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# Article

## **Protecting the Public Without Protectionism: Access, Competence and Pro Hac Vice Admission to the Practice of Law**

**Peter S. Margulies\***

Traditional state limits on the practice of law by out-of-state attorneys clash with powerful economic and technological trends. In the increasingly interconnected world of the 21st century, state rules that characterize the performance of legal work by out-of-state lawyers as the “unauthorized practice of law” require fresh justification or risk becoming relics.<sup>1</sup> The heart of the matter is the trade-off embodied by restrictions on multistate practice: While such rules aim to ensure lawyer competence, they also impair client access to attorneys of their choice.

Balancing these values of competence and access, most jurisdictions supplement plenary admission rules by permitting the admission of out-of-state attorneys *pro hac vice*—for the occasion of a case currently before a court.<sup>2</sup> *Pro hac vice* rules temper the effect on clients of barriers to practice by out-of-state attorneys. However, disputes about the process and scope of *pro hac vice* admis-

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1. Many states, including Florida, New Jersey, and Rhode Island, also impose substantial barriers on the plenary admission of out-of-state attorneys. Barriers include requiring attorneys to take the state bar exam, and sometimes the Multistate Bar Exam too, in order to practice in the state on the full range of legal matters. See Deborah L. Rhode, *In the Interests of Justice*, 153-54 (2000).

2. See Black’s Law Dictionary 1227-28 (7th ed. 1999).

sion embody the same tension between competence and access that pro hac vice admission is designed to alleviate.

A case study of this abiding tension between competence and access is the Rhode Island Supreme Court's recent jurisprudence in *In re Small*<sup>3</sup> and *In re Ferrey*.<sup>4</sup> The court's decisions reflect a comprehensive vision of pro hac vice admission, with the state's highest court having sole authority. In adopting a comprehensive model, the court rejected other models, such as a market approach that allows out-of-state attorneys to freely practice within the jurisdiction, or a tribunal option approach granting particular courts and agencies control over pro hac vice admissions in cases before them.

A comprehensive model has the potential to best serve the values of competence and access. However, the Rhode Island Supreme Court's implementation of the model is flawed in three respects. First, the court's retroactive application of the comprehensive model has disrupted settled expectations, disallowing compensation to attorneys for work done competently and in good faith. Second, the court has been inconsistent in its outcomes. For example, the court denied pro hac vice admission to attorney Small, who was conducting a high-profile ethics investigation, while it granted admission to other lawyers on similar facts. Third, the court has failed to provide adequate reasons for its decisions, exemplified by its issuance of a stark unpublished order in place of an opinion in *Small*.<sup>5</sup> While justices of the court subsequently published op-ed pieces that offered valuable insights on their ruling, judges' use of the media cannot substitute for a well-reasoned judicial opinion.

This Article is in three parts. Part I discusses trends toward multijurisdictional practice and both market and tribunal-option approaches, viewed through the lenses of competence and access. Part II discusses the *Ferrey* and *Small* rulings, and outlines the virtues of a comprehensive model. This Part also analyzes the flaws in the Rhode Island Supreme Court's implementation of the model. Part III outlines the factors a comprehensive model of pro hac vice admission might take into account in deciding particular

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3. *In re Rhode Island Ethics Comm'n (Small)*, No. 01-79 M.P. (R.I. Mar. 1, 2001) (Flanders, J., dissenting).

4. 774 A.2d 62 (R.I. 2001) (per curiam).

5. See *In re Small*, No. 01-79 M.P.

cases. It also discusses other questions left unresolved in *Ferrey*, including the legality of work by out-of-state lawyers on drafting and negotiation prior to the commencement of litigation, the status of non-litigation transactional and counseling work by out-of-state lawyers, and the need for review of Rhode Island's current restrictions on plenary admission of out-of-state attorneys.

### I. MULTISTATE PRACTICE AND THE OUT-OF-STATE ATTORNEY

Economic, technological, and legal imperatives drive the trend toward multijurisdictional practice. In an era in which the United States and global economies are increasingly interwoven, barriers between jurisdictions increasingly seem antiquated. Clients want access to legal services that are not hamstrung by these restrictions. Since business flows between jurisdictions, many argue that lawyers serving business needs should be able to travel without undue burden.<sup>6</sup> In addition, technological innovations, such as online legal databases, air transportation, fax machines, e-mail and teleconferencing, have loosened the ties of lawyers to particular jurisdictions, making the physical location of lawyer, client or hard-copy legal materials virtually irrelevant. Finally, developments within the legal system, such as the increasing role of federal law, international law, and statutes such as the Uniform Commercial Code, have diminished the incidence and significance of interstate distinctions.<sup>7</sup>

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6. See Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. Tex. L. Rev. 717 (1995); Diane L. Babb, Commentary, *Take Caution When Representing Clients Across State Lines: The Services Provided May Constitute the Unauthorized Practice of Law*, 50 Ala. L. Rev. 535 (1999). Indeed, the American Bar Association committee proposing revisions to the Model Rules of Professional Conduct Rule 5.5 (1999) has advanced a formulation that significantly liberalizes multistate practice. See Model Rules of Prof'l Conduct R. 5.5 (Proposed 2000) (permitting lawyer to act, *inter alia*, "with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's practice on behalf of a client in a jurisdiction in which the lawyer is admitted to practice").

7. See Daly, *supra* note 6, at 725. Indeed, traditional barriers between professions, such as rules that bar non-lawyers from receiving fees generated by legal business or co-owning a law practice, are increasingly under siege by calls for a multidisciplinary approach that merges professions such as law and accounting. Just as in the multijurisdictional context, the argument for multidisciplinary practice is an argument for access. See, e.g., Phoebe A. Haddon, *The MDP Controversy: What Legal Educators Should Know*, 50 J. Legal Educ. 504 (2000); Mary C. Daly,

These developments do not extinguish the concern for competence that underlies rules on multijurisdictional practice. Competence has several facets worthy of discussion here. These sound in the keys of client protection, systemic integrity and state interests. I discuss each in turn.

The first interest served by the competence value is the protection of a specific client represented by an attorney. The client should be able to rely on a floor of adequacy beneath any attorney's work. In addition, the client should be able to seek remedies under the law of the state in which an attorney does legal work or appears before an administrative or judicial body. Admission rules link attorney competence with attorney accountability.

Second, clients are not the only parties with an interest in the competence of legal representation. Attorney incompetence touches not only clients, but also other institutions, players and values, including courts, opposing parties and our adversarial conception of justice. When an attorney demonstrates incompetence, one could attempt to safeguard the wronged client's interests by requiring adjudicators or other attorneys appearing in a matter to step in and protect that client's interests. While states have such rules for egregious cases of misconduct or nonfeasance, expanding the reach of such rules imposes burdens on courts and on the adversarial process.

Third, competence serves significant state interests. A state has an interest in maintaining a reputation based on both the skill and ethics of those who appear before its tribunals. No state wishes to be known as a "mill" in which attorneys lacking in diligence, excellence, or ethics ply their trade.

Despite the validity of these interests, a complete history of the bar's attempts to promote competence would also have to acknowledge that these efforts have a nasty underside of exclusion. State bars throughout the first half of the twentieth century used character and background investigations to keep out minorities deemed a threat by the legal establishment.<sup>8</sup> More recently, bar

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*What the MDP Debate Can Teach Us About Law Practice in the New Millennium and the Need for Curricular Reform*, 50 J. Legal Educ. 521 (2000).

8. See Rhode, *supra* note 1, at 152-53; see also Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993). Kronman makes a more subtle argument that homogeneity within the profession facilitated the transmission of "local knowledge" conducive to lawyer competence and service.

applications discriminated on the basis of disability, requiring that applicants disclose whether they had ever received counseling for any purpose, including fertility or stress in law school.<sup>9</sup>

Similar invidious concerns may play a role in prohibitions against out-of-state practice. Motivations for such rules may flow in significant part from protectionist concerns about insulating the lawyers of one state from competition.<sup>10</sup> The accumulated folk wisdom among lawyers about rationales for attorney admission practices lends some credence to the "competence as protectionism" thesis. In Florida, for example, attorneys explain the requirement that even experienced attorneys from other states sit for both the Multistate and Florida Bar Exam as a function of the fear that "snowbird" attorneys from northern states will descend on Florida during the winter or when they approach retirement, and take away the trusts and estates business generated by Florida's substantial senior population. In New Jersey, the folk wisdom goes, the bar fears an influx of New York lawyers. In Rhode Island, fear of Massachusetts lawyers reigns. Some restrictions on out-of-state practice, such as requirements that lawyers reside in a given state in order to practice there, are so overtly protectionist that courts have struck them down as violating the constitutional right to travel.<sup>11</sup> Nor is protectionism waning. A California court has recently suggested, for example, that even a passing involvement with California law in a transaction, whether or not the involvement physically occurred in California, may constitute the unauthorized practice of law when not conducted by an attorney admitted to practice in the state.<sup>12</sup>

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For Kronman, the increasing heterogeneity of the profession, as well as market forces and reductive movements in legal education that promote rigid theory at the expense of an appreciation for facts "on the ground" have contributed to lawyers' disrepute and decline.

9. See *Ellen S. v. Fla. Bd. of Bar Exam'rs*, 859 F. Supp. 1489 (S.D. Fla. 1994) (holding that such intrusive questions violated the Americans with Disabilities Act).

10. See Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229 (1995).

11. See *Keenan v. Bd. of Bar Exam'rs of the State of N.C.*, 317 F. Supp. 1350, 1361 (E.D.N.C. 1970).

12. See *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal.), cert. denied, 525 U.S. 920 (1998); cf. John J. D'Attomo, *The \$1 Million Message: Lawyers Risk Fees and More When Representing Out-of-State Clients*, 39 Santa Clara L. Rev. 447 (1999) (analyzing *Birbrower* case).

Invocations of competence also rarely acknowledge the tension between competence and access. Access refers to a client's ability to secure counsel, preferably the counsel of her choice. Access in this sense promotes values of human autonomy at the heart of our political and legal system. The task of selecting counsel, on this view, is not merely a mechanical exercise in matching a set of credentials with a recipient of services, but a relational activity.<sup>13</sup> Our choices in relationships and associations are fundamental to our freedom.<sup>14</sup> Relationships between client and counsel have an affective component requiring personal commitment and rapport not provided by credentials on a resumé.<sup>15</sup>

Once such relationships have developed, the state bears a heavy burden of justification in interfering with them. Requiring a client to deal with a lawyer that is not her lawyer of choice may impose a cost on human autonomy only marginally less significant than denying the client access to any lawyer. Indeed, "local counsel" rules on multistate practice that require a client wishing to preserve her relationship with a trusted attorney to also hire a lawyer licensed to practice in a particular state can in effect deny a client access to any counsel by pricing the cost of representation out of reach.

Despite these concerns, a careful examination of competence and access reveals that these values are not necessarily in conflict. Competence may increase when a broader group of attorneys competes for clients, minimizing the insularity within a given community of lawyers. Fresh legal blood can boost competence and banish complacency. Similarly, access has meaning only when the access produced is access to competent counsel: few clients would knowingly choose an attorney whose competence was demonstrably in doubt. Moreover, one element of competence is what sociologists call "local knowledge"—a working knowledge of specific practices, like the practice of law, as those practices have evolved

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13. See Kronman, *supra* note 8 (discussing attorney-client relationships); Peter S. Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 64 Geo. Wash. L. Rev. 1071 (1995) (same).

14. Cf. Nancy L. Rosenblum, *Membership and Morals: The Personal Uses of Pluralism in America* (1998) (discussing importance of personal and civic associations in a democracy).

15. See Margulies, *supra* note 13.

within a particular community.<sup>16</sup> Surely, however, local knowledge also includes the knowledge of a client's needs yielded by a long professional relationship. Excluding such precious knowledge because an attorney lacks a license in a particular state seems to exalt form over substance.

In considering tensions between access and competence, courts and commentators have focused on two models: market and tribunal options. The market approach allows prospective clients to choose the mix of services and staffing that suit their needs, relying on pricing, lawyer disclosure, and the client's own experience to allocate the risks and benefits of such choices.<sup>17</sup> The tribunal approach delegates decisions about admission of out-of-state attorneys to specific tribunals, such as state trial courts or administrative agencies.<sup>18</sup> The following paragraphs explore the strengths and weaknesses of the market and tribunal option models.

Each approach argues that the institution it favors generates superior information. A market approach would allow clients to pick their own attorneys among a mix of in- and out-of-state lawyers.<sup>19</sup> Market advocates would argue that markets will inevitably "clear." Information will become available to prospective clients about competent out-of-state attorneys and the market will weed out attorneys who are incompetent. A local approach, in contrast, would assert that individual tribunals, deciding to admit attorneys on a *pro hac vice* basis, have the expertise to decide which attorneys are competent to practice before it, and the first-hand experience to monitor attorneys admitted.

Unfortunately, both market and tribunal option models have flaws. The market approach assumes too readily that information will be available, particularly to less sophisticated and affluent consumers of legal services. Just as professional responsibility rules generally address market failure, rules on attorney admission offer an example of how to compensate for flaws in market processes.

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16. See Brian Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* 149 (1997) (discussing the conceptions of practice).

17. See Pearce, *supra* note 10.

18. *Id.*

19. *Id.*



The tribunal option approach also has problems. First, the plethora of courts in a given jurisdiction, along with agencies, arbitrators and mediators, and other fora, means that a decentralized approach will not generate the comprehensive monitoring and information gathering required to ensure that attorneys are providing competent representation. Instead, it may produce a crazy-quilt of differing requirements, some unduly restrictive, some unduly permissive, and most accessible not in writing but only in the able but sometimes preoccupied minds of court and agency clerks, adjudicators, and practitioners.<sup>20</sup>

Second, particular tribunals may have agendas that do not match with client protection or the public interest. For instance, an arbitrator may be reluctant to lodge a complaint against an attorney who has failed to represent a client competently or has engaged in some form of misconduct, because the arbitrator is afraid of losing her place on the arbitrator's panel if she complains about the attorney. A member of a state agency that deals with powerful economic entities such as corporations may be unwilling to point out attorney misconduct because the agency member has been in a subtle or egregious way "captured" by the interests of the corporation her agency is supposed to regulate. In addition, some trial level courts might prefer to have attorneys who are docile or indolent and settle cases, rather than insist on discovery and evidentiary proceedings that keep cases on the docket and consume judicial time and resources.<sup>21</sup> The flaws in both the market and local option approaches suggest that another model is needed.

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20. The other exception to state attorney admission requirements (along with pro hac vice rules) is federal practice, which does not necessarily support the argument for tribunal option. Federal courts, for one, usually require that an attorney be a member of the bar of the jurisdiction in which the court is located. Federal agencies do not have such a requirement. However, most federal agencies deal with highly specialized bodies of law, such as tax, so that the monitoring of attorney performance is easier. In addition, some federal agencies, such as the INS and Executive Office for Immigration Review (Immigration Court) have monitoring problems with some attorneys because many prospective clients are unsophisticated and lacking in market power.

21. Cf. John F. Sutton, Jr., *Unauthorized Practice of Law by Lawyers: A Post-Seminar Reflection on "Ethics and the Multijurisdictional Practice of Law,"* 36 S. Tex. L. Rev. 1027, 1031 n.27 (1995) (arguing against giving tribunals discretion to apply rules for attorneys admitted pro hac vice that are stricter than rules that apply to attorneys licensed in that jurisdiction, on grounds that such disparate treatment might impair zealous representation by attorneys admitted pro hac vice); compare *Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1054-55 (D.C. Cir.

II. THE VIRTUES AND PITFALLS OF A COMPREHENSIVE APPROACH:  
RHODE ISLAND IN TRANSITION

A comprehensive model of pro hac vice admission can remedy the flaws of both the market and tribunal option approaches. The Rhode Island Supreme Court has recently made clear that this model constitutes the law of the state.<sup>22</sup> While the court's underlying holding is sound, its application of the comprehensive model suffers from three serious flaws: disruption of settled expectations, inconsistency in results, and failure to provide adequate reasons. This section analyzes the strengths of the court's substantive holding, and then addresses the flaws in implementation identified above.

A. *The Comprehensive Approach in Action*

Two recent cases, *In re Ferrey* and *In re Small*, illustrate the court's adoption of the comprehensive approach. In *In re Ferrey*, the Supreme Court of Rhode Island held that only the supreme court could grant pro hac vice applications for appearances before Rhode Island courts or administrative agencies.<sup>23</sup> While the Rhode Island Energy Facility Sitting Board previously had granted the pro hac vice application of Ferrey, a Massachusetts attorney, the supreme court held that state agencies and inferior courts lacked authority to grant such applications.<sup>24</sup> The court went on to authorize Ferrey to appear in the future before the Board. However, the court held that it lacked authority to grant Ferrey's request to approve his application *nunc pro tunc*, i.e., dating back to his initial appearance before the agency.<sup>25</sup> As a consequence, the court held, it had no alternative but to require Ferrey to disclaim any compensation from his putative client for his prior work.<sup>26</sup>

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1984) (arguing that standard for misconduct should be the same for attorneys admitted pro hac vice and other attorneys), *with* Royal Indem. Co. v. J.C. Penney Co., 501 N.E.2d 617 (Ohio 1986) (declining to reach issue of whether disparate treatment of pro hac vice attorneys is appropriate, and noting that pattern of misrepresentations by lawyer was sufficiently egregious to constitute misconduct under any standard).

22. *In re Ferrey*, 774 A.2d 62, 64 (R.I. 2000) (per curiam).

23. *Id.*

24. *Id.* at 65.

25. *Id.*

26. *Id.* at 64 (citing R.I. Gen. Laws § 11-27-6 (1956) (2000 Reenactment)).

*In re Small* concerned a Massachusetts attorney hired by the Rhode Island Ethics Commission to investigate alleged unethical behavior by a powerful lobbyist.<sup>27</sup> The lobbyist's lawyers opposed Small's pro hac vice application, arguing that Small's acceptance of compensation for his work with the Commission prior to filing a pro hac vice application violated Rhode Island law.<sup>28</sup> The court, in an unpublished order, denied Small's application.<sup>29</sup>

The core holding of the Rhode Island Supreme Court in these cases—that the court, not the market or individual tribunals, is best situated to exercise authority over practice by out-of-state attorneys—is sound. This comprehensive approach locates authority within the state's highest court, which has the greatest stake in promoting competent, ethical practice. Locating decisionmaking within the institution with the greatest stake represents an improvement over both the market and tribunal option approaches.

The superiority of the supreme court to both the market approval or individual tribunals becomes clear when one considers how legal ethics figures in conceptions of competence. A competent attorney fulfills a role toward both clients and the legal system. Ethical practice is important in both areas. For example, a competent attorney must undertake to make a record at trial that can serve to ground an appeal from an adverse verdict or ruling at trial. Individual tribunals may grow irritated with the lawyer's persistence in this regard. Yet a lawyer serves clients, appellate tribunals and the underlying systemic value of due process by ensuring development of the record. While individual tribunals, particularly trial courts, have some incentive to prod out-of-state attorneys to "move along" by threatening attorneys' pro hac vice status, the supreme court of the state has no such interest.

Conversely, markets sometimes give short shrift to "public goods" that are in everyone's long-term best interest, but may conflict with some parties' short-term agendas.<sup>30</sup> Clients choosing attorneys in an unregulated market might undermine the public goods served by ethics rules. For example, clients might reject out-

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27. *In re Small*, No. 01-79 M.P.

28. *Id.*; see Victoria Lederberg, Editorial, *We're Victims of Erroneous Innuendoes - In Defense of the R.I. Supreme Court*, *Prov. J. Bull.*, Mar. 23, 2001, at B6.

29. *In re Small*, No. 01-79 M.P.; see Carl T. Bogus, *Why Judicial Silence Is Golden*, *Prov. J. Bull.*, Apr. 12, 2001, at B6.

30. Cf. Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* 289 (2000) (discussing interplay of private and public interests).

of-state lawyers who honor ethical dictates, such as candor toward the tribunal,<sup>31</sup> that preserve the integrity of the system but do little to concretely benefit those clients. The supreme court, however, has an incentive to maintain and enhance such public goods, rather than cut corners as a market might do. In this sense, a comprehensive approach relying on the supreme court is the best institutional choice for regulation of out-of-state practice.

### B. *Flaws in Implementation*

While the supreme court's choice of a comprehensive approach is sound, its implementation of that choice would have benefited from further refinement. Reflecting the view that constructive criticism is the best tribute to a tribunal's efforts, the following paragraphs address the areas where refinement would have been helpful.

#### 1. *Trampling on Settled Expectations*

One hallmark of the rule of law is a reluctance to disrupt settled expectations. Because of this concern, legislatures, courts, and agencies often make changes in rules prospective, rather than retroactive. Retroactive application often does not allow parties relying on one legal regime a fair chance to conform their conduct to a successor regime.<sup>32</sup> This failure of notice and opportunity can trigger constitutional concerns. Even when constitutional questions are not present, retroactive application can work needless hardships. The retroactivity of the supreme court's application of the comprehensive model is a case in point.

##### a. *The Pre-Ferrey Tribunal Option Regime in Rhode Island*

Problems with retroactivity emerge from the supreme court's application of the comprehensive model because Rhode Island custom and practice formerly resembled a tribunal option model. Individual tribunals, including state boards and agencies, would

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31. See Model Rules of Prof'l Conduct R. 3.3 (2001) (stating, *inter alia*, that a lawyer shall not knowingly "make a false statement of material fact or law to a tribunal").

32. See, *e.g.*, *INS v. St. Cyr*, 533 U.S. 289 (2001) (interpreting immigration statute prospectively to avoid trampling on expectations of aliens who pleaded guilty to criminal charges in reliance on reasonable likelihood of securing waivers of deportation).

independently receive and adjudicate applications for pro hac vice admission. Inferior courts, such as the superior court, had specific rules providing for the admission of out-of-state attorneys.<sup>33</sup> However, the supreme court asserted in *Ferrey* that it possesses "sole authority to determine who may, and who may not, engage in the practice of law in this state."<sup>34</sup> The court's lengthy silence on these issues prior to *Ferrey*, in the face of published superior court rules to the contrary, suggested an acquiescence to the tribunal option system.

b. *The Harshness of the Ferrey Remedy*

In light of the tribunal option system in place in Rhode Island prior to the supreme court's recent rulings, the court's remedy in *Ferrey* seems particularly severe. The court precluded Ferrey, who by all accounts had acted competently and in good faith, from receiving compensation from his client for his months of work prior to the supreme court's decision.<sup>35</sup> However, the court was in no way obliged to reach this harsh result.

As the court noted, the statutes governing admission pro hac vice do not speak to the timing of the application made by the attorney, or to the necessity of making an application to cover matters before an administrative or other non-judicial tribunal.<sup>36</sup> While there are good policy reasons, discussed above, for a comprehensive approach that makes the supreme court a clearinghouse for all such applications, such an approach is not required by the statute.

As the *Ferrey* court conceded, its authority came not from a statute, but from its inherent authority to govern the admission of lawyers in Rhode Island.<sup>37</sup> Logic and practice suggest, however, that this inherent power extends to incidental matters, such as the timing of applications. Nothing in the statute barred approval of

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33. See R.I. Super. Ct. R. Crim. P. 50(c) (1997) ("No person, who is not an attorney and counsellor of the Supreme Court of the State of Rhode Island, shall be permitted to act as attorney or counsellor for any defendant in any proceeding, hearing or trial in the Superior Court unless granted leave to do so by the Superior Court.").

34. See *In re Ferrey*, 774 A.2d at 65.

35. *Id.* at 64.

36. *Id.* at 65.

37. *Id.* at 64 (noting the court's "unquestioned inherent right to permit an out-of-state attorney to [practice] upon a timely *pro hac vice* request").

an application *nunc pro tunc*, dating back to Ferrey's application to the Energy Facility Siting Board. The court's decision to deprive attorney Ferrey of all the fruits of his labor should be judged, like any exercise of inherent authority, from the standpoint of reason and equity. Viewed through this lens, the court's decision is unconvincing.

The court's justification for denying Ferrey's motion boils down to its argument that granting the motion would be "tantamount to affixing an *ex post facto* imprimatur of approval on . . . the unauthorized practice of law."<sup>38</sup> The court clearly has an important functional and symbolic role in maintaining lawyer competence. It remains unclear, however, why depriving Ferrey of any compensation for his months of work was the only means to achieve this goal, particularly in light of the pervasive perception prior to *Ferrey* that the tribunal option model governed *pro hac vice* admissions. Surely, the court could have devised a sanction less harsh that would have still sent the firm message that out-of-state lawyers must seek supreme court approval for practice before Rhode Island tribunals.

Devising an appropriate remedy would not have been unduly difficult. The court could have fashioned a remedy that took into account the virtues of a comprehensive approach but also considered Ferrey's apparent competence and good faith, as well as the material change to long-established practice in Rhode Island wrought by the court's holding. For example, the court could have granted the motion *nunc pro tunc* and sanctioned Ferrey by taking away a portion of his compensation, while leaving him with some remuneration for his work.

Such a balanced ruling would have avoided unjust enrichment of the client and collateral litigation by the client's adversary.<sup>39</sup> It would also have sent an abundantly clear message that a *pro hac vice* application should in the future be timely filed with the supreme court. Moreover, it would have avoided the uncertainty now reigning in other significant litigation before Rhode Island tribunals, such as class actions to determine liability for exposure to

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38. See *id.* at 65; but see *id.* at 65 (Flanders, J., dissenting) (arguing that R.I. Gen. Laws § 11-27-13, which authorizes practice by "visiting attorneys . . . temporarily in this state on legal business," was a sufficient legal basis for Ferrey's appearance before the Energy Facility Siting Board).

39. See *id.* at 66 (Flanders, J., dissenting).

lead paint. Under *Ferrey*, any fees awarded to prevailing plaintiffs' counsel may have to be reduced to account for the period before counsel filed a pro hac vice application with the supreme court. Assuming counsel filed such an application pre-*Ferrey* with the superior court, and performed competently, such a result also seems unduly harsh. A more balanced decision by the supreme court could have minimized such harshness at no cost to the Rhode Island statutory scheme or the competence value.

## 2. *Inconsistent Results*

The disruption of settled expectations in the court's application of the comprehensive model dovetails with the lack of consistency in the court's recent decisions. Consistency is a prized virtue in judicial decisionmaking, promoting guidance for those who rely on the courts and discipline for adjudicators swayed by momentary tempests.<sup>40</sup> Of course, courts are not automatons, and Emerson was certainly correct in observing that a mechanical uniformity bespeaks not justice but a narrow mind. Nevertheless, all other things being equal, a court should reach similar results in cases where the facts converge in most material respects. Unfortunately, the supreme court's application of the comprehensive model does not meet this test.

The core of the consistency problem is the discontinuity between the court's order in *In re Small* and its other decisions and pronouncements. In *Small*, the court denied a motion by the Rhode Island Ethics Commission for the pro hac vice admission of Daniel Small, a reputable Massachusetts attorney.<sup>41</sup> The Commission had hired Small to investigate whether a lobbyist who sat on the Commission had behaved ethically in voting on a proposal to allow members of the legislature to accept more gifts. The problem is that *Small* cannot be reconciled with the past or present precedents of the Rhode Island Supreme Court.

Op-ed pieces written by supreme court justices to set forth the reasoning behind the unpublished order in *Small*<sup>42</sup> suggest that the basis of the court's concern was Small's receiving payment for

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40. Indeed, the doctrine of stare decisis itself indicates a fundamental concern for consistency in the legal system.

41. *In re Small*, No. 01-79 M.P.; see Bogus, *supra* note 29.

42. I discuss the benefits and drawbacks of judges' media explanations *infra* notes 50-59 and accompanying text.

legal work prior to filing of the pro hac vice application.<sup>43</sup> If one looked at Small's case in a vacuum, the issue raised by the justices in their op-eds might be persuasive. However, courts function not in a vacuum, but in a continuum of past and present precedent. Examination of this precedent reveals that the supreme court had never before, and has not since, revoked or denied pro hac vice status for lawyers whose behavior was indistinguishable from that of Small. Moreover, the court denied Small's application despite the fact that the Ethics Commission's retention of Small clearly fulfilled one of the criteria set out in the court's own rules.

First, consider how snugly *Small's* facts fit within past and present supreme court cases granting out-of-state attorneys pro hac vice status. In both relevant decisions, *In re Ferrey* and *In re Healey*,<sup>44</sup> the out-of-state attorney received or maintained pro hac vice status, despite seemingly being paid prior to filing the pro hac vice application. In *Healey*, the petitioner began working for the Ethics Commission in July, 1993, but did not file a pro hac vice application until October of that year.<sup>45</sup> There is no suggestion that Healey worked for the Commission without a fee for those three months. Furthermore, Healey's work as a prosecutor for the Commission was indistinguishable from Small's. Yet, the supreme court declined to revoke Healey's pro hac vice admission. Similarly, in *Ferrey*, the petitioner worked for months for his client prior to filing an application with the supreme court. While *Ferrey*, too, may have worked *pro bono* for this period, such philanthropy is nowhere evident from the recitation of facts in the opinion. In *Ferrey*, while the court ruled that *Ferrey* was not entitled to fees for this work, the court nevertheless granted the attorney's pro hac vice petition. The court's singling out of Small for harsher treatment seems out of step with the case law.

The singling out of Small is particularly puzzling because the Commission's hiring of Small, an experienced out-of-state attorney, to investigate an influential Rhode Island lobbyist clearly satisfied one of the court's criteria for granting pro hac vice status. The court's own rules provide, *inter alia*, that granting of a pro hac vice application may be appropriate in light of a "lack of local coun-

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43. See Lederberg, *supra* note 28; Frank J. Williams, *Protocol is Important: Ethics Flap is Mr. Healey's Fault*, *Prov. J. Bull.*, Mar. 25, 2001, at B7.

44. 654 A.2d 705 (R.I. 1995).

45. *Id.*



sel with expertise in the field involved."<sup>46</sup> Because of the tightly-knit nature of the legal community in Rhode Island and the fact that Goldberg was both a well-known lobbyist and the spouse of a supreme court justice,<sup>47</sup> finding Rhode Island lawyers to take on this prosecution was a challenging task.<sup>48</sup> According to the supreme court's own rules, therefore, *Small* should have been a textbook case for pro hac vice admission. However, the op-ed articles written by supreme court justices after issuance of the order summarily denying admission in *Small* fail to acknowledge the wisdom in the court's own criteria.<sup>49</sup> The values of access and competence underlying pro hac vice admission demand a higher level of consistency.

### 3. *The Failure to Provide Adequate Reasons*

The op-ed articles written by justices of the supreme court after issuance of the order in *Small* demonstrate the third and final problem with the court's implementation of the comprehensive model: the failure to provide adequate reasons contemporaneous with results. The need to articulate reasons for a given result imposes a valuable discipline on decisionmakers.<sup>50</sup> Decisionmakers with an obligation to provide reasons must measure a proposed result against a rationale. They must consider the paradigm cases that such rationales embody, and endeavor to discern the paradigm case that most closely resembles the case at hand. When decisionmakers are free to give results first, and advance reasons later or not at all, discipline suffers. Unfortunately, the failure to give contemporaneous reasons in *Small* is a case in point.

Reasons are particularly important when a case has high stakes and, when the result is a departure from the ordinary

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46. See R.I. Sup. Ct. R. art. II, R. 9 (2000).

47. See Lederberg, *supra* note 28.

48. See Bogus, *supra* note 29.

49. It does not follow from raising such issues that one believes the court is engaged in some kind of vast conspiracy. Cf. Williams, *supra* note 43 (rejecting conspiracy theories). Those who see pervasive conspiracies in the courts are just as simplistic as those who view law as the "brooding omnipresence in the sky" ridiculed by Holmes. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917). To understand *Small*, one needs no theory of judges as conspirators—only a theory of judges as human beings.

50. See *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.").

course of business. *Small* met both of these criteria. In a democracy, disputes about the ethics of persons in public life are always high stakes matters. In addition, since courts routinely approve most pro hac vice applications,<sup>51</sup> a denial like the one in *Small* is a rare event. The very novelty of the outcome in such a high stakes matter naturally triggers questions about why this case is different from the rest. To answer this question, the supreme court owed one modest gesture to the public and the legal profession: the articulation of reasons at the time of the decision. The court did not see fit to extend this gesture. Instead, it provided its reasons some time later, on the editorial page of the *Providence Journal*.<sup>52</sup>

Giving reasons in the media should not be a substitute for giving reasons in judicial decisions. The wisdom of the comprehensive approach is that the public and the profession are served by having one definitive source—the decisions of the supreme court—for attorney admissions. Requiring the public to peruse the *Journal* and sundry other media outlets for nuggets of guidance from the court undercuts the logic of the comprehensive model.<sup>53</sup>

The op-ed pieces may have served a useful purpose in one respect. As the justices asserted, their newspaper articles supplied a rationale for the *Small* decision that contravened the conspiracy theories gaining currency in the media.<sup>54</sup> In particular, as Chief Justice Williams observed, the court's apparent harshness in

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51. See *In re Ferrey*, 774 A.2d at 66 n.4 (Flanders, J., dissenting).

52. See Lederberg, *supra* note 28; Williams, *supra* note 43. Of course, Justice Lederberg is accurate in pointing out that the court writes hundreds of opinions every year featuring extended analysis. See Lederberg, *supra* note 28. My only point here is that a high stakes matter where the court reached an unusual result, such as *Small*, should have received comparable treatment. Justice Lederberg argues in her op-ed that the court's failure to provide reasons is justified by the Ethics Commission's failure to seek a full hearing. *Id.* However, the court owes its duty to provide reasons—a duty, like its authority over attorney admissions, that is inherent rather than statutory—not only to the parties, but to the public and members of the bar. Parties should not possess the power to waive substantial public interests. Granting parties such power reinstalls the market regime that the court rightly rejected in *Ferrey*.

53. Although the court did not handle *Small* as well as it could have, the court continues to be a strong voice for appropriate conduct by Rhode Island lawyers. See, e.g., Tracy Breton, *High Court Censures Traffic-Tribunal Judge*, *Prov. J. Bull.*, Oct. 30, 2001, at B1 (reporting supreme court's censure of lawyer who misrepresented to client that she had filed defamation suit on his behalf; while the client continued to rely on the lawyer's assurances, which continued after she became a magistrate of the Traffic Tribunal, the statute of limitations ran on his claim).

54. See Lederberg, *supra* note 28.

*Small* emerges as perhaps justifiable impatience with the cavalier attitude demonstrated by then-Director of the Ethics Commission, Martin Healey of *In re Healey* fame.<sup>55</sup> Healey had encountered some difficulty with his own pro hac vice status because of his arguably engaging in the practice of law without appropriate authorization.<sup>56</sup> Although the court had ultimately allowed him to continue his work<sup>57</sup>—a dispensation that the court declined to accord *Small* on similar facts<sup>58</sup>—perhaps Healey should have taken his own difficulties into account when he retained *Small*.<sup>59</sup>

The perspective offered by the justices in their articles does not deal with all of the issues raised in this section. In particular, the justices' perspective focuses unduly on the failures of Healey as Ethics Commission Director, without addressing the *public* interest in having a disinterested lawyer like *Small* conduct the investigation of such a politically charged case. The public's interest is undimmed by Healey's distractions. Nevertheless, the justices' reasons at least provide an antidote to the worst case scenarios of political cronyism that this unfortunate episode has generated. Such scenarios would have gained little purchase in the first place, however, if the court had provided reasons in its decision.

### III. THE FUTURE OF THE COMPREHENSIVE MODEL

Criticizing the court's implementation—or, for that matter, praising its choice of the comprehensive model—can only take one so far. At the end of the day, one must still consider the questions left unanswered by the court's new pro hac vice jurisprudence.<sup>60</sup> This section seeks to resolve some of those issues.

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55. See Williams, *supra* note 43.

56. See *In re Healey*, 654 A.2d at 705.

57. *Id.* at 708.

58. See *supra* notes 29-31 and accompanying text.

59. See Williams, *supra* note 43.

60. The Rhode Island Supreme Court has appointed an Ad Hoc Committee on procedures for pro hac vice admission. The Committee's Report is a thoughtful hybrid, balancing the accountability promoted by the comprehensive approach with the flexibility of the tribunal option method. See Report of Ad Hoc Committee to Review Article II, Rule 9 on Pro Hac Vice Admissions (December 2001). It clearly states that the Rhode Island Supreme Court is the final arbiter of rules governing in-state practice. With that as a premise, the Report proposes authorizing courts in each county of the state to decide motions for pro hac vice admission, and authorizing the court to which an appeal is taken to decide motions regarding practice before state administrative agencies. The Ad Hoc Committee also recom-

### A. *Criteria for Future Pro Hac Vice Admissions*

One fundamental issue outstanding after *Ferrey* is the substantive test for pro hac vice admission. The supreme court has commenced a rulemaking proceeding to arrive at meaningful criteria for pro hac vice admissions. Sensible criteria should borrow from the court's current Rule 9,<sup>61</sup> which includes a number of factors that are useful. However, deliberation about the applicable criteria should also refine the current test.

In its current Rule, the court cites five factors:

- a) a showing that the cause involves a complex field of law in which the nonresident attorney is a specialist, b) a long-standing attorney-client relationship, c) lack of local counsel with expertise in the field involved, d) the existence of legal questions involving the law of the foreign jurisdiction, e) the need for extensive discovery in the foreign jurisdiction.<sup>62</sup>

While the court acknowledges that these criteria are not exhaustive, when taken together they nevertheless unduly restrict client access. For example, if one reads the criteria narrowly, they suggest that an attorney with a substantial but not necessarily long-standing relationship with a client may have to show extraordinary competence. The court should not require such a showing, as long as some pre-existing attorney-client relationship prevails. Justifications for admission, such as a pre-existing relationship with the client or a paucity of in-state practitioners in a given specialty, should be disjunctive. Other conditions, such as basic experience in the subject matter, disclosure to all parties of out-of-state status, and membership in good standing in each bar to which the attorney has previously been admitted, should be conjunctive. Consistency in the application of each criterion should be a hallmark of adjudication. The following paragraphs offer greater detail on these factors.<sup>63</sup>

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mends a consolidated procedure for attorneys prosecuting or defending large numbers of mass tort cases. The Ad Hoc Committee's hybrid approach deals with a number of the pressing problems identified in this Article. However, it does not fully address the problem of inconsistency in results because it does not require findings when a motion is denied. The Ad Hoc Committee also does not address the broader issue of multijurisdictional practice identified here.

61. See R.I. Sup. Ct. R. art. II, R. 9 (2000).

62. *Id.*

63. The ABA has recently drafted a proposed model pro hac vice rule that is broader than the approach taken here. See ABA Commission on Multijurisdic-

1. *Justifications (Disjunctive)*a. *The Attorney's Relationship with the Client*

The length of a client's relationship with an attorney is clearly a significant factor in an assessment. Access values are promoted when a client is not forced to choose between pursuing or defending a cause of action on the one hand, and on the other maintaining a relationship with a trusted attorney. In addition, permitting clients to maintain relationships in such cases also serves competence goals. An attorney who has a long-time relationship with a client should have knowledge about the client's needs that will be helpful in the representation. Moreover, a pre-existing relationship helps promote ethical representation, by giving the attorney a stake in a client's welfare that an attorney with no previous acquaintance with the client may not share.

b. *The Lack of Competent In-State Practitioners*

The Rhode Island Supreme Court already includes the paucity of in-state practitioners in a given specialty among its factors justifying pro hac vice admission.<sup>64</sup> This requirement reflects both access and competence values. Clearly a client, even lacking a pre-existing relationship with an out-of-state lawyer, should have recourse to such a lawyer if in-state counsel lack the necessary experience.

2. *Conditions*a. *The Adequacy of the Attorney's Disclosure*

If a matter is before a court or agency, the out-of-state lawyer should also be required to make full and timely disclosure to the supreme court, to his or her client and to any other party to the dispute or transaction. Such a timely disclosure demonstrates the attorney's good faith, and also ensures that both the client and any other party have some opportunity to inquire about the consequences of the attorney's participation and whether the attorney fulfills the other standards outlined in this subsection.

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tional Practice (2001). The proposed model rule basically provides for pro hac vice admission absent a demonstration of prejudice to the client. The ABA approach offers tribunals substantial flexibility. For tribunals seeking more guidance, the approach taken here may be useful.

64. *Id.*

b. *The Acquaintance of the Lawyer with the Subject Matter at Issue*

The client and the public interest in competence is served most clearly when attorneys have significant experience in the subject matter of the litigation. An attorney with substantial experience in family law, for example, is more likely to grasp the central issues in a custody case, and even to be familiar with the general tenor of proceedings in the relevant tribunal, than would an attorney whose main experience is in federal securities law. Conversely, clients have a much less compelling claim about access when the attorneys they seek to enlist have no demonstrable expertise in the domain of the instant dispute.

c. *The Extent of the Attorney's Previous Pro Hac Vice Admissions in the State*

The court has a legitimate interest in limiting the number of pro hac vice appearances by an individual attorney.<sup>65</sup> An attorney who has a proliferating number of such admissions may in effect be holding herself out as a member of the bar in that state. When pro hac vice admissions become an ally of attorney marketing efforts, instead of a safety valve for clients, competence suffers. An attorney representing a substantial number of clients on state law matters in a given state should become a member of the bar in that state, instead of relying on extraordinary measures such as pro hac vice admission. Indeed, an attorney who fails to take such steps is more likely to lack the time management skills and discipline that are essential to competence.

d. *The Attorney's Disciplinary Record*

This criterion also goes to the interaction of competence and ethics. An attorney who has violated the rules of ethics in one jurisdiction should not be able to use pro hac vice admission as a safe haven for practice in another jurisdiction. Similarly, the court should revoke the pro hac vice admission of an attorney who has engaged in misconduct in the case for which she was admitted.

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65. See *Brookens v. Comm. on Unauthorized Practice of Law*, 538 A.2d 1120 (D.C. 1988) (citing District of Columbia court rule limiting attorneys admitted pro hac vice to appearances in no more than five actions or proceedings in any calendar year).

However, the standard for misconduct should be the same for attorneys admitted generally to the state and those admitted *pro hac vice*. A more demanding standard for the latter group would put them at a disadvantage in adversarial proceedings with the former group. Clients of attorneys admitted *pro hac vice* would be the ultimate losers. Such a result clearly contravenes the public purpose in assuring competent, vigorous representation through *pro hac vice* admissions.

### 3. *Summary*

Out-of-state attorneys who meet these standards should be able to practice on a *pro hac vice* basis. Out of concern for access, a court should not require that an out-of-state lawyer, who meets these criteria, to associate with in-state counsel. Local counsel requirements offer little meaningful protection for clients and impinge on access by forcing clients to pay more lawyers.<sup>66</sup> Focusing on the attributes of out-of-state lawyers, without the fig leaf of local counsel, is necessary to detach *pro hac vice* admissions from vestiges of protectionism.

### B. *Procedure and Public Access*

Procedure is just as important as substance in vindicating access and competence values. Consider one issue: What should an attorney admitted *pro hac vice* do to preserve her status if she appeals an adverse decision received by a client? Once the supreme court has approved a *pro hac vice* application, no further filings should be required of the lawyer for the pendency of the matter, absent a material change of circumstances. The court, of course, retains authority to revoke an attorney's *pro hac vice* admission if the attorney engages in misconduct in the case in which she was admitted,<sup>67</sup> or if changes occur with respect to other factors material to her application, such as her standing in jurisdictions to which she is admitted to practice.<sup>68</sup> Attorneys admitted *pro hac*

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66. See Rhode, *supra* note 1, at 154.

67. See *In re Bailey*, 273 A.2d 563 (N.J. 1971) (revoking *pro hac vice* admission of attorney F. Lee Bailey upon finding that he committed misconduct by sending out a mass mailing designed to influence the jury pool in the case).

68. See *In re Rubin*, 675 A.2d 1115 (N.J. 1996) (attorney barred from *pro hac vice* admission in New Jersey after being disbarred in New York for making false statements).

vice should have a continuing duty, like law students seeking initial admission to the bar or like parties to discovery under federal and Rhode Island rules of civil procedure, to disclose changes in material facts to the supreme court.<sup>69</sup>

In addition to procedure, public access to pro hac vice decisions is important. Public access is both a virtue and a necessity under the comprehensive approach. All pro hac vice decisions should be available online, for perusal by both lawyers and the general public. Through such a database, both the profession and the public can inform themselves about the numbers of attorneys admitted pro hac vice, the qualifications of such attorneys and the matters in which they have been admitted. If patterns reveal themselves, for instance in specific kinds of matters in which clients are turning most readily to out-of-state attorneys, the Rhode Island bench, bar and legal academy should take such trends into account when training and encouraging the professional development of Rhode Island attorneys.

### C. *Other Unanswered Questions*

#### 1. *Legal Work Prior to Filing a Complaint*

Consider also the issue of preparing a complaint for an action. The out-of-state attorney may plan to file a motion for admission pro hac vice along with her complaint. However, this begs the issue of whether the attorney's work on the complaint, *prior* to her motion, constitutes the unauthorized practice of law.

Relevant authorities seem mixed on this issue. The proposed revisions to the American Bar Association's Model Rules of Professional Conduct suggest an answer in the negative.<sup>70</sup> However, the

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69. The supreme court has also recently ordered that an attorney must file a new pro hac vice application upon commencing an appeal for a matter in which she appeared below. See Jonathan D. Rockoff, *High Court Clarifies Rules for Out-of-State Lawyers in R.I.*, Prov. J. Bull., Oct. 3, 2001, at B1. The new application rule seems designed to address the issue of changed circumstances, such as new disciplinary proceedings not disclosed in a previous application. However, requiring a new application for an appeal is costly and cumbersome for both the lawyer and the supreme court. The "continuing duty" approach advanced in the text addresses the changed circumstances problem, while minimizing unnecessary cost and effort.

70. See Model Rules of Prof'l Conduct R. 5.5 (Proposed 2000) (allowing a lawyer to act when she is "preparing for a proceeding in which the lawyer reasonably expects to be . . . authorized [to appear by a tribunal]").



Rhode Island statute seems to indicate that preparation of a complaint by an out-of-state attorney may constitute the unauthorized practice of law. The Rhode Island statute includes within its definition of the practice of law "the preparation of pleadings or other legal papers incident to any action or other proceeding of any kind . . . ."<sup>71</sup> On balance, the ABA's revisions embody the better position.

To understand why the ABA's proposed revision is superior, we should return to our consideration of access and competence. Barring the out-of-state attorney from any role in preparing pleadings does violence to the access value, while doing little to promote competence. If it seems likely, based on factors noted above,—such as length of the professional relationship with the client, experience with the subject matter of the litigation, etc.—that the court will grant the *pro hac vice* motion, little is added in the way of promoting competence by barring the lawyer from participating in the preparation of the pleadings. Moreover, representation prior to filing a complaint is, by definition, limited in terms of time. It lasts only for the period from the several weeks to the two to three month period when the complaint is being written. Since the complaint articulates the theory of the case, precluding the lawyer's participation affects the client's choice of tactics not merely at the complaint stage, but throughout the pendency of the litigation. The better view, which may require a statutory amendment in Rhode Island, is to allow the out-of-state lawyer to participate in drafting and negotiation.

## 2. *Transactions*

Another issue is the scope of both unauthorized practice prohibitions and *pro hac vice* admission for transactional representation. Much legal practice today is transactional in nature, involving drafting, counseling and negotiation. Indeed, the Rhode Island Supreme Court recognized as much decades ago when it noted that, "practice of law under modern conditions consists in no small part of work performed outside of any court."<sup>72</sup>

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71. See R.I. Gen. Laws § 11-27-2(1) (1956) (2000 Reenactment).

72. See *In re Ferrey*, 774 A.2d at 64 (citing R.I. Bar Ass'n v. Auto. Serv. Ass'n, 179 A. 139, 144 (R.I. 1935) (quoting *In re Opinion of the Justices to the Senate* (Mass.), 194 N.E. 313, 317 (Mass. 1934))).

While enforcement of unauthorized practice rules is relatively rare in transactional cases, some statutes and judicial decisions take a restrictive view of what out-of-state lawyers may do. The Rhode Island statute defining unauthorized practice describes the practice of law as “services of a legal nature . . . pertaining to any action or proceeding” in any judicial or administrative tribunal, or “for the preparation of any legal instrument.”<sup>73</sup> This definition seems to encompass much transactional work, including drafting contracts. In addition, at least one influential state, California, has held that out-of-state lawyers engage in the unauthorized practice of law when they negotiate in California on behalf of California clients and on matters governed by California law.<sup>74</sup> However, other states take a more flexible view of transactional work, at least when it involves merely incidental or brief contact with a jurisdiction or with clients from that state.<sup>75</sup> The proposed revisions to the Model Rules of Professional Conduct take this more flexible tack.<sup>76</sup>

A sound analysis should start with the premise that issues regarding transactional work feature the same interaction of access and competence that drives the debate about out-of-state attorneys in litigation. To regulate transactional work by out-of-state attorneys, the supreme court should adopt the same standards set out above for *pro hac vice* admission: extent of the previous relationship with the client, availability of in-state lawyers practicing in a particular specialty, adequacy of the lawyer’s disclosure to all relevant parties, acquaintance with the subject matter, number of previous appearances or transactions within the state and the state of the attorney’s disciplinary record. Application of these factors will

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73. See R.I. Gen. Laws § 11-27-6 (1956) (2000 Reenactment).

74. See *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal.), cert. denied, 525 U.S. 920 (1998); cf. *D’Attomo*, *supra* note 12, at 454-55 (discussing California Supreme Court’s analysis of test to determine if lawyer’s contact with client rises to level of practicing law in California).

75. Cf. *In re Jackman*, 761 A.2d 1103 (N.J. 2000) (suggesting that passing or isolated contact with a jurisdiction might not violate unauthorized practice rules, while holding that the practice of corporate law in New Jersey for seven years was more than merely passing or isolated). For commentary urging a flexible approach, see Stephen Gillers, *Conflict of Laws: Real-World Rules for Interstate Regulation of Practice*, 79 A.B.A. J. 111 (Apr. 1993).

76. See Model Rules of Prof’l Conduct R. 5.5 (Proposed 2000) (permitting multistate practice by in-house counsel and lawyers acting in matters reasonably related to practice on behalf of pre-existing clients, in jurisdictions where the lawyer is admitted to practice).

preserve clients' access and subject out-of-state attorneys' work to built-in safeguards for competence.

Consider a core transactional case involving a multistate business deal. Clients participating in such transactions typically have in-house counsel or ties to outside firms that the law should not lightly disrupt. Requiring staffing by attorneys licensed with each state for large multistate transactions would impose significant financial costs. Such costs could impair the client's ability to engage in transactions viewed as economically beneficial or necessary. The involvement of such "repeat players" is also an important safeguard for competence. Corporate clients can effectively monitor counsel's performance. Counsel retained in this setting have an incentive to maintain their competence to attract repeat business from clients who can readily transfer their legal business elsewhere if they are dissatisfied.<sup>77</sup>

On the other hand, states have a legitimate interest in prohibiting out-of-state lawyers from holding themselves out to the public in those states as fully competent to perform the full range of legal work. Consider here a lawyer's role in a house closing. Some elements of such a real estate transaction are common to many jurisdictions, or required by federal law. However, "local knowledge" gleaned from statutes, regulations and case law within the jurisdiction is often helpful on issues such as the seller's obligation to deal with property damage between the signing of sales agreement and the closing. Contacts with major banks and other "repeat players" within the state are crucial for arrangements that facilitate transactions, such as escrow accounts.<sup>78</sup>

At the same time, the close communication facilitated by a long-standing attorney-client relationship may trump these factors even in the real estate setting. A trusted attorney's knowledge of her client's tolerance for uncertainty, for example, may be a crucial element of competence in ensuring a real estate transaction that does not create undue anxiety for a client. So here too, allowing for

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77. See Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (1970) (discussing the implicit threat of "exit" as a means of ensuring quality).

78. Professor Gillers, while generally favoring liberalization of rules governing multistate practice, argues against authorizing out-of-state lawyers' work on transactions concerning real property. See Gillers, *supra* note 75, at 111.

the maintenance of attorney-client relationships preserves access and competence.

### 3. *Plenary Admission for Out-of-State Attorneys*

The bench, bar and legal academy should consider whether standards for plenary admission to practice for out-of-state attorneys should change. States like Massachusetts and New York have long had liberal admissions practices which do not require experienced out-of-state attorneys in good standing to take all or part of the bar exam. Rhode Island has recognized the benefits of this trend with its decision to spare attorneys admitted elsewhere the task of sitting for the Multistate Bar Exam, yet it still requires attorneys to take the Rhode Island portion. In this age of overlapping commerce and client needs, Rhode Island should investigate whether requiring passage of the Rhode Island Bar for admitted attorneys materially furthers the competency goal outlined above. It may be that taking the bar serves this goal, particularly in light of the essay questions on Professional Responsibility and on Rhode Island Civil Practice featured on the examination. However, more study of what taking the bar adds to the competence of out-of-state attorneys would be worthwhile. This is particularly true if a reasonable argument exists that allowing multistate practice for experienced attorneys would establish a more favorable business climate for large consumers of legal services, such as corporations, thereby yielding opportunities for developing new competencies in Rhode Island for attorneys admitted both in this state and elsewhere.

### CONCLUSION

Out-of-state practice is a reality fed by economic and technological change. Often, out-of-state practice enhances the value of access, thereby allowing a client to retain the attorney of her choice. However, the interest in enhancing attorney competence and ethics is an important supplement to conceptions of access. Competency and ethics require some regulation of out-of-state practice, including *pro hac vice* admissions.

The two most prominent regulatory models for *pro hac vice* admissions are the market and tribunal option approaches. Those viewing clients as adequate guardians of their own interests argue that a market approach is the best regulation—arguing in effect

that government governs best when it governs least. Those who argue that the market model can sometimes fail often argue for a tribunal option model, giving particular courts authority over admissions *pro hac vice*. Each of these approaches, however, has problems with vindicating either client interests or the broader public interest.

A comprehensive approach is the best remedy for the flaws of the market and tribunal option models. By using the state's highest court as a source of both information and decisionmaking authority, the comprehensive model can vindicate both competence and access concerns. The Rhode Island Supreme Court's recent *pro hac vice* rulings are a welcome step in this direction. To fulfill the promise of the comprehensive approach, however, the court's implementation must be as sound as its underlying rationale.

Thus far, unfortunately, the court's implementation of the comprehensive model reflects three significant flaws: disruption of settled expectations, inconsistency in results, and failure to provide adequate reasons. The court disrupted expectations by making its application of the comprehensive model retroactive, despite a long-standing tribunal option system. In *Ferrey*, this retroactive application yielded the harsh and unnecessary result of denying an attorney compensation for work done competently and in good faith. It also introduced uncertainty into many other pending matters, including the important lead paint litigation now proceeding through Rhode Island courts.

In addition to disrupting expectations, the court was inconsistent in denying *pro hac vice* status to attorney Daniel Small, whom the Ethics Commission had retained to investigate a prominent lobbyist, while granting such status to attorneys Ferrey and Healey in factually similar cases. By denying Small's petition in an unpublished order, the court failed to give adequate reasons for its decision, despite the public importance of investigating government ethics issues and the novelty of such denials. Justices who subsequently wrote op-ed pieces explaining the outcome in *Small* failed to acknowledge the importance of giving reasons when a decision is made. Although the justices' op-eds succeeded in rebutting conspiracy theories about the role of the court in the case, their clarifications would have been more effective in a judicial opinion accompanying their ruling.

The state rulemaking proceeding mandated by the court may remedy some of these problems and offer sound guidance for the future. To avoid harsh results, a comprehensive model would allow out-of-state attorneys who acted competently and in good faith to keep a portion of the fees they earned prior to the supreme court's change to a comprehensive model. In addition, the supreme court should adopt the following common sense standards for pro hac vice admission, some of which are currently articulated in Rule 9 of the supreme court rules: the extent of the previous relationship with the client, availability of in-state counsel in a particular specialty, adequacy of the lawyer's disclosure to all relevant parties, acquaintance with the subject matter, number of previous appearances or transactions within the state, and the status of the attorney's disciplinary record. Out-of-state attorneys who meet these standards should also be able to do legal work incident to filing a complaint in an action, and work on transactions.

Sound implementation of the comprehensive model also requires attention to procedural issues. Out-of-state attorneys should apply to the supreme court prior to their first appearance in a matter before any Rhode Island agency or court. However, out-of-state lawyers should not have to file a new petition on appeal, but rather should be subject to a continuing obligation to disclose changes in material facts. All pro hac vice decisions by the supreme court should be accessible to the public and the legal profession online. When denying a petition, the court should take care to state reasons, to guide attorneys filing future petitions. The supreme court should also appoint a task force to consider whether current requirements for plenary admission of out-of-state attorneys, such as passing the Rhode Island Bar Exam, are necessary.

A comprehensive approach will not blunt the economic and technological imperatives driving multistate practice. These imperatives are here to stay. However, a comprehensive model can place these imperatives in a framework that honors both access and competence. In this fashion, a comprehensive model serves both the public and the legal profession.

