
(2) Termination of the holder's employment with the employer referenced above in section B(3);
(3) A finding that the holder has proven unfit to retain the license because the holder has been convicted of a crime or been convicted of a violation of (name the jurisdiction's code of ethical conduct);
(4) A violation of any of the conditions upon which the license was granted.

90. The author strongly suggests that the attorney not be authorized to appear in court unless otherwise admitted pro hac vice.
VIII. Conclusion

To promote clarity and uniformity, states should adopt a uniform rule requiring corporate in-house counsel to obtain a limited license to practice law such as the proposed rule above. Balkanization has created confusion and impedes service to multi-jurisdictional clients.