

LAWYERS ON THE ROAD: THE UNAUTHORIZED  
PRACTICE OF LAW AND THE 2004 PRESIDENTIAL  
ELECTION

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## I. INTRODUCTION

During the days preceding Election Day 2004, thousands of lawyers from firms big and small, from large cities and little towns, swept across the country to aid and assist in the conduct of elections on a local level. The planning for the widespread deployment of lawyers was initiated well before the election when the Kerry-Edwards campaign and the Democratic National Committee announced their plan to send 10,000 lawyers to the so-called “swing states,” where the polling data showed that the election was “too close to call” before Election Day.<sup>1</sup> Even as late as October 26, 2004—just a week before the election—I personally received e-mail solicitations to join the Kerry-Edwards team as a “poll watcher” in Florida.<sup>2</sup>

The Kerry-Edwards campaign was not alone. The Republican National Committee (for the Bush-Cheney campaign and others) also sent their own lawyers to those very same states,<sup>3</sup> and the self-proclaimed non-partisan “Election Protection” campaign sponsored by the Lawyers’ Committee for Civil Rights, the People for the American Way, and the National Coalition on Black Civic Participation/Unity ’04 sent unknown numbers of individuals (mostly lawyers) to virtually every state, as well as creating and manning telephone hotlines to “offer immediate, legal assistance to voters during the early voting period and on Election Day.”<sup>4</sup> This was in addition to the United States Department of Justice’s decision to send “approximately 840 federal observers and more than 250 Civil Rights Division

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1. Ron Fournier, *Kerry Maps Post Election Plan*, CHICAGO SUN-TIMES, Oct. 21, 2004, at 16, available at <http://www.suntimes.com/output/elect/cst-nws-eside21.html> (quoting Michael Whouley of the Democratic National Committee as saying, “[r]ight now, we have 10,000 lawyers out in the battleground states on Election Day, and that number is growing by the day.”). John Fund, in *The Wall Street Journal*, identified the first announcement of Kerry’s intent to use thousands of lawyers to a speech made in Indianapolis in July 2004. John H. Fund, *The Man with the Most Lawyers Wins*, WALL ST. J., Sept. 22, 2004, at A28.

2. The e-mail solicitation originated from a partner with a large New York law firm and also sought contributions (on file with author).

3. See, e.g., Terry Maxon, *Lawyers Converge on Polls*, DALLAS MORNING NEWS, Oct. 29, 2004, at 1A (describing a “72-hour legal task force” of Republican lawyers prepared to travel to contested states).

4. Lawyers’ Committee for Civil Rights Under Law, *Election Protection 2004*, available at <http://www.lawyerscomm.org/ep04/epintro.html> (last visited Mar. 20, 2005) (emphasis added).

personnel [mostly lawyers] to eighty-six jurisdictions in twenty-five states to monitor the general election on Tuesday, November 2, 2004.”<sup>5</sup>

During the early voting period (the period before Election Day November 2, 2004, in which individuals otherwise not available on Election Day could cast their vote in person) and on Election Day, Lawyer-volunteers actively participated in poll-watching, campaigning, and, on the Kerry-Edwards side, in manning temporary legal clinics for voters at polling sites. In Florida, for example, out-of-state and in-state Democratic lawyers alike wore hats, buttons, and stickers pronouncing themselves (on behalf of the Kerry campaign) to be “Florida Voting Rights Attorneys” and part of the “Kerry Legal Team.”<sup>6</sup> The Republican National Committee and local state parties in Florida offered lawyers the opportunity to wear golf shirts, baseball caps and pins proclaiming that the individual was a “Voting Rights Counselor.”<sup>7</sup> The Election Protection folks donned black t-shirts with white text stating: “You have a Right to Vote.” Internet logs of Election Protection volunteers indicate that such volunteers were instructed to look for anyone coming out of a polling place not wearing an “I voted” sticker and to approach them to ask questions.<sup>8</sup> They also were to hold signs that indicated that they could advise the voter on their rights and answer questions.<sup>9</sup>

The precedent set during this last election cycle for partisan and supposedly non-partisan teams of lawyers to fan out across the states whose electoral votes may decide the presidential election is troublesome. The lawyer-deployment efforts encouraged lawyers to use their legal skills to advise voters in states where the lawyer was not authorized to practice law. In

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5. U.S. Department of Justice Press Release, Department of Justice Announces Federal Observers to Monitor General Election in States Across the Country (Oct. 28, 2004), *available at* [http://www.usdoj.gov/opa/pr/2004/October/04\\_crt\\_725.htm](http://www.usdoj.gov/opa/pr/2004/October/04_crt_725.htm).

6. I personally observed this while assisting in campaign efforts in North Florida. 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. That did not prevent her from putting on her baseball cap proclaiming she was a Florida Voting Rights Attorney.

7. I received such apparel as a volunteer for the Republican National Committee’s 72-Hour Task Force effort, but chose not to wear it. Several non-Florida lawyers did.

8. Mary Harrington, *From Freestone to Philadelphia* (Oct. 31, 2004), *at* <http://www.uua.org/news/2004/voting/harrington.html> (“Each of us will wear an Election Protection T-shirt and hold a sign identifying us as someone who knows what a voter’s right [sic] are and who can help if needed. We’ll be looking for people who come out of the polling place not wearing an “I VOTED” sticker and check to see if there was a problem. There will be lawyers on call who can come immediately and offer assistance . . .”).

9. *Id.*

other words, the out-of-state lawyers were encouraged to engage in the potentially criminal act of unauthorized practice of law (“UPL”).

The incentive to engage in the unauthorized practice of law—with all props provided—was enormous. However, it is not in the interests of the candidates, the parties, or the individual lawyers to do so. First, encouraging breaking the law is not likely to win a candidate votes. Second, political parties should not be depleting valuable local resources to send those lawyers to other states, and the host state may want to think twice about whether the visiting lawyer has the same interests at heart as attorneys from the host state. Indeed, employing out-of-state lawyers who do not have a long-term vested interest in the state and all of the local races occurring on Election Day creates the potential for abuse. Finally, individual lawyers should be wary of violating UPL rules as punishments in some states can include jail time.

Looking to the UPL rules to control out-of-state lawyers who may be interfering with an election makes sense. The UPL rules are meant to protect the public from relying on incompetent—or worse, fraudulent—advice from someone holding themselves out to be a professional. During the voting period, many lawyers provided legal advice to voters at the polls. How would anyone know, however, whether that advice was competent or even accurate? How would anyone know that a “Florida Voting Rights Attorney” did not have a hidden objective to skew the result in favor of a particular candidate or party? There is a very real danger that this could occur if lawyers are encouraged to leave their home states to practice law, even temporarily, where the stakes—individually and for the nation—are so high.<sup>10</sup>

As discussed below, the UPL statutes serve a valuable public protection goal. Merely because the lawyer-deployment effort was massive in scope does not mean that the rules no longer apply. In other words, just because everyone is doing it does not make it right. It is in the interests of the campaigns, lawyers, and the public to use the tools already available—the UPL laws—to protect the integrity of the voting process from the incompetent and the unscrupulous—and to encourage civic participation by lawyers and citizens in their home states.

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10. It also goes without significant discussion that relying on local lawyers rather than deploying out-of-state lawyers will result in significant cost-savings to campaigns and political parties.

## II. STATES HAVE THE RIGHT TO REGULATE THE PRACTICE OF LAW

### A. *The Purposes Behind UPL Rules*

The United States Supreme Court has recognized that the individual States have “a substantial interest in regulating the practice of law within the State and that, in the absence of federal legislation,” the individual states may prohibit out-of-state and non-lawyers from practicing law.<sup>11</sup> And, every state in the Union has a UPL rule on the books.<sup>12</sup>

Florida’s state bar organization may have said it best when it opined that the “main purpose of UPL investigations and prosecutions is protection of the public from fraud and bad advice affecting legal rights.”<sup>13</sup> The Florida Supreme Court, in *State of Florida v. Sperry*, held that

The reason for prohibiting the practice of law by those who have not been examined and found qualified to practice is frequently misunderstood. It is not done to aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop. It is done to protect the public from being advised and represented in legal matters by unqualified person over whom the judicial department can exercise little, if any, control in the matter of infractions of the Code of Conduct which, in the public interest, lawyers are bound to observe.<sup>14</sup>

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11. *Sperry v. Florida*, 373 U.S. 379, 383 (1963).

12. See *infra* Part II.B (What constitutes practicing law may differ significantly from state to state).

13. Florida Bar Organization, *Unlicensed Practice of Law* (July 2004), at <http://www.flabar.org/DIVCOM/PI/BIPS2001.nsf/0/dc4a88c3a91eea378525669e004e16f9?OpenDocument>.

14. *State ex rel. Florida Bar v. Sperry*, 140 So.2d 587, 595 (Fla. 1962), *judgment vacated on other grounds*, 373 U.S. 379 (1963). Not everyone, as the Florida Supreme Court alluded to in the quote in the text above, agrees that regulation of lawyers is a valid policy objective. Instead, many see the UPL rules as setting a bar to non-lawyers providing legal information and legal advice to consumers, restricting the market for legal services and creating higher than warranted legal fees. See George C. Leef, *Lawyers Fees Too High? The Case for Repealing Unauthorized Practice of Law Statutes*, REGULATION (1997), available at <http://www.cato.org/pubs/regulation/reg20n1c.html> (last visited Nov. 19, 2004); George C. Leef, *First, Let's Deregulate All the Lawyers*, at <http://www.fee.org/vnews.php?nid=3788&printable=Y>, (last visited Dec. 5, 2004); Federal Trade Commission & U.S. Dep't of Justice Comments on the American Bar Association's Proposed Model Definition of the Practice of Law, at <http://www.usdoj.gov/atr/public/comments/200604.htm> (Dec. 20, 2002) (indicating concern over the proposed definition of “practice of law” because it was thought to “raise costs for consumers and limit their competitive choices”). Some have gone so far as to say that “the practice of law

Avoiding the risks associated with uninformed, and possibly ill-motivated, legal practice is a laudable public protection goal, a goal that may be best served by state-by-state regulation that is tailored to meet the local needs of its citizens.<sup>15</sup> Ohio's Supreme Court similarly found that the UPL rules were enacted "to protect Ohio citizens from the dangers of faulty legal representation rendered by persons not trained in, examined on, or licensed to practice by the laws of our state. These dangers can arise from the services of out-of-state attorneys unfamiliar with Ohio's legal system . . . ."<sup>16</sup> Such public protection is also a goal that is uniquely within a state's rights to promote through legislation and regulation.

### B. *What It Means to Practice Law*

Obviously, a lawyer tasked to assist on a campaign in another state can violate the UPL rule only if he or she is practicing law. Thus, at the crux of most debates—and most court decisions on UPL claims—is this question: What does it really mean to be practicing law? From a policy perspective, most states are concerned about preventing the unscrupulous from taking advantage of the unwitting, particularly unwitting consumers, during routine or domestic legal matters. Generally, they are matters in which non-lawyers might be able to serve admirably, but which states have made the decision to regulate, such as real estate closings, bankruptcy, divorce, custody issues, and others. The decision to regulate the practice of law in these areas reflects the personal importance of these matters in the lives of the citizens of the state—another public protection goal. In

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in Florida, and in other states, is nothing more than a government-sponsored and government-protected racket . . . . Such activity is a clear abuse of the power of the state to protect the cash cow of the elite and powerful." Able Legal Forms UPL Cartoon, at <http://www.ablelegalforms.com/uplcartoon.html> (last visited Nov. 19, 2004). These concerns raise the question of whether each state should be allowed to regulate lawyers at all, not whether, with those regulations in place, the deployed lawyers violated those regulations. Moreover, this concern addresses not the multijurisdictional practice of law, but the regulation of it in the first instance. This debate, while thriving, it is beyond the scope of this article.

15. See AM. BAR ASSOC., CENTER FOR PROFESSIONAL RESPONSIBILITY, CLIENT REPRESENTATION IN THE 21ST CENTURY: REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 6 (2002), available at [http://www.abanet.org/cpr/mjp/final\\_mjp\\_rpt\\_121702.doc](http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.doc) [hereinafter ABA MULTIJURISDICTIONAL PRACTICE REPORT] ("In general, state admissions processes are intended to protect the public by ensuring that those who are licensed to practice law in the state have the requisite knowledge of that state's laws and the general fitness and character to practice law.").

16. Office of Disciplinary Counsel v. Pavlik, 732 N.E.2d 985, 988 (Ohio 2000).

Arizona, which did not have a UPL law on the books for almost eighteen years, the state bar claims that

Custody cases have been lost by unregulated legal service providers who file defective documents or fail to file documents in a timely [manner], young families experiencing financial difficulties needlessly have moved to homeless shelters because they have relied upon a dishonest and unregulated “pretend attorney,” thousands of dollars have been paid to non-lawyers for services that were never rendered, personal injury cases may have been compromised by ineffective non-lawyers, and personal injury victims have never received the settlements awarded to them and their non-lawyer representative.<sup>17</sup>

But protection of consumers is not the only goal. As can be seen from the varying definitions of the “practice of law,” the protection of the integrity of the profession is also at issue. For instance, as the American Bar Association (“ABA”) noted, many see professional reputation and integrity of lawyers as important goals.

[T]hose who oppose eliminating jurisdictional restrictions raised a variety of concerns about harms that may result from eliminating jurisdictional restrictions entirely, including: unscrupulous lawyers may provide services that they are unqualified to render; well-intentioned lawyers may misjudge their ability to render competent advice in a foreign jurisdiction; overworked disciplinary agencies may not be able to regulate out-of-state lawyers effectively; lawyers may “race to the bottom” by gaining admission in states that are perceived to have lower admissions criteria and then practicing law in states that are perceived to have more stringent criteria; and national practice may erode the commitment of the bar to objectives such as undertaking *pro bono* representation,

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17. Memo From Ernest Calderón, President of the Board of Governors of the State Bar of Arizona, to the ABA Task Force on the Model Definition of the Practice of Law, at 2 (Jan. 3, 2003) (“Re: Draft Definition of the Practice of Law”). As the Arizona State Bar sees it (and, mindfully, its definition of practicing law is more restrictive than many states), UPL statutes are needed to ensure that not just lawyers are subject to potential disciplinary action. Should the individual assisting another with the exercise of legal rights fail to fulfill that undertaking in a complete, honest, and diligent manner, then Arizona wants the ability to prosecute that person to vindicate the rights of the individual duped by the shyster’s false claims.

working to improve the law, maintaining client protection funds, and promoting continuing legal education programs.<sup>18</sup>

The ABA has adopted model rules and recommendations to encourage a unified approach to tricky ethical questions and to develop a standardized, reliable approach to them. In 2001 and 2002, in connection with the ABA's expansive review of multijurisdictional practice of law issues, the ABA considered adopting a "Model Definition" of the practice of law. The organization ultimately decided not to do so, and instead issued a recommendation that every state adopt a coherent definition of the "practice of law" and that the rule "include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity."<sup>19</sup>

In addition, nothing in the ABA Task Force's recommended definition is dependent upon the creation of an attorney-client relationship, which is what "practicing law" brings to most people's minds. Indeed, the establishment of the relationship, which gives rise to other issues such as the application of the attorney-client privilege, do not affect whether the lawyer's conduct constitutes practicing law.

Although the ABA Task Force has recommended that the states adopt a model definition of "practicing law," the laws among the states continue to vary quite a bit. In Alabama, for example, "practice of law" is defined to include individuals who appear in court in a "representative capacity," or "perform[] any act" in connection with a legal proceeding,<sup>20</sup> or perform various acts (such as preparing documents relating to secular rights),<sup>21</sup> or "[f]or a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, do[] any act in a representative capacity in behalf of another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right."<sup>22</sup> Alabama also allows

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18. ABA MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 15, at 15–16 (citation omitted).

19. American Bar Association, Task Force on the Model Definition of the Practice of Law Standing Committee on Client Protection & Washington State Bar Assoc., Report to the House of Delegates, Recommendation (Aug. 11, 2002), at <http://www.abanet.org/cpr/model-def/recomm.pdf>.

20. ALA. CODE § 34-3-6(b)(1) (1975).

21. ALA. CODE § 34-3-6(b)(2) (1975).

22. ALA. CODE § 34-3-6(b)(3) (1975).

non-lawyers to do what some might consider ministerial tasks, such as preparing titles or other paperwork for real estate transactions.<sup>23</sup>

Alabama's definition is much narrower than that proposed by the ABA, and much narrower than that of my home state of Georgia, where "the giving of any legal advice" is the practice of law.<sup>24</sup> Most states draw the line at any act that amounts to the provision of legal advice to a client—i.e., advice that involved informing someone of their rights as a matter of law. In Ohio, much like Georgia, the practice of law includes "in general all advice to clients and all action taken for them in matters connected with the law."<sup>25</sup> And, an Ohio lawyer can be prosecuted for aiding-and-abetting a non-Ohio lawyer in the practice of law in Ohio.<sup>26</sup>

In Florida, where the legislature has not defined the practice of law, the Supreme Court has opined that the giving of legal advice and the performing of legal services will constitute the practice of law if

such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.<sup>27</sup>

Hence, what might not be considered practicing law in Alabama because it was not perceived as a benefit, reward, or consideration to the attorney, very well could be the practice of law in Ohio, Florida, Georgia, and other states.

### *C. Defining the Unauthorized Practice of Law*

The ABA Task Force, as part of its consideration of the issues involving the unauthorized practice of law, went on to resolve that "each state and territory should determine who may provide

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23. ALA. CODE § 34-3-6(c) (1975).

24. GA. CODE ANN. § 15-19-50(4) (1981).

25. *Disciplinary Council v. Brown*, 789 N.E.2d 210, 212 (Ohio 2003) (citations omitted).

26. *Disciplinary Council v. Pavlik*, 732 N.E.2d 985, 988 (Ohio 2000) (citing DR 3-101(A)).

27. *State ex rel. Florida Bar v. Sperry*, 140 So.2d 587, 591 (Fla. 1962).

services that are included within the state's or territory's definition of the practice of law and under what circumstances, based upon the potential harm and benefit to the public. The determination should include consideration of minimum qualifications, competence and accountability."<sup>28</sup>

Given the variations among the states on what it means to practice law and what it means to be unlicensed to do so, the ABA has recommended that states adopt, and several have adopted, the ABA's Model Rule on Unauthorized Practice of Law and Multijurisdictional Practice of Law (Model Rule 5.5).<sup>29</sup> Several states also have adopted statutes similar, although not identical, to Model Rule 5.5.<sup>30</sup> In pertinent part, this rule forbids a lawyer from holding himself or herself "out to the public or otherwise represent that the lawyer is admitted to practice law in [the] jurisdiction."<sup>31</sup> (This is precisely what any lawyer wearing "Florida Voting Rights Attorney" apparel did.) The rule also prohibits a lawyer from assisting another to do so.<sup>32</sup>

The ABA rule does, however, set out instances in which a lawyer not authorized to practice law in the particular jurisdiction may render services on a "temporary" basis.<sup>33</sup> For example, if the out-of-state lawyer associates local counsel "who actively participates in the matter," then the lawyer can be

28. *Id.*

29. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2002). See ABA State Implementation of ABA MJP Recommendations (Dec. 9, 2004), at [http://www.abanet.org/cpr/jclr/5\\_5\\_quick\\_guide.pdf](http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf) [hereinafter State Implementation Chart].

30. *Id.*

31. MODEL RULES OF PROF'L CONDUCT R. 5.5(b)(2) (2002).

32. MODEL RULES OF PROF'L CONDUCT R. 5.5(a) (2002).

33. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(1)-(4) (2002). Rule 5.5(c) provides:

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

admitted to appear before the tribunal in which a particular case is pending or by pro hac vice motion; or he can be admitted if the services are “reasonably related to the lawyer’s practice” in his home jurisdiction.<sup>34</sup>

Considering that visiting lawyers were in-state often for just a matter of a few days, that many were not accompanied by in-state lawyers, that the voting rights advice given to the man- or woman-on-the-street could not be “reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice,” the temporary practice rules do not authorize deployed attorneys to practice law on Election Day.<sup>35</sup> As noted above, many states, including Florida, Georgia, Pennsylvania, and others have adopted a rule similar to ABA Model Rule 5.5.<sup>36</sup>

In developing its model rules, the ABA Task Force also specifically looked at whether, given the rise in multijurisdictional practice, the ABA should recommend to all states to scrap the UPL rules, and their jurisdictional limitations, altogether.<sup>37</sup> Doing so, of course, would render this type of legal “SWAT” effort a non-issue. However, the ABA chose not to do so, because it concluded that the public protection goals served by the rules outweighed the perceived benefits of allowing freer interactions between lawyers and out-of-state clients.<sup>38</sup> Indeed, while the jurisdictional bars to practicing across state lines may yet one day fall, they are very much intact (if not observed) today.

### III. HOW OUT-OF-STATE LAWYER-VOLUNTEERS WERE DEPLOYED DURING ELECTION 2004

Before heading off to the airport, in most cases, lawyer-volunteers attended a seminar on the Help America Vote Act of

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34. *Id.*

35. There is the nagging notion that someone, somewhere will suggest that because the election was a presidential (i.e., federal) one, that the state laws should not apply. Aside from being remarkable from so many perspectives (the Constitution and principles of federalism coming primarily to mind), as a simple matter of law, this notion is contrary to the law: the Supreme Court has indicated that this remains an area of State’s Rights, in absence of the intervention of the Supremacy Clause of the Constitution. *See Sperry v. Florida*, 373 U.S. 379, 384 (1963). Moreover, it fails to recognize the vast number of local and state-wide races on each ballot on the same day as the federal election.

36. *See* State Implementation Chart, *supra* note 29.

37. ABA MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 15, at 13.

38. *See id.* at 16.

2002,<sup>39</sup> received general overviews of certain local election rules of the jurisdictions we were visiting, and general statements of what to expect as a practical matter when the plane landed in the land far away. Many expected to be mere observers of the process.<sup>40</sup>

What happened when lawyers arrived at their destination? Most folks received more specific training on the local election rules and were then let loose. Once deployed, the lawyers may have been at a bit of a loss as to how to define their roles and how to conduct themselves in unknown and quickly changing situations.

From my own experiences, the lawyers were confident that they were in control, without a clue as to why. For example, while I was in Florida, a Boston lawyer proposed to advise voters—inside an early voting location—of what the voter’s rights were. The Boston lawyer clearly identified herself as a member of the “Kerry Legal Team” by a sticker she wore on her sweater and her hat that proclaimed her to be a “Florida Voting Rights Attorney.” When a voter looked confused about voting procedures, the Boston-Florida Voting Rights Attorney sprang into action. An exchange occurred between the Boston-Florida Voting Rights Attorney and the poll supervisor, with the attorney claiming the right to advise the voter of his legal rights. The poll supervisor quickly put a kibosh on the exchange between the lawyer and voter, but there it was—an opportunity for the lawyer to give legal advice regarding what the voter should do to exercise his legal rights within the polling place. I have little doubt that the young lawyer from Boston was not licensed to give advice of that sort in Florida.

More brazenly, the Kerry Legal Team reportedly also set up makeshift legal clinics outside of polling places in South Florida from which out-of-state (and likely in-state) attorneys proposed to provide legal advice to potential voters.<sup>41</sup> The legal clinics

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39. Help America Vote Act of 2002, 42 U.S.C. §§ 15301 *et seq.* (2002).

40. *See, e.g.*, Daniel Wise, *NY Lawyers Set to Volunteer in Battleground States on Election Day*, NEW YORK LAWYER, at <http://www.nylawyer.com/news/04/10/100604a.html> (Oct. 6, 2004).

41. The reports received of these makeshift legal clinics in troubled precincts are anecdotal; however, these reports detail exactly what the Democratic National Committee admittedly did in Florida during the 2002 elections when they placed “‘signs up’ offering legal advice to voters.” Alisa LaPolt, *DNC to Post Lawyers at Key Election Polling Sites*, FLA. TODAY (Brevard Co.), Oct. 30, 2002, at 3. Flashbacks to Charles M. Schulz

presumably were manned by “Florida Voting Rights Attorneys.” A lawyer not licensed in Florida could purport to advise that voter on his or her rights on everything from the proper voting site, the need for identification, and provisional ballots.

Although the first two of these types of inquiries are relatively simple and not likely to spawn legal advice rather than factual advice, the last, of course, is tricky. Provisional balloting, in its first year of use in many places, was the targeted area for many—the more provisional ballots cast, the better. Imagine this scenario:

Voter (comes up to lawyer and says): They wouldn’t let me vote.

Lawyer: What happened?

Voter: I am not registered in this precinct, but I live here, and they won’t let me vote.

Lawyer: Ah, this is what you should do: Go back in there and demand that they give you a provisional ballot; they are required to do that under federal law. You fill out the provisional ballot, and once they confirm that you live here, they’ll count your vote.

Is this the practice of law? Certainly; the lawyer was advising the voter of his rights under the law for a provisional ballot—regardless of whether the lawyer was correct on the law—it was the practice of law.<sup>42</sup>

Now think of the same scenario, but this time the voter has some clearly identifiable material that indicates he is going to vote for the other party’s candidate—say he just put something in his car before coming over and the car has campaign stickers all over it. What if the lawyer, instead of telling the voter to get a provisional ballot, then tells the voter, “you need to go vote in your old precinct; you can’t vote here” or even, “too bad, you are out of luck; you should just go home”?

If the lawyer is not committed to giving unbiased, accurate legal advice, then the reasons for UPL laws are implicated and should be enforced.<sup>43</sup> This type of scenario could have occurred at any number of places where lawyers identified themselves as Florida Voting Rights Attorneys and hoped to advise Florida

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“Peanuts” cartoons and Lucy’s advertising of giving psychiatric advice for 5¢ come to mind.

42. See *supra* Part II.B.

43. See *supra* Part II.A.

voters. In tension-filled elections, like the 2004 election, it is this very real risk that counsels in favor of strict application of UPL rules to lawyers attempting to assist voters in connection with their “voting rights.”

#### IV. REIGNING IN LAWYERS ON THE GROUND

##### *A. Policing the Unauthorized Practice of Law*

Penalties for violating a state’s unauthorized practice of law rules (which vary from state-to-state) are generally (but not always) criminal. The penalties range, for example, from civil injunction, civil contempt citation, and restitution to criminal fine and prison time.<sup>44</sup>

For generally law-abiding folks, these sanctions seem pretty hefty. However, because the visiting lawyers were there only temporarily, the risk of getting caught was slim. Indeed, how would the state’s disciplinary committee ever track down the lawyer in the Voting Rights hat at the forty-ninth precinct, three days after the election? By the time that complaint is processed, the lawyer has long since boarded a plane back to his or her abode. To monitor these lawyers effectively would require roving bands of disciplinary attorneys—certainly not a cost-effective use of the state’s budget.

The ABA recently released the results of its 2004 Survey of Unlicensed Practice of Law Committees.<sup>45</sup> In the results, the ABA reported that only twenty-three jurisdictions “actively enforce UPL regulations” and that ten jurisdictions reported that “enforcement is inactive or non-existent,” mostly because of limited financial resources available to fund the effort.<sup>46</sup> Given the chance that state entities could not likely find and prosecute the UPL violations, deployed lawyers were given a virtual *carte blanche* to do as they pleased without the risk of any repercussions. Clearly, states were not in a position in the 2004

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44. ABA STANDING COMMITTEE ON CLIENT PROTECTION, 2004 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES Chart II, at [http://www.abanet.org/cpr/clientpro/2004UPLSURVEY\\_ChartII.pdf](http://www.abanet.org/cpr/clientpro/2004UPLSURVEY_ChartII.pdf) (last visited Mar. 3, 2005).

45. ABA STANDING COMMITTEE ON CLIENT PROTECTION, 2004 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES Introduction, at <http://www.abanet.org/cpr/clientpro/2004INTRO.DOC> (last visited Mar. 3, 2005).

46. *Id.* at 1. The report, however, did note that “[t]he Florida Bar leads the country in funding UPL enforcement.” *Id.* The report stated that the Florida Bar spent “approximately \$1.4 million annually” on UPL enforcement. *Id.*

elections to address this massive influx of lawyers and the potential for unrestricted, unauthorized practice of law.

*B. Self-Regulating by the Lawyers*

Out-of-state lawyers sent to serve in the battleground states were required neither to register nor to abide by the local jurisdiction's disciplinary processes during the election. Thus, the lawyers had very little personal incentive either to learn the local rules or to abide by them. In any event, because the lawyers were not in any real danger of state enforcement, any infractions would go unnoticed.

First and foremost, as attorneys, we each have to take responsibility for our own compliance with the law. That is, each lawyer should take the steps necessary to learn the UPL rules of the state to which the lawyer is traveling, to understand the extent of what the lawyer may and may not do, and to avoid the difficult situations where a voter is clearly seeking legal advice regarding his or her right to vote. When deployed, the lawyer is the one personally obligated to make sure that he or she does not engage in conduct that runs afoul of the rules. Unfortunately, as we saw in Florida during the 2004 election, relying on individual self-policing was not entirely satisfactory.

*C. Regulating by Campaigns and Political Parties*

If the incentives for an individual lawyer to abide by the rules of the state in which he or she is present are insufficient, then perhaps we should look to the political parties, campaigns, and non-partisan coalitions sponsoring the lawyers to be responsible for the conduct of their attorneys. A possible solution in this regard would involve, at a minimum, requiring campaigns, political parties, and non-partisan coalitions to demand lawyer-volunteers to agree (in writing) to obey the rules of the state and to be subject to the disciplinary authority of that state's bar before the lawyer begins his or her duties. The organizations could go so far as to mandate that the volunteer-lawyers register directly with the state bar and receive temporary authorization to practice law or require the out-of-state lawyer to register with local election officials in the county to which the attorney has been assigned.

Encouraging the sponsor-organization to be responsible for the conduct of its lawyer-volunteers could reduce the risk of inappropriate and fraudulent legal advice. Awareness that the campaign or organization would suffer should the lawyer violate the UPL rules or other ethical rules of the state to which the lawyer was assigned, could have the salient effect of reducing the incentive to engage in questionable behavior. Additionally, expanding statutes like the aiding-and-abetting rules in Ohio and in Model Rule 5.5<sup>47</sup> to include non-lawyers or organizations could have the same effect. Ultimately, while it should be the individual lawyer's responsibility to abide by the rules governing the profession, in reality, the most effective mechanism could be to hold the sponsoring organizations responsible.

#### V. APPROPRIATE TASKS FOR OUT-OF-STATE LAWYER-VOLUNTEERS

It should be clear that none of the concerns about providing legal advice at polling places apply to the in-state lawyer who is familiar with state law, the disciplinary rules of the state, and perchance even election law. As the adage goes: all politics is local. Having local people involved in resolving local disputes has worked for centuries—there is nothing new here that could not be resolved locally. As the ABA noted,

By strengthening lawyers' ties to the particular communities in which they maintain their offices, jurisdictional restrictions [on the practice of law] may also help maintain an active and vibrant local bar, which in many communities serves a crucial public role, because lawyers serve voluntarily on court committees, in public office, and on the boards of not-for-profit institutions in the community.<sup>48</sup>

If the person is a member of the bar in good standing and subject to the potential discipline of the state bar, then that person should be free to provide legal advice within the boundaries of that state's law. In fact, in-state lawyers should be

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47. As noted above, "[a]n Ohio lawyer can aid the unauthorized practice of law and violate DR 3-101(A), then, by facilitating or failing to adequately limit [sic], through supervision, the activities of a lawyer unlicensed in Ohio." Office of Disciplinary Counsel v. Pavlik, 732 N.E.2d 985, 988 (Ohio 2000). The ABA's Model Rule 5.5 on the Unauthorized and Multijurisdictional Practice of Law also prohibits a lawyer from assisting another in engaging in the unauthorized practice of law. MODEL RULES OF PROF'L CONDUCT R. 5.5 (2002).

48. ABA MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 15, at 8.

encouraged to become engaged in the election process and to be protective of the right to vote—as poll workers, poll watchers, and local election officials. This includes attorneys who are not otherwise partisan or tied to a particular political party or campaign; these individuals should be ready volunteers for truly non-partisan election integrity efforts.

Consider the Kerry-Edwards' e-mail asking for volunteers to be poll watchers in Florida. In some states, including Florida, there were already assigned and registered poll watchers—from each party—positioned inside polling places. Poll watchers were local individuals whom the state had trained, and in some cases, they were repeat volunteers from other local and state-wide election cycles. The Kerry-Edwards campaign did not need me as a “poll watcher.” In fact, under Florida law, the campaign could not even use me as a poll watcher because I was not a “qualified and registered elector of the county in which” I would have served.<sup>49</sup> That role was, as it should have been, fulfilled by a local citizen.

What then is the appropriate role for out-of-state lawyers? Every campaign needs volunteers: people to do every conceivable task to bring their voters to the polls. There are never too many volunteers in the closing days of a campaign and on Election Day. A lawyer can go door-to-door as a volunteer and make get-out-the-vote calls just as can any other person not burdened with a law degree. Thus, it is not that lawyers should stay home—not at all. Instead, they should get involved locally in the election process or as a true campaign volunteer—not as a self-proclaimed “Voting Rights Attorney.”

Out-of-state lawyers and non-lawyer volunteers also can assist in localities where there are not enough lawyers to assist in ensuring a fair process. However, the duties of the out-of-state lawyers should not involve the actual practice of law, but should be focused instead on using the skills and judgment developed as a lawyer and on filling in on other tasks so that the local

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49. FLA. STAT. § 101.131(1) (2002). The statute provides in pertinent part that Each political party and each candidate may have one watcher in each polling room at any one time during the election. No watcher shall be permitted to come closer to the officials' table or the voting booths than is reasonably necessary to properly perform his or her functions, but each shall be allowed within the polling room to watch and observe the conduct of electors and officials. The watchers shall furnish their own materials and necessities and shall not obstruct the orderly conduct of any election. Each watcher shall be a qualified and registered elector of the county in which he or she serves.

lawyers can use their state licenses to practice law and skill appropriately. Appropriate functions for out-of-state lawyers include assisting in observing the counting of absentee and early ballots at canvassing boards, observing recounts, and other general work that does not rely on advising a citizen of his or her voting rights.<sup>50</sup>

In addition to assisting in such tasks, lawyers also could be employed as mediators. Many of the issues raised on Election Day included voter intimidation or conflicts between campaign volunteers. On at least one occasion when I was in Florida, Bush and Kerry campaign volunteers got into a dispute about encroaching on space, rude comments, and the like. When this was brought to the attention of the attorneys on-site (a local Florida lawyer and me), all it took to calm the two sides down was for the lawyers to remind the campaign-supporters to behave like adults and to mention that the supporters' behavior reflected badly on the campaigns and candidates. The respective legal educations of the two lawyers did not make us uniquely qualified to head off the coming storm, but it worked. Deploying attorneys trained in conflict resolution, not just local election procedures, could help reduce or defuse conflict at polling sites and thus reduce complaints regarding voter intimidation. Or, failing mediation, attorneys can use their skills to document incidents and obtain other critical information that could assist subsequent investigations into and prosecution or defense of allegations of voter fraud and voter intimidation.

Anecdotal evidence also indicates that lawyers apparently had a deterrent effect on potentially bad behavior by campaigners and miscreants. For some reason, many people seemed to behave better when a lawyer was present. Perhaps people will behave themselves in front of a lawyer because of the threat of the unknown. While policeman traditionally play that role, lawyers are not as controversial and not as supposedly intimidating as policemen, particularly if the lawyer is not carrying a firearm. Thus, if having a lawyer present at a polling site furthers the goal of deterring potentially problematic

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50. The genesis of the idea to deploy lawyers to the swing states in advance of the election likely was the lengthy Florida recount battle in 2000. However, the lawyers who volunteered their time to inspect hanging and pregnant chads were not practicing law by doing so; instead, they were merely using their skill and judgment to assist in the electoral process. That type of assistance is not problematic from the UPL perspective.

behavior, then the presence of a lawyer is perfectly acceptable. Of course, this is only so long as the lawyer is not seeking to advise a potential voter of his or her legal rights, which causes concern regarding the legitimacy of the advice and fraud.

#### VI. CONCLUSION

The Unauthorized Practice of Law statutes rarely were discussed during the days preceding November 2, 2004, and as there were few reported problems of out-of-state lawyers giving bad legal advice, the unauthorized practice of law that occurred during the 2004 Election has been swept under the rug. However, ignoring the problem does not make it go away. States have the right, even in federal election cycles, to regulate the practice of law. That states are under-funded and incapable of policing a massive influx of attorneys makes the violation of the law no less problematic. As keepers of the law, lawyers should carefully consider whether their conduct meets the expectations and the highest standards of both the state in which they are licensed and the states in which they volunteer. Moreover, campaigns, state and national party organizations, and non-partisan coalitions should be looking for ways to employ lawyers within the confines of the law.