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# ELECTION DAY AT THE BAR

*Allison R. Hayward<sup>†</sup>*

## INTRODUCTION

Imagine a lawyer who is an active member of the California and District of Columbia Bars. This lawyer specializes in political law, and her professional work is in harmony with personal enthusiasms—she donates to campaigns, talks and writes about issues and candidates, votes, and encourages others to do the same.

She was asked by a national organization of partisan attorneys to work as an Election Day volunteer lawyer. She agreed to travel wherever her services were most needed. On Election Day in 2006, with a couple hours' warning, she ended up in Ohio. After some instruction, she was given a hat that said "voting integrity team," and provided with precinct maps, a notebook of federal and state election rules, a folder of forms with which to report irregularities and take witness statements (if necessary). Dispatched to her area, she was asked to check in on several precinct polling locations to observe whether precinct workers and voters were following proper procedures.

Perhaps her day was blissfully uneventful. She befriended partisan attorneys from the other side, as well as voting rights attorneys affiliated with nonprofits. She talked with confused voters about voting rules and with a few locals about politics in general. She freely admitted when asked that she was from the Washington D.C. area and practiced law there and in California. She handed out a few cards. It is not until months later she receives word a complaint has been filed

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against her in Ohio, asserting that she had engaged in the unauthorized practice of law.

To make a long hypothetical short, the Ohio Board on the Unauthorized Practice of Law, considering for the first time whether Election Day volunteering by out-of-state lawyers is the unauthorized practice of law in Ohio (and the corollary question of whether local attorneys working with nonmembers have "supervised" or "aided" in the unauthorized practice) concludes that it is. Given the lack of notice—since this is a matter of first impression—Ohio sends a letter of admonishment to the lawyer, her local "supervisors" and the number of other out-of-state volunteers similarly identified.

Obligated under the rules applicable to her as a California and D.C. Bar member, she notified her member jurisdictions of this discipline. In both jurisdictions, the unauthorized practice of law in another jurisdiction is itself a violation of local ethics rules. In the past (as we shall see) California has not necessarily limited its discipline to that chosen by the other Bar. Furthermore, even were the California Bar not to act, a private citizen could enforce California's legal ethics rules in a private action. The D.C. Bar customarily chooses identical *reciprocal* discipline. In any event, this isolated volunteer activity in Ohio could lead to a discipline record in California and D.C., regardless of whether or not these jurisdictions would conclude that the activity was the "unauthorized practice of law" under their own standards.

Although such volunteer activity has only recently received much national attention, local lawyers in jurisdictions around the country have been offering gratis partisan legal advice for decades. One noteworthy example involves the activities of the late Chief Justice William Rehnquist. During his confirmation hearings, it was disclosed that Rehnquist had served as legal counsel in support of Republican poll watchers in Arizona in the 1962 general election. He would visit precincts where poll watchers were having difficulty, and advise workers about the law.<sup>1</sup> (Of course, attorney Rehnquist was a member in good standing of the Arizona Bar.) His experience was not unusual. Volunteer Election Day work by lawyers has been but one of a large variety of ways private actors have traditionally aided the election process (typically hoping to benefit their favored candidates).

Since the 2000 election, national parties and a number of special interest groups have changed how they "lawyer up" for Election Day.

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<sup>1</sup> *Nomination of Justice William Hubbs Rehnquist to be Chief Justice of the United States: Hearing Before the Comm. of the Judiciary, 99<sup>th</sup> Cong. (1986)* (statement of William C. Turner).

They recruit nationally for attorneys to work in whatever “hot spots” develop. Yet as we will see, in key jurisdictions these activities may amount to the unauthorized practice of law (“UPL”). While few party operatives presently seem worried about the effect these vagaries will have on Election Day attorney activities, it would be better to clarify the status of these volunteers in advance of a Bar inquiry.

UPL discipline of these attorneys may seem unlikely so long as all participants in elections desire to mobilize these volunteers. Yet enforcement could be triggered once local interests who rely on suppression or fraud recognize that outside volunteers will cause them to lose their edge.<sup>2</sup> In addition, an isolated instance of selective enforcement in one jurisdiction (perhaps a place that allows private actions to enforce professional ethics rules) could inspire actions elsewhere.

As in so many other aspects of American political life, volunteers are valuable and necessary in the election context. By imposing uneven jurisdiction-by-jurisdiction standards, state-based UPL rules confuse participants. They also discourage the development of trained national Election Day experts, skilled in the federal rules applicable to elections and voting, familiar with the kinds of issues that arise on Election Day, and—perhaps most overlooked—with a stake in the smooth functioning of American elections *over time*. In an area of increasing federal concern, it makes sense to move away from relying on Election Day lawyering from local partisan non-specialists and regional political supplicants.

Can the situation be improved, or are these vagaries the necessary consequence of an intransigently parochial election—and ethics—regime? While a national ethical code would alleviate the disparities, for many reasons that particular reform is unlikely. This paper suggests a much more modest proposal, through established ethics reform channels (i.e. the American Bar Association) that would not just clarify the position of Election Day volunteer attorneys, but insulate other very limited and casual “practice” situations from professional discipline. Without some change, the enforcement of UPL rules against Election Day attorneys would seem to be a reality in only a matter of time. The following chill on participation will be felt everywhere and ultimately voters will lose the benefit of this activity.

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<sup>2</sup> See Susan D. Carle, *From Buchanan to Button: Legal Ethics and the NAACP (Part II)*, 8 U. CHI. L. SCH. ROUNDTABLE 281, 298–99 (2001) (describing legal ethics enforcement against the NAACP).

One key assumption animating this proposal is that volunteers recruited nationally may be better choices for these tasks. If that is not the case, then reforms designed to facilitate their activity would be undesirable. Nationally recruited volunteer attorneys may lack sufficient sensitivity to local interests, or may not care about any deleterious impact from what they do. They may displace better, but less prominent, local specialists. They may also do a poor job, because they see no reason to invest energy in doing a good one. Local attorneys, who would otherwise spend time and energy on improving the local administration of elections, may see that the system is out of their hands.<sup>3</sup> However, national voting rights groups and both major parties continue to invest time and energy in these mobilizations. These groups do have a longer view, and will care less about provincial matters than local actors do. If volunteer attorneys begin to alienate voters or otherwise damage the reputation of the entities recruiting them, the recruitment would probably cease. So it would seem that most anticipated problems, if they do materialize, would be self-correcting.

The existing literature has missed important aspects of this peculiar position faced by Election Day volunteer lawyers, and fails to propose a solution that improves the situation. General commentaries on transactional (as opposed to litigation) multi-jurisdictional practice discuss out-of-state activity that aids a bona fide *existing* client in an *ongoing* matter.<sup>4</sup> That would be the situation faced by transactional lawyers working on paying matters generally. But neither of these “legitimizing” characteristics is present when an attorney volunteers for an isolated election mobilization. The most relevant articles addressing the Election Day situation are student works. They recommend that campaigns do a better job of observing the existing patchwork of laws.<sup>5</sup>

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<sup>3</sup> See Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 346–47 (2004) (arguing that lawyer licensing gives lawyers incentive to participate in state lawmaking, discussing benefits and costs).

<sup>4</sup> See Christine R. Davis, Note, *Approaching Reform: The Future of Multijurisdictional Practice in Today's Legal Profession*, 29 FLA. ST. U. L. REV. 1339, 1348–50 (2002); Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 708–09 (1995). Similarly the ABA's Revised Model Rule 5.5, adopted in 2002 with little controversy, provides exceptions to the general ban on unauthorized practice that requires the unauthorized activity be connected to some existing bona fide client matter in the attorney's jurisdiction of admittance. See MODEL RULES OF PROF'L. CONDUCT R. 5.5(c) (2002); *Admissions: ABA Delegates Approve Full MJP Package with Little More than Scattered Opposition*, 18 A.B.A./B.N.A. LAW. MANUAL PROF'L. CONDUCT 477 (2002).

<sup>5</sup> Erika C. Birg, *Lawyers on the Road: The Unauthorized Practice of Law and the 2004 Presidential Election*, 9 TEX. REV. L. & POL. 305, 319–320 (2005); Jason Belmont Conn, Note, *Of Challenges and Challenges*, 37 U. TOL. L. REV. 1021 (2006).

These works also tend to focus on the standards set forth in the ABA's Model Rules, rather than the standards required in specific jurisdictions. It is one thing to muse whether a certain Election Day function is the "practice of law" under general legal principles or a Model Rules hypothetical, quite another to apply inconsistent jurisdictional rules and precedents. Remarkably, prominent articles about Election Day legal issues never make mention of the challenges faced by out-of-jurisdiction legal professionals.<sup>6</sup> An article relating the results of a survey of politically active attorneys focused on whether proper conflicts checks were done, and whether bar rules regarding truth-telling were observed. The researcher did not ask *at all* about out-of-jurisdiction service or Election Day activism.<sup>7</sup>

The lack of specificity may be because no lawyer has been disciplined for Election Day lawyering in a foreign jurisdiction. According to the ABA, Unauthorized Practice of Law (UPL) rules are actively enforced in only 23 jurisdictions.<sup>8</sup> But as noted, in the charged atmosphere of campaigns and elections, one should not count on this truce lasting indefinitely. The timing seems particularly likely at present because volunteer mobilizations appear to have become part of the accepted Election Day practice, while at the same time state bars and courts are reexamining (and breathing new life into) their licensing and UPL rules.

This Article focuses on the threshold issue of whether volunteer Election Day lawyers are engaged in the "practice of law" and if that activity is "unauthorized." It does not attempt to answer a number of other worthy questions. It does not evaluate whether attorneys who are out campaigning for office (or advocating someone else's election) face additional restrictions on what they can say. Nor does it look at *pro hac vice* admissions, which may be available to litigators but are not helpful to volunteer "transactional" lawyers. It also does not weigh the different thresholds for when a person may become a "client," what measures should be taken to avoid conflicts of interest, whether the lawyer faces conflicting confidentiality standards, or

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<sup>6</sup> Sherry A. Swirsky, *Minority Voter Intimidation: The Problem That Won't Go Away*, 11 TEMP. POL. & CIV. RTS. L. REV. 359 (2002) (urging training and deployment of network of lawyers on Election Day to thwart intimidation, making no mention of professional rules that would also apply to activity); Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 429 (2002).

<sup>7</sup> Robert F. Housman, *The Ethical Obligations of a Lawyer in a Political Campaign*, 26 U. MEM. L. REV. 3 (1995). Admittedly this article was published well before the 2000 election.

<sup>8</sup> ABA STANDING COMM. ON CLIENT PROTECTION, 2004 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES (2004), <http://www.abanet.org/cpr/clientpro/2004INTRO.DOC>.

other restrictions on speech arising from a jurisdiction's regulation of solicitation, contact with represented or unrepresented people, or public statements.

## I. WHAT LAWYERS DO ON ELECTION DAY

### *A. What Lawyers Are Recruited to Do*

In anticipation of Election Day monitoring and advisory activities, both partisan and nonpartisan nonprofit groups explicitly recruit lawyers *as lawyers* for these tasks. As one Florida paper described the situation, voters "will be joined by hundreds of lawyers working for either end of the political spectrum. Some already lived in-state, but many spent the weekend parachuting in from across the country."<sup>9</sup> Dubbed "legal SWAT Teams" by *Forbes*, Election Day activism provided law firms and activist lawyers from across the country with an opportunity to work closely with candidates and parties.<sup>10</sup> Bingham McCutchen, as part of its *pro bono* commitment, funded 100 of its attorneys to participate as monitors in Florida, Massachusetts, Nevada and Ohio in 2004.<sup>11</sup>

Recruiting efforts, and boasts about recruiting success, began in late summer and continued through the election. Howard Dean, national chairman of the Democratic National Committee ("DNC"), stated that the DNC would recruit 7,500 *pro bono* lawyers and law students for the DNC's 2006 "election protection program."<sup>12</sup> Democratic staff anticipated 200 lawyers to monitor the 2006 election in Ohio's 88 counties, and another 200 in Indiana to police the implementation of a new voter ID law there.<sup>13</sup> DNC materials dated from October 2004 also promised "[t]housands of volunteer Democratic Party voting rights attorneys will be deployed at precincts in battleground states on Election Day to ensure that polls are opened and staffed properly; that voting systems are tested and operated properly; and especially, that problems experienced by lawfully

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<sup>9</sup> Alisa Ulferts, *Brigades of Lawyers Go to Polls*, ST. PETERSBURG TIMES, Nov. 7, 2006, at 1B.

<sup>10</sup> Jessica Holzer, *Legal SWAT Teams*, Oct. 18, 2006, <http://www.forbes.com> (search for "Legal Swat Teams" and follow hyperlink) (last visited Sept. 1, 2007).

<sup>11</sup> *Bingham Blog*, AM. LAW, Dec. 2004, at 22.

<sup>12</sup> Peter Wallsten, *Parties Battle Over New Voter ID Laws*, L.A. TIMES, Sept. 12, 2006, at 1.

<sup>13</sup> See Associated Press News Wire, *Parties Lining Up Lawyers for Election Day Challenges*, Sept. 25, 2006, available on Westlaw at: 9/25/06 APALERTOH 19:05:33 (discussing Ohio Democrats' efforts to fight suppression of votes by lining up teams of lawyers) (last visited Sept. 1, 2007).

registered voters are solved quickly. . . .”<sup>14</sup> As described to the press, these lawyers are “to fight what [Democrats] allege could be GOP efforts to suppress votes.”<sup>15</sup>

Republicans in 2006 reportedly dispatched 150 attorneys from the Washington D.C. area to other states to assist with local efforts to police against voter fraud, and announced a \$500,000 “recount account” to fund Election Day lawyers on telephones and at the polls. (Most Election Day lawyers served without pay).<sup>16</sup> National Republican recruiting materials specifically requested volunteers to serve as “victory lawyers” (once called “72-hour lawyers”) and as “recount lawyers.” The specific request for recount lawyers recognized the need for out-of-state lawyers, by noting that “in the unlikely event of a statewide recount, few if any states will have enough local lawyers available to handle all the monitoring activities. . . .”<sup>17</sup>

The Lawyer’s Committee for Civil Rights Under Law and the NAACP also boasted of dispatching 2,000 lawyers among 20 states in 2006.<sup>18</sup> Under the auspices of the “National Campaign for Fair Elections,” these groups sought lawyers, students and paralegals to participate in its national hotline to provide state-specific advice and respond to problems, as well as serve as field attorneys and poll monitors.<sup>19</sup> A similar coalition claimed to mobilize 6,000 lawyers and law students “to assist minority voters” in 2004.<sup>20</sup> The 2004 Election Protection Coalition partnership was headed by (again) the NAACP, People for the American Way, and the Lawyer’s Committee. The American Bar Association was among its touted members.<sup>21</sup> The Coalition’s program included a legal team to file lawsuits “to challenge election laws and procedures that would lead to voter disenfranchisement” and “volunteers who monitor polls . . . to

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<sup>14</sup> *Kerry-Edwards/Democratic Voting Rights Institute 2004 Voter Protection Program*, Oct. 5, 2004, [http://www.democrats.org/pdfs/2004\\_1005\\_vri\\_protection.pdf](http://www.democrats.org/pdfs/2004_1005_vri_protection.pdf) (last visited Sept. 1, 2007).

<sup>15</sup> *Id.* See also Birg, *supra* note 5, at 306 (author solicited by New York attorney in October 2004 to volunteer as attorney poll watcher in Florida).

<sup>16</sup> Ian Urbina, *As Vote Nears, Parties Prepare for Legal Fights*, N.Y. TIMES, Nov. 4, 2006, at A1.

<sup>17</sup> Email on file with author.

<sup>18</sup> *Id.*

<sup>19</sup> National Campaign for Fair Elections, <http://www.nationalcampaignforfairelections.org> (last visited Sept. 1, 2007).

<sup>20</sup> Jo Becker, *Legal Battle for Presidency Underway: Lawsuits Over Election Rules Pending, with Both Sides Gearing Up for More*, WASH. POST, Oct. 20, 2004, at A01 (discussing the trend of numerous political parties creating campaign teams of attorneys).

<sup>21</sup> See Election Protection 365, List of Partners and Coalition Members, <http://www.ep365.org> (follow the “EP Coalition” hyperlink) (last visited Sept. 1, 2007).



provide direct assistance to voters.”<sup>22</sup> The group boasted that “some 8,000 attorneys and law students volunteered their expertise to voters.” The materials also stated that “[v]olunteer lawyers are urgently needed on Election Day” and would receive special 2–3 hour training in election law, including special election manuals, and instructions for reporting voting rights violations.<sup>23</sup> The on-line volunteer form asked whether a person was a lawyer or a law student, but provided no place for the volunteer to report where he or she was admitted to practice.

Only one group’s attorney-recruiting materials collected in this research—the 2006 National Campaign for Fair Elections—asked whether a volunteer lawyer was admitted to practice or where.<sup>24</sup> Given the accounts about their activities, which suggest lawyers were assigned in jurisdictions where they were not admitted, it is not clear to what use that information was put. No recruiting materials asked volunteers about areas of expertise, potential client conflicts, or any other specifics relevant to a lawyer’s professional responsibility duties.<sup>25</sup> Yet, as these accounts show, these parties and groups explicitly recruited lawyers because they were lawyers to engage in a variety of “lawyer-like” Election Day activities.

### *B. What Volunteer Attorneys Do*

On Election Day, volunteers may perform a variety of functions. Increasingly, volunteer lawyers can be called in to assist in those more sensitive tasks involving applying rules on the fly, dealing with officials, or exercising greater judgment. In preparation for Election Day, campaigns, parties and outside groups prepare materials for Election Day use and train volunteers. These groups also dispatch volunteer poll watchers to monitor early voting sites. Poll watchers and other monitors are also sent forth on Election Day. Certainly at specific times and places, poll watchers and other workers may fall short of various election laws, but for the purpose of this article, I will

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<sup>22</sup> Election Protection 365, Mission Statement, <http://www.ep365.org> (follow “Election Protection’s Mission” hyperlink) (last visited Sept. 1, 2007).

<sup>23</sup> Election Protection 354, FAQs About Volunteering, <http://www.ep365.org> (follow “Volunteer FAQs” hyperlink) (last visited Sept. 1, 2007).

<sup>24</sup> The National Campaign for Fair Elections 2006 Election Protection volunteer materials ask volunteers, “If a lawyer, in what states are you admitted to the bar?” National Campaign for Fair Elections, Election Protection Signup Form, <http://www.nationalcampaignforfairelections.org/page/signup> (last visited Sept. 4, 2007).

<sup>25</sup> The Republican solicitation for “recount lawyers” requested information about a volunteer’s recount experience.

assess the activities of Election Day attorneys that fall within the bounds of these laws.<sup>26</sup>

There are two distinct forms of “poll watcher”—the designated local volunteer who is part of a special group inside the polls, and the more casual volunteer who monitors poll activity from outside. Typically, state law requires that parties identify poll watchers for positions inside polling places in advance of Election Day. Many jurisdictions also limit those eligible poll watchers to electors from *that* jurisdiction.<sup>27</sup> Once at the polling location, poll watchers may challenge the credentials of individuals seeking to vote. Most jurisdictions do not allow watchers to address voters directly, but instead the watchers may make challenges to the official election staff, i.e. the precinct judge.<sup>28</sup>

“Inside” poll watchers have been recognized, used, and regulated for many decades.<sup>29</sup> In that time, they have been acknowledged as partisans, and their loyalties have been understood as flowing to the party or other appointing authority. “Challengers and watchers are in no sense public officials charged by law with the responsibilities of conducting fair and impartial elections. . . [t]heir function is *partisan*, not *nonpartisan* in character. . . [they are] simply *the agents of the party which appoints them to protect its political interests at the polls . . .*”<sup>30</sup> Duly authorized poll watchers get special privileges.

<sup>26</sup> See *People v. Ellis*, 384 N.E. 2d 331, 332, 335 (Ill. 1978) (attorney poll watcher convicted of electioneering). Conviction of a misdemeanor of this type would usually result in suspension or disbarment, but there is no apparent Illinois bar discipline record for Ellis.

<sup>27</sup> See D.C. CODE ANN. § 1-1001.09(d)(1) (LexisNexis 2006) (registered voter may be a watcher and challenge voter’s status as a qualified elector); FLA. STAT. ANN. § 101.131 (West 2002 & Supp. 2007) (parties and candidates may appoint poll watchers, who must be qualified and registered electors in county, and must be designated two weeks before election); OHIO REV. CODE ANN. § 3505.21 (West 1995 & Supp. 2007) (party may appoint one qualified elector per precinct to serve as an observer, and shall notify board eleven days before election); TEX. ELEC. CODE ANN. § 33.031 (Vernon 2003) (watcher must be a qualified voter of the county or political subdivision where the election is held); VA. CODE ANN. § 24.2-604(C) (West 2006 & Supp. 2007) (watcher must be a qualified voter of county or city where the poll is located).

<sup>28</sup> See, e.g., CAL. ELEC. CODE § 14240 (West 2003) (only a member of a precinct board or other official may challenge voters directly); TEX. ELEC. CODE ANN. § 33.058 (Vernon 2003) (watchers may not converse with voters); VA. CODE ANN. § 24.2-651 (West 2006 & Supp. 2007) (any qualified voter may challenge voters by filling out a form with which an officer of election will challenge the voter directly).

<sup>29</sup> See HUGH A. BONE, *AMERICAN POLITICS AND THE PARTY SYSTEM* 522 (2d ed. 1955) (“Most election laws permit each party to have ‘watchers’”; JAMES K. POLLOCK, JR., *PARTY CAMPAIGN FUNDS* 160 (1926) (“Watchers must also be provided to protect the party’s interests at the polls”). Before jurisdictions adopted the “Australian” ballot, a ballot provided by the government and cast secretly, parties provided ballots, or (earlier) voting was conducted *viva voce*. In either case “poll watching” was unnecessary. See generally CHARLES EDWARD MERRIAM & HAROLD FOOTE GOSNELL, *THE AMERICAN PARTY SYSTEM* 432–45 (reprint 1969) (1949); A. JAMES REICHLEY, *THE LIFE OF THE PARTIES* 167–68 (1992).

<sup>30</sup> *Preisler v. Calcaterra*, 243 S.W.2d 62, 65–66 (Mo. 1951). However, one federal court concluded that poll watchers perform a dual function, both protecting the interests of the party

They are able to monitor the election, remain within a polling place for an extended period, observe whether the laws are followed, and make, when appropriate, timely challenges.<sup>31</sup> The rules governing poll watchers, and when and how challenges are made, vary from state to state.<sup>32</sup> Outside groups may not be entitled to appoint watchers, but in many jurisdictions they can use informal election observers.<sup>33</sup> In those jurisdictions that require poll watchers to be "jurisdiction voters," out-of-state attorneys would not be able to serve.

Poll watchers and lawyers assigned to precincts may want to wear special identifying hats or buttons.<sup>34</sup> At least one court has enjoined poll watchers from wearing tags or identification that invite voters to ask them about voting rights.<sup>35</sup> Another court enjoined the presence of Republican "challengers" altogether in Ohio polling places in 2004, but this ruling was overturned by the United States Court of Appeals for the Sixth Circuit mere hours before the polls opened.<sup>36</sup>

By contrast, activity *outside* a polling place is less regulated, and not restricted to electors or party/candidate representatives. Here, the growing practice is for lawyer volunteers, wearing special insignia as a member of a candidate's "Legal Team," a "Voting Rights Attorney" or an "Election Protection Volunteer," to offer assistance to rejected voters or field complaints about the election's administration from

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and guarding the integrity of the electoral process. *Tiryak v. Jordan*, 472 F. Supp. 822, 824 (E.D. Pa. 1979).

<sup>31</sup> See, e.g., *Powell v. Weyant*, 761 N.Y.S. 2d 545, 546 (N.Y. App. Div. 2003) (a poll watcher made timely challenge to opening of absentee ballots with errors on applications).

<sup>32</sup> Compare CAL. ELEC. CODE § 14240 (West 2003) (only precinct board members and election officials may challenge voters), and OHIO REV. CODE ANN. § 3505.20 (West Supp. 2007) ("Any person offering to vote may be challenged at the polling place by any judge of elections") with TEX. ELEC. CODE ANN. § 63.011 (Vernon 2003 & Supp. 2006) (challenger statute was repealed, and now voters who are not on the precinct's list execute provisional ballots).

<sup>33</sup> See Ben Szobody, *Selby's Ex-Lawyer to Try to Block ACLU*, GREENVILLE NEWS, Aug. 31, 2004. See also *Baer v. Meyer*, 728 F.2d 471, 476 (10th Cir. 1984) (rule allowing only parties to have poll watchers is not unconstitutional); *State ex rel. Wing v. Farrell*, 145 N.E. 324 (Ohio 1924) (under state law, Cuyahoga County Conference for Progressive Political Action can be denied challengers).

<sup>34</sup> See Florida Legal Team Operations Overview, in *Florida Victory 2004*, Sept. 3, 2004, on file with author (Democrat Election Day legal team plan specified that "poll watchers to wear blue hats; poll watchers & precinct lawyers to wear "Every Vote Counts" buttons).

<sup>35</sup> See *Metzger v. Doe*, No. 04-1540 (Lucas Cty. Ct. of Common Pleas Judgment Entry Nov. 2, 2004).

<sup>36</sup> *Summit County Democratic Cent. & Executive Comm. v. Blackwell*, 388 F.3d 547 (6th Cir. 2004). See generally Dale Smith, Comment and Case note, *Preserving Rights or Perpetuating Chaos: An Analysis of Ohio's Private Challengers of Voters Act and the Sixth Circuit's Decision in Summit County Democratic Central and Executive Committee v. Blackwell*, 74 U. CIN. L. REV. 719, 721-22 (2005).

voters and from poll watchers.<sup>37</sup> These lawyers may be from anywhere.<sup>38</sup> Lawyers may be given manuals with blank forms to record complaints and witness statements.<sup>39</sup> They may call on other roving attorneys to assist if they detect “trouble.” Although not as strictly regulated as those of “inside” poll watchers, their activities are not completely unrestricted. In most jurisdictions electioneering within a certain distance from a polling place is forbidden,<sup>40</sup> as is coercion or intimidation of voters.<sup>41</sup>

Without passing judgment on the merits, it is generally true that Republican challengers and observers are deployed to prevent improper voting and are more concerned about detecting and reporting fraud in voting, while Democrat challengers and observers are deployed to get more people to vote and are more concerned about vote suppression. Because partisan goals are different, seemingly neutral election administration rules have partisan effects. The belief is that “anti-fraud-in-voting” reforms such as requiring voter identification or easing challenges will disproportionately burden Democrats and favor Republicans. However, voter

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<sup>37</sup> See Birg, *supra* note 5, at 308 (“many lawyers provided legal advice to voters at the polls”). For an example, pictures of lawyers wearing caps and buttons of the “Florida Voting Rights Team,” are posted at <http://groups.msn.com/FloridaElectionActivist> (last visited Sept. 4, 2007) and [www.troubleinparadise.org/Lawyers.jpg](http://www.troubleinparadise.org/Lawyers.jpg) (last visited Sept. 4, 2007).

<sup>38</sup> See Birg, *supra* note 5, at 307 n.6 (“One of Kerry’s ‘Florida Voting Rights Attorney[s]’ I met introduced herself as an attorney in-house with an environmental services company in Boston. This did not prevent her from putting on her baseball cap proclaiming she was a Florida Voting Rights Attorney”). See also Kim M. Keegan, *Building on the Legacy: Equalizing Justice for All*, NAT’L B. ASS’N MAG., Sept.-Dec. 2004, 1, at 1 (noting that “countless National Bar Association members have undergone training . . . to assist voters before and on Election Day. Many of our members have traveled around the country to assist communities in battleground states where the need for legal expertise can make the difference between votes counted and votes discarded.”).

<sup>39</sup> See RNC, Poll Watcher 2001, on file with author. See also Florida Legal Team Operation Overview, *supra* note 34 (“poll workers, precinct lawyers have legal bullet point sheets to answer questions.”) See also *id.*, attached flow chart depicting Florida Democratic Legal Team Organization (“Polling Places: up to 1820 precinct lawyers, 1,370 at targeted Pcts, 450 roaming, [with] legal bullet points, basic law manual, incident report form, affidavit forms . . .”).

<sup>40</sup> See, e.g., ALASKA STAT. § 15.15.170 (2006) (no “persuasion” within 200 feet of polling entrance); ARIZ. REV. STAT. ANN. § 16-515 (2006) (only voters within 75 foot perimeter); KY. REV. STAT. ANN. § 117.235 (2006 & Supp. 2006) (no electioneering within 300 feet); OHIO REV. CODE ANN. § 3501.30 (1995 & Supp. 2006) (loitering or electioneering within 100 feet of poll prohibited); TEX. ELEC. CODE ANN. § 61.003 (2003) (loitering or electioneering within 100 feet of an outside door to polls is misdemeanor); VA. CODE ANN. § 24.2-604 (West 2006) (electioneering, loitering prohibited within 40 feet of entrance to polling place).

<sup>41</sup> E.g., 18 U.S.C. § 594 (2000) (federal offense to threaten, intimidate voters in a federal election); CAL. ELEC. CODE § 18540 (2003) (use of force, violence, or tactic of coercion or intimidation toward voters a felony); OHIO REV. CODE ANN. § 3599.24 (1995 & Supp. 2006) (same, may be misdemeanor or felony). Voter fraud is also a crime, See, e.g., CAL. ELEC. CODE § 18500; D.C. CODE § 1-1001.14 (2006) (fines and/or imprisonment for “corrupt election practices”); FLA. STAT. ANN. § 104.061 (2002) (felony for corruptly influencing voting).

participation reforms such as reducing credentialing, providing same-day voter registration, extending the time polls remain open, and the like are believed to disproportionately burden Republicans and favor Democrats. Both anti-fraud and voter facilitation are worthy goals, and one can imagine system reforms in pursuit of both, though such reforms may be unlikely to occur in our present partisan climate.<sup>42</sup>

These competing views of Election Day “reform” are borne out in reports from the field. One California volunteer, who stated that she had served as a Republican “roving attorney watching the polls” in Wisconsin in 2004, described her experience on her blog. She said that she received preliminary training in Wisconsin election law, then received “a couple hundred pages of manuals, statutes and cases, all of which I read . . . and only a fraction of which was helpful . . . . Much of Election Day was spent arguing with our attorney counterparts from the Democratic Party. They, too, had manuals and statutes and cases.”<sup>43</sup> Another Republican Election Day challenger, a Cincinnati attorney assigned to Election Day work in Cincinnati (appropriately enough), said he received a voter list and was told to challenge voters who had both requested an absentee ballot and were attempting to vote in person.<sup>44</sup> A Democratic recruit, an Illinois public defender working a poll in Wisconsin in 2004, reported stopping authorities from closing her Milwaukee precinct early.<sup>45</sup>

Out-of-state attorneys volunteering on Election Day are not bashful about discussing their activities, even when it is clear that they are not admitted to practice in the jurisdiction.<sup>46</sup> A group of

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<sup>42</sup> Richard L. Hasen, *Fraud Reform? How Efforts to ID Voting Problems Have Become a Partisan Mess*, SLATE, Feb. 22, 2006, <http://www.slate.com/id/2136776/>.

<sup>43</sup> Posting of Justene Adamec to Calblog, <http://www.calblog.com/archives/004147.html> (Jan. 29, 2005, 15:00 PST). Ms. Adamec practices law in California. See Pumilia Patel & Adamec, LLP Attorney Profile of Justene M. Adamec, <http://www.pumilia.com/profile-justene-adamec.htm> (last visited Sept 8, 2007). Her name does not appear in the on-line directory of members of the Wisconsin Bar. State Bar of Wisconsin-Lawyer Directory, <http://www.wisbar.org/directory/> (search “Last Name” for “Adamec”) (last visited Sept. 8, 2007).

<sup>44</sup> *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 532 (S.D. Ohio 2004). These instructions, which the attorney, Drew Hicks, received at a training session, apparently contradicted the manual Hicks received, which stated that “non-resident” status would likely be the main basis for challenges. *Id.* Also, the voter list Hicks was given consisted of the names of apparently deceased persons who had requested absentee ballots. *Id.* at 533 n.7. See also Barry M. Horstman, *GOP Plan Targeted New Voters*, CINCINNATI POST, Nov. 1, 2004, at 14A (quoting from a GOP training manual). Notably, the manual advised that challengers should “[u]se good judgment about whether to challenge a voter or not . . . This is not just a legal decision, but also a political one.” *Id.* (emphasis added).

<sup>45</sup> Lisa Lerer, *The War that Wasn’t*, AM. LAW., Dec. 2004 at 18, 19 (discussing Election Day efforts and preparations by lawyers).

<sup>46</sup> See *supra* notes 38 & 43. See also *Parties Battle Over New Voter ID Laws*, L.A. TIMES, Sept. 12, 2006, at A1 (mentioning Missouri attorney Thor Hearne’s activities in Florida); Medea Benjamin & Deborah James, *Florida’s Palm Beach County Bracing for the Electoral Storm*,

Election Protection volunteers told a reporter for the *ABA Journal E-Report* that they spent Election Day troubleshooting and advising voters of their legal rights.<sup>47</sup> One such volunteer, a Chicago attorney working a polling place in Miami, said he worked the line and told voters that if they had problems voting they should come see him.<sup>48</sup> The ABA's own publication made no mention of any professional ethics issues with any of the reported activities.

### *C. What These Volunteers Should Know*

As either "voting rights" or "voting fraud" advisors, these partisan out-of-state attorneys may be asked to opine and argue about a blend of state and federal laws and rulings. Relevant federal laws include the Fourteenth and Fifteenth Amendments,<sup>49</sup> and the voting requirements of the Help America Vote Act of 2002 (HAVA).<sup>50</sup>

Another very important component of the relevant federal laws is the consent decree governing the Republican National Committee ("RNC"), but not the DNC, "ballot security" programs. In the 1981 New Jersey gubernatorial campaign between James Florio and Thomas Kean, the RNC challenged 45,000 voter registrations based on registered voters' returned mail.<sup>51</sup> The RNC also posted signs at polling places reading "It is a Crime to Falsify a Ballot or to Violate Election Laws" and hired uniformed precinct workers to monitor targeted precincts in black and Hispanic areas. The DNC sued, and

COMMONDREAMS.ORG NEWSCENTER, Nov. 1, 2004, <http://www.commondreams.org/views04/1101-33.htm> (discussing New York attorney Liz Grisaru's role with Kerry Voting Rights Protection Team negotiating for more Florida early voting locations and other Election Day provisions); Scrivenings, <http://dmorgen.blogspot.com/2004/10/need-for-monitors-in-early-voting.html> (Oct. 22, 2004, 10:59:00 EST) (email from Massachusetts attorney Edward Dorsey recruiting lawyers for poll monitors in Florida).

<sup>47</sup> Molly McDonough, *Help Was Along the Way: In Florida, Left-Leaning Lawyers Assisted Voters—Even When it Meant a Vote for the Other Guy*, 3 N. 44 A.B.A. J. E-REP. 2, Nov. 5, 2004, <http://www.abanet.org/journal/ereport>.

<sup>48</sup> *Id.* The attorney, identified as Christopher T. Hurley, does not appear in the on-line directory of Florida Bar members. Florida Bar-Find a Lawyer, <http://www.floridabar.org/names/MEsearch?OpenForm> (search "Last Name" for "Hurley" and "First Name" for "Christopher") (last visited Sept. 9, 2007).

<sup>49</sup> U.S. CONST. amend. XIV, § 1; *id.*, amend. XV, § 1.

<sup>50</sup> Help America Vote Act of 2002, 42 U.S.C. §§ 15301-15545 (2004) (in particular, see the provisional voting and voting information requirements in § 15482). See generally U.S. Dep't. of Justice Civil Rights Div., Voting Section-HAVA, <http://www.usdog.gov/crt/voting/hava/hava.html> (on HAVA interpretation and enforcement, shows the separate state agreements and memoranda to implement HAVA) (last visited Sept. 9, 2007).

<sup>51</sup> See Rachel E. Berry, *Democratic National Committee v. Edward Rollins: Politics as Usual or Unusual Politics*, 2 RACE & ETHNIC ANC. L. DIG. 44, 47-49 (1996) (reciting facts pled in *Democratic Nat'l Comm. v. Republican Nat'l Comm.*, Civ. No. 81-3876 (D.N.J. filed Nov. 1, 1981)).

the DNC and RNC entered into a consent decree over which Judge Dickinson R. Debevoise of the United States District Court for the District of New Jersey retains jurisdiction.<sup>52</sup>

Under that decree, the RNC agreed that it would refrain, nationwide, from ballot security activities where the racial composition of an area is a factor in deciding to engage in the program. Moreover, if RNC Election Day activities are directed toward a district with substantial minority populations, that fact "shall be considered relevant evidence of such a factor and purpose." The 1982 decree was modified in 1987 to require prior review of RNC "ballot security" programs but allowed the RNC "to deploy persons to perform normal poll watch functions so long as such persons do not use or implement the results of any other ballot security effort."<sup>53</sup> It was modified again in 1990 to require the RNC to include information about the consent decree in informational materials.<sup>54</sup>

The consent decree continues to be a useful tool in Democratic pre-election litigation. In 2004, the New Jersey District Court again enjoined Republican conduct alleged to violate the consent decree (this time in Ohio),<sup>55</sup> but the Third Circuit Court of Appeals sitting *en banc* stayed the injunction.<sup>56</sup> Justice David Souter, sitting as Circuit Justice, denied the application to vacate the stay.<sup>57</sup> Because the consent decree applies nationally and in perpetuity, Republican and Democratic election lawyers anywhere could be expected to know its parameters, and could be asked to evaluate its scope and effect in particular situations.

State and local governments administer elections; therefore, many Election Day questions will involve applications of state law, regulation, and rulings. Local jurisdictions enforce criteria for poll watchers, precinct judges, and conduct of any person at or around the polls.<sup>58</sup> They also set polling hours, procedures for handling voting materials, ballot security, contests, and counting and recounting

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<sup>52</sup> Democratic Nat'l Comm. v. Republican Nat'l Comm., Civ. No. 81-3876 (D.N.J. Nov. 1, 1982) (Consent Order). See Swirsky, *supra* note 6, at 360-63 (history and description of consent decree).

<sup>53</sup> Democratic Nat'l Comm. v. Republican Nat'l Comm., (D.N.J.), Civ. No. 86-3972 (July 27, 1987) (Settlement Stipulation and Order of Dismissal) ¶¶ B, C.

<sup>54</sup> Democratic Nat'l Comm. v. Republican Nat'l Comm., Civ. No. 86-3972 (D.N.J. Nov. 5, 1990).

<sup>55</sup> Democratic Nat'l Comm. v. Republican Nat'l Comm., Civ. No. 81-3876 (D.N.J. Nov. 1, 2004) (Order of Injunction).

<sup>56</sup> Democratic Nat'l Comm. v. Republican Nat'l Comm., No. 04-4186 (3d Cir. Nov. 2, 2004)(granting stay of Nov. 1 order for rehearing *en banc*).

<sup>57</sup> Democratic Nat'l Comm. v. Republican Nat'l Comm., 543 U.S. 1304 (Souter, Circuit Justice 2004) (Justice Souter denied the application on Nov. 2, 2004, after the intervenor, Ebony Malone, who moved for the injunction, cast a vote on Election Day).

<sup>58</sup> See, e.g., *supra* notes 32, 40-41.

rules.<sup>59</sup> Perhaps the most critical components of voting—voter registration and information regarding precincts and voting by mail (where available)—is the province of state and local authorities. While there are similarities among many states' laws, one familiar with the laws and interpretation in one state should not assume that another state's rules work the same way. One vivid example of confusing material inconsistencies among state laws are the differing state limits on voting by felons.<sup>60</sup> Another is the unique provisions Texas has made for voting by individuals on space flights.<sup>61</sup> Clearly there is a mixture of local and federal law governing Election Day that one advising the public should master.

Despite the existence of varying state rules, the Election Day experience for a volunteer lawyer, as described by participants and press, does look similar from state to state. Lawyers are recruited by political parties, candidate campaigns and outside interest groups, and usually seek the experience because they want to help a candidate or party, or they believe in the "cause" of voting. Recruits receive summary materials and some training, usually. Local lawyers may be recruited to work inside polling places as poll watchers, but most others volunteers, including out-of-staters, are assigned positions as outside monitors or roving attorneys. They are dispatched with short notice to jurisdictions where the recruiting entity feels their services are needed, without, it appears, much concern for whether they are admitted to practice in that jurisdiction. Once at their appointed site,

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<sup>59</sup> State law setting polling hours include ARIZ. REV. STAT. ANN. § 16-565 (2006) (6 am to 7 pm); 10 ILL. COMP. STAT. ANN. § 5/17-1 (West 1993) (6 am to 7 pm); KAN. STAT. ANN. § 25-106 (2000) (7 am to 7 pm). Ballot security laws and procedures for casting a vote include CAL. ELEC. CODE §§ 14215-14227 (2000). Counting and contests statutes include ARK. CODE ANN. § 7-5-801 (2000), CAL. ELEC. CODE §§ 16440-16444 (2003); COLO. REV. STAT. § 1-11-201 (2006); 10 ILL. COMP. STAT. ANN. § 5/24-10 (West 1993).

<sup>60</sup> See FLA. CONST. ART. VI, § 4 ("No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote . . . until restoration of civil rights or removal of disability."); FLA. STAT. ANN. § 97.041(2) (West 2007) (felon not entitled to register or vote); PA. DEP'T. OF STATE, VOTING RIGHTS OF CONVICTED FELONS, CONVICTED MISDEMEANANTS AND PRETRIAL DETAINEES, 2, [http://www.dos.state.pa.us/dos/lib/dos/20/convicted\\_felon\\_brochure\\_website.pdf](http://www.dos.state.pa.us/dos/lib/dos/20/convicted_felon_brochure_website.pdf) (last visited Sept. 7, 2007) (incarcerated felons may not vote nor register to vote); TEX. CONST. ART. VI, § 1(a) (convicted felon may not vote unless excepted by Legislature); TEX. ELEC. CODE § 11.002 (Vernon 2003) (felon may vote once sentence fully discharged or pardoned); VA CONST. ART. II, § 1 (felon not qualified to vote unless civil rights have been restored). According to the Sentencing Project, 48 states and the District of Columbia forbid incarcerated inmates from voting, but Maine and Vermont permit them to vote. Ohio and Pennsylvania, among others, only bar incarcerated felons from voting. 35 states prohibit parolees from voting, and 30 also exclude felony probationers. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 3 (2007), [http://www.sentencingproject.org/admin/documents/publications/fd\\_bs\\_fdlawsinus.pdf](http://www.sentencingproject.org/admin/documents/publications/fd_bs_fdlawsinus.pdf). Every state has its own procedure for restoring voting rights, adding to the patchwork of laws and procedures. See *id.*

<sup>61</sup> TEX. ELEC. CODE § 106.001 (Vernon 2003).



they monitor voting, approach voters offering assistance, report suspicious behavior, take affidavits, fill out incident reports, and confer with precinct judges, law enforcement, other volunteer lawyers, and partisan staff.

In many situations, these volunteers help voters vote, may improve the chances of a fair and accurate count, and may deter malefactors. Certainly local government or the U.S. Department of Justice could not provide such extensive support. Stipulating for our purposes that their work is a "good" we still must ask—is it the practice of law? If it is, then the out-of-state attorney may be violating not only the legal ethics rules of the "away" jurisdiction, but of the "home" jurisdiction.

## II. IS THIS THE PRACTICE OF LAW?

One will search in vain for a controlling definition of the practice of law.<sup>62</sup> The American Bar Association, for its part, has chosen to leave this fundamental threshold definition up to state jurisdictions.<sup>63</sup> State attorney disciplinary and ethics bodies have themselves been reluctant to articulate a standard, instead choosing to opine case-by-case as situations are brought before them. What results is a patchy and sometimes unpredictable conglomeration of law.

More specific to this paper, in key jurisdictions it would seem reasonable that the activities of partisan volunteer lawyers would be sanctioned as the unauthorized practice of law (UPL). This fact may be obscured if one looks to national expressions of legal ethics standards, such as those in the *Restatement of the Law Governing Lawyers*. The *Restatement*, after noting that interstate practice is increasingly common, declares that out-of-jurisdiction contacts for a client "is customary in many areas of legal representation" and "should be recognized as permissible so long as they arise out of or otherwise reasonably relate to the lawyer's practice. . . ."<sup>64</sup> The Model Rules share this perspective, and Rule 5.5 permits temporary out of state practice that is reasonably related to the attorney's home practice. Those volunteer attorneys who can show a connection between their Election Day work and their regular practice (a small

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<sup>62</sup> See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 3 cmt. d, 4 cmt. c (2000) [hereinafter RESTATEMENT] (definition of "practice" vague, conclusory and varies depending on circumstances); RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 944 (Am. Bar Ass'n 2000) ("State Law definitions of unauthorized practice are a hodgepodge . . .").

<sup>63</sup> ABA Task Force on the Model Definition of Practice of Law 3 (2003) ("[T]he Task Force also became convinced that the necessary balancing test for determining who should be permitted to provide services that are included within the definition of the practice of law is best done at the state level.").

<sup>64</sup> RESTATEMENT, *supra* note 62, § 3 cmt. e.

subset to be sure) may feel reassured that their temporary volunteer activity will not trigger UPL issues. Yet the *Restatement* and the Model Rules are “ahead” of some state Bars in their tolerance of this situation. Obviously, they also would not protect volunteers who have no connection between their practice and the Election Day work.<sup>65</sup>

For lawyers serving charitable groups, rather than political parties, some state procedures, including special applications, fees, and clearances, might apply.<sup>66</sup> It does not appear that attorneys participating in Election Day activities on behalf of charitable “voting rights” groups, or the groups themselves, even attempt to comply with these requirements. When jurisdictions set advance application or fees requirements for charitable groups involved in Election Day work, they demand more foresight and advance planning than most groups can accommodate.

Because there is no single, overriding definition of the “practice of law,” we must look at the states separately. According to the ABA’s 2004 Survey, the “practice of law” is defined in thirteen state jurisdictions by court rule, by statute in five, through case law in six, and through advisory opinions in two. The following discussion highlights the rules in eight specific jurisdictions—California, the District of Columbia, Florida, Maryland, Pennsylvania, Ohio, Texas, and Virginia—chosen because of size, significant Election Day-related activity in the recent past, and/or because of the likelihood that politically motivated attorneys will be admitted to practice there. This last category is important when a jurisdiction disciplines members reciprocally for acts done in other jurisdictions.

### *A. Defining “The Practice of Law”*

All jurisdictions profess to define the “practice of law” but these definitions vary widely in their degree of precision. “Practice of law” has been defined in California cases as “doing or performing services in a court of justice” as well as “legal advice and counsel and the preparation of legal instruments and contracts. . . .”<sup>67</sup> The California Supreme Court has added that “[i]n close cases, the courts have determined that the resolution of legal questions for another by advice and action is practicing law ‘if difficult or doubtful legal questions are

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<sup>65</sup> While forty-seven jurisdictions have adopted the Model Rules, they have done so with significant variation. Nancy J. Moore, *Lawyer Ethics Code Drafting in the Twenty-First Century*, 30 HOFSTRA L. REV. 923, 932 (2002).

<sup>66</sup> See *infra* notes 115–23 and accompanying text (discussing special provisions for lawyers working for certain charitable groups).

<sup>67</sup> *Baron v. City of Los Angeles*, 469 P.2d 353, 357 (Cal. 1970) (quoting *People v. Merchants Protective Corp.*, 209 P. 363, 365 (Cal. 1922)).

involved which, to safeguard the public, reasonably demand the application of a trained legal mind.”<sup>68</sup> Further, “if the application of legal knowledge and technique is required, the activity constitutes the practice of law. . . .”<sup>69</sup> This vague rule, and case by case approach, is shared by most other jurisdictions.<sup>70</sup> California and others have shown little inclination to define the standard more clearly.<sup>71</sup>

Cases in key jurisdictions look to whether the work requires expertise beyond that possessed generally. The leading Florida case states that if “the giving of such advice and performance of such services affect important rights of a person under the law, and. . . requires that the persons giving such advice possess legal skill and a knowledge of the law *greater than that possessed by the average citizen*” this constitutes the practice of law.<sup>72</sup>

Florida and Ohio law also state that a non-attorney who holds himself or herself out as an attorney has engaged in the unauthorized practice of law.<sup>73</sup> Similarly, Pennsylvania finds the “practice of law”

<sup>68</sup> *Id.* at 358.

<sup>69</sup> *Id.*

<sup>70</sup> See, e.g., Maryland: MD. CODE ANN., BUS. OCC. & PROF. § 10-101(h) (LexisNexis 2004) (including in the definition of the practice of law that which the Court of Appeals finds to be the practice of law); Pub. Serv. Comm’n v. Hahn Transp., Inc., 253 A.2d 845, 852 (Md. 1969) (applying a different definition of “practice of law” based on legislative history); Pennsylvania: Shortz v. Farrell, 193 A. 20, 21 (Pa. 1937) (declining to “formulate a precise definition” of the practice of law); Texas: TEX. GOV’T. CODE § 81.101 (Vernon 2005) (leaving to the judiciary power to determine what acts constitute the practice of law); TEX. DISCIPLINARY R. PROF’L. CONDUCT 5.05 cmt 3 (available at <http://www.texasbar.com/ContentManagement/ContentDisplay.cfm?ContentID=12477>) (leaving the definition of the practice of law open for further judicial development); Unauthorized Practice Comm. v. Cortez, 692 S.W. 2d 47, 51 (Tex. 1985) (“[T]he court has the duty and the inherent power to determine in each case what constitutes the practice of law.”) (quoting Grievance Comm., State Bar of Tex., Twenty-First Cong. Dist. v. Coryell, 190 S.W.2d 130 (Tex. Civ. App. 1945, writ ref’d w.o.m.)).

<sup>71</sup> At the same time a Bar may apply its case-by-case approach extra-jurisdictionally. The California State Bar court found a California-licensed attorney who moved to South Carolina, took employment discrimination clients in South Carolina, but never obtained a license to practice in South Carolina had violated California professional conduct rules. *In re Wells*, 2005 WL 3293313 (Cal. Bar. Ct. Dec. 5 2006). California’s Rule 1300(B) forbids California lawyers from the unauthorized practice of law in another jurisdiction. Notably, South Carolina did not discipline the lawyer, so it was the California Bar’s reading of South Carolina’s laws and rules that resulted in suspension of this lawyer. *Id.* at \*14.

<sup>72</sup> *State ex rel. Fla. Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962) *vacated on other grounds*, 373 U.S. 379 (1963) (emphasis added). Ohio and Pennsylvania also look for knowledge not possessed by an ordinary layperson. See *Sharon Village Ltd. v. Licking Cty. Bd. of Revision*, 678 N.E.2d 932 (Ohio 1997); *In re Campanella*, 207 B.R. 435, 444 (Bankr. D. Pa. 1997) (citing *In re Arthur*, 15 B.R. 541 (Bankr. E.D. Pa. 1981)).

<sup>73</sup> See, e.g., FLA. R. REGULATING FLA. BAR 4–5.5(b) and OHIO PROF’L COND. R. 5.5(b), 5.5 cmt. 4 (establishing an office and holding oneself out as a lawyer prohibited without license); Fla. Bar v. Kaiser, 397 So. 2d 1132 (Fla. 1981) (advertisements created impression that New York attorney was licensed in Florida and did not specify that practice was limited to immigration); Fla. Bar v. Gentz, 640 So. 2d 1105 (Fla. 1994) (holding oneself out as a judge capable of granting divorces is unlicensed practice of law); Fla. Bar v. Matus, 528 So. 2d 895, 896 (Fla. 1988) (operating an immigration service firm constituted unlicensed practice of law);

when an individual holds himself out to the public as “competent to exercise legal judgment.”<sup>74</sup> The Pennsylvania court reasoned that by holding oneself out, an individual is implicitly representing that he has the legal skills, abilities, and requisite character to represent another.<sup>75</sup> The Texas Penal Code prohibits a person from holding himself out as a lawyer only if done with intent to obtain an economic benefit, unless licensed to practice law in Texas.<sup>76</sup>

In contrast to the above, the District of Columbia Court of Appeals has promulgated a detailed definition of the “practice of law.” The practice of law in the District is “the provision of professional legal advice or services where there is a client relationship of trust or reliance.”<sup>77</sup> While at first blush the practice of law standard would seem to conflate into a narrower inquiry about whether there is an attorney-client or a fiduciary relationship, the D.C. Rule continues with a list of activities “presumed” to be the practice of law when done on another’s behalf.<sup>78</sup> Among this presumed conduct is “[p]reparing any legal document,”<sup>79</sup> “[p]reparing or expressing legal opinions,”<sup>80</sup> and “[p]roviding advice or counsel as to how any” of the listed activities “might be done.”<sup>81</sup> Yet a lawyer will not be found to be practicing law in the District if his or her presence is “incidental or occasional.”<sup>82</sup> Virginia has a similarly detailed definition in its Rules, however without the exception for incidental or occasional activity.<sup>83</sup>

Fla. Bar v. Consol. Bus. and Legal Forms, 386 So. 2d 797 (Fla. 1980).

<sup>74</sup> Dauphin County Bar Ass’n. v. Mazzacaro, 351 A.2d 229, 232 (Pa. 1976). See also Office of Disciplinary Counsel v. Marcone, 855 A.2d 654, 660–61 (Pa. 2004) (following “holding out” reasoning from *Mazzacaro*); Kountz v. Rowlands, 46 Pa. D. & C. 461 (Pa. C.P. 1942) (granting injunction prohibiting non-attorney from holding himself out as skilled in legal interpretation and advice). Pennsylvania Rule of Professional Conduct 5.5 also prohibits an individual not admitted from holding himself out as an admitted attorney. PA. R. PROF’L COND. 5.5 (b).

<sup>75</sup> *Mazzacaro*, 351 A.2d at 232. The court also stated that the lack of the necessary skills is the exact danger the rules are intended to prevent.

<sup>76</sup> TEX. PENAL CODE ANN. § 38.122 (Vernon 2006).

<sup>77</sup> D.C. CT. APP. R. 49 (b)(2).

<sup>78</sup> *Id.* R. 49(b)(2)(A)–(F).

<sup>79</sup> *Id.* R. 49(b)(2)(A).

<sup>80</sup> *Id.* R. 49(b)(2)(B).

<sup>81</sup> *Id.* R. 49(b)(2)(E).

<sup>82</sup> *Id.* R. 49(b)(3). See also Op. D.C. Ct. App. Comm. UPL Op. 16-05 (June 17, 2005); Op. D.C. Ct. App. Comm. UPL 14-04 (Dec. 10, 2004). The Commentary to the Rule adds that the lawyer can rebut presumptions by showing that there is no client relationship of trust or reliance, or no explicit representation of authority of competence, or that both are absent. D.C. CT. APP. R. 49(b)(2) Examination of Rule 49 Committee of the District of Columbia Bar commentary. Yet the Commentary goes on to state that “[w]here a member of the public correctly understands that a person is not admitted to the District of Columbia Bar but is nonetheless offering to perform services functionally equivalent to those performed by a lawyer, that person is subject to sanction under the consumer protection statutes . . .” D.C. CT. APP. R. 49(b)(4) Examination of Rule 49 Committee of the District of Columbia Bar commentary (citing Banks

As we will see in the discussion of specific disciplinary matters, jurisdictions may look particularly askance at document assistance and commercial form preparation. Maryland courts, for instance, defined the practice of law to include preparing and interpreting legal documents,<sup>84</sup> yet “mechanical” acts, such as filling out forms or clerical work, are not considered the practice of law.<sup>85</sup> In Maryland, an individual crosses the line when the preparation of forms requires “more than the most elementary knowledge of the law, or more than that which the ordinary or average layman may be deemed to possess.”<sup>86</sup>

### *B. Exceptions to the “Practice of Law”*

All jurisdictions recognize some exceptions to their “practice of law” standards. Jurisdictions where the rules resemble the ABA’s Model Rules share similar (but not identical) exceptions. Texas’s rules are identical to the former Model Rules before the 2002 amendments. California has not adopted the Model Rules, and is examined separately.

Jurisdictions may also permit out-of state attorneys to practice within the jurisdiction in special situations. A recent illustration of this is the special orders allowing attorneys displaced by Hurricane Katrina to practice temporarily in various jurisdictions.<sup>87</sup>

#### *1. Model Rule Jurisdictions*

Model Rule 5.5 allows several activities otherwise prohibited as the unauthorized practice of law. It permits lawyers in good standing in outside jurisdictions to engage in the practice of law if done in association with a lawyer who is admitted to practice in that jurisdiction and who actively participates in the matter. It also allows

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v. D.C. Dep’t of Consumer and Reg. Aff., 634 A.2d 433 (D.C. 1993)).

<sup>83</sup> See VA. SUP. CT. R. 6 § 1(B); VA. CODE OF PROF’L RESPONSIBILITY Canon 3, EC 3-5 (1999). See also *Fears v. Virginia State Bar*, 51 Va. Cir. 367, 376 (Va. Cir. Ct. 2000) (citing *Commonwealth v. Jones & Robins, Inc.*, 186 Va. 30, 34 (Va. 1947)).

<sup>84</sup> *Lukas v. Bar Ass’n of Montgomery Cty., Md.*, 371 A.2d 669, 673 (Md. Ct. Spec. App. 1977). See also 65 Op. Att’y Gen. Md. 28 (1980) (formal opinion on scope of unauthorized practice of law by layperson outside of a trial).

<sup>85</sup> *Lukas*, 371 A.2d at 673.

<sup>86</sup> *Id.* See also *Land Title Abstract & Trust Co. v. Dworken*, 193 N.E. 650 (Ohio 1934).

<sup>87</sup> See Order Authorizing Practice of Law by Atty’s Displaced by Hurricane Katrina (D.C. Ct. App. Sept. 20, 2005) (temporary practice allowed until Feb. 28, 2006); MD. R. GOVERNING ADMISSION TO THE BAR 15.1 (2005 (expired 2006) (Court of Appeals Rule authorizing displaced, out-of-state attorneys limited practice until June 30, 2006); Order 377 (Pa. Sup. Ct. Sept. 19, 2005) (temporary practice for nine months from date of order).

practice related to a pending or potential proceeding in which the lawyer is otherwise authorized by law to appear. It allows participation in arbitration, mediation or other dispute resolution arising out of the lawyer's practice in the home jurisdiction. Finally, the Model Rules provide a general allowance for other lawyering related to the lawyer's practice at home.<sup>88</sup> Each of these exceptions looks to whether the activity in the foreign jurisdiction is related to a lawyer's existing *bona fide* practice in his jurisdiction of admission. Yet these alternatives are not intended to exhaust the possible situations where practice by unadmitted attorneys in good standing elsewhere could be allowed.<sup>89</sup>

The Model Rules acknowledge two other situations where "away" practice will not be considered UPL. The first permits an in-house lawyer in good standing to provide transactional legal services to his or her employer.<sup>90</sup> The second allows lawyers who are authorized by other state or federal law to provide those authorized legal services.<sup>91</sup>

Most of the Model Rule jurisdictions have adopted rules regarding the unauthorized practice of law that resemble Model Rule 5.5, but there are some interesting departures and additions worth noting. Virginia's rules appear to be the most like the Model Rules. There a foreign attorney may engage in the practice of law if: (1) admitted to practice and in good standing in any state in the United States; (2) performs only occasional and incidental services for the purpose of representing a client; and (3) informs the client that they are not admitted in Virginia.<sup>92</sup>

Florida Rule 4-5.5 sets conditions for the temporary practice of out-of-state attorneys that contain the same factors, only in the disjunctive. Legal services may be provided on a temporary basis in association with the active participation of a member of the Florida Bar if there is sufficient nexus between the matter or the client and the *home* jurisdiction of the attorney.<sup>93</sup>

Ohio has recrafted its Rules of Professional Conduct to follow the ABA's Model Rules more closely. The new version of Ohio Rule 5.5 is not, however, intended to reflect any *change* in Ohio law. Accordingly, the Ohio Bar omitted aspects of the Model Rule that had no existing basis in Ohio law.<sup>94</sup> For attorneys admitted in other

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<sup>88</sup> MODEL RULES OF PROF'L RESPONSIBILITY 5.5(c) (2007).

<sup>89</sup> *Id.* 5.5 cmt. 5 ("Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized.").

<sup>90</sup> *Id.* 5.5(d)(1) (2007).

<sup>91</sup> *Id.* 5.5(d)(2) (2007).

<sup>92</sup> VA. SUP. CT. R. 6. § 1(C).

<sup>93</sup> See FLA. RULES OF PROF'L CONDUCT R. 4-5.5(c).

<sup>94</sup> OHIO SUP. CT., REPORT OF THE SUPREME COURT OF OHIO TASK FORCE ON RULES OF

jurisdictions, practice by an out-of-state attorney on a temporary basis is permissible in some contexts where there is a connection with a matter, client, or issue in that attorney's home jurisdiction.<sup>95</sup>

The Pennsylvania Rules of Professional Conduct allow out-of-state attorneys to practice temporarily in Pennsylvania under limited circumstances.<sup>96</sup> An attorney must be in good standing and supervised by an admitted attorney; the matter must be reasonably connected to a matter in the home jurisdiction; and, the out-of-state attorney must expect to be authorized to practice in Pennsylvania.<sup>97</sup>

The D.C. Court Rules also exclude a number of activities from the admission requirements. The exceptions are for practicing United States government employees,<sup>98</sup> government practitioners,<sup>99</sup> practitioners before a federal court,<sup>100</sup> District employees,<sup>101</sup> in-house counsel,<sup>102</sup> *pro hac vice* admissions,<sup>103</sup> limited-duration practice under the direct supervision of a D.C. bar member,<sup>104</sup> *pro bono* practice,<sup>105</sup> and limited representation for corporations in small claims and landlord-tenant matters.<sup>106</sup>

The Texas Disciplinary Rules of Professional Conduct were identical to the original Model Rule 5.5, but have not been amended

PROFESSIONAL CONDUCT 25 (Oct. 2005).

<sup>95</sup> OHIO RULES OF PROF'L CONDUCT 5.5(c) (2007). As in Florida, supervision by an Ohio bar member is also required, and the Ohio Court has looked closely at whether a "reviewing attorney" was in fact closely involved and giving independent advice. *See* Cleveland Bar Ass'n v. Sharp Estate Services, 837 N.E.2d 1183, 1186 (Ohio 2005). In the context of the 2006 election, a Pennsylvania attorney was accused of UPL for representing an Ohio voter before the Columbiana County Board of Elections. *See* Mary Ann Greier, *Board of Elections Can't Decide Strickland Residency*, EAST LIVERPOOL REVIEW, Oct. 13, 2006. The initial uproar does not seem to have resulted in any sanctions.

<sup>96</sup> PA. RULES OF PROF'L CONDUCT 5.5(c) (2006).

<sup>97</sup> *Id.* However, Pennsylvania's statute making unauthorized practice a misdemeanor is narrower than the standard in Rule 5.5, and would apply to anyone claiming to be an attorney who was not admitted in Pennsylvania. *See* 42 PA. CONS. STAT. § 2524(a) (2004) ("any person. . . who shall hold himself out to the public as being entitled to practice law, or use or advertise the title of lawyer, attorney at law, attorney and counselor at law, counselor, or the equivalent in any language, in such a manner as to convey the impression that he is a practitioner of the law of any jurisdiction. . . commits a misdemeanor of the third degree. . .") (emphasis added).

<sup>98</sup> D.C. CT. APP. R. 49(c)(1).

<sup>99</sup> *Id.* R. 49(c)(2)(United States government practitioner); *Id.* R. 49(c)(5) (D.C. practitioner).

<sup>100</sup> *Id.* R. 49(c)(3).

<sup>101</sup> *Id.* R. 49(c)(4) (exception limited to first 360 days of D.C. employment).

<sup>102</sup> *Id.* R. 49(c)(6).

<sup>103</sup> *Id.* R. 49(c)(7).

<sup>104</sup> D.C. CT. APP. R. 49(c)(8). Reasonable supervision "depends on the circumstances," and the Court has indicated less supervision is required when the supervised attorney has extensive experience. *Op.* D.C. Ct. App. Comm. UPL Op. 12-02.

<sup>105</sup> D.C. CT. APP. R. 49(c)(9)-(10).

<sup>106</sup> D.C. CT. APP. R. 49(c)(11).

to reflect the substantial changes made in 2002.<sup>107</sup> Even so, under Texas statutes, attorneys licensed in another jurisdiction may be allowed the “limited practice of law” under rules promulgated by the Supreme Court of Texas.<sup>108</sup>

Model Rule jurisdictions look for a nexus between the out-of-state attorney’s home client work and the work that would otherwise be the unauthorized practice of law. That alone will make it difficult for volunteer Election Day attorneys to take advantage of even these relatively more liberal UPL rules, since Election Day matters won’t (typically) have any connection with existing client work. Furthermore, to the extent a jurisdiction (like Pennsylvania) treats “holding out” oneself as an attorney—standing alone—as the unauthorized practice of law, then whatever other exceptions might work will be void as soon as the volunteer attorney invokes his or her status as a lawyer. A lawyer might invoke professional credentials from another jurisdiction to enhance his or her credibility, win an argument, or reassure another of the validity of a particular interpretation. The rules do not distinguish from contexts where the attorney is “holding out” a credential to create respect, make peace, or intimidate.

## 2. California

California has also enacted a number of exceptions to the general rule limiting the practice of law to California lawyers. Effective November 2004, California’s Rules of Court permit non-California attorneys to engage in limited practice as registered legal services attorneys,<sup>109</sup> registered in-house attorneys,<sup>110</sup> attorneys temporarily in California as part of litigation,<sup>111</sup> and transactional attorneys temporarily in California.<sup>112</sup> As the bar noted in its Report accompanying the Rule, “[i]n various circumstances, out-of-state

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<sup>107</sup> TEX. DISCIPLINARY. RULES OF PROF’L CONDUCT § 5.5.

<sup>108</sup> TEX. GOV’T CODE ANN. § 81.102 (Vernon 2005). None have been promulgated that apply to this issue.

<sup>109</sup> CAL. R. CT. 9.45. Registration also requires the payment of California dues, which in 2007 are \$400.

<sup>110</sup> *Id.* R. 9.46.

<sup>111</sup> *Id.* R. 9.47. As noted above, litigating attorneys may also request admission *pro hac vice*. See *Id.*, R. 9.40. California also permits limited practice by military counsel, *id.* R. 9.41, out of state arbitration counsel, *id.* R. 9.43, and registered foreign legal consultants, see *id.* R. 9.44.

<sup>112</sup> CAL. R. CT. 9.48. According to the Report accompanying the final version of the new Rules, the Bar intended to “provide consumers of legal services with the greatest range of choices among legal representatives while ensuring their protection from incompetent or unscrupulous attorneys.” Report of the California Supreme Court Multijurisdictional Practice Implementation Committee, Final Report and Proposed Rules, March 10, 2004, at 4.



lawyers may be the best or most convenient source of legal guidance on matters that require providing legal services in California.”<sup>113</sup>

Yet the California Bar rejected calls for broad comity or reciprocity for out-of-state lawyers, instead choosing what it called “incremental changes, targeting the most pressing needs while minimizing the risk of harm to consumers.”<sup>114</sup> If the bar report is indicative of how California will implement it, this new rule provides scarce relief for Election Day volunteer attorneys. No aspect of what they do comes out of an existing matter or employment outside California.<sup>115</sup>

### 3. *Special Rules for Charitable Voting Rights Groups?*

Jurisdictions may provide special rules for attorneys who wish to do pro bono work, or work for a legal aid or other charitable group to provide legal services to poor people. In California, attorneys working for a qualified California legal services provider may engage in the practice of law without becoming members of the California Bar.<sup>116</sup> However the administrative hurdles required are not trivial. These individuals are required to submit an application for the Determination of Moral Character (yet may practice law while awaiting the bar’s determination) and pay bar fees.<sup>117</sup>

The Maryland Court of Appeals allows out-of-state attorneys to practice on a limited basis if the attorney is employed by or associated with an organized legal service program that is recognized by the Legal Aid Bureau, Inc.<sup>118</sup> As conditions for the limited authorization, the legal services must be provided to indigents in Maryland, the attorney must not hold herself out as a member of the bar, and the attorney must be supervised by an attorney admitted to the Maryland Bar.<sup>119</sup> Florida law provides a limited exception for legal services lawyers working for approved providers, but to qualify the lawyer must ultimately sit for the Florida Bar.<sup>120</sup>

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<sup>113</sup> Report of the California Supreme Court Multijurisdictional Practice Implementation Committee, *supra* note 112, at 6.

<sup>114</sup> *Id.* at 7.

<sup>115</sup> CAL. R. CT. 9.48(c)(3). Moreover, the provision regarding advice on federal or non-California law is too narrow to cover the Election Day work blend of federal, state, and local law. In any case, Rule 9.48(c)(2) applies only to advice given to a California attorney.

<sup>116</sup> *Id.* R. 9.45.

<sup>117</sup> *Id.* R. 9.45(c)(3); *id.* R. 9.45(f).

<sup>118</sup> MD. CODE ANN. BAR ADMISSION R. 15 (2006).

<sup>119</sup> *Id.*

<sup>120</sup> FLA. BAR REGULATIONS R. 13-1.1 (“This chapter authorizes attorneys licensed to practice law in jurisdictions other than Florida to be certified to practice in Florida for up to 1 year while employed by a legal aid organization. The attorney so certified must take the next available Florida bar examination.”).

It does not appear that the charitable groups involved in the Election Protection Coalition<sup>121</sup> have attempted to take advantage of these special rules. Moreover, groups seeking to vindicate civil rights may be able to successfully challenge bar ethics rules on constitutional grounds.<sup>122</sup> California's would seem the least appealing for a group organizing a temporary effort there. Not surprisingly, neither the Election Protection application materials,<sup>123</sup> nor their California Election Protection manual make any mention of special allowances for charitable groups.<sup>124</sup>

### C. Crime & Punishment

Jurisdictions punish the unauthorized practice of law criminally, at least as a misdemeanor.<sup>125</sup> California also allows private parties to bring civil actions for UPL.<sup>126</sup>

Most unauthorized practice matters are handled through the bar disciplinary process.<sup>127</sup> Certain jurisdictions have distinctive traits in

<sup>121</sup> To qualify, the group must be "[a] nonprofit entity incorporated and operated exclusively in California" which would not extend to the national nonprofits like the NAACP Legal Defense and Education Fund or the Lawyers' Committee for Civil Rights Under Law, but might apply to other Election Protection Coalition Members, such as the California Voter Fund. See CAL. R. CT. 9.45(a)(1)(A).

<sup>122</sup> See *Brotherhood of R.R. Trainmen v. Va. State Bar*, 377 U.S. 1 (1964) (holding that right of union to endorse particular legal counsel for members was protected by First Amendment); *NAACP v. Button*, 371 U.S. 415 (1963) (holding that First and Fourth Amendments protect right of nonprofit to give legal counsel to protect clients' civil rights). *Accord* *Frye v. Tenderloin Housing Clinic*, 129 P. 3d 408 (Cal. 2006). Cf. *Drew v. Unauthorized Practice of Law Committee*, 970 S.W.2d 152 (Tex. App. 3d 1998) (rejecting constitutional claim by non-lawyer representing civil rights claims). The constitutional arguments against UPL rules are addressed more fully *infra* notes 150–58 and accompanying text.

<sup>123</sup> See Election Protection 365 Volunteer form at <https://secure.pfaw.org/ep/registration.php> (last visited Sep. 10, 2007).

<sup>124</sup> See *People for the American Way, et al., California Guide to Voter Assistance and Advocacy: From Registration to a Ballot that Counts*, [http://www.naacpldf.org/content/pdf/pubs/manuals\\_2004/California\\_Legal\\_Manual.pdf](http://www.naacpldf.org/content/pdf/pubs/manuals_2004/California_Legal_Manual.pdf) (last visited Sep. 10, 2007).

<sup>125</sup> California: CAL. BUS. & PROF. CODE §§ 6125, 6126 (West 2003) (violation is misdemeanor); Florida: FLA. STAT. 454.23 (2007) (violation is a third-degree felony, Florida Supreme Court held not void for vagueness); *State v. Foster*, 674 So.2d 747 (Fla. 1996) (taking of deposition by non-lawyer violates 454.23)); Maryland: MD. CODE ANN., BUS. OCC. & PROF. § 10-606 (West 2006) (conviction carries a possible one year jail term and maximum \$5,000 fine); Ohio: OHIO REV. CODE ANN. §§ 4705.01–99 (West 2004) (violation is misdemeanor); Pennsylvania: 42 PA. CONS. STAT. ANN. § 2524 (2006); Texas: TEX. PENAL CODE ANN. § 38.123 (Vernon 2004) (class A misdemeanor, repeat offense third-class felony, but intent to benefit financially is required); Virginia: VA. CODE ANN. § 54.1-3904 (West 2005) (class 1 misdemeanor).

<sup>126</sup> CAL. BUS. & PROF. CODE § 6030 (West 2003).

<sup>127</sup> For instance, the D.C. Rule is interpreted and enforced by the Court's Committee on Unauthorized Practice of Law, which can investigate violations of the Rule on complaint or on its own volition. D.C. R. APP. CT. 49(d)(3)(C). Most cases are settled, see Joyce Peters & Anthony C. Epstein, *Ethical Issues of Unauthorized Practice and Supervisory Liability: Part I*, WASH. L., Aug. 2004, at 10. The violation of Texas's UPL law may be enforced by the bar-created District Grievances Committees or through a civil action brought by the Unauthorized

professional discipline. Florida vigorously enforces its admissions requirements against *ad hoc* lawyers and legal forms dealers. The Supreme Court of Florida enjoined one non-lawyer from completing incorporation forms (at no charge) for family and friends.<sup>128</sup> Another non-lawyer was sentenced to 120 days for contempt because she represented an indigent client.<sup>129</sup> The bar fined a “forms center” \$9,000 for providing legal assistance in the selection of legal forms, correcting customers’ errors or omissions, preparing legal documents, hiring a Florida attorney, and utilizing (unsuccessfully, it turns out) that attorney as the supervisor monitoring the work of non-lawyers.<sup>130</sup> Texas has similarly enforced its UPL rules in a number of prominent cases, including against national publishers.<sup>131</sup>

Ohio’s enforcement of its unauthorized practice rules is distinctive for its penalties. The administrative rules of the Ohio Bar authorize a penalty of up to \$10,000 per offense.<sup>132</sup> In a number of cases, the Ohio Supreme Court has imposed penalties far greater than what one

Practice of Law Committee. Tex. R. Disciplinary Proc..2.07; TEX. GOV’T CODE ANN. § 81.104 (Vernon 2005).

<sup>128</sup> Florida Bar v. Keehley, 190 So. 2d 173, 176–77 (Fla. 1966).

<sup>129</sup> Florida Bar v. Furman, 451 So. 2d 808, 815–16 (Fla. 1984). This decision was controversial, reflected poorly on the Bar, and led eventually to initiatives to deliver legal services to the poor. See Florida Bar Business Law Section’s Comment on the Florida Bar’s Petition to Amend the Rules Regulating the Florida Bar and the Florida Rules of Judicial Administration, *In re*, Amendments to the Rules Regulating the Florida Bar and the Florida Rules of Judicial Admin., 907 So. 2d 1138 (Fla. 2005) (No. SC04-135).

<sup>130</sup> Florida Bar v. We The People Forms and Serv. Ctr., 883 So. 2d 1280, 1281–82 (Fla. 2004); see also Florida Bar v. Stupica, 300 So. 2d 683, 686 (Fla. 1974) (divorce forms with advice is UPL). In the most recent amendments to the Florida Rules, the Florida Bar has specified that it “shall not constitute the unlicensed practice of law for a non-lawyer to engage in limited oral communications to assist a person in the completion of blanks on a legal form approved by the Supreme Court of Florida. Oral communications by non-lawyers are restricted to those communications reasonably necessary to elicit factual information to complete the blanks on the form and inform the person how to file the form.” R. REG. FLA. BAR 10-2.1(a)(1) (updated Jan. 1, 2006). The Bar also requires that a lengthy disclosure notice accompany any form completed with the assistance of a non-lawyer. *Id.*

<sup>131</sup> Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., Civ. A. No. 3:97-CV-2859-H, Slip Op. at 13 (N.D. Tex. Filed Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999) (holding “Quicken Family Lawyer” is UPL under Texas law); *In re Nolo Press/Folk Law Inc.*, 991 S.W.2d 768, 769 (Tex. 1999) (Texas courts lack jurisdiction to grant relief by mandamus to force the Unauthorized Practice of Law Committee to disclose records, specifically relating to its investigation of Nolo Press). After a federal district court, applying Texas law, held that the popular software package Quicken Family Lawyer constituted UPL, the Legislature amended the definition of the practice of law to exclude “the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney.” See Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956, 956 (5th Cir. 1999) (*vacating* district court decision). This is a singular exemption found only in Texas. Cristina L. Underwood, *Balancing Consumer Interests in a Digital Age: A New Approach to Regulating the Unauthorized Practice of Law*, 79 WASH. L. REV. 437, 448 (2004).

<sup>132</sup> OHIO GOV. BAR R. VII(8)(B) (2006).

typically sees in other jurisdictions.<sup>133</sup> The Ohio Supreme Court has adjusted penalties in cases where respondents honestly believed they were acting correctly.<sup>134</sup> Even so, Ohio's willingness to impose substantial monetary sanctions for UPL should cause out-of-state attorneys to proceed with care.<sup>135</sup>

### *D. Reciprocity—Home Sweet Home?*

In Maryland, Virginia, and the District of Columbia, how the local bars would apply their own rules is not as important as how they would recognize discipline from another jurisdiction. The real concern for a politically active lawyer admitted to one or more of these jurisdictions should be *reciprocity*. In particular, a national Election Day mobilization of attorneys into the District is not likely. D.C. residents do not vote for members of Congress, the District has few electoral votes, and any closely contested races occur at the local level in the Democratic primary. More likely, a member of a D.C. Bar would be asked to perform Election Day work in another jurisdiction.

If a District of Columbia attorney has been sanctioned in another jurisdiction, the District Court of Appeals will typically impose identical discipline.<sup>136</sup> This deference can result in different penalties

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<sup>133</sup> Cincinnati Bar Ass'n v. Bailey, 852 N.E.2d 1180, 1187 (Ohio 2006) (\$50,000 penalty reduced from \$170,000 against non-lawyer offering relief for drivers with suspended licenses); Dayton Bar Ass'n v. Addison 837 N.E.2d 367, 367 (Ohio 2005) (\$10,000 penalty against non-lawyer who prepared estate planning documents); Cleveland Bar Ass'n v. Sharp Estate Servs., 837 N.E.2d 1183, 1188 (Ohio 2005) (penalty of \$1,027,260 against "trust mill", and suspension of Ohio lawyer who served as "review attorney"); Miami County Bar Ass'n v. Wyandt & Silvers, Inc., 838 N.E.2d 655, 658 (Ohio 2005) (\$20,000 penalty against accountant who prepared business formation papers); Ohio State Bar Ass'n v. Allen, 837 N.E.2d 762, 764 (Ohio 2005) (\$40,000 penalty against document preparer, enhanced because of "demonstrated disrespect").

<sup>134</sup> See Disciplinary Counsel v. Kafele, 843 N.E.2d 169, 173–74 (Ohio 2006) (\$1000 penalty adjusted from \$10,000 because respondent believed as member of LLC he could represent LLC).

<sup>135</sup> Two Ohio matters bear somewhat on the status of "election advice" as the practice of law. In *Ohio State Bar Ass'n v. Burdzinski, Brinkman, Czarasty & Landwehr, Inc.*, the Board on the Unauthorized Practice of Law concluded that a non-lawyer labor specialist's advice in a union election was the unauthorized practice of law. *Ohio State Bar Ass'n v. Burdzinski, Brinkman, Czarasty & Landwehr, Inc.*, UPL 04-05 (Ohio B.U.P.L. Apr. 28, 2006). The Board found that "[b]y negotiating the settlement of election issues, the Respondent . . . engaged in the unauthorized practice of law." *Id.* at 13 (Conclusions of Law ¶ 9). In *State ex rel. Cooker Rest. Corp. v. Montgomery County Bd. of Elections*, the Ohio Court determined that by filing a protest for someone else against a local option petition concerning the sale of alcohol, the non-lawyer representing Cooker had engaged in the unauthorized practice of law. *State ex rel. Cooker Rest. Corp. v. Montgomery County Bd. Of Elections*, 686 N.E.2d 238 (Ohio 1997). "[T]he preparation and filing of a statutory protest with a board of elections constitute the practice of law." *Id.* at 242.

<sup>136</sup> D.C. BAR R. XI, §11(f)(2) (2000). See also *In re Soto*, 840 A.2d 1291, 1291 (D.C. 2004) (reciprocal discipline imposed in D.C. for UPL in Maryland); *In re Cole*, 809 A.2d 1226, 1227 n.3 (D.C. 2002) (imposing "identical discipline" with minimum court review "should be

for similar conduct.<sup>137</sup> It also means that the District's relatively liberal regulation of the "practice of law" will not help D.C. Bar members who also belong to (or are disciplined by) more restrictive jurisdictions.

Maryland imposes reciprocal discipline for violations of another jurisdiction's rules.<sup>138</sup> Maryland courts are "inclined, but not required, to impose the same sanction as that imposed by the state in which the misconduct occurred. [They] are required to assess for [themselves] the propriety of the sanction imposed by the other jurisdiction. . . ."<sup>139</sup>

For Virginia attorneys practicing outside the state, any violations of those jurisdictions' rules are punishable in Virginia.<sup>140</sup> In *Tidwell v. Virginia State Bar*,<sup>141</sup> the court upheld the Virginia State Bar Disciplinary Board's reciprocal disbarment of a member disbarred in New York for a felony conviction, under the Virginia rule declaring that a bar member in this circumstance must show cause why he should not be disbarred.<sup>142</sup> In challenging reciprocal and identical sanctions, Virginia Bar members can only argue that the first proceeding violated due process, extenuating circumstances would mitigate the sanctions to be imposed in Virginia, or that similar conduct would not be penalized in Virginia to the same extent.<sup>143</sup> In general, reciprocal proceedings adopt the facts adjudicated in the initial proceeding. With the limited latitude for making legal arguments, and the similarities among jurisdictions ethics rules, one should expect replication of sanctions as well.

### *E. Assessing the Risks*

Election Day attorneys apply law to specific facts for others. They opine on how a complex array of state and federal laws are being

close to automatic"); *In re Velasquez*, 507 A.2d 145, 146-47 (D.C. 1986) ("grave injustice" standard for not imposing identical discipline). Similarly, when an attorney has been professionally disciplined in another state, Ohio Gov. Bar R. V(11)(F)(4)(a)(ii) requires Ohio to impose identical or comparable disciplinary measures unless a substantially different sanction is warranted. *Disciplinary Counsel v. Meenen*, 725 N.E.2d 626, 626 (Ohio 2000).

<sup>137</sup> See *Soto*, 840 A.2d at 1291-92 (censure for reciprocal UPL for signing one document as attorney), *In re Daum*, 635 A.2d 933, 934-35 (D.C. 1994) (censure for reciprocal UPL for appearing as counsel of record 17 times).

<sup>138</sup> MD. R. 16-773 (2006) (while not automatic, the Bar Counsel may file disciplinary or remedial action in the Maryland Court of Appeals pursuant to Md. Rule 16-751).

<sup>139</sup> Att'y Grievance Comm'n. v. Scroggs, 874 A.2d 985, 995 (Md. 2005) (citation omitted).

<sup>140</sup> VA. RULES PROF'L CONDUCT 8.5(a) (2007).

<sup>141</sup> *Tidwell v. Va. State Bar*, 554 S.E.2d 451 (Va. 2001).

<sup>142</sup> *Id.* at 453. This presumption against the defendant comported with due process because the hearing in the first state to disbar was sufficient. *Id.* See also VA. R. S. CT. 6, § IV, Para. 13(F) (2007).

<sup>143</sup> *Cummings v. Va. State Bar*, 355 S.E.2d 588, 591 (Va. 1987).

followed. When they take affidavits and fill out incident reports, they are preparing materials for later use in proceedings. They may be holding themselves out as “attorneys” as well. To be sure, non-lawyers can take an affidavit or monitor a polling place. But no jurisdiction limits the “practice of law” to performing only those tasks permitted to attorneys.

Of the jurisdictions considered here, the District of Columbia’s would seem most tolerant of temporary volunteering by out-of-state attorneys. A volunteer wearing insignia that implied he is a “lawyer” and performing lawyerly tasks would nevertheless seem *not* to be engaged in UPL because the work is *also* incidental or occasional.<sup>144</sup> The District’s liberal “supervision” standards would also be useful, especially to an election volunteer with special expertise.<sup>145</sup>

In contrast, California’s broad and vague standard for the “practice of law” could easily cover Election Day attorneys’ duties, and none of the limited exceptions in the California Rules of Court provide a safe harbor. In close cases, California precedents find the “practice of law” in “the resolution of legal questions for another by advice and action. . . ‘if difficult or doubtful legal questions . . . reasonably demand the application of a trained legal mind.’”<sup>146</sup> At best, then, simple or mechanical tasks might be performed by out-of-state attorneys, but not when they are held out as “election protection” or “voting rights” experts who can apply the spectrum of election law to “difficult questions.”

The other jurisdictions provide less clear-cut scenarios. Out-of-state lawyers working in Florida would do well to avoid engaging in activities, like document preparation, that Florida has shown a historic propensity to regulate.<sup>147</sup> Like Florida, Ohio has a rich history of proceeding against non-lawyers who help others complete legal forms.<sup>148</sup> So, too, does Texas, and while the legislature has provided relief to forms publishers, no Court rules provide guidance for the Election Day volunteer.

Florida Election Day attorneys should also avoid wearing insignia or hats identifying them (“holding out”) as legal experts or lawyers.

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<sup>144</sup> D.C. CT. APP. R. 49(b)(3) (2007) (defining “in the District of Columbia”).

<sup>145</sup> See UPL Comm. Op. 12-02, *supra* note 104.

<sup>146</sup> *Baron*, 469 P.2d at 358 (quoting *Agran v. Shapiro*, 273 P.2d 619, 626 (Cal. App. Dep’t Super. Ct. L.A. 1954)).

<sup>147</sup> Notably, the Election Protection manual for Florida contains forms for the restoration of civil rights, and for logging voting and Election Day irregularities. Florida Guide to Voter Assistance and Advocacy, Appendices A & E (2004), [http://www.naacpldf.org/content/pdf/pubs/manuals\\_2004/florida\\_legal\\_manual.pdf](http://www.naacpldf.org/content/pdf/pubs/manuals_2004/florida_legal_manual.pdf).

<sup>148</sup> See cases cited *supra* note 133; see also *Cleveland Bar Ass’n v. McKissic*, 832 N.E.2d 49 (Ohio 2005) (non-lawyer enjoined from preparing legal documents).

The current version of Florida Rule 4–5.5 and Florida Statute 454.23 both state that “holding out” oneself as a lawyer is prohibited, independent of whether the non-Florida lawyer has also arranged for supervision by a Florida attorney, has made all the necessary disclaimers to individuals he advises, and has otherwise met the requirements applied to “temporary practice” in Rule 4–5.5(c). Similarly, the Pennsylvania law prohibits “holding out” even by *bona fide* attorneys from other jurisdictions.<sup>149</sup> Finally, given the potential for reciprocal discipline, attorneys practicing in more lenient jurisdictions can face trouble at home for activities in other states.

### III. A SOLUTION?

Election Day attorneys who volunteer in jurisdictions where they are not admitted in order to assist at polling locations as described above, may violate some jurisdictions’ laws forbidding the unauthorized practice of law. Even with those jurisdictions that have applicable exceptions, these volunteers face the potential for reciprocal discipline based on the standards of stricter bars. Enforcement of UPL rules against their activity impedes valuable Election Day activity, and may prevent the development of national expertise in this area.

Moreover, UPL enforcement in this context serves none of the generally accepted goals of UPL rules. Local admission requirements are generally justified because they help ensure competence and ethical service, and provide a means of imposing discipline.<sup>150</sup> Here, UPL enforcement burdens competent national specialists and favors local, *ad hoc*, one-shot counsel. Moreover, UPL is in many places also a crime, and one need not be a member of the bar to be accessible by a state’s police power for violations of state law. If the concern is that out-of-state attorneys will abuse voters or the election process, they will be as vulnerable to federal and state laws forbidding that activity as anyone. If the concern is that these individuals will commit malpractice or breach other duties, most jurisdictions make the breach of another jurisdiction’s ethics rules a stand alone violation of the local Bar’s standards. The concern that the local bar exists to protect the local market is also unpersuasive.

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<sup>149</sup> 42 Pa. Cons. Stat. § 2524 (2006).

<sup>150</sup> *E.g.*, RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS, ch. 1, topic 2, introductory note (2000); Roger J. Goebel, Note, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 INT’L LAW. 307, 334 (2000); Wolfram, *supra* note 4, at 679 (calling the consumer protection motive “pious eyewash”).

Election Day work is one area where niche practitioners of a marginally profitable craft volunteer to work without pay.

There are three potential approaches to resolving this problem. First, a national uniform standard might supersede conflicting state rules. The basis for such a standard might be in the Constitution, or through the more conventional preemption of state law by federal regulation. Second, if states remain the enforcers of practice rules, state bars could be lobbied to adopt more lenient temporary practice rules. Given the inconsistent incorporation and interpretation of the Model Rules in specific states, lack of uniformity would likely remain. Finally, the volunteers and their recruiters could take additional steps to accommodate local requirements. This last alternative would require more advance planning than is presently done, and may require impossible prescience about Election Day “hot spots.”

### *A. Constitutional*

One way attorney ethics rules in this area could acquire some uniformity is by imposition of some “constitutional” standard by the Supreme Court. If the Court imposed a constitutional limit on the ability of states to restrict Election Day attorney activities (specifically or through application of a precedent from another area) the present unevenness and uncertainty, and threat of discipline, would ease. But this is not an easy extension of the Court’s interpretations of the Constitution, and is unlikely to gain much traction in the near future. Noted the Supreme Court in 1979:

This Court, on several occasions, has sustained state bar rules that excluded out-of-state counsel from practice altogether or on a case-by-case basis. These decisions recognize that the Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another.<sup>151</sup>

Since the activity involves elections and politics, one might look to the First Amendment for protection. In some older precedents the Supreme Court has found a First Amendment right for non-lawyers to give legal advice. The Court has held that a state injunction prohibiting a union from furnishing legal aid to its members (by recommending specific lawyers or employing a lawyer to represent

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<sup>151</sup> *Leis v. Flynt*, 439 U.S. 438, 443 (1979) (citations omitted) (citing *Norfolk & W.R.R. v. Beatty*, 423 U.S. 1009 (1975); *Brown v. Supreme Court of Va.*, 414 U.S. 1034 (1973)).



them) violated the First Amendment.<sup>152</sup> The Court found similarly unconstitutional a state law prohibiting a public interest group from soliciting clients, given the political character of the particular interest's legal representation.<sup>153</sup> In these cases, however, involved attorneys were members of the jurisdiction's Bar, and it was a group's "unauthorized practice" at issue.<sup>154</sup> In a more recent appeals court decision considering whether UPL rules abridge free speech, the Seventh Circuit upheld Illinois's UPL rule against a facial challenge, but reserved the possibility the rule might violate the First Amendment as applied in some future case.<sup>155</sup>

The right to practice is easier to see if a client seeks to use an attorney from out-of-state in litigation, and that attorney is either denied *pro hac vice* admission or has argued he should be able to serve without it. Even here, absent extenuating circumstances, a litigant's right to representation—or an attorney's due process rights—do *not* outweigh a tribunal's discretion not to extend temporary *pro hac vice* admission.<sup>156</sup>

Other constitutional protections have been applied in a few select circumstances. State residency requirements imposed as a condition of bar membership have been rejected as violating the Privilege and Immunities clause of Article IV, Section 2.<sup>157</sup> Outside the courtroom (and the traditional power afforded the judiciary to set the rules for the courtroom), it may be easier to claim that a transactional attorney's ability to practice in another state should be protected by the 14<sup>th</sup> Amendment's Privileges or Immunities clause.<sup>158</sup> However, no court in recent times has abrogated evenhanded licensing requirements on such an argument. Since, in the UPL context, in-state

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<sup>152</sup> *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *United Mine Workers, Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217 (1967).

<sup>153</sup> *NAACP v. Button*, 371 U.S. 415 (1963); see also *Frye v. Tenderloin Housing Clinic, Inc.*, 129 P.3d 408 (Cal. 2006) (unregistered legal aide group not committing UPL).

<sup>154</sup> *Button*, 371 U.S. 415 (1963); *Frye*, 129 P.3d. See also *Or. State Bar Ass'n v. Smith*, 942 P.2d 793 (Or. Ct. App. 1997) (under Oregon constitution, unauthorized practice not protected speech).

<sup>155</sup> *Lawline v. ABA*, 956 F.2d 1378, 1386 (7th Cir. 1992).

<sup>156</sup> *Leis*, 439 U.S. at 442–43 (no constitutionally protected property entitlement to appearing *pro hac vice*).

<sup>157</sup> *Barnard v. Thorstenn*, 489 U.S. 546 (1989); *Supreme Court of Va. v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of N. H. v. Piper*, 470 U.S. 274 (1985).

<sup>158</sup> See Goebel, *supra* note 150, at 322; Wilson Pasley, *The Revival of "Privileges or Immunities" and the Controversy over State Bar Admission Requirements: the Makings of a Future Constitutional Dilemma?*, 11 WM. & MARY BILL RTS. J. 1239 (2003). Cf. *Saenza v. Roe*, 526 U.S. 489 (1999) (applying 14<sup>th</sup> Amendment to right-to-travel, finding new residents entitled to be treated like all other residents).

and out-of-state unlicensed “attorneys” are equally prohibited from practice, this argument lacks promise.<sup>159</sup>

### *B. Federal Regulation*

Uniform national ethics standards can preempt state professional responsibility rules for attorneys practicing before certain bodies. In general, preemption in an area like legal ethics, which is traditionally regulated by states, requires clear and manifest expressions of congressional intent.<sup>160</sup> Preemption may also occur when it is impossible for someone to comply with state and federal law, or when ‘state law stands as an obstacle to the accomplishment’ of some congressional goal.<sup>161</sup>

Federal ethics rules appear where a particular practice deals with a special body of federal law adjudicated by a specific federal administrator.<sup>162</sup> So, for example, the Patent and Trademark office has issued a separate set of ethics rules applicable to activities which apply to the preparation and prosecution of patents.<sup>163</sup> Those rules specifically state that they do not intend to preempt the authority of a state to regulate the practice of law, except to the extent necessary for the PTO to accomplish its objectives.<sup>164</sup> States can continue to enforce conduct standards on patent and non-patent attorneys alike (such as rules requiring proper accounting of funds) to the extent those rules do not specially burden patent attorneys or limit the necessary scope of practice before the PTO.<sup>165</sup>

The SEC, in its rules implementing the Sarbanes-Oxley Act of 2002, requires that attorneys practicing before the Commission report material violations up the chain of command within the client organization<sup>166</sup> and allows attorneys to reveal to the Commission confidential information without the client’s consent in certain situations.<sup>167</sup> This rule conflicts with state confidentiality laws, and

<sup>159</sup> See *Paciulan v. George*, 229 F.3d 1226, 1229 (9th Cir. 2000).

<sup>160</sup> See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>161</sup> *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988).

<sup>162</sup> See generally Wolfram, *supra* note 4, at 704–06 (listing three federal agencies that credential lawyers).

<sup>163</sup> 37 C.F.R. §§ 10.20–.24, .30–.40, .46–.57, .61–.68, .76–.78, .83–.85, .87–.89, .92, .93, .100–.103, .110–.112 (2006).

<sup>164</sup> 37 C.F.R. § 10.1. This language is based on *Sperry v. Fla.*, 373 U.S. 379 (1963) (Florida could not enforce licensing requirements imposing additional constraints on patent attorneys).

<sup>165</sup> *Kroll v. Finnerty*, 242 F.3d 1359, 1367 (Fed. Cir. 2001); see also Simon A. Rose & Debra R. Jessup, *Whose Rules Rule? Resolving Ethical Conflicts During the Simultaneous Representation of Clients in Patent Prosecutions*, 12 FED. CIR. B.J. 571 (2002–2003).

<sup>166</sup> 17 C.F.R. § 205.3(b) (2007).

<sup>167</sup> 17 C.F.R. § 205.3(d)(2) (2007).

California in particular has stood by enforcement of its stricter protections of client confidentiality.<sup>168</sup> Nonetheless, the SEC rules declare that its standards preempt conflicting state law.<sup>169</sup>

There are numerous other examples where federal ethical standards govern, or where federal officials have attempted to set legal ethics rules. The military has set forth its own rules for professional conduct, and claim they preempt conflicting state rules.<sup>170</sup> The Internal Revenue Service has promulgated practice rules for attorneys and agents appearing there.<sup>171</sup> The Department of Justice and other federal agencies have at various times attempted to assert greater control, and resist state control, over attorneys, and these efforts can be controversial.<sup>172</sup>

It makes sense for a federal entity to articulate a set of ethics rules to govern lawyers in its purview. Otherwise, different lawyers from different jurisdictions could be subject to different or conflicting standards, even as allies or opponents within the same matter. However, these examples do not provide a good analogous situation to the one encountered by Election Day attorneys, who are not appearing in any federal tribunal or under the regulation of one federal body. Even within these few federal areas, preemption has been controversial, and other efforts to provide uniform ethics rules, as in practice before federal courts, have not been successful.<sup>173</sup>

<sup>168</sup> Corporations Committee of the Business Law Section, California State Bar, Ethics Alert: The New SEC Attorney Conduct Rules v. California's Duty of Confidentiality (2004).

<sup>169</sup> 17 C.F.R. § 205.1 (2007). Moreover, the SEC's rules purport to insulate attorneys who comply in good faith with Part 205 from discipline under any other state or federal jurisdiction's ethics rules. *Id.* § 205.6(c) (2007). North Carolina, with a similarly restrictive confidentiality rule, has issued an opinion stating that the federal standard preempts state law. 2005 Formal Ethics Opinion 9 (North Carolina State Bar, Jan. 20, 2006).

<sup>170</sup> See U.S. DEP'T OF ARMY, ARMY REG. 27-26, Rules OF PROF'L CONDUCT FOR LAWYERS R. 8.5(f) (May 1, 1992); U. S. DEP'T OF NAVY, JAG INSTRUCTION 5803.1C, PROF'L CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL, R. 8.5 cmt. 2 (Nov. 9, 2004) (stating that these rules supersede any conflicting rules when USG attorneys are engaged in Navy or Marine legal functions, but not when practicing in State or Federal civilian court proceedings); see generally, C. Peter Dungan, *Avoiding "Catch-22s" Approaches to Resolve Conflicts Between Military and State Bar Rules of Professional Responsibility*, 30 J. LEGAL PROF. 31 (2006).

<sup>171</sup> 31 C.F.R. pt. 10 (2007) (practice before the IRS); see similarly 31 U.S.C. § 330 (2007) (practice before the Dep't of the Treasury); 31 C.F.R. pt. 8 (2007) (practice before the BATF).

<sup>172</sup> One commentator addresses the problem by recommending a federal code of ethics. Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX L. REV. 335 (1994). Others observe that this is not a serious alternative. Wolfram, *supra* note 4, at 704.

<sup>173</sup> See Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court Practice*, 58 SMU L. REV. 3 (2005); *Uniform Federal Rules of Attorney Conduct: A Flawed Proposal*, 111 HARV. L. REV. 2063 (1998). Although courts have held that state admission is not necessary to practice law in the federal courts in that state, see *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 166 (2d Cir. 1966), more recent decisions have rejected a broad reading of that decision. See *Kohlmayer v. Nat'l R.R. Passenger Corp.*, 124 F. Supp. 2d 877, 883 (D.N.J. 2000) (citing *Leis*, 439 U.S. at 441-42 n. 4).

Although federal law has more to say about the administration of elections since the passage of the Help America Vote Act (HAVA), Congress has not occupied the field of election administration. The Election Assistance Commission provides federal funding for certain election administration purposes, and serves as a source of advice, for example by publishing its view of “best practices” for election administration.<sup>174</sup> The EAC lacks responsibility for implementing these practices or adjudicating claims.<sup>175</sup> If Congress legislates uniform national standards for elections and federal jurisdiction over disputes and contests, then it could make sense to also include nationally applicable standards for the “practice of law” and the other duties of attorneys engaged in election work. However, barring the rebirth of the EAC as an SEC or IRS type entity, there does not seem to be a uniform national scheme that would protect Election Day volunteer lawyers.

There are good reasons to be hesitant about establishing a federal agency with the power to license and regulate the activity of election lawyers (or election administrators, for that matter). That power, centralized and under the control of incumbents, would be a tempting target for abuse. That said, it may also be true that national standards are appropriate because local governments cannot be trusted to enforce election integrity and associated ethics requirements.<sup>176</sup>

### *C. State Standards—What to Do?*

Absent some drastic development, federal assumption of election administration, or of professional ethics, is quite unlikely. Securing uniform rules for Election Day volunteer lawyers that either endorse their multijurisdictional work or carve out their activity from the “practice of law” can only come state-by-state.

The bar’s efficacy in this area provides some fuel for pessimism. Although 47 of 50 states have adopted the format of the ABA’s Model Rules since 1983, the two largest jurisdictions, California and New York, have not.<sup>177</sup> The state bars’ reactions to the ABA’s

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<sup>174</sup> See U.S. ELECTION ASSISTANCE COMM’N, BEST PRACTICES TOOLKIT (2006), <http://www.eac.gov/bp/index.asp>.

<sup>175</sup> See Publius, *Securing the Integrity of American Elections: The Need for Change*, 9 TEX. REV. LAW & POL. 277, 281–82 (2005). “Publius” was later revealed to be Hans von Spakovsky, currently a Commissioner on the Federal Election Commission. Dan Eggen, *Official’s Article on Voting Law Spurs Outcry*, WASH. POST, April 13, 2006, at A19.

<sup>176</sup> See George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After Sabri*, 54 CATH. U. L. REV. 403 (2005) (arguing that recent Supreme Court precedents in *McConnell v. FEC* and *Sabri v. United States* show willingness to exert federal authority over corruption of elections).

<sup>177</sup> See Center for Prof’l Responsibility, Am. Bar Ass’n, Model Rules of Prof’l Conduct:

recently amended Model Rule 1.13, which would loosen restrictions on corporate counsel such that compliance with Sarbanes-Oxley would not run afoul of ethics rules, has been mixed. So has the adoption of Model Rule 5.5, as seen above. Jurisdictions do not easily warm to grand changes. This is especially true when the proposed change involves multijurisdictional practice and erodes the value of local bar membership.

Reform to protect volunteer election lawyers should be no more ambitious than necessary to protect this limited activity (and analogous activity) while respecting the legitimate goals protected by mandatory bar membership. It would also be better, given the heated partisan atmosphere surrounding Election Day controversies, to craft a bright-line rule that does not require courts or bar compliance officers to make judgments about the character of a lawyer's activity.<sup>178</sup>

Accordingly, states should adopt a specific period, such as a five-day grace period, that excuses from UPL enforcement isolated transactional legal practice by members in good standing of other bars. This grace period would extend protection to individuals who presently cannot rely on the exceptions for isolated practice relative to an existing client (there may be no client). It will allow lawyers to travel into an area with little or no notice. If the people of Ohio are sufficiently protected (temporarily) by one's Virginia drivers license, then why shouldn't they be similarly protected by one's Virginia Bar membership? In an age where legal education, testing, and bar qualifications are becoming strikingly uniform, it is hard to argue that one attorney in good standing in any American jurisdiction is not, generally speaking, just as able as any other.<sup>179</sup>

Articulating a specific period within which the practice of law can be excused provides several benefits. Primarily, it is clear and easy for lawyers, non-lawyers, and bar committees to understand and

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Dates of Adoption (2007) (listing states which have adopted the MRPC), [http://www.abanet.org/cpr/mrpc/alpha\\_states.html](http://www.abanet.org/cpr/mrpc/alpha_states.html).

<sup>178</sup> By contrast, Rhode Island's rule protecting "visiting attorneys" "temporarily in the state" R.I. Gen. Laws § 11-27-13 (2007), although seemingly broad, did not protect an out-of-state attorney who appeared before a state agency in accord with the agency's—but not the State Bar's—rules. *In re Ferrey*, 774 A.2d 62 (R.I. 2001). Vague standards are more susceptible of arbitrary or selective enforcement. Here, the opponents of the attorney's client gained tactical advantages from his disqualification. See Gerard J. Clark, *The Two Faces of Multijurisdictional Practice*, 29 N. KY. L. REV. 251, 257–58 (2002) (discussing *Ferrey*).

<sup>179</sup> See NATIONAL CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2007; see also William H. Simon, *Who Needs the Bar? Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 647 (2003) (noting "increasing homogenization of legal education and the admission process.").

apply. It would also sweep away the nuisance situations where there is little reason to enforce Bar membership rules—the phone call as a favor to a family member, casual conversation, videoconferencing, Internet communications, honest mistakes, and so forth. It could make it easier for out-of-state lawyers to respond to disasters or other emergencies (stipulating that lawyers play a positive role at such moments).<sup>180</sup> The ABA already incorporates the notion of “temporary” practice in its revised Model Rule 5.5, however, the Model Rule is imprecise, applicable to preexisting matters only, open to interpretation, and thus likely to diverge in application among jurisdictions over time.<sup>181</sup> Many jurisdictions punish unauthorized practice as a crime,<sup>182</sup> so clarity is desirable to say the least.<sup>183</sup>

Both the American Bar Association’s Model Rules, and the American Law Institute’s *Restatement of the Law Governing Lawyers* provide greater protection than most states for temporary “practice” and these institutions should support a clarifying rule that furthers their shared perspective. The American Bar Association itself has aided the “election protection” efforts of out-of-state attorneys, and one might hope that it would embrace a reform to clarify their legitimacy. Perhaps partisan and election reform groups could also be persuaded to incorporate something like this grace period into model state laws for implementing the federal election administration statutes.<sup>184</sup>

Alternatively, the volunteer lawyers, and the groups recruiting them, can hew more closely to the restrictions in existing state ethics laws. If these groups rely on “supervision” of volunteer lawyers by local bar members, then they should observe closely the inconsistent state standards regarding the degree of supervision, necessity for

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<sup>180</sup> See Letter from Michael S. Greco, President, A.B.A., to Randall T. Shepard, Chief Justice, Indiana Supreme Court (Sept. 9, 2005), available at [http://www.abanet.org/cpr/Chief\\_Justice\\_Letter.pdf](http://www.abanet.org/cpr/Chief_Justice_Letter.pdf) (need to provide assistance after Hurricane Katrina, “admission to practice rules [should] allow licensed out-of-state lawyers to practice . . . [on a] temporary basis”); Brenna Nava, *Hurricane Katrina: The Duties and Responsibilities of an Attorney in the Wake of a Natural Disaster*, 37 ST. MARY’S L. J. 1153, 1172–73 (2006) (describing response of national and state bars to disruption of Katrina).

<sup>181</sup> See Am. Bar Ass’n, Comm’n on Multijurisdictional Practice, Report to the House of Delegates (Report 201B; Rule 5.5) at 3 (“[T]he application of the new standards leaves room for individual opinion and judicial interpretation.”).

<sup>182</sup> See, e.g., CAL. BUS. & PROF. CODE §§ 6125, 6126 (West 2003); MD. CODE BUS. OCC. & PROF. 10-606 (LexisNexis 2004); 42 PA. CONS. STAT. 2524 (2007), VA. CODE ANN. § 54.1-3904 (West 2007).

<sup>183</sup> ROTUNDA & DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE 845 (Am. Bar Ass’n 2007) (the Restatement should influence courts “not to interpret vague criminal statutes drafted in an earlier era to create complex entry barriers . . .”).

<sup>184</sup> See, e.g., RNLA, Draft Model State Laws To Implement Help America Vote Act and National Voter Registration Act, April 15, 2005.

particular disclosures to third parties, and so forth. They must ensure that volunteers are not holding themselves out as “lawyers” at all, especially in those jurisdictions where that is a free-standing violation of the rules. They may also be required to file paperwork in advance with the state’s bar.<sup>185</sup> Any required advance planning could prove prohibitive, since these groups are already very distracted with electoral work and may not predict where they will require volunteer assistance.

More stringent observation of these rules will require time, effort, and some expense. Some experienced attorneys who would have been willing to volunteer will not be able to. Those that do may be at the mercy of local players with their own agendas, and the increased potential for third-party pressure influencing the judgment of the volunteer.

The UPL *status quo* favors provincial interests over national interests, thwarts the development of expertise in this increasingly technical area, and is unjustified by any of the conventional reasons bars cite for preventing unauthorized practice. Certainly the imposition of licensing or admission requirements provides no assurance of competence in this niche area of expertise.<sup>186</sup> Moreover, the traditional market protection rationale cannot justify very short-term practice, especially volunteer practice. Recognizing that the election system depends on the repeated participation of many volunteers—not just lawyers—jurisdictions should be willing to revise UPL restrictions to help them help our elections.

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<sup>185</sup> See RESTATEMENT, *supra* note 62, §3 cmt. e (identifying burdens and expense from rule requiring association with local counsel).

<sup>186</sup> See Pamela A. McManus, *Have Law License; Will Travel*, 15 GEO. J. LEGAL ETHICS 527, 553 (2002) (“If competency truly is the issue, out-of-state lawyers should be allowed to practice law in other states—period . . .”).