

# *Fordham International Law Journal*

---

*Volume 37, Issue 5*

2014

*Article 5*

---

## Multijurisdictional Practice and Alternative Legal Practice Structures: Learning from EU Liberalization to Implement Appropriate Legal Regulatory Reforms in the United States

Melissa Pender\*

\*Fordham Law School

Copyright ©2014 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

NOTE

MULTIJURISDICTIONAL PRACTICE AND  
ALTERNATIVE LEGAL PRACTICE STRUCTURES:  
LEARNING FROM EU LIBERALIZATION TO  
IMPLEMENT APPROPRIATE LEGAL  
REGULATORY REFORMS IN THE UNITED  
STATES

*Melissa Pender* \*

INTRODUCTION..... 1577

I. LAWYER REGULATION IN THE EUROPEAN UNION  
AND THE UNITED STATES ..... 1581

    A. Development of the EU and US Frameworks for  
    Regulating the Legal Profession ..... 1581

        1. Implementing Liberal Lawyer Regulation in the  
        European Union through Interpretation and  
        Application of the Treaty..... 1582

        2. Regulating Lawyers in the United States and the  
        States’ Control Over the Profession..... 1595

        3. Alternative Legal Practice Structures in the  
        United States: Interest and Opposition ..... 1600

    B. The Current Regulatory Climate for Lawyers in the  
    European Union and the United States ..... 1604

        1. The European Union: Established Free  
        Movement of Lawyers and Gradual  
        Implementation of Alternative Legal Practice  
        Structures ..... 1605

        2. Controversy in the United States over  
        Liberalization of Rules on Multijurisdictional

---

\* J.D. Candidate, 2015, Fordham University School of Law; B.S. Journalism, 2012, University of Florida. Many thanks to Professor Roger Goebel for his guidance and for sharing his knowledge and experience during the writing of this Note. I am also infinitely grateful for the endless support and encouragement of my family and friends.

Practice and Alternative Legal Practice Structures .....	1608
<b>II. EMBRACING PROGRESS AND GUARDING TRADITIONAL VALUES: THE US DEBATE ABOUT PROPER AND WISE LAWYER REGULATION .....</b>	<b>1612</b>
A. Can Multijurisdictional Practice Reconcile Lawyer Regulation with Legal Practice in the United States? .....	1613
1. Multijurisdictional Practice in the United States Will Benefit Lawyers, Clients, and the Profession at Large .....	1613
2. Allowing Multijurisdictional Practice in the United States Will Erode the Profession's Traditional Values.....	1618
3. Solutions Proposed by Advocates of Multijurisdictional Practice Reform.....	1619
B. Alternative Legal Practice Structures: Law Firms Looking to the Future, or Abandonment of Professional Standards? .....	1620
1. Alternative Legal Practice Structures Will Meet Client Needs and Create a More Efficient Market for Legal Services .....	1621
2. Alternative Legal Practice Structures Threaten to Make Legal Practice Just Another Business and Erode Lawyers' Core Values.....	1625
3. Progressive Responses to Opposing Arguments ..	1627
4. Solutions Proposed by Advocates for Alternative Legal Practice Structures.....	1628
<b>III. GRADUALLY LIFTING OVERLY RESTRICTIVE RULES WHILE IMPLEMENTING SAFEGUARDS TO UPHOLD THE PROFESSION'S TRADITIONS AND HIGH ETHICAL STANDARDS ACHIEVES A PROPER BALANCE OF FUNDAMENTAL VALUES AND PROGRESS.....</b>	<b>1630</b>
A. Separating Temporary Practice, Permanent Establishment, and Bar Admission to Allow Appropriate Forms of Multijurisdictional Practice ..	1631
1. Suggested Amendments to the Model Rules on Multijurisdictional Practice .....	1631

2. The Benefits of Separating Temporary and Permanent Practice and the Positive Resulting Change to the Model Rule on Admission by Motion ..... 1633

3. Other Benefits of the Proposed Solution ..... 1634

B. The Benefits of Replacing the Prohibition Alternative Legal Practice Structures with a Restriction and the Importance of Monitoring Implementation ..... 1634

1. Suggested Amendment to Model Rule 5.4..... 1635

2. Procedural Advantages of the Proposed Solution ..... 1635

3. Balancing Client, Lawyer, and Law firm Interests with Preservation of Core values..... 1636

4. Reconsideration as a Check on Effectiveness..... 1637

CONCLUSION ..... 1637

*INTRODUCTION*

The European Union’s institutions and Member States have increasingly embraced liberal lawyer regulation during the past few decades.<sup>1</sup> Many restrictions on the legal profession have disappeared or become more permissive, especially those governing where and with whom lawyers may practice.<sup>2</sup> This has allowed the growth of multijurisdictional practice (“MJP”), which refers to a lawyer’s temporary or permanent work done outside of the jurisdiction where he originally obtained his qualification to practice law.<sup>3</sup> Additionally, some Member States

---

1. See PANTEIA, EVALUATION OF THE LEGAL FRAMEWORK FOR THE FREE MOVEMENT OF LAWYERS, FINAL REPORT 5 (2012) [hereinafter EU REPORT] (describing the Lawyers’ Services Directive, the Lawyers’ Establishment Directive, and the Diploma Recognition Directive in relation to the free movement of lawyers); see also Julian Lonbay, *Assessing the European Market for Legal Services: Developments in the Free Movement of Lawyers in the European Union*, 33 FORDHAM INT’L L.J. 1629, 1632–44 (2011) (describing how EU legislation has increased lawyer mobility since the 1970s).

2. EU REPORT, *supra* note 1, at 10 (describing recent Member State reforms eliminating restrictions on partnerships between lawyers and non-lawyers); see Lonbay, *supra* note 1, at 1629–30 (explaining that the growth of interstate legal practice in the European Union is widely acknowledged).

3. ABA Comm’n on Multijurisdictional Practice, ABA Commission on Multijurisdictional Practice Introduction and Overview 5 (Aug. 2002) [hereinafter 2002 MJP Report] (stating that multijurisdictional practice “describes the legal work of a

have eliminated prohibitions on alternative legal practice structures (“ALPS”)—groups of lawyers where non-lawyers may own, manage, or work for the practice—allowing lawyers to practice with other professionals.<sup>4</sup>

This liberalization has dramatically impacted the practice of law throughout the European Union.<sup>5</sup> The European Union has seen an explosion of multi-office legal firms since the 1990s. For example, London-based Clifford Chance grew from twelve to thirty-three offices between 1987 and 2002.<sup>6</sup> Furthermore, some law firms have transformed into multidisciplinary practices (“MDPs”)—one-stop, full-service practices providing consumers with legal, accounting, consulting, and other services.<sup>7</sup>

---

lawyer in a jurisdiction in which the lawyer is not admitted to practice law”); ABA Comm’n on Multijurisdictional Practice, ABA Commission on Multijurisdictional Practice Report 201B to the House of Delegates 1 (Aug. 2002) [hereinafter Report 201B] (explaining that Model Rule 5.5 covers lawyers who are practicing outside the jurisdiction where they are qualified).

4. See Paul D. Paton, *Globalization, Core Values, and Reviving the MDP Debate in America*, 78 *FORDHAM L. REV.* 2193, 2197 (2010) (describing the specific authorization for ALPS the 2007 Legal Services Act in the UK provides); ABA Comm’n on Ethics 20/20, ABA Commission on Ethics 20/20 Discussion Paper on Alternative Law Practice Structures 1 (Dec. 2, 2011) [hereinafter December ALPS Paper] (explaining the trend among countries worldwide to begin permitting ALPS, such as firms with non-lawyer owners).

5. See EU REPORT, *supra* note 1, at 8 (discussing the impact of liberalization on client experience and economics); Lonbay, *supra* note 1, at 1631 (explaining that increased “stratification of the legal professions . . . is likely to become more pronounced as the barriers to increased inter-disciplinary practice decrease at the national level”).

6. See Lonbay, *supra* note 1, at 1630 (explaining the widespread growth of large, multi-office law firms); U.N. Conf. on Trade and Dev., World Investment Report 2004: The Shift Towards Services 326 tbl. A.III.6, U.N. Doc. UNCTAD/WIR/2004, U.N. Sales No. E.04.II.D.33 (2004) (stating that Clifford Chance had grown to 33 offices in 24 countries in 2002).

7. See Lonbay, *supra* note 1, at 1631 (describing new legislation that “will allow multi-disciplinary practice in England and Wales in the form of alternate business structures”). See generally Laurel S. Terry, *German MDPs: Lessons to Learn*, 84 *MINN. L. REV.* 1547 (2000) (analyzing the implementation of MDPs in Germany, where some forms of partnerships with non-lawyers have been permitted since the early 1990s). Multidisciplinary practices (“MDPs”) are a type of alternative legal practice structures (“ALPS”) where non-lawyers practice their profession in the same firm with lawyers, and in some cases may also have an ownership interest. Paton, *supra* note 4, at 2200 (stating that an MDP is “an integrated entity that provides legal services as one of several professional services offerings through a single firm or provider”).

As a result, lawyers' roles and identities, like the size and operations of law firms, are in a state of flux.<sup>8</sup> European attorneys are now more likely to specialize, and those who engage in multijurisdictional practice increasingly choose their physical location for reasons other than nationality; lawyers moving in the Maas-Rhin region of Belgium, Germany, and the Netherlands, for example, are responding to increased need for legal services in certain specialties.<sup>9</sup> In contrast, the US legal profession remains subject to state-by-state regulation that is much more restrictive than EU rules.<sup>10</sup> Lawyers in the United States may engage in MJP only in certain limited situations, and ALPS are prohibited throughout the United States.<sup>11</sup>

The driving forces behind reform and the practical effects felt throughout the European Union and the world have inspired many US lawyers to advocate for similar changes to US lawyer regulation.<sup>12</sup> Many other attorneys, however, unite in opposition to allowing MJP and ALPS due to factors such as the

---

8. See Lonbay, *supra* note 1, at 1630–31 (explaining the specialization resulting from large law firms); Stephen Gillers, *A Profession: If You Can Keep It: How Information Technology and Fading Borders Are Reshaping the Law Marketplace and What We Should Do About It*, 63 HASTINGS L.J. 953, 993 (2012) (describing specialization as one of the profession's recent developments).

9. Lonbay, *supra* note 1, at 1632 (“[T]he increasing de facto specialization of parts of the legal professions will increase pressure on entry regimes to permit ultra-specialized and experienced practitioners access to the growing market for such services.”); EU REPORT, *supra* note 1, at 177 (explaining that most lawyers establishing practices away from home are corporate or international lawyers moving with their clients); *id.* at 179 (highlighting the Maas-Rhin region as an area where high lawyer mobility results from growing numbers of multijurisdictional matters in specific sectors).

10. Roger J. Goebel, *The Liberalization of Interstate Practice in the European Union: Lessons for the United States?*, 34 INT'L LAW. 307, 318 (2000) (explaining that US lawyers are regulated by state laws and court rules); MODEL RULES OF PROF'L CONDUCT PREFACE (“[The ABA] provide[s] leadership in legal ethics and professional responsibility through the adoption of professional standards that serve as models of the regulatory law governing the legal profession.”).

11. See MODEL RULES OF PROF'L CONDUCT R. 5.5 (providing several specific situations where a lawyer may engage in multijurisdictional practice (“MJP”), and outlawing it in all other circumstances); MODEL RULES OF PROF'L CONDUCT R. 5.4 (prohibiting fee sharing between lawyers and non-lawyers).

12. 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, 493 (2011) (calling for reform that “addresses pressing client needs ignored by the current state-based approach”); Gillers, *supra* note 8, at 971 (arguing that the traditional US regulatory model is insufficient to regulate the modern profession).

tradition of self-regulation among US lawyers and the importance of federalism in the United States.<sup>13</sup> This anti-reform movement views changes to the US regulatory framework for lawyers as a threat to the profession's core values.<sup>14</sup>

The clash of these opposing ideologies has brought widespread attention to debates over US implementation of MJP and ALPS.<sup>15</sup> During the last two decades, the American Bar Association ("ABA") has devoted great time and effort to studying these topics and accordingly amended its Model Rules of Professional Conduct (the "Model Rules").<sup>16</sup> Many advocates of reform consider these changes insufficient, while opposing attorneys believe the rules should remain stringent.<sup>17</sup> These two views diverge on many points, but both seek regulation that properly balances protecting ethical values and advancing the profession.<sup>18</sup>

---

13. See generally Gillers, *supra* note 8 (explaining some US lawyers' resistance to reform); Ted Schneyer, "Professionalism" as Pathology: The ABA's Latest Policy Debate on Non-Lawyer Ownership of Law Practice Entities, 40 *FORDHAM URB. L.J.* 75 (2012) (providing an analysis of how the arguments against ALPS prevented their implementation in the United States).

14. See ABA Ctr. for Prof'l Responsibility, Recommendation 10F (2000), <http://www.abanet.org/cpr/mdp/mdp-report10f.html> [hereinafter Recommendation 10F] ("The sharing of legal fees with non-lawyers and the ownership and control of the practice of law by nonlawyers are inconsistent with the core values of the legal profession."). See generally Paton, *supra* note 4 (describing how US lawyers' adherence to the belief that core values cannot survive reform has halted progress).

15. Wald, *supra* note 12, at 490 ("Complaints about the legal profession's self-regulation abound."); ABA Comm'n on Ethics 20/20, ABA Commission on Ethics 20/20 Preliminary Issues Outline 6 (Nov. 19, 2009) [hereinafter Ethics 20/20 Preliminary Outline] (stating that the ALPS debate resounds with US "lawyers and law firms of all sizes").

16. See generally Paton, *supra* note 4, at 2193 (explaining that the ABA's 2000 decision not to implement ALPS "followed a nearly three-year investigation and rancorous debate within the ABA"); see also Wald, *supra* note 12, at 513–14 (stating that the ABA Commission on Ethics 20/20 studied "the impact of nationalization and globalization on law practice, contemplating several rule revisions meant to address the growing gap between practice realities and the state-based regulatory approach").

17. Wald, *supra* note 12, at 491 (finding that many attorneys consider the Model Rules to be outdated); Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 *MINN. L. REV.* 1115, 1144–45 (2000) (discussing the view that adherence to traditional regulations is necessary for sustaining ethical legal practice).

18. Paton, *supra* note 4, at 2242 (explaining the belief that treating law as a business does not have to come at the expense of core values); Gillers, *supra* note 8, at 998 ("[T]he cry we must heed is not for less regulation of the profession, but rather for new regulation of the burgeoning ways that legal services are sold.").

Part I of this Note discusses the historical and legal background of lawyer regulations in the European Union and the United States, and summarizes the current regulatory climates. Part II analyzes the arguments for and against relaxing restrictions on MJP and ALPS in the United States. Finally, Part III suggests amending the Model Rules to help the US legal profession function more efficiently and accurately reflect changes in the modern world.

### I. *LAWYER REGULATION IN THE EUROPEAN UNION AND THE UNITED STATES*

The current divergence between the EU and US systems for regulating lawyers is largely a result of vast differences in development.<sup>19</sup> Part I.A of this Note discusses the background of EU professional responsibility rules, liberal movement between EU Member States, and the relation to competition law in the European Union. It then describes the corresponding US approach to legal regulation. Part I.B describes the modern state of professional regulation in the European Union and the United States.

#### A. *Development of the EU and US Frameworks for Regulating the Legal Profession*

In the European Union and the United States, lawyer regulation evolved over time as legislative action and judicial interpretation expanded foundational principles.<sup>20</sup> Part I.A.1 of this Note discusses the development of the EU system as it relates to MJP and ALPS. Part I.A.2 describes the US framework for lawyer regulation and the evolution of US debates about MJP and ALPS.

---

19. Goebel, *supra* note 10, at 307 (explaining that, since the 1970s, EU lawyers have enjoyed more liberal practice rights than US lawyers); Lonbay, *supra* note 1, at 1630 (stating that US states created restrictions on access to the bar without consideration of the effect on the profession).

20. Goebel, *supra* note 10, at 307 (explaining that legislation and judicial decisions have expanded lawyers' practice rights since the 1970s); Geoffrey C. Hazard, Jr., *State Supreme Court Regulatory Authority over the Legal Profession*, 72 NOTRE DAME L. REV. 1177, 1178 (1997) (discussing "various intrusions" by the federal government and the US Supreme Court on state regulation of lawyers during the past several decades).



## 1. Implementing Liberal Lawyer Regulation in the European Union through Interpretation and Application of the Treaty

The Lisbon Treaty on European Union and its accessory, the Treaty on the Functioning of the European Union (the “Treaty”) act as the EU’s constitution, governing the community formed by its Member States.<sup>21</sup> The Treaty strives to create a sense of unity throughout Europe, and to integrate the separate nations to benefit all Europeans.<sup>22</sup> To that end, it calls for an “internal market” to improve and unite Europe.<sup>23</sup> The internal market is founded on the free movement of people, goods, services, and capital—which the Treaty seeks to facilitate by removing barriers to trade.<sup>24</sup> The provisions relevant to regulating professionals, including attorneys, are those related to the free movement of services and freedom of establishment.<sup>25</sup>

These two freedoms combine to form the basis for EU lawyer regulation, whereby a lawyer can practice throughout the European Union, with limited restrictions imposed by where the

21. Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. C 326/47 [hereinafter TFEU] (providing the basis of EU law); Jean-Claude Piris, *Does the European Union Have a Constitution? Does it Need One?*, 24 *EUR. L. REV.* 557 (1997) (concluding that the EU’s treaties form a “constitutional system”).

22. TFEU, *supra* note 21, preamble, at 49 (stating that the goals of the Treaty are to “lay the foundations of an ever-closer union among the peoples of Europe” and take “common action to eliminate the barriers which divide Europe”); GEORGE A. BERMAN, ROGER J. GOEBEL, WILLIAM J. DAVEY & ELEANOR M. FOX, *CASES AND MATERIALS ON EUROPEAN UNION LAW* 7 (2d ed. 2002) (explaining that the Treaty seeks to develop economic harmonization).

23. Consolidated Version of the Treaty on European Union, 2012 O.J. C 326/13, art. 3(3), at 17 [hereinafter TEU post-Lisbon] (“The Union shall establish an internal market.”); *One Market Without Borders*, EUROPA, [http://europa.eu/pol/singl/index\\_en.htm](http://europa.eu/pol/singl/index_en.htm) (last visited May 15, 2014) (providing a detailed analysis of the internal market concept).

24. CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* 10 (8th ed. 2013) (explaining the importance of abolishing trade barriers to the internal market); *Gaston Schul Douane Expeditie BV v. Inspecteur der Invoerrechten en Accijnzen Roosendaal*, Case C-15/81, [1982] E.C.R. 1409, ¶ 33 (explaining that the EU institutions seek to eliminate obstacles to trade to bring about an internal market).

25. Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 *FORDHAM INT’L L.J.* 556, 566 (1992) (explaining that the freedom to provide services applies to intermittent practice, while the freedom of establishment protects a lawyer’s right to practice in a new residence); 2 IDA E. WENDT, *EU COMPETITION LAW AND LIBERAL PROFESSIONS: AN UNEASY RELATIONSHIP?* 40 (2012) (explaining the importance of the Treaty to free movement of professionals).

attorney was credentialed.<sup>26</sup> Decisions by the European Court of Justice (the “ECJ”) and EU Directives have interpreted this framework as allowing Member States to restrict professionals only to the extent necessary, which has led to the growth of MJP and ALPS.<sup>27</sup>

A professional’s right to provide services freely throughout the European Union is found in Article 56 of the Treaty.<sup>28</sup> The Treaty provides that a Member State may not restrict an individual’s right to temporarily provide a range of services within its territory.<sup>29</sup> Furthermore, the Council of the European Union, acting alone or with the European Parliament, can issue directives drafted by the European Commission intended to achieve the liberalization of services.<sup>30</sup> Directives instruct Member States to achieve a certain result without requiring any specific method of obtaining this result, instead leaving it to the Member States to determine how to implement this requirement.<sup>31</sup>

---

26. Goebel, *supra* note 10, at 339 (stating that there are very few limitations to MJP in the European Union); Lonbay, *supra* note 1, at 1632 (explaining the relative ease with which EU lawyers can engage in temporary and permanent MJP throughout the European Union).

27. Van Binsbergen v. Bestuur Van De Bedrijfsvereniging Voor De Metaalnijverheid, Case 33/74, [1974] E.C.R. 1300 (holding that regulation of professionals must be no broader than necessary); Goebel, *supra* note 10, at 307–08 (explaining the role of EU legislation and European Court of Justice (“ECJ”) case law in the growth of MJP in the European Union).

28. TFEU, *supra* note 21, art. 56, 2012 O.J. C 326, at 70 (prohibiting rules that limit the freedom to provide legal services in foreign Member States); Goebel, *supra* note 10, at 309–10 (explaining that the Treaty provides an in-depth explanation of the right to provide legal services).

29. TFEU, *supra* note 21, art. 57, 2012 O.J. C 326, at 70 (giving Europeans the right to provide industrial, commercial, professional, and craft services); Goebel, *supra* note 10, at 308 (explaining that the Treaty covers a range of industries, including the liberal professions).

30. TFEU, *supra* note 21, art. 59, 2012 O.J. C 326, at 71 (proclaiming that the EU legislative institutions should issue directives); *see, e.g.*, Directive 77/249/EEC of the Council to Facilitate the Effective Exercise by Lawyers of Freedom to Provide Services, 1977 O.J. L 78 [hereinafter Lawyers’ Services Directive] (providing guidelines for regulating lawyers based on the Treaty).

31. TFEU, *supra* note 21, art. 288, 2012 O.J. C 326, at 171–72 (explaining that directives require Member States to work toward EU goals but allow freedom to pursue them in their own way); Application of EU Law, [http://ec.europa.eu/eu\\_law/introduction/what\\_directive\\_en.htm](http://ec.europa.eu/eu_law/introduction/what_directive_en.htm) (“National authorities have to adapt their laws to meet these goals, but are free to decide how to do so.”).

The Treaty grants professionals the right to establish a permanent practice throughout the European Union by requiring Member States to allow foreigners to set up business or professional entities, or pursue self-employment.<sup>32</sup> It also authorizes legislation for the mutual recognition of qualifications and for harmonization of business regulations.<sup>33</sup> Member States can, however, restrict establishment and service rights based on the Treaty's public policy, public security, or public health exceptions.<sup>34</sup>

A few key ECJ decisions have interpreted these provisions as applied to lawyers.<sup>35</sup> The ECJ decided its first case regarding the regulation of lawyers by Member States in 1977, establishing a liberal framework for analyzing professional restrictions.<sup>36</sup> In *Van Binsbergen*, a Dutch lawyer who had moved his residence to Belgium continued to provide legal services across the border in the Netherlands.<sup>37</sup> When the Dutch administrative authority

32. TFEU, *supra* note 21, art. 49, 2012 O.J. C 326, at 67 (prohibiting rules that limit professional foreign establishment); Goebel, *supra* note 10, at 309 (explaining that the freedom of establishment includes the ability to set up an office abroad).

33. TFEU, *supra* note 21, art. 53, 2012 O.J. C 326, at 69 (authorizing "directives for the mutual recognition of . . . qualifications and for the coordination of the provisions laid down by law, regulation or administrative action"); *see, e.g.*, Directive 98/5/EC of the European Parliament and of the Council to Facilitate Practice of the Profession of Lawyer on a Permanent Basis in a Member State Other Than That in Which the Qualification Was Obtained, [1998] O.J. L 77/36, at 36 [hereinafter *Lawyers' Establishment Directive*] (providing guidance on facilitating interstate practice under the Treaty).

34. TFEU, *supra* note 21, art. 52, 62, 2012 O.J. C 326, at 69, 72 ("[The Treaty shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.]); *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas*, Case C-260/89 ERT, [1991] E.C.R. I-2925, ¶ 3 (stating that, under the Treaty, a Member State can impose discriminatory rules that are justified under one of these exceptions).

35. *See, e.g., Van Binsbergen*, [1974] E.C.R. 1300 (limiting the restrictions a Member State can place upon professionals); *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Case C-55/94, [1995] E.C.R. I-4186 (interpreting the Treaty and subsequent legislation to limit Member State regulation of professionals).

36. *Van Binsbergen*, [1974] E.C.R. 1300 (holding that restrictions that limit the activities of professionals must be justified and non-discriminatory); Goebel, *supra* note 10, at 311 (stating that *Van Binsbergen* set the precedent for analysis of Member State restrictions).

37. *Van Binsbergen*, [1974] E.C.R. 1300, 1301 ("Mr. Kortmann had transferred his habitual residence from . . . the Netherlands . . . to Neeroeteren, in Belgium"); Goebel, *supra* note 10, at 310 (explaining that the central issue in *Van Binsbergen* was whether the

told him he could no longer represent a client before a Dutch tribunal because he was not a resident of the Netherlands, pursuant to Dutch rules, the lawyer claimed that he was entitled under the Treaty to perform the representation.<sup>38</sup> The ECJ held that the Dutch authorities could not stop the lawyer from representing a client in an administrative proceeding.<sup>39</sup> In so holding, the ECJ established three principles that form the basic framework for analyzing a regulation's compatibility with the Treaty.<sup>40</sup> First, *Van Binsbergen* stands for the principle that a Member State has the right to restrict the activities of professionals—in this case, lawyers—but only where a regulation is “justified by the general good,” such as “rules relating to organization, qualifications, professional ethics, supervision and liability.”<sup>41</sup> Second, the ECJ emphasized that such rules must be non-discriminatory with regard to national origin and residence because the Court decided that a requirement of habitual residence might be inconsistent with the Treaty as an implied nationality distinction.<sup>42</sup> Third, the ECJ stated that the free movement of services has a direct legal effect, meaning that an individual or enterprise can rely upon this Treaty-based right to challenge an infringing national rule.<sup>43</sup> Thus, challenges to

---

Dutch Bar could outlaw legal practice by professionals who emigrated from the Netherlands).

38. *Van Binsbergen*, [1974] E.C.R. 1300, 1301 (“Mr. Kortmann invoked . . . the Treaty providing for the progressive abolition . . . of restrictions on freedom to provide services within the community”); Goebel, *supra* note 10, at 310 (explaining the position of the Dutch Bar that it could restrict the activities of a non-resident).

39. *Van Binsbergen*, [1974] E.C.R. 1300, ¶ 27 (holding that the Netherlands could not impose the contested requirement); Goebel, *supra* note 10, at 311 (explaining that the ECJ held the rule invalid as it did not serve a public interest).

40. *Van Binsbergen*, [1974] E.C.R. 1300, ¶ 12 (regulations that limit practice rights must be “justified by the general good”); *id.* ¶ 10 (a Member State cannot impose discriminatory regulations); *id.* ¶¶ 18–27 (the Treaty has direct legal effect).

41. *Van Binsbergen*, [1974] E.C.R. 1300, ¶ 12 (explaining that such rules may overcome the policy against regulations); Goebel, *supra* note 10, at 311 (explaining that *Van Binsbergen* established that restrictive lawyer regulation is consistent with the Treaty only where it serves a public goal).

42. *Van Binsbergen*, [1974] E.C.R. 1300, ¶ 10 (establishing the restriction on rules based on habitual residence); Goebel, *supra* note 10, at 311 (explaining that the ECJ established in *Van Binsbergen* that Member States cannot discriminate against professionals from other Member States).

43. *Van Binsbergen*, [1974] E.C.R. 1300, ¶¶ 18–27 (holding that the rights described in the Treaty apply with no further action needed); *see* Goebel, *supra* note 10, at 311 (explaining that, by deciding that the Treaty has direct legal effect, the ECJ

Member State rules have allowed the ECJ to invalidate restrictions that run counter to the goals of the Treaty without justification in appropriate circumstances.<sup>44</sup>

The ECJ's decision in *Van Binsbergen* led the Commission and Council to develop the Lawyers' Services Directive, which specifies how a Member State can regulate via the guidance articulated in *Van Binsbergen*.<sup>45</sup> The directive, issued in 1977, establishes guidelines for the temporary provision of MJP.<sup>46</sup> While it provides that Member States must allow foreigners to practice, it also requires lawyers to use the title for lawyers from their state of residence (their "Home State") to prevent confusion.<sup>47</sup> The directive also authorizes Member States to restrict practice in court and administrative litigation to lawyers qualified to perform these services in their Home State.<sup>48</sup> Further, it establishes that the ethical rules of the State where the lawyer is practicing (the "Host State") apply to representing a client in legal proceedings or before public authorities, while the Home State's rules apply for all other activities.<sup>49</sup>

The directive thus created potential conflicts where Member States varied in their implementation of the directive

---

established that professionals can rely on its provisions to defend their right to practice).

44. *Van Binsbergen*, [1974] E.C.R. 1300, ¶ 27 (providing for abolition of discriminatory rules); Goebel, *supra* note 10, at 311 (explaining that *Van Binsbergen*'s most important impact is the anti-discrimination policy it established under the Treaty).

45. Lawyers' Services Directive, *supra* note 30 (creating the framework for lawyers' freedom to provide services); Goebel, *supra* note 10, at 312 (explaining the huge impact of *Van Binsbergen* upon the Lawyers' Services Directive).

46. *See generally* Lawyers' Services Directive, *supra* note 30 (establishing rules for interstate legal practice); Lonbay, *supra* note 1, at 1641 (explaining that the directive allows the types of lawyers listed to engage in MJP).

47. Lawyers' Services Directive, *supra* note 30, art. 3, at 3 (requiring lawyers to practice under their Home State's title); Goebel, *supra* note 10, at 312 (explaining that, when practicing under the Lawyers' Services Directive, an attorney must use the title from his Home State).

48. Lawyers' Services Directive, *supra* note 30, art. 5, at 4 (permitting Member States to impose requirements on lawyers representing clients in certain legal proceedings); Goebel, *supra* note 10, at 312 (explaining that the directive reserves certain legal proceedings to lawyers with local knowledge).

49. Lawyers' Services Directive, *supra* note 30, art. 4(1), at 4 (applying Host State rules to "[a]ctivities relating to the representation of a client in legal proceedings or before public authorities"); *id.* art. 4(4), at 4 (specifying application of Home States rules in other situations).

and had different ethical rules.<sup>50</sup> In response, the Council of Bars and Law Societies of Europe (the “CCBE”), an organization representing the bars and law societies of many Member States, sought harmonized professional responsibility standards throughout the European Union.<sup>51</sup> In 1977, the CCBE published the Declaration of Perugia, which states generally the professional principles that should be applicable to lawyers, such as personal integrity, confidentiality, and independence.<sup>52</sup> Furthermore, the Code of Conduct for European Lawyers, released by the CCBE in 1988 and periodically amended thereafter, provides many specific rules and ultimately was enacted by the bar association of every Member State.<sup>53</sup>

Another troublesome aspect of lawyers and other professionals engaging in MJP was that distinct qualification standards remained an obstacle to clear directions on standards of practice.<sup>54</sup> Each Member State had its own process for

---

50. COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, CODE OF CONDUCT FOR EUROPEAN LAWYERS § 1.3.1 (2006) (explaining that one purpose of the Code is to “mitigate the difficulties which result from the application” of the directive). *See generally* Jonathan Goldsmith, *The Core Values of the Legal Profession for Lawyers Today and Tomorrow*, 28 NW. J. INT’L L. & BUS. 441, 450 (2007–2008) (explaining how deregulation necessitates harmonization of ethical rules).

51. COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE: ABOUT US, <http://www.ccbe.eu/index.php?id=375&L=0> (last visited Dec. 19, 2013) (“The CCBE was founded in 1960, as the ramifications of the European Economic Community on the legal profession started to be seriously considered.”); Goebel, *supra* note 25, at 579–80 (explaining that the CCBE coordinates the national bar associations in the European Union).

52. COUNCIL OF BARS & LAW SOCIETIES OF EUROPE, CONSULTATIVE COMM., THE DECLARATION OF PERUGIA ON THE PRINCIPLES OF PROFESSIONAL CONDUCT OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN COMMUNITY (1977) (providing an explanation of these and other ethical principles); Goebel, *supra* note 25, at 579–80 (explaining that the CCBE adopted the Declaration of Perugia to establish general ethical principles for EU lawyers on October 16, 1977).

53. COUNCIL OF BARS & LAW SOCIETIES OF EUROPE, CODE OF CONDUCT FOR EUROPEAN LAWYERS (2006) (establishing uniform ethical rules); *see* Goebel, *supra* note 10, at 313 (stating that each national bar association in the European Union has adopted the CCBE code into its rules).

54. Goebel, *supra* note 25, at 595 (stating that, by the 1980s, harmonization was perceived as being too slow a process); Barnard, *supra* note 24, at 308 (explaining the problems associated with the single market program before the application of harmonization was extended to lawyers); Directive 89/48/EEC of the Council on a General System for the Recognition of Higher-Education Diplomas Awarded on Completion of Professional Education and Training of at Least Three Years’ Duration, 1989 O.J. L 19/16 [hereinafter Diploma Recognition Directive], later replaced by

education and its own qualification standards, which made the Member States reluctant to give foreign professionals, including lawyers, full privileges to practice.<sup>55</sup>

To address this issue, the Council adopted the Diploma Recognition Directive in December 1988 to foster mutual recognition of, and confidence in, qualifications across Member States.<sup>56</sup> The Diploma Recognition Directive allows all types of professionals to practice throughout the EU by requiring Member States to recognize foreign qualifications.<sup>57</sup>

The application of this directive to the legal profession posed a particular problem because the proper practice of law depends on local knowledge, and legal education and training, and, thus, is drastically varied among the Member States.<sup>58</sup> Accordingly, the directive allowed Member States the discretion to verify a lawyer's professional competence through either an aptitude test or a period of supervised training.<sup>59</sup>

With these new rules in place, the ECJ articulated a new standard for determining whether national regulation was overly restrictive under the Treaty, the Lawyers' Services Directive, and

Parliament & Council Directive No. 2005/36 on the Recognition of Professional Qualifications, 2005 O.J. L 255/22 [hereinafter Professional Qualifications Recognition Directive].

55. Diploma Recognition Directive, *supra* note 54, at 16 (emphasizing the goal of meeting the expectation of nationals expecting to have their qualifications recognized throughout the EU). *See generally* Goebel, *supra* note 25 (explaining the reasons for the directive and how it effectuated its objectives).

56. *See* Goebel, *supra* note 25, at 595 (stating that directive instructed Member States to trust each other's education standards and recognize foreign diplomas as equal to its own); *see also* Vlassopoulou v. Ministerium für Justiz, Bundesund Europaangelegenheiten Baden-Württemberg, Case C-340/89 [1991] E.C.R. I-2358 (confirming that the principle of mutual recognition of diplomas applies to people as well as goods).

57. Diploma Recognition Directive, *supra* note 54, art. 3, at 19 (prohibiting restrictions based on out-of-state qualifications); Lonbay, *supra* note 1, at 1645 (stating that the Directive allows professionals to have Member States recognize their qualifications).

58. Diploma Recognition Directive, *supra* note 54, art. 4(1)(b), at 19 (making an exception for "professions whose practice requires precise knowledge of national law and in respect of which the provision of advice and/or assistance concerning national law is an essential and constant aspect of the professional activity"); Goebel, *supra* note 25, at 597 (stating that, because Member States have different laws and traditions, their legal education and training varies).

59. EU REPORT, *supra* note 1, at 16 (stating that Member States can require an aptitude test or an adaptation period); Lonbay, *supra* note 1, at 1645 (explaining that Member States can test competence or require an adjustment period).

the Diploma Recognition Directive.<sup>60</sup> *Gebhard v. Milan Bar Council* involved a German lawyer who had been sanctioned by the Milan Bar Council for using the Italian title of *avvocato*.<sup>61</sup> Gebhard, who had practiced in Italy for many years, appealed the sanction and claimed that he was entitled to practice in Italy under the Lawyers' Services Directive.<sup>62</sup> The National Bar Council asked the ECJ whether Italy had properly implemented the Lawyers' Services and Diploma Recognition Directives and how to decide whether a lawyer was practicing on a temporary basis.<sup>63</sup>

The ECJ held that Gebhard was not practicing temporarily, but working as an established lawyer in Italy, because of the "duration . . . regularity, periodicity or continuity" of his practice."<sup>64</sup> However, the ECJ noted that a professional practicing temporarily has the right to set up the "infrastructure" needed to provide services.<sup>65</sup> Having thus discussed the freedom to provide services, the ECJ moved on to

---

60. *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, Case C-55/94 [1995] E.C.R. I-4186 (expanding the standard from *Van Binsbergen* and incorporating the Diploma Recognition Directive); see Goebel, *supra* note 10, at 316 (explaining the importance of *Gebhard*).

61. *Gebhard*, [1995] E.C.R. I-4186, ¶¶ 4–9 (describing Gebhard's German background and long-term practice in Milan); Goebel, *supra* note 10, at 316 (explaining that the Milan Bar sanctioned Gebhard "because of his permanent practice in Italy, using the title of '*avvocato*,' without being qualified as an Italian lawyer.").

62. *Gebhard*, [1995] E.C.R. I-4186, ¶ 12 (explaining that Gebhard argued he was entitled to practice in Milan under the Lawyers' Services Directive); Goebel, *supra* note 10, at 316 (stating that Gebhard justified his practice in Italy by asserting his right to practice under the Lawyers' Services Directive).

63. *Gebhard*, [1995] E.C.R. I-4186, ¶ 18 (describing the questions the Milan Bar referred to the Court); Goebel, *supra* note 10, at 316 ("[T]he National Bar Council asked the Court of Justice whether a 1982 Italian law had properly implemented the Lawyers' Services Directive and what criteria should be used in determining the extent to which a foreign lawyer may practice in Italy under the terms of the directive.").

64. *Gebhard*, [1995] E.C.R. I-4186, ¶¶ 27, 28 (distinguishing the facts of the instant case from temporary provision of services); Goebel, *supra* note 10, at 317 (stating that the ECJ's judgment in *Gebhard* provided guidance on what makes practice temporary rather than permanent).

65. *Gebhard*, [1995] E.C.R. I-4186, ¶ 27 (holding that a short-term service provider can establish necessary aspects of legal practice to aid in provision of services); Goebel, *supra* note 10, at 317 (emphasizing that the ECJ held that providing services temporarily does not preclude the ability to establish the necessary infrastructure). This means that a law firm can maintain a permanent office, staffed with non-lawyers, to allow its attorneys the ability to provide temporary services in another Member State. *See id.* (explaining that a law firm can employ a non-legal staff in a foreign Member State to aid in providing services).



professional establishment standards, characterizing the Treaty concept of professional establishment as “a very broad one” and announcing several rules to that end.<sup>66</sup>

First, it created a liberal framework for regulating interstate establishment by holding that, although lawyers must comply with their Host State’s conditions, any regulation that could violate the Treaty must fulfill four conditions.<sup>67</sup> Specifically, these rules must be (1) equally applicable to nationals and foreigners, (2) justified by some overriding public necessity, (3) properly targeted to achieve their stated objective, and (4) not broader than necessary to achieve their goal.<sup>68</sup> Furthermore, the ECJ held that Member States cannot limit interstate establishment by ignoring foreign qualifications.<sup>69</sup>

Similar to the Lawyers’ Services Directive after the *Van Binsbergen* decision, the legislative EU institutions worked to implement the ECJ’s guidance by creating a more comprehensive directive on lawyers’ rights.<sup>70</sup> The 1998 Lawyers’ Establishment Directive eliminates most national barriers to lawyers’ establishment.<sup>71</sup> The directive provides two ways for a

66. *Gebhard*, [1995] E.C.R. I-4186, ¶ 25 (explaining that establishment is a liberal concept); see EU REPORT, *supra* note 1, at 204 (“[T]he so-called Gebhard-test mean[s] that there should be a reason of compelling public interest, no discrimination, necessity, suitability and, in particular, proportionality, i.e. the prohibition is not justified if a less restrictive measure is available.”).

67. *Gebhard*, [1995] E.C.R. I-4186, ¶ 37 (describing the four requirements for a restriction to be valid); Goebel, *supra* note 10, at 316 (the Court interpreted the establishment provisions “in a very liberal manner”).

68. *Gebhard*, [1995] E.C.R. I-4186, ¶ 37 (holding that “national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must . . . be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary to attain it”); George C. Nnona, *Multidisciplinary Practice in the International Context: Realigning the Perspective on the European Union’s Regulatory Regime*, 37 CORNELL INT’L L.J. 115, 128 n.60 (stating that the ECJ held that national rules that limit practice rights must fulfill these four conditions).

69. *Gebhard*, [1995] E.C.R. I-4186, ¶ 38 (holding that Member States must consider foreign diplomas equivalent to their own); Lonbay, *supra* note 1, at 1645–46 (“[Although *Gebhard* deliberately left the issue of competence and regulation of qualification regimes within the national orbit . . . [n]ational jurisdiction exercised in this field still has to respect the principles of EU law.”).

70. See *supra* note 45 and accompanying text.

71. Lawyers’ Establishment Directive, *supra* note 33, at 36, ¶ 4 (directing Member States to allow a lawyer who “possesses professional experience in that Member State” to “integrate into the profession in the host Member State”); Lonbay, *supra* note 1, at

lawyer to establish himself outside his Home State.<sup>72</sup> One option is to retain his Home State's title for lawyers while engaging in some types of practice in the Host State.<sup>73</sup> The other is to qualify as a Host State lawyer, thus obtaining the Host State's title, by practicing there for three years subject to local review and rules.<sup>74</sup> Regardless of which route a lawyer takes, he must limit his practice to areas in which he is competent.<sup>75</sup>

In the early 2000s, the European Council established the "Lisbon Strategy," encouraging the growth of competition and the further liberalization of professions.<sup>76</sup> The EU institutions, endeavoring to promote the Lisbon policy, have taken steps toward its goals, including a stronger economy and better lives for Europeans.<sup>77</sup> Thus, the EU regulatory climate for lawyers, among other professionals, becomes ever-more liberal.<sup>78</sup>

---

1641 (explaining that the directive allows EU lawyers to establish practice in Member States other than their own).

72. Lawyers' Establishment Directive, *supra* note 33, arts. 2, 10, at 38, 40–41 (describing the Home State and Host State methods of establishment); Lonbay, *supra* note 1, at 1641 (explaining that the directive provides two modes of establishment for lawyers).

73. Lawyers' Establishment Directive, *supra* note 33, art. 2, at 38 (allowing lawyers to "pursue on a permanent basis, in any other Member State under his home-country professional title," many activities of the profession); Lonbay, *supra* note 1, at 1641–42 (stating that a lawyer can establish in another Member State under his Home State title).

74. Lawyers' Establishment Directive, *supra* note 33, art. 10, at 40–41 (providing lawyers the opportunity to practice in a Member State under the title used therein for lawyers); Lonbay, *supra* note 1, at 1642 ("[The Directive creates a new entry route to membership of bars and law societies [that allows foreigners] to transform . . . into a Host State lawyer.").

75. See COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE, CODE OF CONDUCT FOR EUROPEAN LAWYERS § 3.1.3 (2006) (stating that a lawyer must refuse work he cannot handle); Lonbay, *supra* note 1, at 1642 (explaining that bars and law societies depend on attorneys to practice with integrity, which includes staying within their competence).

76. Presidency Conclusions, Lisbon European Council, (Mar. 23–24, 2000), [http://www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm) (setting objectives to "strengthen employment, economic reform and social cohesion as part of a knowledge-based economy"); CORDIS Programmes Lisbon Strategy, [http://cordis.europa.eu/programme/rcn/843\\_en.html](http://cordis.europa.eu/programme/rcn/843_en.html) (seeking to encourage investment and employment in the European Union by working to improve its economic, social, and environmental climates).

77. See Communication from the Commission: Report on Competition in Professional Services, COM(2004) 83 final 3 (Feb. 9, 2004) [hereinafter 2004 Report] (explaining the need to reform professional services rules as a result of the important role professions have in improving the economy); Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 20 NW.J. INT'L L. & BUS. 1,

As the EU's Member States become increasingly intertwined, national rules embracing partnerships with non-lawyers have spread rapidly, and several Member States have eliminated ALPS restrictions in recent years.<sup>79</sup> ALPS have long been allowed in the European Union—some types have existed in Germany since 1994<sup>80</sup>—but the Lawyers' Establishment Directive allows Member States to prohibit ALPS, at least in some circumstances.<sup>81</sup> Competition authorities, however, are skeptical of such rules.<sup>82</sup> This skepticism brought a Dutch law prohibiting partnerships of lawyers and auditors to the ECJ, which held that it was permissible.<sup>83</sup>

---

3 (2009) (the Lisbon Strategy “has been cited as support for the EU Initiative, EU regulation of legal practice, and the European Court of Justice cases that provided part of the impetus for this initiative”).

78. Goldsmith, *supra* note 50, at 442 (analyzing Member State action toward creating a system for lawyer regulation that exerts less oversight over attorneys). *See generally* Lonbay, *supra* note 1 (discussing recent developments in the ability of EU lawyers to practice throughout multiple jurisdictions).

79. Charles W. Wolfram, *Comparative Multi-Disciplinary Practice of Law: Paths Taken and Not Taken*, 52 *CASE W. RES. L. REV.* 961, 978 (2002) (“[T]he right to provide services [throughout the EU] is generally pushing toward permitting in many, if not all, countries many kinds of practices that are permissible in any one.”); *see* Goldsmith, *supra* note 50, at 441 (explaining that meetings among EU governments, deliberate idea-spreading by the European Commission, and media attention have increased the ease with which ideas spread among Member States).

80. Terry, *supra* note 7, at 1557 (stating that MDPs have been allowed in Germany since 1994); Wolfram, *supra* note 79, at 978 (explaining that ALPS have existed in Europe for a quarter century).

81. EU REPORT, *supra* note 1, at 204 (“[I]t is unclear whether the right of the Host State to forbid [ALPS] is *per se* a right or whether the exercise of such right must meet the so-called Gebhard-test . . . .”); *see* *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten*, Case C-309/99, [2002] E.C.R. I-1653, ¶ 110 (holding that the Dutch bar could prohibit partnerships between lawyers and auditors because, in the bar’s judgment, these partnerships threatened the functioning of the Dutch legal profession).

82. *See* Mario Monti, Comm’r for Competition, European Comm’n, *Competition in Professional Services: New Light and New Challenges* (Mar. 21, 2003), available at [http://ec.europa.eu/comm/competition/liberalization/conference/speeches/mmonti\\_berlin\\_032003\\_en.pdf](http://ec.europa.eu/comm/competition/liberalization/conference/speeches/mmonti_berlin_032003_en.pdf) [hereinafter Monti speech] (suggesting that some national regulations might not “continue to serve the legitimate purposes of the protection of the public interest”); 2004 Report, *supra* note 77, at 3 (explaining that, according to research, outdated rules negatively impact consumers).

83. *See* *Wouters*, [2002] E.C.R. I-1653, ¶ 110 (holding that the Dutch bar could prohibit partnerships between lawyers and auditors); Terry, *supra* note 77, at 19 (stating that the ECJ allowed the Dutch ban to stand).

The *Wouters* case began in 1995, when the Amsterdam Bar refused to allow a lawyer-auditor partnership.<sup>84</sup> The EU Advocate General recommended remanding the case to the Dutch court for consideration of whether the ban, which was in his opinion necessary, could be less restrictive.<sup>85</sup> The ECJ, however, declined to send the case back to the Dutch court, holding that the ban did not violate the Treaty's provisions on anti-competition, services, or establishment.<sup>86</sup> In so holding, the ECJ recognized the anti-competitive effects of the ban, and its possible infringement on free services and establishment, but found the professional concerns raised by partnerships between lawyers and auditors sufficient to render the ban necessary.<sup>87</sup>

Despite *Wouters*, implementation of ALPS has continued, partially due to pro-competition initiatives.<sup>88</sup> Incidentally, *Wouters* and another 2002 decision<sup>89</sup> deferring to a Member State's view

---

84. *Wouters*, [2002] E.C.R. I-1653, ¶ 28 (stating that the Dutch authority decided in July 1995 that the partnership was not allowed due to a ban on lawyer-auditor associations); see Laurel S. Terry, *MDPs, Spinning, and Wouters v. NOVA*, 52 CASE W. RES. L. REV. 867, 868–69 (2004) (explaining that the Supervisory Board of the Order of Attorneys for the District of Amsterdam decided in July 1995 not to allow the proposed partnership).

85. Terry, *supra* note 84, at 874–75 (explaining that the Advocate General recommended that the ECJ remand the case to the national court for a determination of whether the ban was necessary and proportional); Opinion of Advocate General Léger, *Wouters v. NOVA*, [2002] E.C.R. I-1653, ¶ 256 (opining that consideration of whether the ban was necessary and proportional “must be referred back to the national court”).

86. *Wouters*, [2002] E.C.R. I-1653, ¶ 110 (holding that the ban did not violate the Treaty because it could “reasonably be considered to be necessary for the proper practice of the legal profession [in the Netherlands]”); Terry, *supra* note 84, at 886 (explaining that the ECJ's analysis of whether the ban violated the Treaty provisions on freedom of services and establishment followed its consideration of the ban under anti-competition provisions).

87. *Wouters*, [2002] E.C.R. I-1653, ¶¶ 87–108 (“[Although the ban is] liable to limit production and technical development . . . [it could] reasonably be considered necessary [to the practice of law in the Netherlands and the Bar was] entitled to consider [that the rule's objectives could not] be attained by less restrictive means.”); *id.* ¶ 122 (holding that, even if the rule was a violation of free movement, “that restriction would in any event appear to be justified for the reasons set out [in the competition analysis]”).

88. See Goldsmith, *supra* note 50, at 450 (explaining that, despite the ECJ's decision in *Wouters*, the United Kingdom implemented ALPS that are even “more radical” than those at issue in that case); see Paton, *supra* note 4, at 2232–36 (stating that the Legal Services Act of 2007 was a response to antitrust pressure).

89. Criminal Proceedings Against Manuele Arduino, Case C-35/99, [2002] E.C.R. I-1561, ¶ 44 (holding that Italian fee schedules were permissible because they were not

of a restrictive regulation as necessary inspired one such initiative.<sup>90</sup> The Commission, concerned about how Member States would interpret and implement these decisions, undertook a stocktaking exercise to study and regulate restrictions on the liberal professions.<sup>91</sup> In February 2004, the Commission published a report detailing competition principles in connection with several liberal professions, including legal practice, emphasizing the importance of deregulation to the Lisbon strategy.<sup>92</sup> On May 1, 2004, the Council's Regulation 1/2003 became effective, directing Member States to work with one another as well as the Commission to end activities that violate the Treaty or Member State laws on competition.<sup>93</sup>

Additionally, in 2006 the Parliament and Council issued the Services Directive, emphasizing the importance of freedom of establishment and services for all professionals, to further increase competition and strive toward the goals of the Lisbon Strategy.<sup>94</sup> Article 16 of the Directive, which basically provides a

too restrictive); *see also* European Commission v. Italian Republic, Case C-565/08 [2011] I-2115 (dismissing the Commission's challenge to Italy's fee schedules).

90. *See* Terry, *supra* note 77, at 26 (explaining that the European Commission called a meeting to discuss competition issues, including proper treatment of the ECJ's decisions in *Wouters* and *Arduino*); *Competition: Study on the Economic Impact of Member States' Regulation in the Field of Liberal Professions*, CCBE INFO, Jan. 2003, at 5, available at [http://www.ccbe.eu/fileadmin/user\\_upload/NTCdocument/n\\_04\\_enpdf1\\_1180966023.pdf](http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/n_04_enpdf1_1180966023.pdf) (describing a discussion among national authorities "to reach a common view on the interpretation of the *Wouters* and *Arduino* judgments").

91. 2004 Report, *supra* note 77, at 7 (explaining that the Commission performed a survey to "obtain a better understanding of the regulation of liberal professions and its effects"); Terry, *supra* note 77, at 43 (describing the questions the Commission asked about regulation of liberal professions).

92. *See* 2004 Report, *supra* note 77, at 3 (stating that the purpose of the report was to "set out the Commission's thinking from the perspective of competition policy on the scope to reform or modernise specific professional rules"); Terry, *supra* note 77, at 49 (explaining that the report, issued by the Commission in February 2004, provided specific information on the value of regulations relative to the burden they impose on competition and progress).

93. Council Regulation No. 1/2003/EC on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2003 O.J. L 1/1, ¶ 1 (providing for "legislation designed to meet the challenges of an integrated market and a future enlargement of the Community"); Terry, *supra* note 77, at 12-13 (explaining that the impact of the regulation, which took effect on May 1, 2004, is that Member States must address modern antitrust in all contexts and work in close cooperation with the Commission).

94. Directive 2006/123/EC of the European Parliament and of the Council on Services in the Internal Market, 2006 O.J. L 376/36, ¶¶ 1-2 [hereinafter 2006 Directive] (seeking "economic and social progress" by calling for "a free market which

summary of case law regarding the freedom to provide services, does not apply matters covered by the Lawyers' Services Directive.<sup>95</sup> The directive also calls for abolition of bans on ALPS to further the goals of the directive except where necessary for professional ethics, independence, and impartiality.<sup>96</sup>

## 2. Regulating Lawyers in the United States and the States' Control Over the Profession

The basic principles upon which the United States was founded stand in stark contrast to the EU's search for prosperity through a combination of resources and the elimination of barriers to liberal practice.<sup>97</sup> The US Constitution emphasizes state autonomy, and does not expressly address the right to provide services or establish oneself professionally.<sup>98</sup> Professional responsibility rules in the United States are therefore largely created by states, with guidance from the Model Rules.<sup>99</sup> However, the US Supreme Court has used the limited, but important, federal oversight granted it by the US Constitution to invalidate regulations that violate the Constitution or other federal law.<sup>100</sup>

---

compels the Member States to eliminate restrictions on cross-border provision of services"); see Timm Rentrop, *The Services Directive: What is Actually New?*, 2 BULL. EUR. INST. PUB. ADMIN. 17, 17 (2007) (stating that the directive is part of the Lisbon Strategy's economic reform plan).

95. 2006 Directive, *supra* note 94, art. 17(4), at 58 (explaining that article 16 does not apply to "matters covered by" the Lawyers' Services Directive); EU REPORT, *supra* note 1, at 65 (stating that article 17 "does not say that all activities of lawyers are excluded, but only matters covered by the Lawyers' Services Directive").

96. 2006 Directive, *supra* note 94, art. 25, at 62 (calling for an end to restrictions on ALPS); Laurel S. Terry et al., *International Legal Developments in Review: 2007*, 42 INT'L LAW. 833, 858 n.152 (2008) (explaining that the directive includes "measures to increase trust and confidence in cross-border services, such as . . . multi-disciplinary practices").

97. Goebel, *supra* note 10, at 318 ("[I]n contrast to the explicit provisions in the EC Treaty setting forth the freedom to provide interstate professional services and the related right of establishment, the United States Constitution contains no express statement of such rights."); see U.S. CONST. amend. X (reserving to the states all powers not expressly granted to the federal government).

98. See Goebel, *supra* note 10, at 318; see also U.S. CONST. amend. X.

99. See *supra* note 10 and accompanying text.

100. Hazard, *supra* note 20, at 1178 (explaining that the Supreme Court has limited state regulation with the Due Process, Equal Protection, and Privileges and Immunities Clauses, and the First Amendment); *Marbury v. Madison*, 5 U.S. 137 (1803) (establishing that the Supreme Court has the power of judicial review); *Martin v.*

The US Supreme Court has recognized the importance of the right to practice law in many contexts, and strikes down restrictions that burden this right unless the rule achieves an extremely important goal.<sup>101</sup> The Court has held that a state's exclusion of a qualified applicant from the bar is invidious discrimination in violation of the Due Process and Equal Protection Clauses.<sup>102</sup> Furthermore, the Court considers legal services included in the right to provide interstate commercial services recognized under the Privileges and Immunities Clause.<sup>103</sup> The Court explained this doctrine in 1985, when it struck down a New Hampshire law requiring state residency for bar membership under the Privileges and Immunities Clause in *Supreme Court of New Hampshire v. Piper*.<sup>104</sup> The Court found the state's argument that the requirement served to ensure lawyers' competence and compliance with ethical rules, which the dissent echoed, insufficient to deprive lawyers from outside New Hampshire of the right to practice law.<sup>105</sup>

---

Hunter's Lessee, 14 U.S. 304 (1816) (extending judicial review to allow invalidation of state laws).

101. See, e.g., *In re Griffiths*, 413 U.S. 717, 726–30 (1973) (holding that, as excluding aliens from the practice of law is discriminatory, the exclusion violated the Equal Protection Clause because Connecticut did not establish that it was absolutely necessary “in order to vindicate its undoubted interest in high professional standards”); see also, e.g., *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288 (1985) (finding that New Hampshire failed to show that its residency requirement bore a “close or substantial relation” to a substantial goal).

102. See *Schwartz v. Board of Bar Examiners of N.M.*, 353 U.S. 232 (1957) (holding that exclusion of a bar applicant for past communist activities, without a finding that he failed to meet qualifications, violated the Equal Protection and Due Process Clauses); *Griffiths*, 413 U.S. at 724 (finding “a link between citizenship and the powers and responsibilities of the lawyer in Connecticut” insufficient to justify excluding aliens from the bar and holding the exclusion invalid under the Equal Protection Clause).

103. *Piper*, 470 U.S. at 281 (holding that, due to the economic importance of the practice of law, along with lawyers' important “noncommercial role and duty” to represent clients with unpopular federal claims, the Privileges and Immunities Clause covers lawyers); Goebel, *supra* note 10, at 322 (“[T]he United States Supreme Court has solidly established the principle that lawyers can claim the Privileges and Immunities Clause in some circumstances when engaging in interstate legal practice.”).

104. See *Piper*, 470 U.S. at 281.

105. *Piper*, 470 U.S. at 284–87 (rejecting New Hampshire's proffered explanations for the ban); *id.* at 292 (Rehnquist J., dissenting) (“[T]he State has a substantial interest in creating its own set of laws responsive to its own local interests, and it is reasonable for a State to decide that those people who have been trained to analyze the law and policy are better equipped to write those state laws and adjudicate cases arising under them.”).

Two other key cases where the US Supreme Court invalidated regulations that violated federal law highlight the inherent tension between state regulation of attorneys and the Court's protection of constitutional and statutory goals.<sup>106</sup> In both cases, one addressing mandatory fee schedules for lawyers and one attorney advertising, the Court failed to see a connection between ethical concerns and the regulation at issue sufficient to justify contravention of federal law.<sup>107</sup>

In *Goldfarb v. State Bar of Virginia*, the US Supreme Court struck down a mandatory fee schedule, rejecting Virginia's assertion that the special professionalism concerns of the legal profession meant that it constituted a "learned professions" exception to the Sherman Antitrust Act.<sup>108</sup> Similarly, the Court rejected Arizona's assertion that disallowing a prohibition on attorney advertising would demean the profession in *Bates v. State Bar of Arizona*.<sup>109</sup> The Court determined that this Arizona rule created a blanket prohibition on attorney advertising that violated the First Amendment.<sup>110</sup>

Although the Supreme Court has recognized the importance of the right to freely practice law, a US attorney can generally only practice in the state where he passed the bar examination (his "Bar State").<sup>111</sup> Modern practice, however,

---

106. See *Goldfarb v. State Bar of Va.*, 421 U.S. 773 (1975) (invalidating fee schedules in violation of the Sherman Act); see also *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (prohibiting advertising restrictions under the First Amendment).

107. See *Bates*, 433 U.S. at 369 (rejecting "the assertion that advertising will diminish the attorney's reputation in the community"); see also *Goldfarb*, 421 U.S. at 793 (declining to consider lawyers outside the scope of the Sherman Anti-Trust Act).

108. *Goldfarb*, 421 U.S. at 786–87 (rejecting the argument that the legal profession was exempted as a "learned profession" from the Sherman Act); *id.* at 793 (holding that lawyers who act to restrain competition are subject to the Sherman Act); see Thomas D. Morgan, *The Impact of Antitrust Law on the Legal Profession*, 67 FORDHAM L. REV. 415, 426 (1998) ("[I]t was the Court's rejection of the learned profession exemption that has had the most direct effect on lawyers and other professionals").

109. *Bates*, 433 U.S. at 368 (finding "the postulated connection between advertising and the erosion of true professionalism to be severely strained"); See Terry, *supra* note 77, at 7 (explaining that the Court in *Bates* struck down Arizona's prohibition on lawyer advertising as a violation of the First Amendment).

110. *Bates*, 433 U.S. at 384 (holding that attorney advertising prohibitions were not consistent with the First Amendment); see Terry, *supra* note 77, at 7 (*Bates* struck down a "disciplinary rule that prohibited lawyers from advertising").

111. Wald, *supra* note 12, at 498 (explaining that the US legal profession is still regulated on a state-by-state basis); Goebel, *supra* note 10, at 308 (stating that the



provides US lawyers with ample reasons to practice away from home, calling state-by-state regulation into question.<sup>112</sup>

The issue captured widespread attention in 1998 when the California Supreme Court decided, in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*, that a New York attorney was not entitled to fees for work done in California.<sup>113</sup> The court held that the practice was unauthorized under a California law that prohibited legal representation without State Bar membership, calling attention to the risks associated with the widening gap between the varying state-created regulations and the reality of practice.<sup>114</sup>

Although 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.<sup>115</sup> Many transactional lawyers, however, negotiated deals, counseled clients, and collected fees outside of their Bar State, despite the fact that this practice was technically

restrictive rules on MJP within the United States are “in sharp contrast” with the liberal regulation embraced in the European Union).

112. Wald, *supra* note 12, at 491 (“Although technological advances continue to flatten our world; clients’ needs increasingly span jurisdictional, regional, and national borders; large law firms become national, even global entities; and outsourcing and off-shoring legal services become a reality, still, the regulation of the legal profession continues to be state based.”); Charles J. Wolfram, *Expanding State Jurisdiction to Regulate Out of State Lawyers*, 30 *HOFSTRA L. REV.* 1015, 1016 (2002) (criticizing the US practice of considering lawyers beyond the control of professional discipline outside their Bar State).

113. Gillers, *supra* note 8, at 960 (stating that the *Birbrower* decision attracted widespread attention and prompted the ABA to update its rules); 2002 MJP Report, *supra* note 3, at 3 (explaining that *Birbrower* highlights “the concern that . . . the laws will impede lawyers’ ability to meet their clients’ multi-state and interstate legal needs efficiently and effectively”).

114. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 140 (1998) (holding that *Birbrower*’s performance of services in California violated a state statute requiring state bar membership to practice, and that *Birbrower* was therefore not entitled to the fees for the services); Gillers, *supra* note 8, at 959 (“Lawyers were spurred into action because here was a living casualty of a dated idea and even more so because other lawyers could easily see themselves in the same predicament.”).

115. 2002 MJP Report, *supra* note 3, at 2 (explaining that restrictions on unauthorized practice outside one’s Bar State “have long been qualified by *pro hac vice* provisions, which allow courts or administrative agencies to authorize an out-of-state lawyer to represent a client in a particular case before the tribunal”); William T. Barker, *The Interstate Practice of Law: are you crossing the line?* 67 *DEF. COUNS. J.* 436, 436 (2000) (describing the lack of a system corresponding to pro hac vice admission for transactional lawyers).

unauthorized—the attorney in *Birbrower* was just one who got caught.<sup>116</sup>

The ABA accordingly decided to study MJP, and in 2002 the House of Delegates adopted all nine recommendations submitted by the ABA Commission on Multijurisdictional Practice to facilitate MJP.<sup>117</sup> The changes included amendments to Model Rule 5.5 that changed its title from “Unauthorized Practice of Law” to “Unauthorized Practice of Law; Multijurisdictional Practice of Law,” and added exceptions to the rule’s original prohibition on MJP.<sup>118</sup>

Additionally, the creation of the Model Rule on Admission by Motion allows a lawyer to gain bar admission outside his Bar State without taking another examination.<sup>119</sup> Furthermore, the creation of the Model Rule on Pro Hac Vice Admission harmonized state processes regarding out-of-state lawyers engaged in litigation.<sup>120</sup>

Despite these strides, however, those within the profession soon began to discuss whether further changes were

---

116. See Gillers, *supra* note 8, at 959 (explaining that the rules on unauthorized practice diverged from how lawyers really behaved); *Birbrower*, 17 Cal. 4th at 119 (“[T]he firm involved engaged in extensive unauthorized law practice in California [because] [i]ts attorneys traveled to California [and worked with clients there].”).

117. 2002 MJP Report, *supra* note 3, at 5–6 (summarizing the proposed changes related to unauthorized or multijurisdictional practice of law); ABA Comm’n on Multijurisdictional Practice, ABA Commission on Multijurisdictional Practice Report on Client Representation in the 21st Century 2 (2002) (“The ABA House of Delegates then adopted all nine recommendations contained in the Final Report”).

118. 2002 MJP Report, *supra* note 3, at 5 (summarizing the Commission’s recommendations, including changing the title of Model Rule 5.5 and adopting Rule 5.5(c) to identify exceptions to the prohibition on out-of-state practice); Report 201B, *supra* note 3, at 1 (describing the changes to Model Rule 5.5, including re-titling the rule and providing exceptions to its general prohibition on MJP).

119. 2002 MJP Report, *supra* note 3, at 6 (recommending that “the ABA adopt the proposed *Model Rule on Admission by Motion* to facilitate the licensing of the lawyer, if the lawyer is admitted to practice in another United States jurisdiction, has been engaged in the active practice of law for a significant period of time and is in good standing in all jurisdictions where admitted”); ABA Comm’n on Multijurisdictional Practice, ABA Commission on Multijurisdictional Practice Report 201G to the House of Delegates (Aug. 2002) [hereinafter Report 201G] (stating that the ABA adopted the proposed Model Rule on Admission by Motion).

120. 2002 MJP Report, *supra* note 3, at 6 (recommending the adoption of the proposed *Model Rule on Pro Hac Vice Admission*); ABA Comm’n on Multijurisdictional Practice, ABA Commission on Multijurisdictional Practice Report 201F to the House of Delegates (Aug. 2002) [hereinafter Report 201F] (stating that the ABA adopted the proposed Model Rule on Pro Hac Vice Admission).

necessary.<sup>121</sup> This issue, among others, led the ABA to create the Commission on Ethics 20/20 (the “20/20 Commission”) in August 2009 in order to address the effects of technology and globalization on the profession and the lack of cross-border uniformity in the regulation of lawyers.<sup>122</sup> However, the ABA ultimately did not propose any amendments to the Model Rule on Motion by Admission, and the amendments made to Model Rule 5.5 and the Model Rule on Pro Hac Vice Admission related only to foreign lawyers.<sup>123</sup>

### 3. Alternative Legal Practice Structures in the United States: Interest and Opposition

The prohibition on US lawyers sharing fees with non-lawyers is a long-standing tradition; it appeared in the ABA’s 1928 Canons of Professional Ethics, its 1969 Model Code of Professional Responsibility, and, after some debate, made it into the Model Rules of Professional Conduct in 1983.<sup>124</sup> However, the prohibition is also controversial, with vehement advocates

---

121. See ABA Comm’n on Ethics 20/20, ABA Commission on Ethics 20/20 Issues Paper Concerning the ABA Model Rule on Admission by Motion, at 1 (Dec. 2, 2010) [hereinafter Motion Admission Paper] (discussing whether the ABA should amend the Model Rule on Admission by Motion to “better accommodate the increase” in MJP). See generally Wald, *supra* note 12 (explaining the ways that state-by-state regulation fails to fit with national law practice).

122. Ethics 20/20 Preliminary Outline, *supra* note 15, at 1 (seeking to “ensure that the Model Rules keep pace with societal change and the evolution of the practice of law and that other sources of professional regulation”). See generally Paton, *supra* note 4 (explaining the effect of globalization, especially reforms in the UK, on the ABA’s establishment of the Commission).

123. ABA Comm’n on Ethics 20/20, ABA Commission on Ethics 20/20 Final Report 3–10 (Feb. 2013) [hereinafter Ethics 20/20 Final Report] (summarizing the proposed amendments); ABA Comm’n on Ethics 20/20, ABA Commission on Ethics 20/20 Report to the House of Delegates Revised 107A (providing the amended Model Rule 5.5); ABA Comm’n on Ethics 20/20, ABA Commission on Ethics 20/20 Report to the House of Delegates Revised 107C (providing the amended Model Rule on Pro Hac Vice Admission).

124. Edward S. Adams & John H. Matheson, *Law Firms on the Big Board: A Proposal for Nonlawyer Investment in Law Firms*, 86 CAL. L. REV. 1, 3–4, 8 (1998) (explaining that, during the Kutak Convention in 1983, the ABA embraced the view that the traditional prohibition on ALPS should be eliminated); Annual Report of the American Bar Association, 51 A.B.A. 778 (1928) (“In the formation of partnerships for the practice of law, no person should be admitted who is not a member of the legal profession.”).

on both sides of the debate over whether the ABA should eliminate or relax this prohibition.<sup>125</sup>

In 1998, prompted by technological innovation, an expanding global economy, and an aging generation of individual clients, the ABA created the Commission on Multidisciplinary Practice to study the possibility of allowing ALPS.<sup>126</sup> The Commission presented two recommendations to the ABA House of Delegates, which rejected both.<sup>127</sup> Its June 1999 Report and Recommendation suggested a broad amendment to the Model Rules that would allow fee sharing or multidisciplinary practice.<sup>128</sup> The May 2000 Report and Recommendation also suggested implementation of fee sharing and partnerships with non-lawyers, but with control of the practice left to the states.<sup>129</sup> Although the Commission was

---

125. Letter from Richard L. Thies to ABA Comm'n on Ethics 20/20 (Feb. 23, 2012) at 4, *available at* [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/ethics\\_20\\_20\\_comments/thies\\_alpsdiscussiondraft\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/thies_alpsdiscussiondraft_authcheckdam.pdf) (expressing concerns that nonlawyer ownership will “facilitate the destruction of the independence and core values of the legal profession and ultimately the judicial branch of government”); Comments of Professor Thomas D. Morgan on the Discussion Paper on Alternative Law Practice Structures 12 (Jan. 30, 2012) (“It is frequently hard for lawyers to welcome change, but I believe that on the topic of Alternative Law Practice Structures your Commission has proposed too little, not too much.”).

126. Laurel S. Terry, *The Work of the ABA Commission on Multidisciplinary Practice 2–3*, in STEPHEN J. MCGARRY, *MULTIDISCIPLINARY PRACTICES AND PARTNERSHIPS: LAWYERS, CONSULTANTS AND CLIENTS* (stating that the ABA President in August 1998 created the Commission on Multidisciplinary Practice); *see* ABA Comm'n on Multidisciplinary Practice, *Background Paper on Multidisciplinary Practice Issues and Developments* (Jan. 1999), *available at* [http://www.americanbar.org/groups/professional\\_responsibility/commission\\_multidisciplinary\\_practice/multicomreport0199.html](http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice/multicomreport0199.html) (explaining that the aging Baby Boomer generation and the expansion of the global economy led many individual and business clients to want and need coordinated advice from teams of professionals).

127. Terry, *supra* note 126, at 2–2 (stating that the House of Delegates defeated both of the ABA's proposals); Recommendation 10F, *supra* note 14 (rejecting the proposals on adopting MDP and disbanding the Commission).

128. Terry, *supra* note 126, at 2-18 (stating that in 1999 the ABA recommended the allowance of MDP, along with its opinion on how to implement and regulate it); ABA Comm'n on Multidisciplinary Practice, *ABA Commission on Multidisciplinary Practice Report to the House of Delegates* (June 1999) (arguing that a lawyer should be able to work in an ALPS).

129. Terry, *supra* note 126, at 2-18 (explaining that the ABA recommended, in May 2000, that lawyers be allowed to partner with non-lawyers, but omitted suggestions on how to implement ALPS); ABA Comm'n on Multidisciplinary Practice, *ABA Commission on Multidisciplinary Practice Report to the House of Delegates 1* (May 2000) [hereinafter *MDP Report 2000*] (stating that the profession should implement

ultimately unsuccessful, its work prompted states to research ALPS and consider the issue.<sup>130</sup>

A decade after the Commission on Multidisciplinary Practice failed to implement any amendments to the Model Rules, concerns over the future effects of globalization and technological innovation led the ABA to re-open the ALPS debate during the 20/20 Commission.<sup>131</sup> This time, the ABA did not even recommend any changes on the topic.<sup>132</sup> Thus, the Model Rules still prohibit all forms of ALPS, as do all fifty states.<sup>133</sup>

---

ALPS and that “[r]egulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to implement these principles and to protect the public interest”).

130. Terry, *supra* note 126, at 2-20 (“Despite the ABA House of Delegates’ rejection of both recommendations submitted by the ABA Commission . . . state and local bar associations . . . engaged in an examination of the MDP issue.”); ABA Comm’n on Multidisciplinary Practice, ABA Commission on Multidisciplinary Practice Summary of State MDP Activity Chart (updated Jan. 18, 2005) (providing descriptions of state efforts to study MDPs).

131. See Ethics 20/20 Final Report, *supra* note 123, at 8 (2012) (stating that the ABA asked the Commission to study the effects of globalization on US legal practice); see also ABA Ethics Comm’n 20/20 Issue Paper Concerning Alternative Business Structures 2 (Apr. 5, 2011) [hereinafter April ABS Paper], *available at* <http://www.americanbar.org/content/dam/aba/administrative/ethics/2020/absissuespaper.authcheckdam.pdf> (explaining that globalization and the state of the economy “invite reconsideration of whether ABS might serve to enhance access to legal services for those otherwise unable to afford them, and to provide new and varied opportunities for lawyers and firms domestically to better serve clients”).

132. December ALPS Paper, *supra* note 4, at 2 (explaining that the ABA decided not to recommend a change in policy on non-lawyer ownership); Schneyer, *supra* note 13, at 79–81 (explaining that the Commission did not recommend any amendments to Model Rule 5.4 because, despite some positive response, members of the profession showed strong resistance to allowing ALPS).

133. Gillers, *supra* note 8, at n.68 (stating that every US jurisdiction besides Washington, D.C. forbids non-lawyer ownership and management of law firms); MODEL RULES OF PROF’L CONDUCT R. 5.4(a) (subject to limited exceptions, “a lawyer or law firm shall not share legal fees with a nonlawyer”); *id.* R. 5.4(b) (“A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.”); *id.* R. 5.4(c) (“A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.”); *id.* R. 5.4(d) (“A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; (2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer”).

Before the ABA decided to abandon the topic, the Working Group on Alternative Business Structures (the “Working Group”) studied possible amendments to Model Rule 5.4’s prohibition on sharing fees with non-lawyers.<sup>134</sup> It considered five possible forms of revision to Model Rule 5.4 before deciding not to propose any changes.<sup>135</sup>

The Working Group first rejected law firms wholly or partially owned by passive investors, law firms that raise capital by issuing stock to outsiders, and multidisciplinary practices, or firms with active lawyer- and non-lawyer-owners providing services to their own clients.<sup>136</sup> However, the ABA gave more consideration to allowing law firms owned partially by non-lawyers who aid in the provision of legal services.<sup>137</sup> The Working Group created a Draft Resolution for this option, influenced by the approach of the Washington, D.C. Bar, which allows non-lawyers to own or manage law firms that solely provide legal services, if the non-lawyers agree to be bound by the ethical rules governing lawyers, and the firm’s attorneys agree to take responsibility for non-lawyers’ conduct.<sup>138</sup> The

---

134. Schneyer, *supra* note 13, at 78–79 (describing the Working Group’s task of researching whether the profession could maintain its “core values” while also implementing ALPS); April ABS Paper, *supra* note 131, at 1 (explaining that the Working Group considered whether ALPS would allow law firms to provide better client service).

135. See April ABS Paper, *supra* note 131, at 17–19 (explaining that the Working Group focused on: “Limited Lawyer/Nonlawyer Partnerships with a Cap on Nonlawyer Ownership”; “Lawyer/Nonlawyer Partnerships with No Cap on Nonlawyers Ownership (The D.C. Approach)”; “MDPs that Offer Non-Legal Services”; “Endorsing Outside Investment”; and “The Australia Model”); Schneyer, *supra* note 13, at 79 (describing the multiple possibilities the Working Group explored before abandoning the prospect of amending Model Rule 5.4).

136. See December ALPS Paper, *supra* note 4, at 1 (“[T]he Commission rejected: (a) publicly traded law firms, (b) passive, outside nonlawyer investment or ownership in law firms, and (c) multidisciplinary practices.”); Schneyer, *supra* note 13, at 79–81 (explaining that the ABA had eliminated the possibilities of allowing publicly traded law firms, outside investment by non-lawyers, and MDPs).

137. December ALPS paper, *supra* note 4, at 2 (explaining that “the sole purpose of such a law firm must be the delivery of legal services and . . . the services provided by nonlawyers must be limited to assisting the lawyers in the delivery of those legal services”); Schneyer, *supra* note 13, at 80–81 (explaining that the Working Group produced a Draft Resolution and circulated a Draft Report for this option).

138. D.C. RULES OF PROF’L CONDUCT R. 5.4 (2012) (providing, *inter alia*, that: “(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that . . . (4) Sharing of fees is permitted in a partnership or other form of organization which meets the requirements of paragraph (b) . . . [which states that] A lawyer may practice in a

option the Working Group considered included two additional restrictions: a cap on non-lawyer ownership and a character assessment of non-lawyer owners.<sup>139</sup> Ultimately, however, the Working Group found that the reasons proffered in opposition trumped those favoring amendment.<sup>140</sup>

*B. The Current Regulatory Climate for Lawyers in the European Union and the United States*

As discussed above, globalization and ever-advancing technology have created new debates, and increased the size and scope of others, related to the proper extent of professional regulations in both the European Union and the United States.<sup>141</sup> Part I.B.1 of this Note discusses the current regulatory system in the European Union, focusing on the liberal rules regarding MJP and ALPS. Part I.B.2 provides a comparative

---

partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if: (1) The partnership or organization has as its sole purpose providing legal services to clients; (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct; (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants [i.e., owners] to the same extent as if nonlawyer participants were lawyers under Rule 5.1; [and] (4) The foregoing conditions are set forth in writing.”); December ALPS Paper, *supra* note 4, at 2 (explaining that, under the D.C. model, “alternative law practice structures are not multidisciplinary practice by another name” because they are limited to providing legal services, and lawyers are responsible for assuring non-lawyers’ compliance with ethical rules).

139. Schneyer, *supra* note 13, at 80–81 (explaining that the Draft Resolution was based on a combination of the Washington, D.C. model, a limit on the percentage of ownership non-lawyers may hold, and a character requirement for non-lawyer owners); December ALPS Paper, *supra* note 4, at 2 (“[Under the Draft Proposal’s approach,] lawyers would have to maintain the controlling financial interest and voting rights in the law firm [and] investigate [a] non-lawyer’s professional reputation for integrity.”).

140. Schneyer, *supra* note 13, at 82–83 (explaining that the Commission did not recommend any changes to Model Rule 5.4 because negative reactions far outnumbered positive ones); Press Release, ABA Commission on Ethics 20/20 Will Not Propose Any Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms (Apr. 16, 2012) (“[T]here does not appear to be a sufficient basis for recommending a change to ABA policy on nonlawyer ownership of law firms.”).

141. Wald, *supra* note 12, at 506 (discussing that state-by-state regulations are increasingly mismatched with national practice). *See generally* Paton, *supra* note 4 (summarizing the extensive history of the ALPS debate).

description of the more restrictive rules governing US lawyers' ability to engage in MJP and ALPS.

### 1. The European Union: Established Free Movement of Lawyers and Gradual Implementation of Alternative Legal Practice Structures

Lawyers in the European Union are increasingly free of restrictions on their practice.<sup>142</sup> Twentieth century ECJ decisions and EU legislation firmly created interstate practice rights for both temporary and permanent MJP, and national controls over the profession have continued to decrease in recent years.<sup>143</sup> This section describes the current regulatory system in the European Union and trends toward de-regulation.

Member States have responded to the ideas spread by the European Commission with legislation removing restrictions.<sup>144</sup> In Italy, for example, the Bersani Decree liberalized several areas of legal regulation, including reducing tariffs to facilitate access and loosening restrictions on multidisciplinary partnerships.<sup>145</sup>

The Lawyers' Services Directive and the Lawyers' Establishment Directive, along with the Diploma Directive which covers the liberal professions more generally, allow lawyers and law firms to provide services on a temporary and permanent basis throughout the European Union.<sup>146</sup> Due to the national

---

142. EU REPORT, *supra* note 1, at 5 (discussing how EU directives have led to large-scale lawyer mobility); Goldsmith, *supra* note 50, at 442–43 (discussing recent liberalizing legislation in Denmark, the UK, and Italy).

143. Goebel, *supra* note 10, at 308 (“[L]awyers are able to carry on freely modern international legal practice throughout most of Europe.”); Goldsmith, *supra* note 50, at 442 (explaining that the European Union has, in the last few years, reduced control over lawyers).

144. See Goldsmith, *supra* note 50, at 443 (“[T]he European Commission . . . has been deliberately spreading certain ideas to all corners of the European Union.”); Paton, *supra* note 4, at 2197 (describing the UK’s 2007 Legal Services Act, which authorizes ALPS).

145. The Bersani Decree-Law of 4 July 2006 (transposed into law on 4 August 2006) (liberalizing professional regulation in Italy); Goldsmith, *supra* note 50, at 442–43 (explaining the impact of the Bersani Decree).

146. EU REPORT, *supra* note 1, at 16 (“[A]long with the Diploma Recognition Directive, which covers the professions generally, the] profession of lawyer is . . . covered by . . . the Lawyers’ Services Directive and the Lawyers’ Establishment Directive.”); see Lonbay, *supra* note 1, at 1641–44 (describing the three directives as the most important legislation relating to the free movement of lawyers).



nature of the legal profession, however, Member States retain control over lawyers that is unique among the professions.<sup>147</sup> Thus, Member States impose certain requirements, such as rules requiring foreign lawyers to work with local lawyers on certain matters and to comply with administrative requirements.<sup>148</sup>

This framework has greatly impacted the legal profession in the European Union.<sup>149</sup> There is a large market for lawyers who provide services temporarily under the Lawyers' Services Directive, either physically or virtually.<sup>150</sup> Regarding permanent practice, the Lawyers' Establishment Directive and the Diploma Recognition Directive have allowed many lawyers to establish themselves outside their Home State.<sup>151</sup>

Lawyer mobility has thus had a large economic impact.<sup>152</sup> Additionally, it has affected the availability of a broader range of legal services, and many lawyers perceive some increase in competition.<sup>153</sup> Although some foreign lawyers experience competitive disadvantages or confusion over choice of

147. EU REPORT, *supra* note 1, at 5 (“[T]he profession of lawyer is specifically targeted to and based on the national legal systems in which prospective lawyers train and fully qualified lawyers practise.”); see Lawyers' Establishment Directive, *supra* note 33 (providing for a system of establishment specifically for lawyers).

148. EU REPORT, *supra* note 1, at 79, tbl. 3.1 (providing Member States' versions of the requirement that a foreign lawyer work with a local lawyer); Lawyers' Establishment Directive, *supra* note 33, art. 3, at 38–39 (requiring foreign lawyers to register with the Host State's competent authority).

149. EU REPORT, *supra* note 1, at 175 (“[Lawyer mobility affects] meeting the needs of clients of legal services in cross-border cases . . . the European economy, and . . . the quality of legal services offered.”); Lonbay, *supra* note 1, at 1640 (characterizing the EU's free practice rights as “dramatic”).

150. EU REPORT, *supra* note 1, at 7 (describing the prevalence of temporary interstate practice); *id.* at 122 (“[L]awyers may provide services to clients in other countries . . . by telephone and/or e-mail.”).

151. EU REPORT, *supra* note 1, at 7 (stating that about 3500 lawyers have established themselves outside their Home State under the Lawyers' Establishment Directive); *id.* (estimating that between 200 and 300 lawyers have fully integrated into the profession in foreign Member State).

152. EU REPORT, *supra* note 1, at 8 (reporting that lawyers established outside their Home State account for about EU€640 million in turnover each year); COPENHAGEN ECONOMICS, *THE LEGAL PROFESSION: COMPETITION AND LIBERALISATION* 6 (Jan. 2006) [hereinafter COPENHAGEN REPORT] (“The legal profession is of great importance to the economy.”).

153. EU REPORT, *supra* note 1, at 9 (“[T]he most commonly perceived effect of lawyer mobility is an increase in the range of legal services that is offered . . . [and] relatively many lawyers perceive an increase in competition pressure because of cross-border mobility of lawyers.”); COPENHAGEN REPORT, *supra* note 152, at 4 (explaining that liberalization leads to increased competition, which can benefit consumers).

regulations, lawyers nonetheless continue to practice in large numbers throughout the European Union.<sup>154</sup>

Additionally, national regulations regarding business structures in the legal profession have recently effected major changes in some Member States' regulation of lawyers.<sup>155</sup> Some Member States allow non-lawyers to partner with lawyers or to participate in ownership or management of law firms.<sup>156</sup>

The Member State reform that has attracted the most attention is the United Kingdom's decision to embrace ALPS after conducting research on consumer preferences and needs.<sup>157</sup> The United Kingdom's 2007 Legal Services Act implemented many significant changes, placing regulatory control of the profession in the Legal Services Board and the Office for Legal Complaints, and declaring that a majority of members of both entities must be non-lawyers.<sup>158</sup> Furthermore, the Act permits the Board to consider new business models, based on the view that the market will benefit from legal advice offered with other business services.<sup>159</sup>

---

154. See *infra* notes 218–20 and accompanying text.

155. EU REPORT, *supra* note 1, at 10 (“[D]evelopments in relation to business structures are especially relevant for cross-border mobility of lawyers and law firms.”); Goldsmith, *supra* note 50, at 442 (describing dramatic changes in Member State control of legal practice).

156. EU REPORT, *supra* note 1, at 206 (explaining that some Member States now allow ALPS); see Ramon Mullerat, *The Multidisciplinary Practice of Law in Europe*, 50 J. LEGAL EDUC. 481, 484–90 (2000) (describing ALPS rules in several EU countries).

157. Legal Services Act of 2007 (Eng.), available at <http://www.legislation.gov.uk/ukpga/2007/29/contents> (enacting a new regulatory scheme); Julian Webb, *Regulating Lawyers in a Liberalized Legal Services Market: The Role of Education and Training*, 24 STAN. L. & POLY REV. 533, 533 (stating that the reforms in the UK have drawn widespread interest).

158. Legal Services Act 2007, pt. 2, at 2–11 (describing the new Legal Services Board); Terry, *supra* note 77, at 10 (“[T]he Act changes the regulatory structure for solicitors and barristers in England and Wales by creating a Legal Services Board and an Office for Legal Complaints, both of which require a majority of members who are not lawyers.”).

159. SIR DAVID CLEMENTI, REVIEW OF THE REGULATORY FRAMEWORK FOR LEGAL SERVICES IN ENGLAND AND WALES: FINAL PAPER 6 (Dec. 2004), available at <http://www.legal-services-review.org.uk/content/report/report-chap.pdf> (“[When] developing business systems to minimise costs whilst maintaining high standards, there is no reason why lawyers should not work alongside those with other skills . . .”); Legal Services Act 2007, pt. 5, at 42–64 (providing for regulation of newly allowed activities).

Accordingly, there are now several types of alternative legal practice structures allowed in the United Kingdom.<sup>160</sup> These include legal firms owned by passive investors, firms that issue stock to non-lawyers to raise capital, multidisciplinary practices, and firms owned, in part, by non-lawyers but limited to providing legal services.<sup>161</sup>

Other Member States that permit lawyers to practice with non-lawyers in multidisciplinary partnerships, usually with some restrictions, include Germany, the Netherlands, Poland, and Spain.<sup>162</sup> Furthermore, England, Wales, Scotland, Italy, Spain, Denmark, and the Netherlands allow non-lawyer ownership or management, with various restrictions on their involvement.<sup>163</sup>

## 2. Controversy in the United States over Liberalization of Rules on Multijurisdictional Practice and Alternative Legal Practice Structures

In the United States, the ABA Model Rules greatly impact state regulation of lawyers; although they are not mandatory, many states implement similar or identical rules.<sup>164</sup> Thus, the Model Rules' provision of only limited exceptions to the requirement that a lawyer practice only within their Bar State is largely incorporated throughout the United States, with little

---

160. See Schneyer, *supra* note 13, at 79 (discussing the five kinds of ALPS that are now allowed in the United Kingdom); The Law Society, *Alternative Business Structures*, § 2 What is an ABS? (July 22, 2013), <http://www.lawsociety.org.uk/advice/practice-notes/alternative-business-structures/> (explaining that the UK now allows a firm where a non-lawyer manages, or has an ownership interest in, a law firm).

161. See Schneyer, *supra* note 13, at 79 (summarizing the ABA's consideration of these five structures); April ABS Paper, *supra* note 131, at 13 ("Under the [Legal Services Act], alternative business structures are defined as entities that have lawyer and nonlawyer management and/or ownership and that provide only legal services or legal services in combination with non-legal services.").

162. EU REPORT, *supra* note 1, at 206 (explaining that France, Germany, the Netherlands, Poland, Spain, and the UK permit MDPs). See generally Terry, *supra* note 7 (describing Germany's long history of allowing multidisciplinary practice).

163. EU REPORT, *supra* note 1, at 206 ("External ownership . . . has been made possible in England and Wales (up to 100% for solicitor firms), Scotland (up to 49%), Italy (33%) . . . Spain (49%) . . . [and] Denmark . . . (10%). In the Netherlands, ownership by non-lawyers is not possible, but minority non-lawyer management is permitted."); see, e.g., Legal Services Act 2007, pt. 5, at 42–64 (describing the types of ALPS allowed in the United Kingdom).

164. See Goebel, *supra* note 10, at 324 (explaining that the Model Rules are adopted by most states); Wald, *supra* note 12, at 500 (stating that most states follow the Model Rules).

deviation.<sup>165</sup> Furthermore, all fifty states prohibit lawyers from sharing fees with non-lawyers, in large part due to the ABA's steadfast refusal to amend Model Rule 5.4.<sup>166</sup> This section discusses the details and impact of these rules.

Under the Model Rules, and throughout the United States, in most situations lawyers cannot practice outside of their Bar State.<sup>167</sup> However, four exceptions to this prohibition listed in Model Rule 5.5 allow lawyers to provide multijurisdictional legal services on a "temporary basis."<sup>168</sup> Thus, lawyers can provide these legal services if they collaborate with a lawyer qualified in that jurisdiction.<sup>169</sup> They can also engage in MJP if they have received *pro hac vice* admission for the matter under consideration or one "reasonably related" to it.<sup>170</sup> Furthermore, a lawyer can practice in ways "reasonably related" to alternative dispute resolution.<sup>171</sup> Finally, a lawyer may offer services that

---

165. See Wald, *supra* note 12, at 499 (describing Model Rule 5.5 as a "nearly uniformly adopted rule of professional conduct"); Am. Bar Ass'n, Comparison of ABA Model Rule on Admission by Motion with State Versions (2010) [hereinafter Motion Admission Comparison], available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission\\_motion\\_comp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_motion_comp.authcheckdam.pdf) (comparing similarities between states' implementation of the Model Rule on Admission).

166. See *supra* notes 126–48 and accompanying text.

167. MODEL RULES OF PROF'L CONDUCT R. 5.5 (prohibiting MJP except in a few limited situations); Wald, *supra* note 12, at 502 ("The state-based regulatory approach . . . generally restricts the practice of law within state jurisdictional lines and deems practice in a state without a license the unauthorized practice of law.").

168. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(1)–(4) (providing four situations where "[a] lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction"); Wald, *supra* note 12, at 503 (stating that Model Rule 5.5(c) is a possible path to national practice rules).

169. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(1) (providing that a lawyer may engage in MJP if he works with a locally qualified lawyer); Wald, *supra* note 12, at 503–04 ("Subsection 5.5(c)(1) permits a state A lawyer to offer legal services in state B that are undertaken in association with a[n actively participating] state B lawyer.").

170. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(2) (allowing foreign lawyers to participate in authorized proceedings, or work on related matters); Wald, *supra* note 12, at 504–505 (explaining that this section corresponds with *pro hac vice* admission). All states allow some form of *pro hac vice* admission. 2002 MJP Report, *supra* note 3, at 10 (stating that every jurisdiction permits *pro hac vice* admission of out-of-state lawyers appearing before a tribunal, although the processes and standards for *pro hac vice* admission differ).

171. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(3) (authorizing lawyers to participate in alternative dispute resolution and practice in related ways); Wald, *supra* note 12, at 505 (explaining that subsection 5.5(c)(3) allows multijurisdictional practice in arbitration, mediation, or similar proceedings).

“arise out of or are reasonably related to the lawyer’s practice” in their Bar State.<sup>172</sup>

However, Colorado takes a more liberal approach: it allows an “out-of-state attorney” to offer temporary legal services there, but places restrictions on certain types of practice, like litigation.<sup>173</sup> In order to be a valid out-of-state attorney, the lawyer must be licensed in another state and be in good standing in all courts and jurisdictions in which he or she is admitted.<sup>174</sup> Additionally, the provision requires that out-of-state attorneys not have a domicile in Colorado, nor an office from which the lawyer solicits Colorado clients.<sup>175</sup> It also subjects out-of-state attorneys to Colorado’s ethical rules.<sup>176</sup>

The Model Rule on Admission by Motion provides that an attorney licensed to practice law in a US jurisdiction who meets certain requirements may obtain admission in another state without taking that state’s bar exam.<sup>177</sup> This rule has been implemented in some form in all but eleven states.<sup>178</sup>

172. MODEL RULES OF PROF’L CONDUCT R. 5.5(c)(4) (allowing a lawyer to perform tasks that “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice”); Wald, *supra* note 12, at 505–06 (explaining that this rule allows lawyers to provide services where a “factual or legal nexus exists to the lawyer’s practice” in their Home State).

173. Colo. R. Civ. P § 220(2) (allowing out-of-state lawyers to practice in Colorado but requiring pro hac vice admission for appearance in a court or tribunal”); Wald, *supra* note 12, at 532 (explaining that Colorado’s approach allows out-of-state lawyers to provide services outside of courtroom litigation, including transactional counseling).

174. Colo. R. Civ. P § 220(1) (defining an out-of-state attorney as one who: (a) is licensed and active in a US jurisdiction; (b) has not lost his good standing in any jurisdiction where he is licensed; (c) has not established a domicile in Colorado; and (d) does solicit, accept, or deceive Colorado clients from an office for regular law practice); Wald, *supra* note 12, at 532–33 (describing the requirements of Colo. R. Civ. P § 220(1)).

175. *See* Colo. R. Civ. P § 220(1)(c)–(d) (prohibiting out-of-state attorneys to practice if they are domiciled in Colorado or have a Colorado office used to solicit Colorado clients); Wald, *supra* note 12, at 532 (describing the requirements of Colo. R. Civ. P § 220(1)).

176. Colo. R. Civ. P § 220(3) (“An out-of-state attorney practicing law under this rule is subject to the Colorado Rules of Professional Conduct and rules of procedure regarding attorney discipline and disability proceedings and . . . remedies . . .”); Wald, *supra* note 12, at 533 (explaining that out-of-state lawyers must comply with Colorado’s ethical rules).

177. MODEL RULES OF PROF’L CONDUCT RULE ON ADMISSION BY MOTION (2012) (“An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction. The applicant shall: (a) have been admitted to practice law in another state, territory, or the District of Columbia; (b) hold a first professional degree in law (J.D. or LL.B.) from a law school

In contrast to the ABA's willingness to show some relaxation of the rules on MJP, the ABA's two studies of ALPS did not result in any changes to the Model Rules.<sup>179</sup> Model Rule 5.4 therefore does not allow lawyers to share fees with non-lawyers, and this prohibition persists in all fifty states.<sup>180</sup> Thus, multidisciplinary practices are not allowed, nor is ownership of law firms by non-lawyers.<sup>181</sup>

In Washington, D.C., however, attorneys may practice with non-lawyers.<sup>182</sup> There, lawyers may work in ALPS with other professionals so long as the purpose of the practice is to provide legal services.<sup>183</sup> If a Washington, D.C. lawyer works with a lawyer from one of the fifty states and the attorneys jointly bill a client, the fact that the US lawyer may eventually share fees with a non-lawyer does not mean that he violates his ethical duties.<sup>184</sup> The

---

approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the graduate matriculated; (c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed; (d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted; (e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdiction; (f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and (g) designate the Clerk of the jurisdiction's highest court for service of process."); Wald, *supra* note 12, at 499 (explaining that the Model Rule on Admission by Motion allows attorneys who satisfy certain criteria to practice outside their Bar State).

178. See Motion Admission Comparison, *supra* note 165 (summarizing state implementation of the Model Rule on Admission by Motion and noting that California, Delaware, Florida, Hawaii, Louisiana, Maryland, Montana, Nevada, New Jersey, New Mexico, and South Carolina have not implemented admission by motion); see, e.g., Illinois Supreme Court Rule 705 ("Any person who, as determined by the Board of Admissions to the Bar, has been licensed to practice in the highest court of law in any United States state, territory, or the District of Columbia for no fewer than five years may be eligible for admission on motion . . .").

179. See *supra* notes 126–33 and accompanying text.

180. See *supra* note 133 and accompanying text.

181. See *supra* note 133 and accompanying text.

182. See *supra* note 138 and accompanying text.

183. See *supra* note 138 and accompanying text.

184. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 464 (2013) ("Where there is a single billing to a client . . . a lawyer subject to the Model Rules may divide a legal fee with a lawyer or law firm in the other jurisdiction, even if the other lawyer or law firm might eventually distribute some portion of the fee to a nonlawyer, provided that there is no interference with the lawyer's independent professional judgment."); PHILA. BAR ASSN. PROF'L GUIDANCE COMM., ADVISORY OP. 2010-7 (2010) (concluding that a law firm that represented a client jointly with a D.C. firm that has a non-lawyer partner could share the fee).

principle applies whether the lawyer who can share fees with non-lawyers is from Washington D.C., or a foreign jurisdiction that allows ALPS.<sup>185</sup>

Although the concerns underlying US opposition to removing or reducing restrictions on MJP and ALPS are deep-seeded and widely accepted, a growing number of US attorneys now hope for at least some reform.<sup>186</sup> The intensity of the debates surrounding the ABA's consideration of MJP and ALPS show that both sides' adherents remain committed to their positions.<sup>187</sup> This leads to the perception that liberalization is inapposite to the profession's core values, but also prompts some members of the US legal profession to discover ways that the two can, and should, co-exist.<sup>188</sup>

## II. *EMBRACING PROGRESS AND GUARDING TRADITIONAL VALUES: THE US DEBATE ABOUT PROPER AND WISE LAWYER REGULATION*

As the European Union continues to see reform on both institutional and national levels, the growing gap between EU and US rules leads many US lawyers to push the profession harder to catch up.<sup>189</sup> This movement, however, continues to meet steadfast opposition by US attorneys citing tradition and core values.<sup>190</sup> Part II.A of this Note summarizes the arguments proffered by US lawyers in favor of allowing MJP, including successful implementation abroad, as well as the reasons opponents of reform cite for adhering to traditional state-by-state regulation. Part II.B examines the longstanding debate over ALPS, comparing the reasons many claim its implementation is both inevitable and favorable with those given for unwavering adherence to the traditional law firm structure.

---

185. *See supra* text accompanying note 184.

186. *See supra* note 12 and accompanying text.

187. *See supra* note 17 and accompanying text.

188. Green, *supra* note 17, at 1146 (explaining that the core values argument assumes that lawyers and their rules are "better" than other professionals and their rules, that non-lawyers are corrupt and will taint lawyers' practices, and that legal ethics cannot be changed); *supra* note 16 and accompanying text.

189. *See supra* note 12 and accompanying text.

190. Letter from Richard L. Thies to ABA Comm'n on Ethics 20/20 (Feb. 23, 2012) (on file with author) .

A. *Can Multijurisdictional Practice Reconcile Lawyer Regulation with Legal Practice in the United States?*

As discussed above, MJP is allowed on a far more liberal basis in the European Union than in the United States.<sup>191</sup> EU lawyers and law firms provide services both temporarily and on a permanent basis throughout the European Union.<sup>192</sup> In contrast, US lawyers may practice outside their Bar State only in limited circumstances.<sup>193</sup> While many US lawyers argue that multijurisdictional practice rules should be reduced or eliminated, others stand firm in the belief that the profession will suffer if the state-based-regulation tradition is abandoned. Part I.A.1 describes the arguments for liberalizing the MJP rules in the United States. Part I.A.2 summarizes the opposing position. Finally, Part I.A.3 provides a description of some of the solutions proponents of reform propose.

1. Multijurisdictional Practice in the United States Will Benefit Lawyers, Clients, and the Profession at Large

There is a growing body of scholarship and case law arguing that the rules of MJP in the United States should be relaxed.<sup>194</sup> This section will describe some of the reasons proffered for reform, including market considerations, client demand, the need for regulation that “fits” with practice, and successful implementation of liberal practice rules in the European Union.<sup>195</sup>

Many US lawyers point out that allowing increased MJP would make the provision of legal services in the United States

---

191. See *supra* notes 142–63 and accompanying text; cf. *supra* notes 164–88 and accompanying text.

192. See *supra* notes 142–63 and accompanying text.

193. See *supra* notes 164–88 and accompanying text.

194. See Wald, *supra* note 12, at 491–92 (“[State-by-state regulation is] outdated and increasingly inconsistent with practice realities.”); *In re Estate of Waring*, 221 A.2d 193, 197 (N.J. 1966) (“While the members of the general public are entitled to full protection against unlawful practitioners, their freedom of choice in the selection of their own counsel is to be highly regarded . . .”).

195. See Gillers, *supra* note 8, at 953 (explaining that the growth of virtual practice requires changes to the Model Rules); Wald, *supra* note 12, at 492–93 (describing the arguments for a national system of lawyer regulation and their particular importance in the twenty-first century).



more efficient.<sup>196</sup> Service by an attorney familiar with the facts of a case or with special expertise relevant to the matter, regardless of their Home State or Bar State, is more efficient than requiring a lawyer from the Host State to take over.<sup>197</sup>

Technological innovation and globalization, proponents of reform argue, render the current regulation of MJP outdated, if not obsolete.<sup>198</sup> Consumers' ability, through the internet, to fully understand their options in choosing a lawyer allows them to look for a price they find acceptable, or search for a specific specialization.<sup>199</sup> One implication of this transparency is the ability to find an attorney who is located out of state or even out of the country.<sup>200</sup> The Internet also allows lawyers to target and serve clients outside of their physical proximity.<sup>201</sup> Thus, some

196. See, e.g., Fred C. Zacharias, *Federalizing Legal Ethics*, 73 *TEX. L. REV.* 335, 342–43 (1994) (“[A national regulation system would be more efficient because] practices of both multistate law firms and less ambitious practitioners . . . have become national in nature.”). See generally Wald, *supra* note 12 (offering societal explanations for why change is necessary).

197. See Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice*, 36 *S. TEX. L. REV.* 715, 725 (1995) (explaining that as lawyers become more likely to specialize, clients increasingly hire national experts); Goebel, *supra* note 10, at 340 (“The ability to use the same qualified counsel, particularly when parallel transactions are undertaken in a number of states, undoubtedly represents a considerable cost-saving and a substantial enhancement of efficiency for modern clients.”).

198. See Gillers, *supra* note 8, at 953 (“The traditional geocentric [regulation] model . . . is unstable today . . .”); Zacharias, *supra* note 196, at 344 (“[C]urrent ethics codes may no longer be effective.”).

199. See ABA Comm. on the Delivery of Legal Servs., *Perspective on Finding Personal Legal Services, The Results of a Public Opinion Poll*, 14 (2011) [hereinafter *Finding Legal Services*] (reporting that 47% of those surveyed are likely to browse websites where lawyers are rated); Vanessa S. Browne-Barbour, *A Fork in the Road: The Intersection of Virtual Law Practice and Social Media*, 52 *WASHBURN L.J.* 267, 276 (2013) (“Consumers increasingly search the Internet, including social media pages, to inform themselves about [legal] products and services.”).

200. See Browne-Barbour, *supra* note 199, at 278–79 (emphasizing the importance of a lawyer’s ability to use the Internet to talk with people throughout the world); Gillers, *supra* note 8, at 997 (explaining that, with the help of the Internet, “specialization is increasingly defined by expertise in areas of law”).

201. See Wald, *supra* note 12, at 495 (“[T]echnological advances have revolutionized the practice of law, making it much easier to practice law nationally, from research tools that make studying law and gaining competence nationally quick, easy, and relatively cheap, to advances that allow lawyers to be virtually present everywhere.”); cf. *Finding Legal Services*, *supra* note 199, at 15 (stating that lawyers have used websites to develop client relationships since the 1990s).

argue that the rigid state system may compromise the client's interest in choosing their own representation.<sup>202</sup>

Aside from wanting more control over their choice of representation, proponents argue, many clients now truly need more geographically widespread counsel.<sup>203</sup> Technology creates more mobile clients, who have multijurisdictional issues.<sup>204</sup> As corporations grow and become more geographically diverse, their needs spread.<sup>205</sup> Recent years have, somewhat resultantly, brought huge amounts of multi-office and international law firms that cross state and national borders.<sup>206</sup>

However, the rules of MJP lag behind the purported supply and demand for it; although clients want more mobile lawyers and lawyers are available to provide interstate services, the practice remains difficult.<sup>207</sup> As matters become increasingly geographically widespread without simultaneous development

---

202. See Goebel, *supra* note 10, at 338 (explaining that the EU model better serves clients interests, especially the right to choose one's own lawyer); Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 712 (1995) ("[T]he client would be better served by legal services provided by familiar, regular counsel or counsel particularly skilled in dealing with a particular specialty.").

203. See Wald, *supra* note 12, at 494–95 (explaining the ways that clients receive better service where lawyers span jurisdictions); Zacharias, *supra* note 196, at 352 (describing the globalized nature of client needs).

204. See Wald, *supra* note 12, at 494–95 (explaining that MJP is necessary because national clients' interests are geographically widespread); Zacharias, *supra* note 196, at 352 ("When national lawyers represent or sue national corporations . . . [they] may find an issue simultaneously governed by the codes in [many states].").

205. See James R. Faulconbridge, Jonathan V. Beaverstock, Daniel Muzio & Peter J. Taylor, *Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work*, 28 NW. J. INT'L L. & BUS. 455, 455 (2008) (explaining that clients expanded throughout world in the 1980s and 1990s); Wald, *supra* note 12, at 497 ("A national . . . [or] international client, may have legal needs in multiple jurisdictions . . .").

206. See Faulconbridge et al., *supra* note 205, at 455 (describing the prevalence and importance of global law firms); Wald, *supra* note 12, at 497 ("[Representing large clients can] inherently entail practice across state lines and cooperation among firm lawyers in multiple offices nationwide and worldwide.").

207. See Wald, *supra* note 12, at 498 (explaining that the persistence of state-based regulation is problematic because national and global law practice is here to stay). See generally Stephanie L. Kimbro, *Practicing Law Without an Office Address: How the Bona Fide Office Requirement Affects Virtual Law Practice*, 36 U. DAYTON L. REV. 1 (2010) (summarizing the difficulties associated with location-based regulation in a virtual world).

for lawyer regulation, the profession as a whole suffers.<sup>208</sup> Allowing efficiency costs to hinder the successful operation of the system may place the United States at a disadvantage when a client considers whether to hire a lawyer from the United States or elsewhere.<sup>209</sup> Thus, proponents of reform argue that the status quo will lead to a continuously less profitable US system.<sup>210</sup>

Additionally, some US attorneys argue that a regulatory system based on physical location is, in many ways, an odd fit with a legal field where much of the activity regulated now occurs on the Internet, and involves collaboration across physical and industry borders.<sup>211</sup> The ability of lawyers to communicate, research, access client records, and perform many other duties from anywhere gives them the ability to choose their location.<sup>212</sup> A growing trend whereby lawyers choose to work far from their physical practice, or without a physical practice at all, has caused the line between what does or does not violate jurisdictional rules to become very blurred.<sup>213</sup>

---

208. Goebel, *supra* note 10, at 336 (explaining that interstate legal practice may better serve modern client needs and reduce efficiency costs); Wald, *supra* note 12, at 494-95 (“[C]lient needs have dictated an expansion in cross-state practices.”).

209. John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 205–06 (2000) [hereinafter MDP Market Approach] (predicting that clients will take their business outside the United States if the ethical rules don’t keep up with client demand); Stephen M. (Pete) Peterson, *Too Many Lawyers? . . . or Not Enough Clients?*, 36 *WYO. LAW.*, Jun, 2013 at 44 (2013) (“For the foreseeable future, we will have a buyer’s market for legal services.”).

210. Adams & Matheson, *supra* note 124, at 1 (“[P]rohibitions against nonlawyer investment and participation in law firms have long hindered the legal profession with no signs of change.”). *See generally* MDP Market Approach, *supra* note 209 (arguing, based on economic theories, that allowing ALPS will benefit the profession).

211. *See* Gillers, *supra* note 8, at 956 (explaining that developments in how lawyers actually practice throughout the world “will marginalize the effectiveness of regulation” if the ALPS ban persists); Kimbro, *supra* note 207, at 3 (“Recent changes to the legal profession due to the globalization of law firms, trends in outsourcing of legal services, and the public demand for online legal services all indicate the need for a wider variety of law practice management structures . . .”).

212. *See* Gillers, *supra* note 8, at 978–79 (stating that technology allows lawyers the freedom to perform their duties from any physical location); Wald, *supra* note 12, at 495 (“[T]echnological advances have revolutionized the practice of law, making it much easier to practice law nationally, from research tools that make studying law and gaining competence nationally quick, easy, and relatively cheap, to advances that allow lawyers to be virtually present everywhere.”).

213. *See* Gillers, *supra* note 8, at 972–78 (discussing the different ways that attorneys use technology to work far from their physical office, or without one at all);

Thus, proponents argue that the gap between state-based regulation and current practice makes ethical rules less relevant, less predictable, and less able to protect clients.<sup>214</sup> Furthermore, the rules vary by state, presumably leaving many attorneys confused about their ethical responsibilities and enforcement bodies unsure about their role.<sup>215</sup> This, it is argued, imposes costs on clients and undermines their ability to feel confident in their lawyers' representation.<sup>216</sup> Thus, those in favor of reform argue that the ABA must recognize the problems associated with state-based regulation and work to reconcile rules with reality.<sup>217</sup>

Another way many proponents support their position is by looking to the benefits of the EU system.<sup>218</sup> A 2012 review of the EU's Lawyers' Establishment Directive (the "EU Report") noted an overall improvement in client service with the ability of lawyers to cross borders, with mobility contributing to the experience of many clients.<sup>219</sup> Regarding the competence issues

---

Kimbro, *supra* note 207, at 2 (stating that some state bars maintain outdated rules and regulations pertaining to the practice of law that may hinder their effectiveness).

214. Wald, *supra* note 12, at 502 ("A regulatory approach that formally purports to adopt a state-based approach but in fact permits national law practice is illegitimate, confusing, and unpredictable."); Zacharias, *supra* note 196, at 344 (advocating for reform based on the view that the current ethical rules have lost their effectiveness).

215. Wald, *supra* note 12, at 493 (explaining that state codes often subject lawyers to conflicting rules); Zacharias, *supra* note 196, at 341 ("The rules governing professional conduct in the various state and federal jurisdictions have become irreconcilably diverse.").

216. Wald, *supra* note 12, at 511 (stating that clients end up paying for legal services that are less effective than they could be under a national system); Zacharias, *supra* note 196, at 344 (explaining the importance of suitable regulation for "the provision of guidance to lawyers and the maintenance of a public image that fosters client trust and thereby improves service to clients").

217. Wald, *supra* note 12, at 501 ("[T]he regulatory approach ought to be reconsidered and realigned with practice realities or risks becoming of little relevance to practicing attorneys."); Zacharias, *supra* note 196, at 344 (calling for re-evaluation of rules where regulation no longer serves its goals).

218. See Motion Admission Paper, *supra* note 121 (stating the importance of regulatory reforms abroad to the study of whether to amend MJP rules in the United States); Goebel, *supra* note 10, at 340 ("[F]rom the point of view of promoting the societal interest in achieving economic efficiency in the marketplace, the liberalization of interstate legal services in the European Union is vastly preferable to the fragmentation produced by much of the United States' case law.").

219. See EU REPORT, *supra* note 1, at 13 ("[I]n general, the legal framework has provided the conditions under which cross-border needs of clients can be met . . ."); Conference, A Single Market for Lawyers: valuing achievements, tackling remaining challenges, Draft Programme, available at [http://ec.europa.eu/internal\\_market/](http://ec.europa.eu/internal_market/)

associated with allowing free movement of lawyers among Member States, the report states that lack of competence seems to be a problem only in new Member States.<sup>220</sup> Thus, the reform movement in the United States will likely continue to draw inspiration from this positive experience abroad, especially as clients seek out the benefits associated with ALPS.<sup>221</sup>

## 2. Allowing Multijurisdictional Practice in the United States Will Erode the Profession's Traditional Values

The main argument proffered by those who oppose MJP in the United States is that clients will suffer a disservice where their attorney has not obtained qualification in the Host State. The rule is meant to protect consumers, who may not be in a position to analyze their lawyer's ability to represent them.<sup>222</sup> The idea is that a lawyer from out-of-state will not be competent in the laws of the jurisdiction.<sup>223</sup> Conversely, a client will feel confident in the ability of an attorney who has passed the bar in that state.<sup>224</sup> A similar worry is that the lawyer will fail to follow

---

conferences/2013/1028-a-single-market-for-lawyers/docs/programme\_en.pdf (explaining that the EU framework has been largely successful).

220. See EU REPORT, *supra* note 1, at 7 (explaining that foreign lawyers are sufficiently competent in all but the newest Member States). *But see* COPENHAGEN REPORT, *supra* note 152 (criticizing deregulation that compromises core values).

221. See MDP Market Approach, *supra* note 209, at 124 (“[If clients can’t find multidisciplinary services in the United States, the practice of] sending international legal business abroad because they find that the European MDP delivers higher quality services . . . will continue.”); Paton, *supra* note 4, at 2194–95 (discussing the ABA’s focus on the positive and negative effects of ALPS throughout the world).

222. See Goebel, *supra* note 10, at 334 (discussing the need to protect consumers from legal representation that is incompetent or unethical); Wald, *supra* note 12, at 525-26 (“Based on the assumptions that many clients seek legal advice when they are vulnerable, and that often clients are not in a position to evaluate the quality of legal services they receive, state-based regulation is meant to protect clients from predatory conduct . . .”).

223. Goebel, *supra* note 10, at 342 (“[R]estrictions reflect a concern that the out-of-state lawyer’s lack of training or knowledge in the local substantive law might harm the client at some point . . .”); Pamela A. McManus, *Have Law License; Will Travel* 15 *GEO. J. LEGAL ETHICS* 527, 535 (2002) (explaining that state bars want to retain their ability to require a license to practice in their state so that they can ensure competent lawyering).

224. McManus, *supra* note 223, at 534 (“Initial licensing requirements may be an ideal method for states to ensure that only qualified individuals receive a law license”); Wald, *supra* note 12, at 526 (explaining that reallocating regulatory control compromises states’ interests in protecting their citizens from harm).

the ethical rules of the state due to confusion about differing local rules or the state's lack of control over the lawyer.<sup>225</sup>

Other arguments focus on the right and ability of state bars to regulate attorneys in relation to national regulation.<sup>226</sup> States assert that they have an interest in ensuring access to legal services, which they achieve through retaining control of the profession within their borders.<sup>227</sup> Furthermore, states and reform opponents argue, adherence to federalism weighs in favor of state control of lawyer regulation because it is not a power delegated to the Federal Government.<sup>228</sup>

### 3. Solutions Proposed by Advocates of Multijurisdictional Practice Reform

Although many attorneys agree on the need for reform, their preferred way to achieve it varies.<sup>229</sup> Some suggest a national system, eschewing separate state regulation in favor of a federal system whereby US attorneys can practice throughout the United States.<sup>230</sup> This would mean assigning responsibilities like standards for admission to the legal profession, legal ethics

---

225. Wolfram, *supra* note 112, at 1038 (explaining that, in general, state bars cannot discipline lawyers who do not have a license to practice in that state); Zacharias, *supra* note 196, at 352-53 (“[T]he splintering of regulation undermines a national practitioner’s ability to find guidance.”).

226. See *Goldfarb v. State Bar of Va.*, 421 U.S. 773, 792 (1975) (recognizing the state’s interest in regulating lawyers); Wald, *supra* note 12, at 524 (recognizing that states have a “legitimate interest” in regulating their own lawyers to exert control over the profession and prevent harm to consumers)..

227. Wald, *supra* note 12, at 526 (“States have a legitimate interest in ensuring that their citizens have access to legal services, and state-based regulation, at least in theory, allows them to pursue this goal.”); cf. Carole Silver, *What We Don’t Know Can Hurt Us: The Need for Empirical Research in Regulating Lawyers and Legal Services in the Global Economy*, 43 AKRON L. REV. 1009, 1016 n.19 (2010) (explaining how nationalizing regulation could shift power from state bars to national law firms).

228. See Hazard, *supra* note 20, at 1177 (discussing state “conflicts with the federal government over certain aspects of . . . regulatory authority”); Wald, *supra* note 12, at 528 (explaining that shifting towards a national system necessarily entails states ceding power to the federal government).

229. See, e.g., Gillers, *supra* note 8, at 999 (proposing the creation of a uniform bar exam with separate state scoring); Wald, *supra* note 12, at 546 (calling for “an open border permission to practice subject to continued state control over admission, licensing, and disciplinary enforcement”).

230. Wald, *supra* note 12, at 522–31 (summarizing the arguments in favor of and against national regulation); Zacharias, *supra* note 196, at 371 (describing the arguable benefits of enacting a national code and allowing the federal government to assume enforcement responsibility).

code drafting, and regulatory enforcement to the federal government.<sup>231</sup>

More moderate approaches focus on how to improve the current system, such as amending Model Rule 5.5 to follow Colorado's approach.<sup>232</sup> Other suggestions attack rules that could pose complications or risks to a hypothetical system of national regulation.<sup>233</sup> Suggestions include homogenizing key ethical rules, such as the advertising regulations that now vary widely among jurisdictions, or requiring that all lawyers obtain malpractice insurance.<sup>234</sup>

B. *Alternative Legal Practice Structures: Law Firms Looking to the Future, or Abandonment of Professional Standards?*

The US legal profession has long considered the possible advantages of practicing in ALPS and the ways in which their implementation can solve problems plaguing the profession.<sup>235</sup> Although the ABA decided not to recommend any such change during the 20/20 Commission, and the House of Delegates rejected both earlier proposals, many attorneys continue to advocate for ALPS.<sup>236</sup>

231. Wald, *supra* note 12, at 514–31 (explaining the responsibilities that would shift to the federal government under a national regulatory scheme); Zacharias, *supra* note 196, at 382 (discussing the national nature of “aspects of professional regulation that reflect great disparity”).

232. See *supra* notes 173–76 and accompanying text.

233. See Am. Bar Ass'n, *Differences between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct*, (May 1, 2013), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/state\\_advertising\\_and\\_solicitation\\_rule\\_differences\\_update\\_for\\_virginia\\_july\\_1\\_2013.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_advertising_and_solicitation_rule_differences_update_for_virginia_july_1_2013.authcheckdam.pdf) (listing how state rules diverge from the Model Rules); Edward Poll, *Law Practice Today, Risky Business—Some Thoughts on Legal Malpractice Insurance*, AM. BAR ASS'N, L. PRACTICE MGMT. SEC., (Feb. 2007), <http://apps.americanbar.org/lpm/lpt/articles/mtt02071.shtml> (discussing Oregon's requirement that all lawyers carry malpractice insurance).

234. Gillers, *supra* note 8, at 1003 (explaining how harmonization of disclosure requirements and minimum standards would simplify the complicated system of attorney advertising rules); *id.* at 1004 (“[R]equiring malpractice insurance . . . would ensure payment of malpractice judgments up to the limit of the lawyer's policy and compliance with the preventive measures that insurance carriers require.”).

235. Schneyer, *supra* note 13, at 102–09 (summarizing the ABA debates on ALPS prior to the 20/20 commission); Adams & Matheson, *supra* note 124, at 8 (describing the 1983 Kutak convention on multidisciplinary practice).

236. See generally Schneyer, *supra* note 13 (describing the reasons the ABA should have amended Model Rule 5.4 during the 20/20 Commission); Gillers, *supra* note 8,

As discussed above, EU Member States may permit or prohibit partnerships between lawyers and non-lawyers, and some states have therefore implemented multidisciplinary partnerships and non-lawyer ownerships.<sup>237</sup> In contrast, fee sharing between lawyers and non-lawyers in the United States is limited to Washington, D.C.<sup>238</sup> While many US lawyers staunchly argue that this prohibition should remain, others vehemently advocate that US lawyers should be able to practice with non-lawyers. Part I.B.1 of this Note provides the arguments for implementing ALPS. Part II.B.2 explains the position of those who oppose any change to the prohibition on ALPS, and Part II.B.3 summarizes some common counter-arguments to that position. Finally, Part II.B.4 describes of some solutions proposed by those who push for ALPS in the United States.

#### 1. Alternative Legal Practice Structures Will Meet Client Needs and Create a More Efficient Market for Legal Services

The most common arguments for relaxing or removing the ban on ALPS are that law firms offering more than just legal services will better meet client interests, that they will conserve resources and promote efficiency, and that they will allow US law firms to compete in the global market.<sup>239</sup> Those who advocate for change state that accepting the existence of new ways to practice law does not necessitate renouncing treasured ethical principles.<sup>240</sup> Instead, they simply call for revised applications, which will regulate in a way that is neither over- nor under-inclusive, but tailored to the state of the profession today.<sup>241</sup> This section summarizes the economic arguments for

---

(analyzing the benefits of abandoning outdated values and embracing practice structures that would better the profession).

237. See *supra* notes 142–63 and accompanying text.

238. See *supra* notes 164–88 and accompanying text.

239. See Paton, *supra* note 4, at 2196 (assessing the MDP debate “in the face of new global realities facing the legal profession”). See generally MDP Market Approach, *supra* note 209 (explaining the economic benefits of MDP).

240. See Gillers, *supra* note 8, at 998 (clarifying that by advocating the elimination of prohibitions on ALPS, the author does not express a desire to reduce control over the profession, but recognizes the need for new rules in light of practical changes); Mullerat, *supra* note 156, at 492 (“The challenge for lawyers at the turn of the twenty-first century is this: how to reconcile current demands to operate efficiently and profitably with the maintaining of professional values.”).

241. Gillers, *supra* note 8, at 998; Mullerat, *supra* note 156, at 492.



reform, as well as those arguments emphasizing that the prohibition of ALPS merely leaves attorneys who claim not to be practicing law outside of legal regulation. It also describes how ALPS proponents use the successful implementation of ALPS abroad to advocate for US reform.

Those advocating for the adoption of ALPS in the United States often argue its necessity based on economic principles, including achieving client demand.<sup>242</sup> One argument is that refusing to allow any sort of alternative structure disserves the US legal profession because it ignores client preferences and puts US law firms at a disadvantage in the global market.<sup>243</sup> Another is that the categorical ban on alternative legal practice structures makes regulating the ways lawyers and non-lawyers work together in reality difficult and encourages creative structures that compete with law firms.<sup>244</sup> Furthermore, a combination of technological innovation, increasingly global trade and access to information, and the modern economic climate, has caused a shift in what clients want and expect—meaning outdated rules stand in the way of what many clients look for, causing them to take their business elsewhere.<sup>245</sup> In contrast, allowing the implementation of ALPS would mean

---

242. Adams & Matheson, *supra* note 124, at 1 (“The sixty-plus-year-old prohibition [on nonlawyer investment in law firms] has created an inefficient legal services market.”); MDP Market Approach, *supra* note 209, at 118–20 (identifying benefits of MDPs, such as better service for clients with both legal and non-legal needs, and saved time and money due to reduced efficiency costs).

243. MDP Market Approach, *supra* note 209, at 205 (stating that if the profession does not embrace regulatory changes, US lawyers will lose their ability to compete in the global market); Adams & Matheson, *supra* note 124, at 40 (“[A]s the practice of law continues to be increasingly transformed from a profession into a business, it makes little sense to prevent lawyers from using the financial tools that virtually every other business has available to it.”).

244. See Peterson, *supra* note 209, at 43 (“Non-law firms are gaining momentum and are eroding law firm revenues and profits.”); cf. Gillers, *supra* note 8, at 984 (describing the different non-law firm structures that evade regulation).

245. MDP Market Approach, *supra* note 209, at 88 (explaining that the ABA studied ALPS because many members of the profession believe clients will take their business abroad if they cannot obtain multidisciplinary services at home); Ethics 20/20 Preliminary Outline, *supra* note 15, at 6 (discussing the importance of “permitting U.S. lawyers and law firms to participate on a level playing field in a global legal services marketplace that includes the increased use of one or more forms of alternative business structures”).

more business kept within US law firms, rather than sent abroad or to more flexible entities.<sup>246</sup>

Proponents of ALPS claim that this change would help alleviate financial burdens on law firms, leading to beneficial expansion, financial stability, and better client service.<sup>247</sup> During the 2008-2009 economic downturn in the United States, law firms' excessive borrowing to fund expansion and salaries contributed to financial instability and diminished quality of service.<sup>248</sup> Proponents argue that it is therefore unsurprising that clients in the United States desire practice models that can better serve their needs.<sup>249</sup> Thus, the argument is that implementation of alternative structures would meet client expectations as well as create a more efficient market.<sup>250</sup>

Additionally, some proponents justify implementing reform on the theory that bringing non-lawyers into the legal profession's regulatory fold is a better option than incurring the costs of trying to regulate those who do not abide by the rules or

---

246. See Adams & Matheson, *supra* note 124, at 40 (stating that, considering "the substantial benefits of allowing law firms to incorporate, to engage in business associations with nonlawyers, and to receive investments by nonlawyers," there are strong reasons to implement reform); MDP Market Approach, *supra* note 209, at 123–24 (stating that U.S. clients want multidisciplinary services and will seek them outside of US law firms if necessary).

247. Adams & Matheson, *supra* note 124, at 40 (discussing the "capital for expansion, capital for investment in new technologies and new lawyers, financing for contingency fee cases, and a myriad of other rewards" that allowing ALPS would bring to US law firms); MDP Market Approach, *supra* note 209, at 118 (explaining that MDPs are more efficient, meaning law firms would save time and money while providing clients better service).

248. See Paton, *supra* note 4, at 2199–200 ("Together, the challenge of the economic downturn in 2008-2009, and the changed global legal practice environment that the ABA's Ethics 20/20 Commission is charged with assessing, mandate a . . . reconsideration of the place of the MDP in America."); cf. April ABS Paper, *supra* note 131 (citing the changed environment in which small and large law firms compete as a factor favoring allowing ALPS).

249. See Randall S. Thomas et al., *Megafirms*, 80 N.C. L. REV. 115, 172 (2001) ("Increases in the number of international mergers and acquisitions and other complex business transactions have led clients to seek out more efficient ways of obtaining professional services."); MDP Report 2000, *supra* note 129, at 17 (stating that evidence suggests clients are interested in obtaining services from MDPs).

250. Thomas et al., *supra* note 249, at 172 ("[Client] demand for MDPs is driven by the clients' sense that these arrangements would be a more efficient, less costly way for them to deal with complex matters that have legal, accounting, and management issues."); Gillers, *supra* note 8, at 999 (explaining that, on this view, failing to embrace ALPS in the face of modern circumstances hurts those values more than it preserves them).

allowing attorneys to abdicate from law firms.<sup>251</sup> They point out that attorneys incentivized to take their skills outside of law firms, such as tax attorneys at accounting firms, are not regulated as lawyers.<sup>252</sup> Accounting firms have shown great interest in recruiting lawyers, based upon client demand for combined tax and legal services and the desire of accounting firms to expand internally.<sup>253</sup> Lawyers have responded by joining these firms.<sup>254</sup> Thus, critics argue, the legal profession is regulating fewer and fewer professionals in the name of protecting core values that are actually harmed by the status quo.<sup>255</sup>

Finally, proponents of implementing ALPS look to countries that allow non-lawyer ownership or MDP, and there is much scholarship about the positive effects of ALPS on clients' and lawyers' interests.<sup>256</sup> In Australia, where law firms may become public corporations, the client experience as well as the

---

251. Gillers, *supra* note 8, at 999 (explaining that allowing professionals to leave the legal regulatory fold leads to less regulation); MDP Market Approach, *supra* note 209, at 111 (“[A] client will often need non-tax services to implement . . . [a] tax plan . . . [such as] transferring title to a property, or drafting the documents for a family limited partnership. Providing these services could arguably constitute the unauthorized practice of law.”).

252. Thomas et al., *supra* note 249, at 173 (explaining that lawyers working outside of law firms may avoid application of the legal profession’s regulations so long as they do not appear in court, which many types of lawyers never do); Green, *supra* note 17, at 1117 (stating that the ethical rules apply “when lawyers practice law”).

253. Thomas et al., *supra* note 249, at 172 (“Clients’ demands have . . . [caused accounting firms] to build up their internal legal groups.”); MDP Market approach, *supra* note 209, at 104 (explaining that where “accounting firms have expanded their consulting practices” they will recruit lawyers).

254. See Gillers, *supra* note 8, at 991–92 (“Tax lawyers have long been willing, if the incentives are strong, to take their skills to accounting firms.”); Thomas et al., *supra* note 249, at 173 (stating that accounting firms aggressively pursue tax partners from major law firms).

255. Gillers, *supra* note 8, at 999 (arguing that the profession has a responsibility to implement changes that would improve access to legal services without compromising core values); Schneyer, *supra* note 13, at 136 (explaining that allowing more lawyers to embrace partnerships with non-lawyers outside the law firm context will cause the profession to miss “the opportunity to learn from experience which, if any, forms of nonlawyer ownership cause problems and how best to regulate firms with nonlawyer owners”).

256. See MDP Market Approach, *supra* note 209, at 114 (“The Swiss economy, which is dominated by the banking industry, has long recognized the value of decisions informed by many different professionals.”); Terry, *supra* note 7, at 1599 (reporting that German lawyers indicated in interviews that their clients want and benefit from multidisciplinary services).

achievement of law firm goals appear to point in favor of incorporated legal practices.<sup>257</sup> And although ALPS are new in the United Kingdom, early studies report better client service and increased market share.<sup>258</sup>

One field of study emphasizes that the ethical concerns cited by opponents of ALPS may be less relevant or inevitable than anti-reform scholarship presents.<sup>259</sup> Proponents emphasize that lawyers practicing with non-lawyers in Germany, where MDPs have long been allowed, have not sacrificed their ethical standards.<sup>260</sup> Thus, as ALPS continue to take hold abroad, they may serve to push reform in the United States.<sup>261</sup>

## 2. Alternative Legal Practice Structures Threaten to Make Legal Practice Just Another Business and Erode Lawyers' Core Values

Opposition to allowing ALPS reflects a concern that any change in ownership structure would erode the “core values” of the legal profession.<sup>262</sup> The steadfast opposition to

---

257. See Andrew Grech & Kirsten Morrison, *Slater & Gordon: The Listing Experience*, 22 GEO. J. LEG. ETHICS 535, 540 (2009) (“The Slater & Gordon experience has shown that an IPO can be an effective strategy.”); Laurel S. Terry, *Transnational Legal Practice (International)*, 47 INT’L LAW. 485, 496 (2013) (summarizing a study that found that Australian law firms that have incorporated receive less complaints).

258. LEGAL SERVICES BOARD, EVALUATION: CHANGES IN COMPETITION IN DIFFERENT LEGAL MARKETS (2013) (explaining that UK law firms embracing ALPS are starting to positively impact client experience and that new structures have increased market share); Julius Melnitzer, *Alternative Business Structures More Productive Than Law Firms*, U.K. Regulator Finds, FIN. POST (Oct. 24, 2013), <http://business.financialpost.com/2013/10/24/alternative-business-structures-more-productive-than-law-firms-u-k-regulator-finds/> (reporting that the Legal Services Board found ALPS more productive than law firms and more adept at complaint management).

259. See Mullerat, *supra* note 156, at 488 (“[Germany’s MDPs] do not seem to have shown any of the problems now being discussed such as protection of independence, confidentiality, and avoidance of conflicts.”); Terry, *supra* note 257, at 496 (explaining that, with the help of the “appropriate managing systems” requirement, Australia has successfully worked toward the elimination of ethical concerns with public law firms).

260. Terry, *supra* note 7, at 1623 (summarizing Germany’s positive experience with multidisciplinary practice); Mullerat, *supra* note 156, at 488 (explaining that lawyers practicing in Germany’s MDPs have not lost their ethical values).

261. Paton, *supra* note 4, at 2194 (explaining how developments abroad brought about the possibility that the idea of alternative business structures may “have new life in America”); Gillers, *supra* note 8, at 998 (opining that the idea of alternative business structures are “not a trend . . . that we can vote down”).

262. December ALPS Paper, *supra* note 4, at 2 (discussing “whether such practices could operate in a manner that is consistent with the American legal profession’s core

organizational reform is based on the fear that sharing ownership with non-lawyers will erode lawyers' confidentiality, loyalty, candor, and diligence.<sup>263</sup> The argument is that mixing lawyers with non-lawyers who recognize different values threatens legal professionalism, causes ethical concerns, and ultimately, may undercut the dignity of the profession.<sup>264</sup>

Opposition to changes in the regulation of the legal profession is often supported by the long-standing, principle differences in separating attorneys from other professionals and holding lawyers to higher ethical standards.<sup>265</sup> This argument highlights the unique attributes of the legal profession, such as the lawyer-client confidentiality relationship and the lawyer's role as a zealous advocate, as necessitating unique ethical rules.<sup>266</sup>

Another oft-cited reason to oppose reform is that allowing non-lawyer ownership and MDP will cause law to become just another business, dominated by giants at the sacrifice of ethics.<sup>267</sup> Allowing even limited forms of ALPS, some say, will

---

values."); see Green, *supra* note 17, at 1117 (2000) ("[T]hose who oppose multidisciplinary practice rally under the banner of core values.").

263. See Gillers, *supra* note 8, at 998 ("Opponents of ALPS believe that] if we do anything that recognizes these changes, we afford a patina of legitimacy at the expense of the American legal profession's core values: confidentiality, loyalty, candor, and diligence."); Paton, *supra* note 4, at 2198 (explaining that lawyers who oppose ALPS claim that embracing new structures will threaten the core values of the profession).

264. Gillers, *supra* note 8, at 987 ("If powerful nonlawyers in law firms are positioned to influence the compensation and status of firm lawyers, they may cause the lawyers to violate ethical obligations if they believe that doing so will enhance the finances of the firm and therefore their own."); Green, *supra* note 17, at 1146 (stating that the argument against ALPS assumes that proper lawyer-client relationships can exist only if lawyers are regulated by special professional standards).

265. See *Goldfarb v. State Bar of Va.*, 421 U.S. 773, 786-87 (1975) (describing the Bar's argument that lawyers, as members of a "learned profession," are different than other tradespeople and thus should not be subject to the same rules); Gillers, *supra* note 8, at 987 ("[N]on-lawyers are not governed by legal ethics rules, do not have to worry about professional discipline, and might be quite willing to violate duties to clients, courts, or others in order to enrich themselves . . .").

266. See Green, *supra* note 17, at 1147 ("[L]awyers' client-centered duties, such as the duties of loyalty and zealous advocacy, are thought to be incompatible with accountants' public-regarding ethos . . ."); Schneyer, *supra* note 13, at 131 (describing the threat to confidentiality that opponents of ALPS connect with associations among lawyers and non-lawyers).

267. Adams & Matheson, *supra* note 124, at 15-16 ("Opponents of ALPS] fear that nonlawyers in management will exert control over a lawyer's actions, forcing decisions that are best for the organization's business, rather than decisions that the

lead down a “slippery slope.”<sup>268</sup> Opponents furthermore dismiss the positive effects of ALPS on competition, claiming they are irrelevant because competition is foreign to the legal profession.<sup>269</sup>

### 3. Progressive Responses to Opposing Arguments

The concerns voiced by opponents of ALPS are not discounted by pro-reform scholarship; it is the argument itself that has come under fire, causing proponents to question whether the professionalism argument continues to deserve its prominent place, or rather any place at all, in this contemporary ethical debate.<sup>270</sup> Pro-reform commentary focuses largely on the relative unimportance of these arguments compared with the advantages of ALPS.<sup>271</sup> Furthermore, proponents cite the options available to avoid the feared consequences of allowing non-lawyer ownership and MDP.<sup>272</sup>

---

lawyer knows are best for the client.”); Thomas R. Andrews, *Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?* 40 HASTINGS L.J. 577, 605–06 (1989) (explaining that allowing non-lawyers to own and manage law firms will lead to lawyers losing control over their practice).

268. See Schneyer, *supra* note 13, at 129 (“The opponents’ comments invoke the slippery slope theory to argue that, even if adopting the Working Group’s proposal would not be objectionable in itself, it would allow the proverbial camel to get its nose under the professional tent.”); see, e.g., Letter from Douglas R. Richmond to ABA Comm’n on Ethics 20/20 (Jan. 6, 2012), available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/ethics\\_20\\_20\\_comments/richmond\\_alpsdiscussiondraft.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_comments/richmond_alpsdiscussiondraft.authcheckdam.pdf) (opposing amendments to Model Rule 5.4 because of a belief that later, more dramatic changes will follow and cause harm to the profession).

269. See *Bates v. State Bar of Ariz.* 433 U.S. 350, 368 (1977) (summarizing the bar’s argument that advertising legal services would lead to a competitive marketplace and, therefore, the erosion of legal ethics); Schneyer, *supra* note 13, at 133 (“[P]romoting competition in legal services, far from being a core value of the American legal profession, has been a negative value.”).

270. See Paton, *supra* note 4, at 2198 (discussing the need “to reconsider whether ‘core values’ rhetoric needs to be viewed through a new lens and new forms of business models including the MDP need to be permitted”); Schneyer, *supra* note 13, at 135 (explaining that resort to professionalism rhetoric has negative effects on the profession).

271. Schneyer, *supra* note 13, at 92–93 (analogizing the prohibition of ALPS to restrictions on attorney advertising by analyzing the weight of ethical concerns compared with other effects); Wald, *supra* note 12, at 501 (explaining that arguments based on “tradition, historical-path dependencies, and aversion to change” are insufficient, even if they are not incorrect).

272. See Schneyer, *supra* note 13, at 1001–02 (proposing safeguards that would reduce the risks associated with allowing formation of attorney-client relations on the

The importance of professionalism concerns is difficult to quantify, so those advocating reform state that resorting to these arguments may stifle debate and analysis.<sup>273</sup> Many attorneys argue that reliance on such subjective arguments, combined with a lack of empirical evidence, leads to weak discourse that may raise questions about the ABA's ability to regulate the legal profession.<sup>274</sup> Finally, proponents of reform state that categorical bans imposed based upon professionalism concerns are vulnerable to external attack and possibly invalidation.<sup>275</sup>

#### 4. Solutions Proposed by Advocates for Alternative Legal Practice Structures

Those who advocate for ALPS call for an amendment to Model Rule 5.4 that would allow some forms of fee sharing between lawyers and non-lawyers to exist in the United States.<sup>276</sup>

The 20/20 Commission indicated that the adoption of legislation allowing ALPS abroad prompted the need for research on whether to implement these ALPS in the United States.<sup>277</sup> The ABA expressed concerns about being edged out

internet, such as subjecting lawyers to "the disciplinary and judicial authority" of the jurisdiction entered virtually to hold them accountable); December ALPS Paper, *supra* note 4, at 12–13 (proposing a character assessment for non-lawyer owners as a way to eliminate the fear that non-lawyers will cause lawyers to violate their ethical duties).

273. See Schneyer, *supra* note 13, at 135 ("[I]diom-based arguments, which are value-laden but often devoid of factual support, may well be displacing more difficult, evidence-based assessments of the risks and benefits, or the likely impact, of a proposed rule . . . ."); Paton, *supra* note 4, at 2198 (explaining how this argument, repeated throughout time, causes dissension within the profession).

274. See THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* 68–69 (2010) (denouncing the efforts to achieve professionalism as little more than "hollow phrases"); Schneyer, *supra* note 13, at 135–36 (explaining that rhetorical arguments can create "doubts that the bar can make appropriate rules on such subjects").

275. Schneyer, *supra* note 13, at 136 ("[I]t is no longer fanciful to suppose that categorical bans on [non-lawyer] ownership will be struck down on constitutional grounds in the foreseeable future, or that state legislatures will try to override the bans by statute."); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368–72 (1977) (holding that categorical bans on advertising violate the First Amendment).

276. See Adams & Matheson, *supra* note 124, at 3 (advocating for change by discussing the potential benefits of allowing law firms to incorporate, to engage in business associations with nonlawyers, and to receive investments from nonlawyers); Paton, *supra* note 4, at 2242–43 (arguing that the ABA should implement ALPS).

277. See Schneyer, *supra* note 13, at 76 (explaining that the ABA studied the topic to see if changes were called for in light of the globalization of law practice and technological developments); December ALPS Paper, *supra* note 4, at 7 ("The Working

of the global marketplace, confusion about handling collaboration with lawyers who partner with non-lawyers, and a desire to use alternative legal practice structures to help foster the provision of affordable legal services to those in need.<sup>278</sup> These motivations caused the ABA to seriously consider some of the forms of non-lawyer ownership that have been implemented abroad.<sup>279</sup> The least restrictive form of ALPS that the ABA considered would allow lawyers to freely partner, and share fees, with other professionals practicing in their own field.<sup>280</sup> However, more regulated variations include restrictions such as requiring that the firm only practice law (the D.C. model), that the non-lawyer ownership be limited to a certain percentage, and that all non-lawyer owners pass a character test, as they must in the United Kingdom.<sup>281</sup> Another option is to allow non-lawyers to invest capital in law firms but not let them have an active position in the firm.<sup>282</sup>

---

Group also studied ALPS models adopted abroad, because U.S. lawyers and law firms are increasingly operating in markets where such models are permitted.”).

278. See April ABS Paper, *supra* note 131, at 1 (suggesting a connection between ALPS and the ability of US lawyers to compete in the global market); December ALPS Paper, *supra* note 4, at 1 (discussing the possibility that ALPS would allow lawyers to provide clients improved access to justice and better quality representation).

279. Schneyer, *supra* note 13, at 78 (explaining that the ABA asked the ALPS Working Group to consider ALPS in light of reforms abroad); April ABS Paper, *supra* note 131, at 1 (“[T]he Commission formed a Working Group that has been studying the impact of domestic and international developments [regarding how] core principles of client and public protection [can] be satisfied while simultaneously permitting U.S. lawyers and law firms to participate on a level playing field in a global legal services marketplace that includes the increased use of one or more forms of alternative business structures.”).

280. April ABS Paper, *supra* note 131, at 19 (describing this option and identifying it as the Australian model); Schneyer, *supra* note 13, at 79 (explaining that these firms “have lawyer- and nonlawyer-owners who are all active in firm operations, with the nonlawyers providing nonlegal services to their own clients”).

281. April ABS Paper, *supra* note 131, at 17–19 (providing an explanation of how these restrictions fit into the options); Schneyer, *supra* note 13, at 80–81 (“[The ABA considered] a version of Rule 5.4 that would follow the District of Columbia model, but with two further restrictions: a percentage cap on non-lawyer ownership in order to maintain lawyer control, and a requirement that the law partners conduct a character inquiry to assess the capacity of prospective non-lawyer owners to act in a manner compatible with the lawyers’ duties.”).

282. April ABS Paper, *supra* note 131, at 19 (“An alternative would be to permit non-lawyer passive investment in such entities.”); Schneyer, *supra* note 13, at 79 (explaining that one form of ALPS are firms owned, in whole or in part, by passive investors).



III. *GRADUALLY LIFTING OVERLY RESTRICTIVE RULES  
WHILE IMPLEMENTING SAFEGUARDS TO UPHOLD THE  
PROFESSION'S TRADITIONS AND HIGH ETHICAL  
STANDARDS ACHIEVES A PROPER BALANCE OF  
FUNDAMENTAL VALUES AND PROGRESS*

As technological innovation and globalization continue to shift consumer and societal needs and expectations, reform of the professional legal standards are necessary to keep pace with everyday realities of the profession.<sup>283</sup> The issue thus becomes: how much change the profession can handle before it is unrecognizable, and how much change is right for key stakeholders in the market for legal services?<sup>284</sup>

Attorneys in the United States are protective of the self-regulating nature of the profession, and this attitude can stall debate and, ultimately, progress.<sup>285</sup> Applied to MJP and ALPS, this analysis weighs in favor of moderate reform that will gradually improve the “fit” between regulation and modern realities of practice.<sup>286</sup> Part III.A of this Note proposes and defends amendments to the Model Rules that would facilitate MJP. Part III.B discusses the benefits of replacing the categorical ban on ALPS with a rule allowing lawyers to practice with non-lawyers, subject to safeguards and restrictions.

---

283. See Goldsmith, *supra* note 50, at 444 (“The globalisation of ideas . . . means that our societies around the world are becoming more like each other.”). See generally Terry, *supra* note 257 (describing the many relevant recent reforms).

284. Gillers, *supra* note 8, at 1022 (“Reasonable people will disagree on when and how the profession and the courts should react to [the] gap [between practice and reality]. But doing nothing is not an option.”); Goldsmith, *supra* note 50, at 453 (discussing the “need to show that the values of our profession are consistent with the modern governing ideology”).

285. See Green, *supra* note 17, at 1146 (describing the repetitive nature of the “core values” argument); Schneyer, *supra* note 13, at 135–36 (explaining the negative effects of repetitive arguments amongst attorneys).

286. See Goebel, *supra* note 10, at 340 (“In the United States, despite the fact that modern interstate transactional practice is increasingly important and common, there exists no solid doctrinal view permitting such practice.”). See generally Wald, *supra* note 12 (describing the “gap” between practice and reality).

*A. Separating Temporary Practice, Permanent Establishment, and Bar Admission to Allow Appropriate Forms of Multijurisdictional Practice*

The European Union's system of regulating MJP in the legal profession is superior to the ABA's approach in terms of client interests and efficiency.<sup>287</sup> However, liberalization of the US system must occur more gradually because federalism and tradition play an important role in the US system.<sup>288</sup> Section III.A.1 proposes amendments to the Model Rules that would facilitate MJP in the United States. Section III.A.2 describes the benefits associated with separating different types of MJP. Finally, section III.A.3 explains other positive effects of the proposed amendments.

1. Suggested Amendments to the Model Rules on Multijurisdictional Practice

The best approach is a series of amendments to the Model Rules regarding MJP. First, Model Rule 5.5 will treat temporary and permanent MJP separately, although some rules will overlap.<sup>289</sup> Additionally, Model Rule 5.5 will incorporate parts of the open-border approach in place in Colorado, but eliminate the restrictions on lawyers with a domicile or office in Colorado.<sup>290</sup>

Furthermore, the rule will impose several additional safeguards to protect against the erosion of tradition and

---

287. See Goebel, *supra* note 10, at 338 (explaining that the EU model of lawyer regulation provides clients with a better way to realize their interest in choosing their lawyer); Lonbay, *supra* note 1, at 1629–30 (explaining that EU lawyers are better able to fulfill their duties because they are not hiding their practices).

288. See *supra* notes 97–101 and accompanying text.

289. See Lawyers' Services Directive, *supra* note 30 (issued "to facilitate the effective exercise by lawyers of freedom to provide services"); *cf.* Lawyers' Establishment Directive, *supra* note 33 (seeking "to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained").

290. Colo. R. Civ. P § 220(1) (providing the conditions for applicability of Colorado's out-of-state rule); Wald, *supra* note 12, at 534 ("[Although requiring] an out-of-state attorney to be admitted in another United States jurisdiction, maintain an active status, and be in good standing . . . seems to be reasonably related to . . . ensuring quality and providing some measures of consumer protection. Using domicile and the establishment of a permanent office as disqualifying factors . . . seems ill advised.").

ethics.<sup>291</sup> It will require that multijurisdictional service providers obtain malpractice insurance in their Home State, similar to the mandatory requirement in Oregon.<sup>292</sup> Additionally, attorneys practicing under this rule will be subject to the ethical rules of the Host State where rules conflict.<sup>293</sup> The rule will also require attorneys who establish themselves on a permanent basis to register with the Host State, deriving support from Nevada's Rule 5.5A.<sup>294</sup>

Implementation of this rule would call for a change to the Model Rule on Admission on Motion, which would create a different framework for admission to the bar of the Host State.<sup>295</sup> This amendment will require attorneys seeking admission outside their Bar State to either practice in the Host State for at least one year or pass an aptitude test.<sup>296</sup>

---

291. See *supra* notes 247–51 and accompanying text.

292. OR. REV. STAT. ANN. § 752.035(1) (West 2014) (requiring “all qualified members of the profession to carry professional liability insurance offered by the fund with primary liability limits of at least \$200,000”); Oregon State Bar, Professional Liability Fund (PLF), <http://www.osbar.org/plf/plf.html> (stating that the Professional Liability Fund is “the mandatory provider of primary malpractice coverage for Oregon lawyers”).

293. See Wald, *supra* note 12, at 535 (stating that subjecting lawyers to the regulations of the Host State “ensures that an out-of-state lawyer could be held accountable . . . [and] provides an out-of-state attorney who wishes to enjoy the benefits of law practice in a given jurisdiction the incentive to accept the consequences of doing so, including the risk of discipline.”); EU REPORT, *supra* note 1, at 106 (suggesting, as a solution to the confusion caused by conflicting ethical rules, a system whereby “in case of conflicting rules the regulation of the host country applies”).

294. See NEV. RULES OF PROF'L CONDUCT R. 5.5A (West 2006) (requiring registration by “a lawyer who is not admitted in [Nevada], but who is admitted and in good standing in another jurisdiction of the United States, and who provides legal services for a Nevada client in connection with transactional or extra-judicial matters that are pending in or substantially related to Nevada.”); Wald, *supra* note 12, at 535 n.180 (stating that another example of a registration provision is “the European model pursuant to the Lawyers Establishment Directive”).

295. See MODEL RULES OF PROF'L CONDUCT RULE ON ADMISSION BY MOTION (providing a means of obtaining admission outside of a lawyer's home state, but only on a permanent basis); *cf.* Lawyers' Services Directive, *supra* note 30; Lawyers' Establishment Directive, *supra* note 33 (allowing European lawyers to practice either temporarily or permanently throughout the EU).

296. See Diploma Recognition Directive, *supra* note 54 (providing for either an aptitude test or an adaptation period); EU REPORT, *supra* note 1, at 16 (stating that the Diploma Recognition Directive allows Member States to implement “either an adaptation period or an aptitude test”).

## 2. The Benefits of Separating Temporary and Permanent Practice and the Positive Resulting Change to the Model Rule on Admission by Motion

The EU system allows three different levels of MJP: (1) temporary practice, (2) permanent establishment as a Home State lawyer, and (3) permanent establishment as a Host State lawyer.<sup>297</sup> However, the current US system does not explicitly allow permanent MJP under Model Rule 5.5, which means US lawyers do not have an effective way to move their practice without seeking admission to a new bar.<sup>298</sup>

Affording them this middle ground will benefit lawyers, who will have more options to practice virtually or physically.<sup>299</sup> This may be especially helpful to young lawyers who passed the bar in one state and got a job in another, where they plan to take the bar; or who need to move for personal reasons. Finally, it will allow states more control over attorneys practicing for longer periods of time.<sup>300</sup>

This also allows the imposition of additional restrictions for admission by motion, which should contribute to more uniform implementation of the rule.<sup>301</sup> The requirement of one year's practice in the Host State is based upon the three-year requirement in the Lawyers' Establishment Directive, but would require just one year for two reasons: (1) to avoid the EU phenomena of attorneys opting to practice under their home state title and encourage US attorneys to seek admission, furthering the states' desire to control their attorneys, and (2)

---

297. See *supra* note 146 and accompanying text.

298. See *supra* note 168 and accompanying text.

299. See *supra* notes 222–26 and accompanying text.

300. See Lawyers' Establishment Directive, *supra* note 33, at 37 (“[T]his Directive does not lay down any rules concerning purely domestic situations, and where it does affect national rules regulating the legal profession it does so no more than is necessary to achieve its purpose effectively.”); Wald, *supra* note 12, at 524 (“[S]tates have long argued that they have a legitimate interest in regulating lawyers practicing in their jurisdiction in order to protect their citizens and exercise control over state power.”).

301. See MODEL RULES OF PROF'L CONDUCT RULE ON ADMISSION BY MOTION (as amended August 6, 2012) (“[The ABA] urges jurisdictions that have not adopted the Model Rule on Admission by Motion to do so, and urges jurisdictions that have adopted admission by motion procedures to eliminate any restrictions that do not appear in the Model Rule on Admission by Motion.”); Motion Admission Paper, *supra* note 121, at 4 (“[A]pproximately thirty jurisdictions have an admission by motion procedure that imposes restrictions beyond those contained in the Model Rule.”).

because some of the differentials in practice existing in the EU, such as language and culture, are much less pronounced among US states.<sup>302</sup>

### 3. Other Benefits of the Proposed Solution

The rule described will follow Colorado's lead in opening the door to MJP, but will go further by eliminating the no-domicile and no-office requirements.<sup>303</sup> These restrictions are arguably unconstitutional, and their objectives are served by separating temporary and permanent multijurisdictional practice.<sup>304</sup>

The rule's malpractice insurance requirement will protect consumers by giving them redress for unethical or uninformed attorneys.<sup>305</sup> Consumers will also benefit from the Host State ethics rule choice because, by holding attorneys to the ethical standards of the Host State, the problem of confusion about ethical rules is ameliorated.<sup>306</sup> This will also allow the state to retain control over practice within its borders.<sup>307</sup>

#### B. *The Benefits of Replacing the Prohibition Alternative Legal Practice Structures with a Restriction and the Importance of Monitoring Implementation*

The ABA's categorical prohibition on ALPS is outdated, inefficient, and vulnerable.<sup>308</sup> Conversely, the European Union's

302. See EU REPORT, *supra* note 1, at 7 (“[I]mportant reasons for lawyers to prefer the route of the Professional Qualifications Directive over that of the Establishment Directive are that lawyers want to integrate earlier than after three years, or that they did not want to establish in the host country.”); *id.* at 20 (explaining the client demand for “specific language abilities”).

303. See Wald, *supra* note 12, at 532 (explaining Colorado's “open-border” approach); see *supra* notes 173–76 (providing an analysis of the system implemented in Colorado).

304. See *supra* notes 101–10 and accompanying text (describing the Supreme Court's invalidation of rules that discriminate or deprive lawyers of the right to practice law); Wald, *supra* note 12, at 534 (“[D]omicile and a permanent office are used as proxy to identify lawyers who serve clients in a particular state.”).

305. See Poll, *supra* note 233 (explaining the advantages of Oregon's malpractice insurance requirement); Gillers, *supra* note 8, at 1004 (“Few if any rules could protect clients as effectively as a rule requiring malpractice insurance.”).

306. See *supra* notes 222–25 and accompanying text.

307. See *supra* notes 226–28 and accompanying text.

308. See *supra* notes 194–221 and accompanying text.

system, which allows Member States to prohibit ALPS but does not require it, allows national governments to appropriately harness the benefits of ALPS.<sup>309</sup> Thus, Part III.B.1 suggests that the ABA should amend Model Rule 5.4 to allow limited forms of ALPS. Part III.B.2 describes the procedural advantages of the suggested approach. Part III.B.3 explains how the suggested amendment properly balances the interests of lawyers and clients alike. Finally, Part III.B.4 emphasizes that by encouraging reconsideration of the issue, the ABA can ensure that the profession will benefit.

### 1. Suggested Amendment to Model Rule 5.4

The best course of action for the ABA is to amend Model Rule 5.4 to allow very limited forms of ALPS, and to reconsider the topic in the near future.<sup>310</sup> Specifically, the Model Rule will allow non-lawyer ownership of law firms, with three important caveats: (1) the law firm must only practice law; (2) the percentage of non-lawyer owners must be 25% or less; and (3) all non-lawyer owners must pass a character and fitness test.<sup>311</sup> It will also incorporate the ABA's position on fee sharing between lawyers located in jurisdictions that allow ALPS and those that do not.<sup>312</sup>

### 2. Procedural Advantages of the Proposed Solution

The procedures for implementing reform are vastly different in the European Union than in the United States.<sup>313</sup>

---

309. See *supra* notes 256–58 and accompanying text.

310. See Motion Admission Paper, *supra* note 121, at 4 (“[The next commission to study MJP should] reexamine the Model Rule, determine whether it has had its intended effect, and determine if any new efforts might be advisable in this area.”); *supra* notes 308-09 and accompanying text.

311. See *id.*

312. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 464, *supra* note 184 (providing that attorneys in jurisdictions that disallow multidisciplinary fee sharing may share fees with lawyers in those that allow multidisciplinary fee sharing); Ethics 20/20 Final Report, *supra* note 123, at 9 (explaining that confusion over “whether a lawyer in a jurisdiction that prohibits nonlawyer ownership of law firms and the sharing of legal fees with nonlawyers may divide a fee with a lawyer in a different firm in which such ownership or fee sharing occurs and is permitted by the Rules applicable to that firm” inhibits multidisciplinary practice).

313. See *supra* notes 21–96 and accompanying text; *cf. supra* notes 97–143 and accompanying text.

The ABA provides the US legal profession with Model Rules, whereas the EU's institutions provide more general guidance regarding the limits on national governments' ability to regulate.<sup>314</sup>

This means that the ABA must not incorporate a radical change, because states may choose to not implement the amended rule.<sup>315</sup> However, if the ABA continues prohibiting ALPS, states may never implement any changes, and the debate will remain at a standstill.<sup>316</sup> Thus, by amending Model Rule 5.4 to allow a restrictive form of ALPS, the ABA opens the door for states to embrace progress.<sup>317</sup>

### 3. Balancing Client, Lawyer, and Law firm Interests with Preservation of Core values

This suggestion meets client demand for one-stop business services, and will lead to the efficient market envisioned by those advocating for reform.<sup>318</sup> At the same time, the three requirements will help ensure that the priority of law firms is always to practice law according to the profession's values of

---

314. See *supra* note 99 and accompanying text; *cf. supra* note 27 and accompanying text.

315. See EU REPORT, *supra* note 1, at 205–06 (summarizing EU Member States' implementation of MDP and non-lawyer ownership and showing that modest reforms are more often implemented than drastic changes); Motion Admission Comparison, *supra* note 165 (showing that states are reluctant to adopt the rule in full).

316. Paton, *supra* note 4, at 2193 (stating that, following the House of Delegates' refusal to amend Rule 5.4, “[f]or all intents and purposes, the MDP was dead, buried in ‘core values’ rhetoric”); Schneyer, *supra* note 13, at 84 (explaining that “constant reliance over time on virtually the same rhetorical tools” inhibits progress).

317. See Adams & Matheson, *supra* note 124, at 30–35 (discussing the progress law firms could make with outside capital, including expansion, investment in technology, and better hires); MDP Market Approach, *supra* note 209, at 90 (“A narrowly tailored system of regulation of MDPs will accomplish the important goals of satisfying client demand for multidisciplinary services while protecting the legitimate interests of the legal profession in preserving its core values.”).

318. Mullerat, *supra* note 156, at 481 (“There are strong reasons in favor of allowing MDPs: they promote freedom of initiative and competition, and . . . may benefit the user in terms of time, cost, and efficiency.”). See generally MDP Market Approach, *supra* note 209 (describing the ways in which alternative legal practice structures will create an efficient market).

independence and commitment to client confidentiality and advocacy.<sup>319</sup>

Implementing the ABA's position on fee sharing between jurisdictions with different approaches to ALPS will eliminate confusion, allowing attorneys to provide efficient and ethical services to their clients.<sup>320</sup>

#### 4. Reconsideration as a Check on Effectiveness

When the time comes for reconsideration, the profession will have the advantage of seeing how these changes worked in the states that implemented the Model Rule.<sup>321</sup> Furthermore, US lawyers will have seen how other forms of implementing ABS abroad have fared.<sup>322</sup> This will change the rhetoric of the argument to ensure that debate is meaningful and progress occurs.<sup>323</sup>

### CONCLUSION

The debate in the United States over whether the legal profession can embrace reform without compromising its core values is off the mark. In reality, the better question is how the profession can achieve this balance. This Note submits that the suggested amendments to the Model Rules are the way to do so. If the rhetoric can shift away from core values versus reform toward core values alongside reform, the profession is sure to implement the proper changes for the future.

---

319. April ABS Paper, *supra* note 131, at 17 (describing the United Kingdom's use of a "fit to own" test); Paton, *supra* note 4, at 2243 (discussing the reconciliation of "core values" questions with new models of service delivery").

320. See Wald, *supra* note 12, at 493 ("[L]awyers who increasingly have a national practice find themselves subject to the conflicting regulation of several jurisdictions."). See generally ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 464 (2013), *supra* note 184 (explaining that the ABA does not require lawyers to refrain from sharing fees with other lawyers, even if one lawyer can share fees with non-lawyers).

321. See *supra* note 310; *supra* notes 273-75 (explaining the need for new evidence on the subject of MDP).

322. See Legal Services Act 2007, *supra* note 157 (implementing a regulatory system that allows ALPS in the United Kingdom); *supra* notes 273-75.

323. See Schneyer, *supra* note 13, at 135 (explaining that, by eliminating idiom-based arguments from the profession's debates, assessments of possible reform options based on evidence will allow the profession to achieve progress); *supra* notes 273-75.



