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Two Approaches to the Modern Reality of Temporary Cross-Border Legal Practice: The United States and the European Community

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**TWO APPROACHES TO THE MODERN REALITY OF TEMPORARY
CROSS-BORDER LEGAL PRACTICE:
THE UNITED STATES AND THE EUROPEAN COMMUNITY**

Jonathan B. Brown*

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* J.D. Candidate, May 2019, University of Missouri-Kansas City School of Law. I would like to thank UMKC Law Professor Thomas Nanney for his expertise and encouragement in pursuing this paper. I would also like to thank my wife, Megan, and the rest of my family for their love, encouragement, and support throughout law school and as I begin my legal career. Lastly, I would like to thank the panel of reviewers and the leadership, staff, and members of the American Inns of Court for this great honor and for embracing and promoting legal scholarship, civility, and professionalism.

I. INTRODUCTION

Throughout the twenty-first century, globalization has created a world that is interconnected and interdependent in many ways. Worldwide integration is one of the most lasting and defining characteristics of the world in which we live today. In fact, globalization is the primary driver behind much of the technological, scientific, economic, and even socio-political innovations, improvements, and developments that define today's world. While some see this modern phenomenon as beneficial and particularly "enrich[ing]," others are critical of the vast economic inequalities that seem to result.¹ What is undeniable, however, is that globalization is a very real part of today's world, transcending state, national, and even international borders.

Indeed, even our concept of "borders" has drastically changed. As globalization continues to advance, territorial borders become much less significant, most especially because one particular side effect (or perhaps the intended effect) of globalization is that "local communities are now far more likely to be affected by activities and entities with no local presence."²

As advances in technology, communication, and transportation make cross-border interactions and relationships less rare and much easier, the legal profession has responded by similarly expanding legal practice across jurisdictional borders. Even still, the regulation of the legal profession remains largely "state-based" in both the United States and the European Community.³ This state-based regulation has the potential to present a unique problem in today's globalized environment, as lawyers—largely confined within the state where they are licensed and admitted to practice—encounter legal problems and issues that necessarily extend across state lines.

This Article will analyze the primary systems of professional regulation of legal practice within both the United States and the European Community.

1. C.R., *When Did Globalization Start?*, THE ECONOMIST: FREEEXCHANGE (Sept. 23, 2013), <https://www.economist.com/blogs/freeexchange/2013/09/economic-history-1>.

2. Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 318–19 (2002).

3. See *Leis v. Flynt*, 439 U.S. 438, 442 (1979); RAMÓN MULLERAT, REPORT ON MULTIDISCIPLINARY PRACTICES IN EUROPE - CENTER FOR PROFESSIONAL RESPONSIBILITY, A.B.A. (Apr. 1999), https://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/mullerat1.html#note10 ("The bar in Europe . . . is organised either through national bars . . . or through local bars . . . coming within a national federation [which are then] integrated into the Council of the Bars and Law Societies of the European Community . . ."). I use "state-based" to refer to the individual fifty states within the "unit" of the United States, and for each Member State (country) within the "unit" of the European Union, or more precisely, the European Community.

Specifically, this Article will compare the professional rules that consider and impact temporary cross-border legal practice by licensed attorneys, highlighting how each unique approach has confronted the natural tension existing between strong state-based regulation and the modern inevitability of temporary cross-border legal practice. Understanding the systemic differences and the corresponding impact is particularly important as globalization, and correspondingly, cross-border legal practice continues to grow on a regional, national, and international plane.

The primary motivating scenario behind this Article is how each system deals with temporary inter-state (but intra-system) legal practice. In other words, I attempt to illustrate how a lawyer, duly licensed and admitted to practice in one state, (e.g., Missouri in the United States system or France in the European Community system) may—or may not—engage in the temporary practice of law in another jurisdiction within the same system (e.g., Kansas or Germany, respectively).

Part II will look at the relationship between globalization and the primarily state-based regulation of the legal profession generally within both systems. Part III will specifically examine the systemically-limited avenues for temporary cross-border legal practice within the United States system, and then Part IV will analyze the less-restrictive European system that freely allows temporary cross-border legal practice between or among Member States. Part V explains why this comparison is important to the U.S. legal profession, and Part VI briefly concludes.

II. GLOBALIZATION AND STATE-BASED REGULATION

In many ways, globalization has resulted in the “internationalization” of the practice of law.⁴ Most significantly, as obstacles to inter-state trade, communication, and travel are necessarily reduced, individuals and companies alike—the two primary entities that hire lawyers in the first place—frequently find themselves involved with “foreign” law, either concerning a discrete legal issue or more generally, even if only on a temporary basis.⁵ As some of the biggest players in the global legal market,⁶

4. See Wayne J. Carroll, *Innocents Abroad: Opportunities and Challenges for the International Legal Adviser*, 34 VAND. J. TRANSNAT'L L. 1097, 1099 (2001) (examining the “internationalized” modern-day practice of law).

5. *Id.* at 1103.

6. See *Global Legal Services Market Report 2017—Research and Markets*, BUSINESSWIRE (May 4, 2017, 9:59 AM), <https://www.businesswire.com/news/home/20170504005920/en/Global-Legal-Services-Market-Report-2017> (stating that in 2016, the United States accounted for forty-five percent of the \$645 billion global legal services market).

the legal systems of the United States and Europe are particularly significant—a status that only grows as the nature of the practice of law begins to change from being primarily localized to more broad, far-reaching, and expansive. Thus, as the globalized nature of the legal practice continues, the regulation of lawyers becomes a much more salient and important factor, having greater implications than ever before.

In the United States, even as clients' inter-state relationships and issues continue to grow, the states themselves have principally retained their monopoly over the regulation of the legal profession.⁷ Even the United States Supreme Court has recognized that state-by-state regulation is a long-standing tradition within the United States legal system: “[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left *exclusively* to the States”⁸ In addition to being a natural by-product of federalism and notions of state sovereignty, the particularized and fragmented system of legal regulation resulted, in due part, because of the traditional locally-confined nature of lawyering, as well as strong protectionist tendencies of the individual states emanating from the state-based federalism upon which the United States was founded.⁹

Comparatively, the professional regulation of lawyers within the European Union occurs primarily from within the sub-parts of the whole. In essence, the national bars within each individual Member State have the authority to—and do in fact—regulate the legal profession.¹⁰ State-based regulation within Europe is particularly significant and meaningful because most of the trade of services within the European Community occurs primarily among (with) other Member States.¹¹

while the United Kingdom, France, and Germany accounted for an additional fourteen percent (about \$90 billion)).

7. See Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age*, 48 SAN DIEGO L. REV. 489, 498–99 (2011).

8. *Leis*, 439 U.S. at 442 (emphasis added).

9. See Supreme Court of N.H. v. Piper, 470 U.S. 274, 285 n.18 (1985) (“Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition.”) (quoting Chesterfield Smith, *Time for a National Practice of Law Act*, 64 A.B.A. J. 557, 557 (1978)); AM. BAR. ASS’N, 2002 REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 7.

10. See AM. BAR. ASS’N, *supra* note 9, at 13 (noting that lawyers may easily establish law practices in different member states).

11. See *Trade in Goods & Services*, THE EUROPEAN COMMISSION: SINGLE MARKET SCOREBOARD (July 11, 2018), http://ec.europa.eu/internal_market/scoreboard/integration_market_openness/trade_goods_services/index_en.htm. For instance, in 2015, all but five European Union Member States imported more services from other EU Member States than non-EU Member States, and similarly—with the exception of four EU Member States—more services were exported to fellow Member States than non-EU states. *Id.*

In both legal systems—although to differing degrees—states have traditionally implemented rules that allow only duly licensed and admitted lawyers to practice within their borders. In the United States, “unauthorized practice of law” (UPL) rules generally prohibit legal practice without first being licensed to do so within that state.¹² Similarly, various national bars within the European Community have established rules that require national residency in order to appear before certain courts, and they have allowed the establishment of only one legal chamber.¹³ However, as discussed below, the foundational principles of “unity” and “integration” of the European Community have led to a much more understanding and non-prohibitive regulatory scheme for cross-border legal practice.¹⁴

III. TEMPORARY MULTIJURISDICTIONAL PRACTICE IN THE UNITED STATES

While the individual fifty states do have wide latitude and discretion for the regulation of the legal profession including developing and applying UPL rules,¹⁵ these rules and regulations must ultimately be confined by the constraints and protections of the U.S. Constitution.¹⁶ However, while the Supreme Court has firmly established the principle that the practice of law

12. See generally Christine R. Davis, *Approaching Reform: The Future of Multijurisdictional Practice in Today's Legal Profession*, 29 FLA. ST. U. L. REV. 1339, 1341 (2002) (defining unauthorized practice of law as “when a lawyer licensed in his or her home state crosses state boundaries to handle legal matters in state where he or she is not licensed”); La Tanya James & Siyeon Lee, *Adapting the Unauthorized Practice of Law Provisions to Modern Legal Practice*, 14 GEO. J. LEGAL ETHICS 1135, 1137–39 (2001) (discussing rules governing out-of-state practice of law).

13. See Case 33/74, *Van Binsbergen v. Bestuur Van de Bedrijfsvereniging Voor de Metaalnijverheid* (Bd. Trade Ass'n Eng'g Indus.), 1974 E.C.R. 1299, 1301 (examining a Netherlands law requiring “only persons established in the Netherlands can act as legal representatives or advisers” before the Central Appeals Board); Case 107/83, *Paris Bar Ass'n v. Klopp*, 1984 E.C.R. 2972, 2973 (Paris Bar Council allowing an avocat (lawyer) to establish chambers in one place only—within the jurisdiction of the regional court—effectively not allowing bar-membership in another foreign bar).

14. See, e.g., Melissa Pender, *Multijurisdictional Practice and Alternative Legal Practice Structures: Learning from EU Liberalization to Implement Appropriate Legal Regulatory Reforms in the United States*, 37 FORDHAM INT'L L.J. 1575, 1582–83 (2014).

15. See *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (explaining that the licensing and regulation of lawyers has widely been left exclusively to the states).

16. *Bhd. of R.R. Trainmen v. Va. ex rel Va. St. B.*, 377 U.S. 1, 6 (1964) (citing *NAACP v. Button*, 371 U.S. 415 (1963); *Konigsberg v. State Bar of Cal.*, 353 U.S. 252 (1957); *Schwartz v. Bd. of Bar Exam'rs of State of N.M.*, 353 U.S. 232 (1957)) (recognizing that “Virginia undoubtedly has broad powers to regulate the practice of law within its borders; but . . . a State cannot ignore the rights of individuals secured by the Constitution”); *Silverman v. Browning*, 414 F. Supp. 80, 85–86 (D. Conn.), *aff'd*, 429 U.S. 876 (1976).

itself is protected under the Privileges and Immunities Clause,¹⁷ there has been only minimal guidance concerning permanent cross-state practice (i.e., being admitted to another state's bar), and no direction by the Supreme Court concerning constitutional issues surrounding the regulation of temporary cross-border legal practice.¹⁸ Thus, while the Court has specifically recognized, in the more limited context of a state residency requirement for the state bar, that "[t]he lawyer's role in the national economy" necessitates, in part, that the practice of law is a "fundamental right" under Article IV of the Constitution, the practice of law generally is not an unlimited, ubiquitous, or absolute right.¹⁹ As we will see, although the national economic importance of lawyers aids the Court in constitutionally limiting what states may require for bar admission applicants,²⁰ it is not so strong—unlike within the European Community—as to open practice-borders for lawyers on a temporary basis on Constitutional, statutory, or other grounds.

Most of the individual U.S. states continue to regulate temporary cross-border legal practice primarily through UPL rules.²¹ Broadly interpreted and increasingly expansively applied UPL rules generally prohibit the "temporary practice of an out-of-state lawyer without proper authorization."²² Originally, state bars implemented such UPL rules as a form of both consumer and economic protection.²³ Essentially, states relied on their own individual licensing exams and admissions requirements to ensure that the lawyers practicing within their jurisdiction were competent in the particular state's law and would provide capable, efficient, and skilled legal services.²⁴

Historically, when the practice of law was naturally constrained to local or regional spheres by limitations in technology, communication, and

17. See *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 279–82 (1985).

18. See Alessandro Turina, *Temporary Interstate Transactional Practice in the United States and Europe—Keeping up with Modern Commercial Realities*, 28 B.C. INT'L & COMP. L. REV. 225, 226, 227–29 (2005) (examining Supreme Court Privileges and Immunities jurisprudence relating to cross-border legal practice).

19. See *Piper*, 470 U.S. at 281–85 (recognizing only that the state's rule excluding bar admission nonresidents was a violation of the Privileges and Immunities secured by the Constitution).

20. See *id.* at 282.

21. See, e.g., MO. SUP. CT. R. 4-5.5 (2017) (providing that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction . . .").

22. James W. Jones et al., *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?*, 30 GEO. J. LEGAL ETHICS 125, 142 (2017).

23. See Davis, *supra* note 12, at 1344.

24. See *id.* (recognizing that, originally, states "assume[d] . . . that lawyers who have not fulfilled a state's admissions requirements are not competent to practice law within that state" as a form of consumer protection).

infrastructure (notwithstanding federal law), these laws were of little consequence.²⁵ However, as the nature of law and legal practice continues to become less spatially or geographically-restricted alongside great advances and innovation in technology and infrastructure, state-based UPL rules become particularly important—having potentially significant consequences. For instance, how narrowly or expansively a state—or rather a state supreme court—defines what constitutes the “practice of law” in the context of its UPL rules, largely determines how easy it may be to violate (knowingly or unwittingly) the general rule against temporary cross-border legal practice.

In 2016, for example, the Minnesota Supreme Court affirmed discipline imposed by the Minnesota state bar on a Colorado-licensed attorney for the unauthorized practice of law.²⁶ The state bar, and subsequently the Minnesota Supreme Court, determined that the lawyer had engaged in the practice of law when he participated in a settlement negotiation through e-mail.²⁷ Although the Colorado-based lawyer was never physically present within the state, and indeed only had a “virtual” presence by communicating with Minnesota citizens through the internet, the Minnesota Supreme Court found the lawyer had violated the state’s UPL statute because he practiced law in the state of Minnesota without holding a Minnesota law license.²⁸ Although only a private admonition was imposed by the court for the UPL violation,²⁹ such a determination can result, in addition to state bar sanctions and other disciplinary action, in the withholdings of compensation for the legal services provided.³⁰

25. See Jack A. Guttenberg, *Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straightjacket: Something Has to Give*, 2012 MICH. ST. L. REV. 415, 421–22.

26. *In re Charges of Unprofessional Conduct* in Panel File No. 39302, 884 N.W.2d 661, 663 (Minn. 2016).

27. *Id.*

28. *Id.* at 665, 666 (recognizing that under the state’s UPL rules, “[c]ertainly, physical presence is one way to practice law in a jurisdiction. But . . . it is not the only way” and thereby finding that the dispute involved only Minnesota legal issues and Minnesota clients, the attorney accordingly violated the state’s UPL statute through online legal services).

29. *Id.* at 669.

30. See *Ranta v McCarney*, 391 N.W.2d 161, 164 (N.D. 1986) (holding, based upon the state’s UPL statutes, “an out-of-State attorney who is not licensed to practice law in this State cannot recover compensation for services rendered in th[is] State”); *Spivak v. Sachs*, 211 N.E.2d 329, 330–31 (N.Y. 1965) (reversing the lower court’s order awarding judgment for an out-of-state lawyer who had sued to recover compensation for work performed, and recognizing that “[t]his was an illegal transaction and . . . we refuse to aid in it” because the illegal (unlicensed) practice of law was not a “single isolated incident,” but was fairly characterized as the “practice of law”).

In a similar case, the California Supreme Court broadly asserted that “[p]hysical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated [the UPL rule], but it is by no means exclusive.”³¹ In other words, so long as the unlicensed legal practice (i.e., cross-border legal practice) is connected to a “California client on California law in connection with a California legal dispute,” it is a UPL violation, whether or not the lawyer was physically or only virtually “present.”³²

Partly in response to the *Birbrower* court’s decision, the American Bar Association’s Commission on Multijurisdictional Practice amended the Model Rules of Professional Conduct to reflect an understanding of the important consequences the then-existing state-based UPL statutes could potentially have in a modern system characterized by an increased—arguably necessarily so—incidence of temporary cross-border legal practice.³³

A. Amended Model Rule of Professional Conduct 5.5(c): An Expansion of Temporary Cross-Border Legal Practice in the United States

Prior to 2002, the Model Rules of Professional Conduct (MRPC) provided only that: “A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.”³⁴ Today, even though the broad and largely discretionary state-based authority to define what exactly constitutes the practice of law within a UPL rule persists,³⁵ there is, at the same time, a growing acceptance of the need to embrace the contemporary reality of temporary inter-state legal practice.

With this in mind, the 2002 ABA Commission on Multijurisdictional Practice (the Commission) amended Rule 5.5 to specifically reflect this recognition by creating a new exception to the traditional UPL rule, which had effectively prohibited cross-border legal practice altogether. In particular, the Commission stated that the primary driving force behind the amended rule was the “dynamic change and evolution in nature and scope of legal practice

31. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara Cty.*, 949 P.2d 1, 5 (Cal. 1998).

32. *Id.* at 5–6.

33. See AM. BAR. ASS’N, *supra* note 9, at 3–4.

34. *Id.* at 16 (striking through language omitted in the 2002 amendment and underlining language added in the amendment).

35. See, e.g., *Simons v. Steverson*, 106 Cal. Rptr. 2d 193, 208–09 (Cal. Ct. App. 2001) (holding that a California-licensed attorney residing in New York engaged in the practice of law in California by reviewing, negotiating, and completing a sales agent and distribution agreement with respect to parties residing in California).

during the past century,” an explicit recognition of the influence and pervasiveness of modern globalization on both the practical and the intellectual levels of law (e.g., that of actual legal practice and the “law” itself).³⁶

By adopting Amended Rule 5.5,³⁷ the ABA created a “safe harbor” for temporary inter-state (i.e., cross-border) legal practice.³⁸ Under this expanded rule, entitled “Unauthorized Practice of Law; Multijurisdictional Practice of Law,” temporary cross-border legal practice is now generally allowed within the forty-seven states who have adopted Rule 5.5(c) with their own very similar or identical state rules.³⁹ Pursuant to MRPC 5.5(c), temporary cross-border legal practice is permitted—as an exception to the general rule against unauthorized practice of law—under four discrete and specific contexts: (1) When working closely in association with a lawyer who is admitted to practice in the host-state and who “actively participates” in the representation; (2) When the legal services are “ancillary” to litigation where the lawyer is either already admitted or expects to be admitted *pro hac vice*; (3) When the legal services arise in the alternative-dispute-resolution context so long as they “arise out of or are reasonably related to the lawyer’s practice” in a jurisdiction in which they are admitted to practice; or (4) Non-litigation work that “arises out of or is reasonably related to” the lawyer’s home-state (i.e., duly licensed) practice.⁴⁰

Specifically, the ABA Commission intended these amendments to “facilitate multijurisdictional law practice in identifiable situations that serve the interests of clients and the public and do not create an unreasonable regulatory risk [for the states].”⁴¹ Thus, under this modern framework, while the general prohibition against unlicensed cross-border legal practice still

36. AM. BAR. ASS’N, *supra* note 9, at 3.

37. See Rex R. Perschbacher, *Lawyers and Ethical Issues/Considerations in Cross-Border Class Action Litigation*, 2004 MICH. ST. L. REV. 735, 738 (“In August 2002, the ABA House of Delegates adopted all nine recommendations (as amended),” including the Commission’s amendments to Model Rule 5.5).

38. Robert E. Lutz et al., *Transnational Legal Practice Developments*, 39 INT’L LAW. 619, 633 (2005).

39. See AM. BAR. ASS’N, *State Implementation of ABA Model Rule 5.5 (Multijurisdictional Practice of Law)* (May 16, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/quick_guide_5_5.auth_checkdam.pdf.

40. AM. BAR. ASS’N, *supra* note 9, at 6; MODEL RULES OF PROF’L CONDUCT r. 5.5(c) (AM. BAR ASS’N 2002).

41. REP. OF THE COMMISSION ON MJP, *supra* note 9, at 20–21.

persists,⁴² temporary cross-border legal practice is now permitted within the vast majority of the States under certain circumstances and certain situations.

B. The Limited Realities of Temporary Cross-Border Legal Practice in the United States

While the new Rule 5.5(c) does permit temporary cross-border legal practice, it does so only in a very limited sense. First, cross-border legal practice within the United States is limited by the inherent nature of the temporary legal practice that is allowed pursuant to Rule 5.5(c). In other words, the cross-border practice in the host state must not be (or become) the practice of law that may be characterized as “systematic and continuous.”⁴³ While the Model Rules leave this as an undefined and generally ambiguous conceptual limitation to be interpreted by the states in constructing their own rules,⁴⁴ practicing lawyers who are thrust into cross-border legal practice by the nature of their client’s situation must carefully consider the ambiguous gray-area existing between “temporary” cross-border legal practice which is permitted and an improper “regular,” “established,” or “systematic and continuous” legal practice.⁴⁵ This consideration is particularly important as a practical matter, especially considering the severe consequences of unauthorized legal practice, including state bar sanctions, disciplinary action, and even forfeiting compensation for legal services rendered.

Some courts, however, have provided limited guidance for determining when a legal practice may fairly be considered only temporary. For instance, some courts have conceptualized this standard as one based upon notions of the quantity and frequency of one’s legal practice. In *Disabled Patriots of America, Inc. v. HT West End, LLC*, the district court held that the out-of-state lawyers were necessarily “approaching a continuous and systematic presence” after discovering that the lawyers had filed seven cases within the same district

42. See MODEL RULES OF PROF’L CONDUCT r. 5.5(a) (“A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.”).

43. *Id.* at cmt. 5.

44. See *id.* at cmt. 6, which states:

There is no single test to determine whether a lawyer’s services are provided on a “temporary basis” Services may be “temporary” even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation”).

45. See Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5—An Interim Assessment*, 43 AKRON L. REV. 729, 734 (2010) (citing AM. BAR. ASS’N, *supra* note 9, at 26.).

in the preceding two years, thereby violating the natural limitation based on the plain language of the statute—i.e., what plainly constitutes temporary cross-border legal practice.⁴⁶ Thus, while permitted, temporary cross-border legal practice is made difficult and is inherently limited due to the ambiguity and the court-by-court nature that result from such an open-ended conceptual standard, itself further restraining temporary cross-border legal practice in the United States.

Second, under Rule 5.5(c)(1), a lawyer may provide temporary cross-border legal services so long as the lawyer *actively associates* with a lawyer duly licensed to practice law in the forum state. While the MRPC similarly leaves “active participation” fundamentally undefined,⁴⁷ states have generally applied this standard in their own rules based on the plain language to require that the host-state lawyer significantly participate.⁴⁸ In other words, the duly-licensed lawyer must be involved more than by name only, playing a large role in the legal proceedings.⁴⁹

Alternatively, some courts—in implementing their own rules of professional conduct—have construed this requirement more liberally. For example, the District Court for the Southern District of Ohio interpreted “active participation” as only requiring that the in-state lawyer take “final responsibility for the pleading, motion or brief,” effectively allowing the out-of-state lawyer to primarily draft the documents or participate in the legal proceedings within the confines of allowable cross-border legal practice.⁵⁰ On the other hand, other courts have enforced a more practice-restrictive view by

46. *Disabled Patriots of Am., Inc. v. HT W. End, LLC*, No. 1:04 CV 3216 JEC, 2006 WL 449152, at *4 (N.D. Ga. Feb. 23, 2006).

47. *But see* MODEL RULES OF PROF'L CONDUCT r. 5.5 cmt. 8 (qualifying the “active participation” requirement of MRPC 5.5(c)(1) by requiring “share[d] responsibility for the representation of the client”).

48. *See* Greenbaum, *supra* note 45, at 733–34 (noting that “a number of the terms used in the rule to differentiate proper from improper multijurisdictional conduct were purposefully left vague”). *But see* *Armor v. Lantz*, 535 S.E.2d 737, 745–46 (W. Va. 2000) (holding that the local association requirement of the District Court was “ambiguous as to the precise responsibilities of local counsel” and “does not necessarily require that local counsel take equal charge of preparing and prosecuting a case”).

49. Greenbaum, *supra* note 45, at 743; *see* S.C. Ethics Advisory Opinion 93-35 (1993) (noting “[t]he [in-state] lawyer may not serve merely as a conduit for the out-of-state lawyer, but must be jointly responsible for the representation of the [in-state] client”); Utah Ethics Opinion No. 17-04 (2017) (noting, “[a]cting as local counsel for a pro hac vice attorney is not a minor or perfunctory undertaking” and local association requires the in-state attorney acting “more than [as] a mail drop or messenger” for the out-of-state lawyer).

50. *HSBC Bank USA v. Cline*, Civil Action No. 2:13-cv-00978, 2013 WL 5775362, at *2 (S.D. Ohio Oct. 25, 2013). Although this is a federal district court rather than a state court, it remains instructive as to how courts in general may interpret or construe the vague standard that exists of what *active participation* may mean.

requiring the host-state lawyer to provide a greater contribution in a more dynamic role throughout the proceedings.⁵¹ Ultimately, although it has not provided any guidance on what it actually means (perhaps due to the inherent federalist-nature of these requirements), the United States Supreme Court has upheld as constitutionally valid these kinds of local association requirements.⁵²

Third, out-of-state lawyers may temporarily gain *pro hac vice* admission before a specific court or tribunal.⁵³ *Pro hac vice* refers to the process in which out-of-state lawyers must file a motion with a local court asking permission to appear before that court—in a jurisdiction in which they are not licensed to practice law—on a specific matter or in a specific case.⁵⁴ However, this particular safe harbor for cross-border practice is fundamentally limited only to the realm of litigation practice as no comparable process exists for transactional, commercial, or any other non-litigation-related legal practice that does not appear before a judicial body.⁵⁵

Furthermore, as the 2002 ABA Commission recognized, even without the express inclusion of this exception, “every jurisdiction permits *pro hac vice* admission of out-of-state lawyers appearing before a tribunal,” although the

51. See *Gsell v. Rubin & Yates, LLC*, 41 F. Supp. 3d 443, 448 (E.D. Pa. 2014) (citing *Bilazzo v. Portfolio Recovery Assocs.*, 876 F. Supp. 2d 452, 464 (D.N.J. 2012)) (following a five-factor test to determine whether the lawyer actively participated or merely consulted: (1) having no direct contact with any client; (2) having limited contact with opposing counsel; (3) neither signing nor drafting a substantial portion of the pleadings and motions; (4) participating only by “reviewing motions, preparing memos, editing documents, discussing litigation strategy . . . and conducting legal research”; and (5) “record[ing] only a modest number of hours” as compared to lead counsel); *Disabled Patriots of Am., Inc.*, 2006 WL 449152, at *4 (requiring “more than 1.5 hours of work expended reviewing the Complaint and Settlement Agreement, drafting one letter, and participating in a twenty-minute phone conference”).

52. *Martin v. Walton*, 368 U.S. 25, 25–26 (1961) (per curiam) (citing *Phelps v. Bd. of Educ. of W. N.Y.*, 300 U.S. 319, 324 (1937)) (holding that requiring out-of-state counsel to associate with local counsel does not violate the Fourteenth Amendment’s Due Process protections).

53. MODEL RULES OF PROF’L CONDUCT r. 5.5(c)(2); Greenbaum, *supra* note 45, at 744–45.

54. *Leis v. Flynt*, 439 U.S. 438, 441–42 (1979) (“[T]he practice of courts in most States is to allow an out-of-state lawyer the privilege of appearing upon motion.”).

55. *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara Cty.*, 949 P.2d 1, 4–5 (Cal. 1998) (transactional attorney prosecuted by the state bar for unauthorized practice of law by an out-of-state lawyer); AM. BAR ASS’N, *supra* note 9, at 9–10 (noting there is “no counterpart to *pro hac vice* admission” for “transactional and counseling practices, and other work outside court or agency proceedings” even though “multijurisdictional law practice is common” for these practitioners as well); Pender, *supra* note 14, at 1598 (citing AM. BAR ASS’N, *supra* note 9, at 2) (recognizing that “[a]lthough litigators have long been allowed to engage in MJP by *pro hac vice* admission in certain limited situations, traditionally transactional lawyers had not been afforded any such leeway” despite feeling the same globalization factors).

exact processes, standards, and requirements vary among jurisdictions and even from court to court.⁵⁶ Thus, Rule 5.5(c)(2) effectively allows and endorses the continued utilization of *pro hac vice* admission within the context of temporary cross-border legal practice without “supplant[ing] [existing] *pro hac vice* requirements” for each individual state or court.⁵⁷ Generally, *pro hac vice* admission is construed strictly as a highly discretionary⁵⁸ and limited “privilege”⁵⁹ that may be subject to exacting procedural requirements.⁶⁰ Indeed, the United States Supreme Court noted that under Ohio’s UPL and MJP rules (very similar in substance to Rule 5.5),⁶¹ the approval of a *pro hac vice* application is “expressly consign[ed] . . . to the discretion of the trial court” and is not a protected interest under either the Ohio constitution or the U.S. Constitution.⁶²

Most states typically require the out-of-state lawyer seeking *pro hac vice* status to: (1) Prove good standing within their own state bar; (2) Associate with a host-state-licensed attorney; (3) Demonstrate lack of any “substantial relation with the forum state”; (4) Only have limited *pro hac vice* appearances; and (5) Recognize that the “court[] retain[s] broad discretion to revoke their admission.”⁶³ However, these standards may (and do) change from court to court and among jurisdictions. For instance, the United States District Court for Puerto Rico has held that under the plain meaning of *pro hac vice* (plainly translated as meaning: “[f]or this occasion or particular purpose”), an out-of-state counsel who had appeared *pro hac vice* six times in the preceding two years was deemed ineligible to appear *pro hac vice*.⁶⁴ Alternatively, other

56. AM. BAR ASS’N, *supra* note 9, at 9.

57. *Id.* at 23.

58. See *Silverman v. Browning*, 414 F. Supp. 80, 88 (D. Conn.), *aff’d*, 429 U.S. 876 (1976) (applying a liberal “abuse of discretion” standard to a state court’s decision regarding *pro hac vice* applications).

59. See Note, *Retaining Out-Of-State Counsel: The Evolution of a Federal Right*, 67 COLUM. L. REV. 731, 735 (1967) (stating that out-of-state lawyers admitted on a *pro hac vice* status are “typically restricted to making court appearances and performing other functions directly related to a particular pending case”).

60. See, e.g., *In re Ferrey*, 774 A.2d 62, 64 (R.I. 2001) (claiming the “exclusive and ultimate authority to determine who may, and may not be permitted to practice law in this state” and therefore that only the Rhode Island Supreme Court had the authority to grant *pro hac vice* admissions to out-of-state lawyers appearing temporarily before any “municipal or state agency, board or commission”).

61. See AM. BAR ASS’N, *supra* note 39, at 3.

62. *Leis v. Flynt*, 439 U.S. 438, 443 (1979); see also *Roma Constr. Co. v. Russo*, 96 F.3d 566, 576–77 (1st Cir. 1996) (quoting *Frazier v. Heebe*, 482 U.S. 641, 651 n.13 (1987)).

63. Clint Eubanks, Student Commentary, *Can I Conduct This Case in Another State? A Survey of State Pro Hac Vice Admission*, 28 J. LEGAL PROF. 145, 147 (2004).

64. *Mateo v. Empire Gas Co.*, 841 F. Supp. 2d 574, 579, 581 (D.P.R. 2012).

states vaguely apply a non-quantifiable standard, leaving *pro hac vice* admission virtually to the court's unfettered discretion.⁶⁵ Consequently, while *pro hac vice* admission is a somewhat accessible avenue for litigators to utilize in cross-border legal practice—especially in the courts that view *pro hac vice* admission as a “matter of course” and “normally routine”⁶⁶—it is inherently limited both by any particular requirements of the state bar or local courts,⁶⁷ as well as, again, the innate limitations within the very concept of engaging in *temporary* cross-border legal practice.

Lastly, temporary cross-border legal practice is generally permitted by the MRPC under a *nexus requirement*. Particularly, so long as the legal representation is “reasonably related” to either alternative dispute resolutions arising out of the lawyer’s home-state practice or temporary activities simply arising out of the lawyer’s home-state practice, a sufficient nexus exists and temporary cross-border legal practice is allowed.⁶⁸ Factors that demonstrate a “reasonable nexus” include: a pre-existing lawyer–client relationship, the client residing in or having substantial contacts with the lawyer’s own home-state, or that the legal matter has a “significant connection” with the host-state.⁶⁹

Particularly informative to this exception to the general rule banning cross-border legal practice—temporary or otherwise—in the United States is *In re Charges of Unprofessional Conduct in Panel File No. 39302*, in which the Minnesota Supreme Court rejected an out-of-state lawyer’s claim that his services within Minnesota did not violate the state’s UPL rules.⁷⁰ Specifically, the lawyer asserted that his practice was valid within the meaning of Minnesota’s version of the Rule 5.5 exception.⁷¹ He argued that Minnesota citizens (coincidentally the lawyer’s in-laws) had hired him to settle a debt

65. See ARIZ. CT. R. 39(e) (“Absent special circumstances, repeated appearances by any person pursuant to this [*pro hac vice*] rule may be the cause for denial of the motion . . .”).

66. See William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501, 1525–26 (2001).

67. See *Silverman v. Browning*, 414 F. Supp. 80, 82–83, 88 (D. Conn. 1976) (upholding as constitutional the discretionary *pro hac vice* admission rule of Connecticut state court that required: (1) Good standing in another state; (2) A “special and infrequent occasion” and “good cause” demonstrated by long standing attorney-client relationship, specialized skill and knowledge, or that the client is unable to secure Connecticut counsel for representation; and (3) That duly-licensed Connecticut attorney must “be present at all proceedings and must sign all [filed papers] and assume full responsibility for them”).

68. See Greenbaum, *supra* note 45, at 746–48.

69. See MODEL RULES OF PROF’L CONDUCT r. 5.5 cmt. 14; see generally Jones, *supra* note 22, at 131–33 (exploring variations on what reasonably related means within the context of individual states).

70. 884 N.W.2d 661, 667–68 (Minn. 2016).

71. See AM. BAR ASS’N, *supra* note 39, at 2.

dispute—an area of law his primarily environmental law practice had encountered before—and, as a result, his activities in Minnesota plainly “arose out of [his] law practice.”⁷² However, the Minnesota Supreme Court disagreed. The court held that because the lawyer’s clients were “Minnesota residents with a debt that arose in Minnesota that they owed to a Minnesota resident and that was governed by Minnesota law,” regardless of his professional expertise or prior experience with this kind of legal practice (which in reality was not a lot), his legal practice in Minnesota did not, in fact, sufficiently “arise out of” his Colorado law practice to constitute a lawful exercise of the temporary cross-border legal practice exception.⁷³

Even with the conscious expansion of the rules of professional conduct and professional regulation to account for modern multijurisdictional legal issues, temporary cross-border legal practice within the United States remains a limited exception rather than the general rule. Although certainly it is more frequently allowed under these rules than perhaps it has been historically,⁷⁴ it remains fundamentally limited by the inherent constraints of what temporary means, as well as the Model Rule’s express limitations requiring either active local association, *pro hac vice* admission, or a sufficient nexus.

IV. TEMPORARY MULTIJURISDICTIONAL PRACTICE IN THE EUROPEAN COMMUNITY

While the magnitude or actual quantity of European law concerning cross-border legal practice is more limited than within the United States, the regulation of temporary multijurisdictional legal practice is, at the same time, much narrower and more limited in application, demonstrating a greater acknowledgement and acceptance of the modern necessity of temporary cross-border legal practice. Put succinctly, the European Community not only encourages, but actively protects the very provision of temporary cross-border legal services by lawyers of any of the Member States.

Fundamentally, Member States within the European Community’s legal system have much less discretion in the realm of cross-border practice than

72. *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d at 667.

73. *Id.* at 668–69.

74. *See, e.g.*, *Spivak v. Sachs*, 211 N.E.2d 329, 330–31 (N.Y. 1965) (noting “[i]t is settled that the practice of law forbidden in this State by [NY’s UPL law] to all but duly licensed New York attorneys includes legal advice and counsel as well as appearing in the courts,” and only exceptions for “out-of-State lawyers to appear in our courts on occasion or even be admitted to practice here . . . [but under] express permission of the court and always on recommendation of a member of our Bar”); Perschbacher, *supra* note 37, at 753.

their United States counterparts. Similar to the overriding nature of the Constitution within the legal framework of the United States—which, as of yet, has not been applied to substantively limit the general rule against cross-border practice temporary or otherwise—at the core of the European legal framework is the Treaty of Rome of 1957 (EEC Treaty). The EEC Treaty established the European Economic Community, intended to “lay the foundations of an ever-closer union among the peoples of Europe.”⁷⁵

As such, the European Union—and its core of the European Community—has traditionally existed and endured with the specified and intentional purpose of promoting a greater freedom of inter-state movement of services, persons, goods, and capital.⁷⁶ To this end, a series of amendments to the EEC Treaty in the late twentieth-century continued to implement programs specifically to advance the European Community’s interest in an “integrated internal market,”⁷⁷ or more specifically, “an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured.”⁷⁸ Ultimately, the impact of this underlying framework of expansive inter-state comity and integration on the regulation of European lawyers is two-fold. First, at the core of the European Community—as laid out by the EEC Treaty—is both the right and the freedom to provide services, which, second, paves the way for an actively integrated legal system with a greater conception of “open borders,” most especially in terms of temporary cross-border legal practice.⁷⁹

A. *European Community Law: Clearing the Way for Temporary Cross-Border Legal Practice*

The European Court of Justice (ECJ) has firmly established the principle that “each Member State is free to regulate the . . . legal profession within its

75. D. Bruce Shine, *The European Union’s Lack of Internal Borders in the Practice of Law: A Model for the United States?*, 29 SYRACUSE J. INT’L L. & COM. 207, 209 (2002) (citing Treaty Establishing the European Economic Community, March 25, 1957 [hereinafter EEC Treaty]). The European Community, as the “core [political and legal system] of the European Union,” is the inter-governmental, internationally recognized legal entity of the European Member States. Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 INT’L LAW. 307, 307 n.2 (2000).

76. Turina, *supra* note 18, at 231.

77. See Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 FORDHAM INT’L L.J. 556, 559–60 (1991) (citing The Single European Act of July 1, 1987, art. 8a).

78. *Id.* at 560.

79. See *id.* Although not unlimited, as we will see, the European System is undoubtedly more open and accepting of cross-border legal practice than the United States.

territory,” but only in the absence of European Union (or European Community) law.⁸⁰ In effect, where it exists, European Community law takes precedence over the national laws of Member States, as is the case within the context of the legal profession. While somewhat similar to the state-based professional regulation of lawyers in United States, the reality for European Community Member States is much different. Due to the regionally-focused European program of economic integration—including, as a subpart, professional integration—the European Community actively imposes supranational European law on Member States specifically regarding professional regulations. Comparatively, neither the U.S. Constitution nor the U.S. Supreme Court have firmly established any kind of particular constitutional guidelines regarding temporary cross-border legal practice (other than under general constitutional considerations for the legal profession as a whole).

At the core of the European Community, the EEC Treaty (binding upon the assenting Member States) unequivocally asserts—as undeniable rights—both the freedom of movement and the freedom to provide services. First, Article 59 broadly mandates that Member States abolish “restrictions on freedom to provide services within the Community.”⁸¹ Article 60 further extends this freedom, specifically directing that providers of “services,” defined as including “activities of the professions,” shall have the right to “temporarily pursue his activity in the State where the service is provided.”⁸² Accordingly, all Member States consider lawyers and the legal profession to be within this protected class of “professionals,” and as a result, lawyers have the rights of professionals and of services providers as established under the EEC Treaty.⁸³ Additionally, and even more specifically, Member States are required to hold the temporary cross-border legal services provider to the “same conditions as are imposed by that State on its own nationals.”⁸⁴

80. Case 107/83, *Paris Bar Ass’n v. Klopp*, 1984 E.C.R. 2972, 2989.

81. EEC Treaty, *supra* note 75, at art. 59 (re-numbered as art. 49 under the Treaty of Amsterdam, May 1, 1999). To avoid confusion, I will be using the numeration under the original EEC Treaty of 1957. For a complete re-numbering of the EEC Treaty in the 1999 Treaty of Amsterdam, see EUROPEAN PARLIAMENT, TABLE OF EQUIVALENCIES, TREATY OF AMSTERDAM 85–91, <http://www.europarl.europa.eu/topics/treaty/pdf/amst-en.pdf>.

82. EEC Treaty, *supra* note 75, at art. 60; *see also* Consolidated Version of the Treaty on the Functioning of the European Union art. 56, Oct. 26, 2012, 2008 O.J. C 115 (“[R]estrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.”).

83. Goebel, *supra* note 77, at 566.

84. EEC Treaty, *supra* note 75, at art. 60.

Under Article 60, the distinction between temporary services and established (or permanent) services is, like in the United States, a particularly significant limitation on cross-border legal practice. Interestingly, both the United States and the European systems have left this concept largely undefined and are satisfied to merely contrast it with a similarly vague “continuous,” “permanent,” or “established” legal practice.⁸⁵ However, the ECJ has suggested, at least in the European context, a much more liberal interpretation of this distinction than in the United States: “[T]he temporary nature of the activities . . . has to be determined in the light, not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity.”⁸⁶ Additionally, the court considered that the inherent limits of having a temporary practice did not in fact preclude an out-of-state lawyer from “equip[ping] himself with some form of infrastructure in the host Member State (including an office, chambers or consulting rooms)” pursuant to his representation and provision of temporary legal services.⁸⁷

Of utmost importance, in 1975, the ECJ held that both Article 59 and Article 60 were directly applicable to Member States, thereby having a direct effect in the national courts of Member States.⁸⁸ As a result, any citizen of any Member State could rely on either, or both, Articles 59 and 60 to engage in and provide temporary cross-border professional services in any other Member State.⁸⁹ Ultimately, the freedom to provide services within the European Community is the foundation and the very core of the European right to temporary cross-border legal practice.⁹⁰

In addition to the EEC Treaty itself, Article 189 of the Treaty allows for the European Commission to issue “directives” to implement the goals and principles of the EEC Treaty.⁹¹ Such directives are binding on Member States

85. *But see* Goebel, *supra* note 77, at 607–08 (suggesting that the line between temporary and a more permanent legal practice lies somewhere within determining the “line of demarcation between providing a service and [actual] establishment” of which the former implies occasional activities and the latter suggests some degree of permanence).

86. Case C-55/94, *Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* (Council of the Order of Lawyers and Procurators of Milan), 1995 E.C.R. I-4186, I-4195.

87. *Id.*

88. *See* Case 33/74, *Van Binsbergen v. Bestuur Van de Bedrijfsvereniging Voor de Metaalnijverheid* (Board of the Business Association for the Metal Industry), 1974 E.C.R. 1300, 1304–05.

89. *See* Goebel, *supra* note 75, at 311 (citing *Van Binsbergen*, 1974 E.C.R. at 1311–12); *see also* Goebel, *supra* note 77, at 567 (citing *Comm’n v. France*, Case 167/73, 1974 E.C.R. 359) (recognizing the effect of the ECJ holding that articles 59 and 60 have direct effect as being “immediately binding in Member States regardless of the existence of any national legislation”).

90. *See* Goebel, *supra* note 77, at 566.

91. EEC Treaty, *supra* note 75, at art. 189.

only “as to the result to be achieved,” thereby allowing individual Member States to exercise discretion as to the “form and methods” utilized in actually executing the directives.⁹² Pursuant to this authority, in 1977, the European Commission implemented *Council Directive No. 77/249 to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services* (the Lawyers’ Services Directive).⁹³ Still in force today,⁹⁴ the Lawyers’ Services Directive, in effect, implements the EEC Treaty’s freedom to provide services specifically as to lawyers, setting forth specific guidelines and principles for the acceptance and promotion of temporary cross-border legal practice within and throughout the European Community.⁹⁵

Ultimately, the Lawyers’ Services Directive, with one exception,⁹⁶ decidedly permits the temporary cross-border legal practice of Member State lawyers within other Member States with only a few qualifications.⁹⁷ First, Article 1 of the Directive specifically identifies the legal professionals in each country who are entitled and permitted to engage in cross-border legal practice.⁹⁸ Second, the Directive places three main conditions on the exercise of the right to provide cross-border legal services:⁹⁹ (1) lawyers engaged in cross-border legal practice must retain and use the professional title of their home state;¹⁰⁰ (2) lawyers engaged in cross-border legal practice involving “representation of a client in legal proceedings or before public authorities” are subject to the host-state’s professional rules and conditions with the exception of residency or professional registration requirements;¹⁰¹ and (3)

92. *Id.*

93. See Goebel, *supra* note 77, at 576; Council Directive 77/249 to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services, 1977 O.J. (L 78/17) [hereinafter Lawyers’ Services Directive], <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31977L0249> (adding to the list of recognized “lawyers” when last amended in 2013 legal professionals from several countries).

94. See Lawyers’ Services Directive, *supra* note 93.

95. See Pender, *supra* note 14, at 1586; Goebel, *supra* note 75, at 312 (discussing in detail the 1977 Lawyers’ Services Directive provisions).

96. See Lawyers’ Services Directive, *supra* note 93, at art. 1(1) (allowing Member States to “reserve to prescribed categories of lawyers” the legal practice of preparing formal documents concerning real estate transactions or the administration of estates).

97. See Lawyers’ Services Directive, *supra* note 93, *id.* at art. 1–2; Goebel, *supra* note 75, at 312, 339.

98. Lawyers’ Services Directive, *supra* note 93, at art. 1(2); see Goebel, *supra* note 75, at 312 (discussing the Lawyers’ Services Directive).

99. See Goebel, *supra* note 75, at 337 (citing Lawyers’ Services Directive, *supra* note 93, at art. 4(2), (5) (discussing two main conditions: an association requirement and the lawyers’ subjection to the professional rules of the host state).

100. Lawyers’ Services Directive, *supra* note 93, at art. 3.

101. *Id.* at art. 4(1).

Member States may require that out-of-state lawyers in some legal practices must associate and work alongside local counsel.¹⁰²

B. The European Court of Justice's Application of EU Law on Cross-Border Law Practice

Similar in function to the U.S. Supreme Court in this context, the European Court of Justice has jurisdiction and authority under the EEC Treaty to interpret the Treaty as well as any subsequent directives issued to implement and to guide Member States' application of the Treaty.¹⁰³ Although there are only a small number of ECJ cases dealing directly with Articles 59 and 60 of the EEC Treaty and the more recent Lawyers' Services Directive, the ECJ has actively safeguarded, expanded, and firmly entrenched the right to provide temporary cross-border legal practices throughout the European Community Member States.¹⁰⁴

The first case to definitively examine the scope of Article 59 (generally establishing the freedom to provide services) and Article 60 (establishing the right to provide temporary services) arose as an Article 177 preliminary ruling¹⁰⁵ emanating from the Netherlands. In *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* (Board of the Trade Association of the Metal Industry),¹⁰⁶ the ECJ firmly established and recognized the expansive scope of both Article 59 and Article 60.

The ECJ received the case after the Dutch social security appeals court (Centrale Raad van Beroep) determined that Van Binsbergen's counsel, a Dutch lawyer who had an established legal practice in the Netherlands, became ineligible to represent Van Binsbergen in the legal proceeding before the court.¹⁰⁷ Particularly, the court relied on a Dutch law that required legal representatives, per the "organization and rules of procedure of Netherlands social service courts," to be established in the Netherlands.¹⁰⁸ Because Van Binsbergen's counsel moved from the Netherlands to Belgium while the

102. *Id.* at art. 5.

103. See Goebel, *supra* note 75, at 308 n.3.

104. See Goebel, *supra* note 77, at 580–83, 606 (discussing the three cases which have examined the 1977 Lawyers' Services Directive); Pender, *supra* note 14, at 1584.

105. EEC Treaty, *supra* note 75, at art. 177 (providing authority to the ECJ to make a preliminary decision concerning the "interpretation of this Treaty" by reference from any national or domestic court or tribunal). This judicial procedure is not unlike sending a certified question on a point of law to another court in the U.S. system.

106. Case 33/74, *Van Binsbergen v. Bestuur Van de Bedrijfsvereniging Voor de Metaalnijverheid*, 1974 E.C.R. 1300.

107. *Id.* at 1301.

108. *Id.*

social security appeal was pending, the Dutch appeals court held that counsel was no longer eligible to appear before the court and could no longer represent Van Binsbergen under Dutch law.¹⁰⁹ Thus, the Dutch appeals court asked the ECJ to determine: (1) whether Articles 59 and 60—collectively establishing a freedom to provide temporary cross-border legal services—were directly applicable to the Member States, and (2) if so, whether this Dutch national law conflicts with the right established in Article 60 to provide temporary legal services regardless of residency within the Member State.¹¹⁰

First (and perhaps most importantly), the ECJ held that both Article 59 and Article 60 were, in fact, directly applicable to the Member States.¹¹¹ This is particularly important because it meant that the EEC-freedom to provide services (including temporary cross-state services) is thereupon “binding in Member States regardless of the existence of any national legislation, [and therefore] provid[es] immediate rights to individuals that may be vindicated in [any] national court or administrative proceeding” of the Member States.¹¹² Additionally, as to the second question posed to the EJC by the Dutch court, it found that Articles 59 and 60 were specifically intended to foster the “abolition of any restriction on freedom to provide services imposed by a Member State . . . based on the fact that . . . [the] provision of services is an act which, even though performed by a national of another Member State, nevertheless entails the crossing of frontiers.”¹¹³ Accordingly, the European Court invalidated the Dutch law—essentially a residency requirement for legal practice—as necessarily incompatible with the established freedom of lawyers to provide (temporary) cross-border services.¹¹⁴

However, the court did recognize, perhaps based on underlying subterranean notions of state sovereignty, that Member States may nonetheless impose “special condition[s] under the national law” so long as those conditions are in the nature of pursuing the “general good.”¹¹⁵ But the court clarified that, regarding professional regulation of lawyers, these conditions or regulations are only valid insofar as they apply equally to both in-state and out-of-state lawyers practicing within the Member State.¹¹⁶ Thus,

109. *Id.*

110. *Id.*

111. *Id.* at 1312–13.

112. Goebel, *supra* note 77, at 567 (citing Case 167/37, *Comm’n v. France*, 1974 E.C.R. 359) (explaining the implications of the ECJ finding Article 48 to be directly applicable—i.e., having “direct effect”).

113. *Van Binsbergen*, 1974 E.C.R. at 1307.

114. *Id.* at 1310 (holding the residency requirement necessarily denied nationals and residents of other member states this recognized right).

115. *Id.* at 1309–10.

116. *Id.*

Van Binsbergen quickly established three key principles underlying the much less restricted temporary cross-border legal practice of the European legal system: (1) The right and freedom to provide professional services—temporarily or otherwise—is directly applicable to the Member States regardless of any national legislation; (2) Member States cannot discriminate against out-of-state lawyers, and any regulation that does so—including a residency requirement that reaches into and affects temporary multijurisdictional practice—is necessarily inconsistent with the established rights and freedoms of the EEC; and (3) Member States may dictate and apply non-discriminatory professional rules that are justified by the general good.¹¹⁷

In large part, the *Van Binsbergen* decision demonstrated the need for further and more concrete guidance concerning the application of Articles 59 and 60 to temporary cross-border legal practice within the European Community. Enter the Lawyers' Services Directive.¹¹⁸

As noted above, the Lawyers' Services Directive played an important role in clarifying and clearly articulating the limits to the apparent right to engage in temporary cross-border legal practice under the EEC Treaty. For instance, Article 5 of the Directive permits Member States to require that out-of-state lawyers "work in conjunction" with a local lawyer.¹¹⁹ Although facially similar to the local associational requirements found throughout MRPC 5.5 and various *pro hac vice* admissions standards, this exception to the general rule of inter-state practice in the European context is much more limited in its application than within the U.S. context, where it effectively acts as an exception to the exception of the general rule against cross-border legal practice.

First, the Lawyers' Services Directive permits a requirement of local association only when the provision of legal service necessarily includes "representation . . . in *legal proceedings*."¹²⁰ By implication, then, transactional, contractual, and all other non-litigation-related work seems to be outside the scope of the requirement of local association.¹²¹ Already, this is a much narrower limitation than in the United States where local association may be a valid requirement for *any* temporary cross-border legal practice, not just for litigators (further restricting such practice).

In a second case, *Commission of the European Communities v. Federal Republic of Germany*,¹²² the ECJ further limited valid applications of this

117. *See id.* at 1309, 1312.

118. Pender, *supra* note 14, at 1586 (citing Lawyers' Services Directive, *supra* note 93).

119. Lawyers' Services Directive, *supra* note 93, at art. 5.

120. *Id.* (emphasis added).

121. Goebel, *supra* note 75, at 313.

122. Case 427/85, *Comm'n v. Germany*, 1988 E.C.R. 1154.

condition on temporary cross-border lawyering. In 1988, the Commission of the European Union, pursuant to Article 169 of the EEC Treaty,¹²³ challenged a German law enacted in an attempt to implement this exception as laid out under Article 5 of the Lawyers' Services Directive. In substance, the German law mandated that out-of-state lawyers engaged in cross-border legal practice within Germany must "act only in conjunction with a German lawyer" when providing Germans with legal services and when appearing before a court.¹²⁴ Furthermore, the law required that the local association itself must be able to be "proved whenever a step is taken," and that a violation (i.e., not actively associating with a local lawyer at any point in the legal representation/legal proceedings) would effectively void the offending lawyers' legal actions.¹²⁵

The ECJ ultimately ruled that by requiring out-of-state lawyers to associate and work closely with local German counsel—especially when there is "no requirement of representation by a lawyer"¹²⁶—Germany had, for all intents and purposes, vastly restricted the EEC-established right to temporarily provide legal services in another Member State—as established by Articles 59 and 60—rather than having merely implemented either the EEC Treaty or Lawyers' Services Directive.¹²⁷ Notably, the court revealed its interpretation and belief as to the purpose and goal of the Lawyers' Services Directive, including Article 5, as to "facilitate the effective pursuit of the activities of lawyers" by allowing out-of-state lawyers to freely provide services on a temporary basis.¹²⁸ Ultimately, by invalidating this law that, on its face, seemed consistent with the plain language of the Lawyers' Service Directive, the ECJ asserted that local association could only be required to the extent and degree necessary to "support" the out-of-state lawyer's efforts to comply with procedural and ethical rules.¹²⁹ Moreover, in relation and in the same case, and to a greater degree than within the United States context, the ECJ both established and decisively upheld the rights of clients to have a

123. This provision allows the Commission to refer a case to the ECJ when it believes a Member State has "failed to fulfil [any of its obligations] under [the EEC]." EEC Treaty, *supra* note 75, at art. 169.

124. *Germany*, 1988 E.C.R. at 1155–56.

125. *Id.* at 1156.

126. *Id.* at 1166.

127. *See id.* at 1167–68.

128. *Id.* at 1158.

129. *See id.* at 1161–62; Goebel, *supra* note 77, at 581 (citing *Germany*, 1988 E.C.R. at 1160–63) (examining *Commissio v. Germany* and concluding that Article 5 does not require the local lawyer to take a leading role in the representation or drafting or even to be "continuously present" in court).

lawyer of their choosing over a Member State's concerns regarding cross-border legal practice.¹³⁰

Finally, in 1991, the ECJ implicitly reaffirmed its decision in *Commission v. Germany* and continued to narrow the acceptable application of the local association requirement by striking down a similar French law in *Commission of the European Communities v. French Republic*.¹³¹ Similar in substance to Germany's earlier attempted implementation of Article 5 of the Lawyers' Services Directive, France enacted a law requiring foreign or out-of-state lawyers to retain a local lawyer in civil cases specifically before the Regional Court (Tribunal de Grande Instance) and the Court of Appeals (Cour d'Appel).¹³² Here, unlike in *Germany*, the ECJ applied the plain language of Article 5—allowing local association requirements when pursuing “activities relating to the representation of a client in *legal proceedings*”—to invalidate France's version of a local association law.¹³³

Importantly, the ECJ has expressly affirmed its commitment to the foundational principles underlying Articles 59 and 60 of the EEC as well as those found within the Lawyers' Services Directive: That the freedom to provide legal services necessarily includes the freedom and right of out-of-state lawyers to engage in temporary cross-border practice under the same conditions and rules as are imposed upon in-state lawyers.¹³⁴ So far, the ECJ has consistently narrowly construed the few exceptions found within the Lawyers' Services Directive to the general rule permitting temporary cross-border legal practice, thereby bolstering and firmly establishing an expansive and broad European right to provide and engage in temporary cross-border legal services.

V. RECOGNIZING THE MODERN REALITY OF TEMPORARY CROSS-BORDER LEGAL PRACTICE

While temporary cross-border legal practice and lawyer mobility is becoming more accepted within the United States, it still remains the *exception* rather than the *rule*. This remains true even though nearly every

130. See *Germany*, 1988 E.C.R. at 1161–62; Goebel, *supra* note 75, at 337–38 (citing *Germany*, 1988 E.C.R. at 1162) (noting that within the state court's discretion particularly concerning *pro hac vice* admission, U.S. clients have no established right to be represented by an out-of-state lawyer).

131. Case C-294/89, *Comm'n v. France*, 1991 E.C.R. I-3606.

132. *Id.* at I-3608.

133. *Id.* at I-3610–11 (emphasis added) (invalidating the law, in part, on the grounds that it was invalid as-applied to activities before authorities with no judicial function and when the assistance of a lawyer is not compelled under French law).

134. See *id.* at I-3612.

state has adopted Rule 5.5(c) in some form—a rule the ABA heavily amended in the early 2000s to address the outdated UPL rules that unnecessarily constrained the legal profession. Nonetheless, temporary cross-border practice in the United States continues to be fundamentally limited as much by underlying notions of federalism that promote states' rights and independence—especially in prescribing regulations of the legal profession itself—as the individual rules of professional conduct (i.e., allowing temporary cross-border practice but only under certain limited and discrete circumstances). On the other end of the spectrum is the European model, where temporary cross-border legal practice is the *rule* rather than merely a limited *exception*.

Today, more than ever, not only is “the practice of law . . . important to the national economy,”¹³⁵ but it is an important component to the American system both domestically and abroad. Lawyers provide a necessary service that impacts all aspects of society by framing and guiding our social and business relationships, as well as in upholding and imposing the rule of law. In this context, states have begun to recognize—either willingly or unwillingly—the importance and arguable necessity of permitting cross-border multijurisdictional law practice. For example, although state-specific bar exams have long been served as a form of self-imposed consumer protection to ensure competence,¹³⁶ more states continue to adopt the Uniform Bar Examination as part of their licensing scheme, creating a national licensing framework made necessary by the characteristics of the modern legal profession.¹³⁷ This is a move in the right direction, reflecting programs that other countries have also begun to implement.¹³⁸ However, the changing legal landscape requires more than just a uniform program for licensing and regulation (although it is important); rather, it also requires an understanding and recognition that today's legal issues are highly mobile and not constrained by geographic or political borders.

As the legal landscape continues to evolve without regard to borders, allowing more expansive cross-border law practice as a domestic matter within the United States is important as U.S. law becomes increasingly

135. Supreme Court of N.H. v. Piper, 470 U.S. 274, 281 (1985).

136. See Davis, *supra* note 12, at 1344.

137. See *Jurisdictions That Have Adopted the UBE*, NAT'L CONF. B. EXAM'RS, <http://www.ncbex.org/exams/ube/> (last visited Oct. 27, 2018) (thirty-four out of fifty-six U.S. jurisdictions have so far adopted the UBE).

138. See Laurel S. Terry, *Transnational Legal Practice (International)*, 47 YEAR IN REV. (ABA) 485 (2013) (recognizing Canada, in particular, has begun developing uniform standards to foster and to be competitive in the world of transnational legal practice by promoting uniform standards for lawyer admission, professional rules, mobility, and foreign lawyer admission).

nationalized,¹³⁹ allowing the United States to continue to be a worldwide leader and competitor in an increasingly globalized economy.¹⁴⁰ As we continue to implement and pursue a more nationalized program of professional licensing and regulation while also incorporating the flexibility of technology in legal practice—both necessary to remain competitive and to meet the needs of the modern legal framework—a necessary corollary is recognizing (and resolving) how the historically protectionist UPL rules actually constrain and prevent the competent, thorough, and effective lawyering the rules of professional conduct seek to effectuate. As cross-border legal practice continues to become a modern reality on a temporary, let alone continual basis, failing to recognize this necessity and constraining lawyers with strict and expansive UPL rules and only limited MJP avenues will unnecessarily constrain lawyers seeking to abide by the prescribed rules of professional conduct while at the same time trying to meet the modern needs of their clients and provide competent and effective legal representation. Freely allowing temporary cross-border legal practice does not mean we cannot also uphold the high levels of professionalism and competence each state desires for the legal services provided to its citizens; we can—and should—do both.

VI. CONCLUSION

As globalization continues to drive multijurisdictional structures, relationships, and interactions, all lawyers will inevitably be faced with the need to file a brief, conduct a negotiation, draft a contract, or appear before a court in a jurisdiction different from their own—no matter how local they perceive their practice to be. The lessons learned in dealing with the changing nature of temporary cross-border legal practice—including the struggles and implications of the hierarchy of values that are ultimately protected—are particularly informative and useful for the future. The United States, grounded in principles of federalism, values states' rights and liberties above economic and professional integration by leaving professional regulation of lawyers to the states; even in a profession that has such large national (and societal) significance. States persist within the United States in implementing protectionist-motivated regulation of lawyers, leaving temporary cross-border

139. See James W. Jones et al., *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?*, 30 GEO. J. LEGAL ETHICS 125, 140–42 (2017) (recognizing the average legal practitioner inherently engages in a nationalized legal practice because of the expansive body of law that expands beyond and without regard to state borders including federal law and uniform codes).

140. See *id.* at 187–88.

legal practice a restricted exception to the general rule. Alternatively, with its program of vast economic integration and professional rights, the European Community values integration and a nationalization in terms of the European Community system of law practice, making temporary cross-border legal practice the established rule with only limited exceptions.

Quite simply, the future of the legal profession is one where all practitioners are faced with cross-border legal issues on a more-than-temporary basis. As our globalized world becomes all-the-more interconnected, the issue of multijurisdictional legal practice will continue to evolve and will remain an important facet of both global economies and legal systems. Accordingly, the best approach to future regulation in an ever-changing world is to understand where we are, where we have been, and where we need to go in all aspects of cross-border, multijurisdictional legal practice.

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