Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court: A Defensible Outcome, But a Striking Example of the Need to Reform Unauthorized Practice of Law Provisions*

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In recent months, as disgruntled members have leveled charges that the [State] Bar [of California] is bloated, arrogant, oblivious and unresponsive, the Bar has promptly done its best to verify each indictment. . . .

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. . . Indeed, California bar dues are more than twice the average of the other forty-nine states, which is approximately $200 per year. None of this appears to be of any consequence to the Bar. . . .

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. . . Created in 1927, the Bar is designed to act as an arm of the California Supreme Court with responsibility for regulating the legal profession and promoting fair and efficient administration of justice. The Bar has drifted, however, and become lost, its ultimate mission obscured. It is now part magazine publisher, part real estate investor, part travel agent, and part social critic, commingling its responsibilities and revenues in a manner which creates an almost constant appearance of impropriety.

It is time for the Bar to get back to basics: admissions, discipline and educational standards.[1]

1. Governor's Veto of S.B. 1145, 1997-98 Cal. Legis. Sess. (Oct. 11, 1997), *available at* California State Senate, 1997-1998 Session Legislation (visited Oct. 6, 1999) <http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_1101-1150/sb_1145_vt_19971011.html> (quoting California Governor Pete Wilson).

I. INTRODUCTION

The comments of then-Governor Pete Wilson perhaps echo a commonly held, nationwide belief: the State Bar of California is arrogant.[2] If the State Bar of California has been perceived historically as aloof, then the Supreme Court of California created a public relations nightmare—indeed, threw gasoline on a simmering inferno—with its recent opinion in the case of *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court* ("*Birbrower II*").[3] In *Birbrower II*, the court held that a New York law firm was unable to collect the majority of its fees, which exceeded one million dollars, because some of its attorneys—none of whom were members of the State Bar of California—had engaged in the unauthorized practice of law in California.[4] This Casenote takes the position that the Supreme Court of California's handling of *Birbrower II* is defensible. This Casenote contends, however, that the facts presented in *Birbrower II* expose the need for legislatures in general, and the California Legislature in particular, to amend unauthorized practice of law provisions. Such an amendment is

2. *See, e.g., Raising the Bar*, S.F. EXAMINER, May 18, 1998, at A22 (stating that the State Bar of California "has given ammunition to its enemies with a long record of arrogance toward critics and questionable use of dues money for lobbying and liberal-leaning political advocacy with which many members disagree" and that "[s]ome of its stands had little or nothing to do with the practice of law"); Walter H. Bithell, *The California Bar Experience: A Valuable Lesson*, ADVOC., Nov. 1998, at 4 ("Ultimately the California Bar will recover, but it will never be the same proud, powerful, politically arrogant and seemingly untouchable organization it was just a few years ago.").

3. 949 P.2d 1 (Cal. 1998) [hereinafter *Birbrower II*], *superseding* 56 Cal. Rptr. 2d 857 (Ct. App. 1996) [hereinafter *Birbrower I*], *cert. denied*, 119 S. Ct. 291 (1998). *Birbrower II* has caused a considerable amount of commentary. *See, e.g.*, Debra Baker, *Lawyer, Go Home: Firms Negotiating Multistate Deals Should Take Heed of California Decision on Unauthorized Practice*, A.B.A. J., May 1998, at 22-23 (quoting several predictions that the decision "sets the legal field back a quarter of a century at least," that it only benefits California lawyers, and that it "tosses everything up in the air" and "won't be followed and . . . shouldn't be" because it's "insane"); Arthur S. Hayes, *No Trespassing: License is Required*, NAT'L L.J., Jan. 19, 1998, at A4 ("A caveat to all out-of-state attorneys: California is very territorial and frowns on both physical encroachment and cyber-trespassing.") (emphasis omitted); Lori Tripoli, *Ill Wind from the West . . . State Efforts to Restrict Legal Practice Challenged by Lawyers Nationwide*, INSIDE LITIG., Sept. 1998, at 10, 11 (quoting several criticisms of the decision as being "out of step with the way the modern world is living in terms of legal practices," engaging in "protectionism, pure and simple," and creating "an economic balkanization that is a core violation of the commerce clause").

4. *See Birbrower II*, *supra* note 3, at 7, 13.

necessary in light of the evolving, irreversible interstate nature of the practice of law. To that end, this Casenote proposes an amendment to California's unauthorized practice of law provision.

Part II of this Casenote provides a contextual background for *Birbrower II*, including a factual summary and the case's procedural route to the Supreme Court of California. Part III examines the core elements, as well as the holding, of the case. Part IV examines California's recognized exceptions to the general rule prohibiting the unauthorized practice of law. Part IV also discusses the various would-be exceptions to the general rule which the law firm of Birbrower, Montalbano, Condon & Frank ("Birbrower") urged the court to adopt. Part V proposes a legislative amendment to the unauthorized practice of law statute in California, the purpose of which is to serve the competing, and seemingly incongruous, goals of protecting a state's citizens from incompetent legal representation while simultaneously recognizing the irreversible interstate nature of the legal profession.[5]

II. BACKGROUND

A. *Factual History*

Birbrower, a professional corporation, is incorporated in New York and has its principal place of business in New York.[6] The New York law firm began representing ESQ Business Services, Inc. ("ESQ-New York"), a New York corporation, in 1986.[7] None of the Birbrower lawyers held a license to practice law in California.[8] In 1990, Kamal Sandhu, the sole shareholder of ESQ-New York, asked Birbrower to review a proposed software development and marketing agreement between ESQ-New York and Tandem Computers, Inc. ("Tandem"), a Delaware corporation with its principal place of business in Santa Clara

5. This proposed amendment would not have rescued Birbrower from the impact of California's unauthorized practice of law provision. Indeed, the California Legislature has already responded to *Birbrower II* by passing an amendment allowing out-of-state attorneys to represent individuals in a private arbitration proceeding without running afoul of California's unauthorized practice of law provisions. *See* CAL. CIV. PROC. CODE § 1282.4 (West Supp. 1999); *see also infra* Part IV.B.2. Rather, the proposed amendment is intended to apply outside the context of arbitration and litigation, which includes, most notably, transactions. Adopting this amendment would avoid the *Birbrower II*-type scenario of waiting for a court to inform an out-of-state transactions attorney that the court's hands are tied by California's unauthorized practice of law provisions and the Legislature's silence regarding an out-of-state attorney exception. *See infra* Part V.

6. *See Birbrower II*, *supra* note 3, at 3.

7. *See id.* at 14.

8. *See id.*

County, California.[9] The agreement gave Tandem worldwide distribution rights to software created by ESQ-New York.[10] The agreement further provided that it would be governed by California law and that disputes were to be resolved by arbitration under the rules of the American Arbitration Association.[11] This is the agreement which ESQ-New York and Tandem eventually adopted.[12]

After the ESQ-New York/Tandem agreement was executed, a second corporation, ESQ Business Services, Inc. ("ESQ-California"), was incorporated under the laws of California.[13] The principal shareholder of ESQ-California was Iqbal Sandhu, the former vice president of ESQ-New York and brother of Kamal Sandhu, ESQ-New York's sole shareholder.[14] In 1991, ESQ-California consulted Birbrower concerning Tandem's performance under the contract.[15] In 1992, ESQ-New York and ESQ-California jointly hired Birbrower, via a contingency fee agreement executed in New York, to resolve the dispute with Tandem, including the investigation and possible prosecution of claims against Tandem.[16] The New York-executed contingency fee agreement was subsequently modified into a fixed fee agreement in California.[17]

Birbrower lawyers made several trips to California in an effort to resolve the Tandem dispute.[18] While in California, Birbrower lawyers met with officers from ESQ-New York and ESQ-California, as well as with representatives from Tandem.[19] The lawyers also interviewed prospective arbitrators and participated in negotiating a possible settlement of the dispute with Tandem.[20] On February 12, 1993, Birbrower filed an arbitration proceeding with the American Arbitration Association in San Francisco, California on behalf of ESQ-New York and ESQ-California and against Tandem.[21] The dispute was eventually settled before any arbitration hearings were held.[22]

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9. *See id.* at 3, 14.
10. *See id.* at 14.
11. *See id.*
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.*
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.*

B. *Procedural History*

1. *The Trial Court*

In January of 1994, ESQ-California and its principal shareholder, Iqbal Sandhu, sued Birbrower for malpractice.[23] Birbrower removed the case to federal district court and filed a counterclaim to recover its fees under the fee agreement, which exceeded one million dollars.[24] After the case was remanded back to state court, ESQ-California moved for summary adjudication on Birbrower's claims that ESQ-California breached the fee agreement.[25] ESQ-California contended that Birbrower lawyers had practiced law in California without a California license and without associating local counsel.[26] Such a practice, ESQ-California argued, constitutes the unlawful practice of law as defined by section 6125 of the Business and Professions Code.[27] Accordingly, ESQ-California contended that Birbrower's unlawful practice of law rendered the fee agreement unenforceable.[28]

The trial court granted ESQ-California's motion, concluding that: (1) the Birbrower attorneys were not licensed to practice law in California; (2) the Birbrower attorneys had not associated California counsel; (3) the Birbrower attorneys had provided legal services in the state of California; and (4) "[t]he law is clear that no one may recover compensation for services as an attorney in this state unless he or she [is] a member of the state bar at the time those services [are] performed."[29] The trial court left open the possibility that Birbrower could recover fees for work that was performed in New York.[30]

2. *Court of Appeal*

Birbrower petitioned the California Court of Appeal for the Sixth District, seeking a writ of mandate directing the trial court to vacate its prior order.[31] The Court of Appeal denied the writ.[32] The court

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23. *See id.*
24. *See id.* at 4.
25. *See id.*
26. *See id.*
27. *See id.*; *see also* CAL. BUS. & PROF. CODE § 6125 (West Supp. 1999). Section 6125 provides that "[n]o person shall practice law in California unless the person is an active member of the State Bar." *Id.*
28. *See Birbrower II*, *supra* note 3, at 4.
29. *Id.*
30. *See id.*
31. *See Birbrower I*, *supra* note 3, at 859.
32. *See id.*

concluded that the attorney fee agreement was void and unenforceable because it included payment for services rendered in California.[33] It based this conclusion upon the determination that the client was a California client involved in a California dispute between California parties.[34] Moreover, the court found that the contract was entered into in California and was to be governed by California law.[35] Lastly, Birbrower "never associated with California counsel, yet it engaged in numerous acts in California that constituted the unauthorized practice of law in [California]."[36]

III. THE SUPREME COURT OF CALIFORNIA

The Supreme Court of California granted review of the case in order to determine whether Birbrower's actions and services performed while representing ESQ-New York and ESQ-California constituted the unauthorized practice of law under section 6125 of the California Business and Professions Code[37] and, if so, whether a violation of section 6125 renders a fee agreement entirely unenforceable.[38] The court began its analysis by looking to the text of section 6125, which provides that "[n]o person shall practice law in California unless the person is an active member of the State Bar."[39] The court then pointed out that "[n]o one may recover compensation for services as an attorney at law in this state unless [the person] was at the time the services were performed a member of [t]he State Bar."[40] In determining whether Birbrower violated the unauthorized practice of law provision of section 6125, the court analyzed two discrete aspects of the provision. First, the court addressed the issue of what it means to "practice law."[41] Second, the court attempted to define when someone engages in such activity "in

33. *See id.* at 863. It is worth noting that the court of appeal, unlike the trial court, concluded that Birbrower was *totally* precluded from recovering any fees under the agreement, including fees generated while in New York, because the fee agreement encapsulated payment for California services. *See id.*
34. *See id.*
35. *See id.*
36. *Id.* at 864.
37. *See* CAL. BUS. & PROF. CODE § 6125 (West Supp. 1999).
38. *See Birbrower II*, *supra* note 3, at 5.
39. CAL. BUS. & PROF. CODE § 6125 (West Supp. 1999).
40. *Birbrower II*, *supra* note 3, at 5 (second alteration in original) (quoting Hardy v. San Fernando Valley Chamber of Commerce, 222 P.2d 314, 317 (Cal. Ct. App. 1950)).
41. *See id.* at 5.

California."[42]

A. *What Does It Mean to "Practice Law" in California?*

The court had relatively little trouble determining that Birbrower "practiced law" in California.[43] According to the court, the practice of law entails "performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure."[44] The court further determined that the practice of law also entails the giving of legal advice, the drafting of legal documents, and the preparation of contracts, irrespective of whether these items are associated with litigation.[45]

Under this definition, few would dispute the conclusion that Birbrower was practicing law. Birbrower was hired by ESQ-New York and ESQ-California in order to resolve a contractual dispute with Tandem, including the investigation and possible prosecution of claims against Tandem.[46] Birbrower lawyers made several trips to California in an effort to resolve the Tandem dispute and, to that end, they met with officers from ESQ-New York and ESQ-California, as well as with representatives from Tandem.[47] The lawyers also interviewed prospective arbitrators and participated in negotiating a possible settlement of the dispute with Tandem.[48] Finally, Birbrower filed an arbitration proceeding with the American Arbitration Association in San Francisco, California on behalf of ESQ-New York and ESQ-California and against Tandem.[49] Against this factual backdrop, the majority of the court had no trouble concluding that Birbrower had engaged in the practice of law.[50]

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42. *See id.* at 5-6.
43. *See id.* at 13.
44. *Id.* at 5 (quoting People *ex rel.* Lawyers' Inst. of San Diego v. Merchants' Protective Corp., 209 P. 363, 365 (Cal. 1922)).
45. *See id.* (citing *Merchants'*, 209 P. at 365).
46. *See id.* at 14.
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.* at 13. The dissent, however, found the issue to be a more difficult question. *See generally id.* at 13-18 (Kennard, J., dissenting). One "practices law," in the view of the dissent, when one represents another in a judicial proceeding or participates in an activity "requiring the application of that degree of legal knowledge and technique possessed only by a trained legal mind." *Id.* at 13 (Kennard, J., dissenting) (citing Baron v. City of Los Angeles, 469 P.2d 353, 357-58 (Cal. 1970)). Under this definition and in light of the factual circumstances surrounding Birbrower's activities, the dissent was of the opinion that the case presented a factual dispute as to whether Birbrower "practiced law." *See id.* at 13-14 (Kennard, J., dissenting).

B. What Does It Mean to Practice Law "In California"?

After concluding that Birbrower had "practiced law," the court addressed the more difficult issue of whether Birbrower had practiced law "in California."[51] The court, after noting the relative dearth of case law interpreting the meaning of practicing law "in California," determined that "the practice of law 'in California' entails sufficient contact with the California client to render the nature of the legal service a clear legal representation."[52] The test for determining whether an individual has practiced law "in California," at least when the individual is an attorney licensed to practice in another jurisdiction, is "whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations."[53]

In fleshing out this standard, the court attempted to provide some guidance.[54] At one end of the continuum, an out-of-state attorney does not necessarily practice law "in California" when she practices California law in another jurisdiction or when she "virtually" enters California by telephone, facsimile, e-mail, satellite, and the like.[55] Additionally, "[m]ere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California.'"[56] At the other end of the continuum, however, the test for determining whether an out-of-state attorney has practiced law "in California" "does not necessarily depend on or require the unlicensed lawyer's physical presence in the state."[57] Physical presence in California is only one of many factors courts should consider in determining whether section 6125 has been violated.[58] In addition to looking at an out-of-state attorney's actions quantitatively, courts should consider the nature of the unlicensed lawyer's activities in California.[59] Perhaps realizing the

51. *See id.* at 5-7.
52. *Id.* at 5.
53. *Id.*
54. *See id.* at 5-6.
55. *See id.* at 6.
56. *Id.* at 5.
57. *Id.*
58. *See id.*
59. *See id.* In other words, an out-of-state attorney violates section 6125, according to the Supreme Court of California, if she engages in *X* amount of activities over a certain period of time, *A*, or if she engages in *Y* amount of activities (*Y* being less than *X*) over a different period of time, *B* (*B* constituting a longer period of time than *A*). A compelling argument can be made that this "formula" provides inadequate guidance to

difficulty in applying these principles, the court ultimately admitted that each case will have to be evaluated on its facts.[60] The court, in evaluating the facts of this case,[61] concluded that Birbrower practiced extensively "in California" and, hence, engaged in the unauthorized practice of law.[62]

C. *To What Extent Was the Birbrower Fee Agreement Enforceable?*

In light of the determination that Birbrower had engaged in the unauthorized practice of law, the court next considered the issue of whether the Birbrower/ESQ fee agreement was enforceable at all and, if so, to what extent. The court of appeal had determined that "the attorney fee agreement [wa]s void and unenforceable for the reason that it include[d] payment for services rendered in California."[63] The Supreme Court determined that the contract was severable.[64] Hence, Birbrower was allowed to pursue the fees attributable to the services performed for ESQ in New York, at least to the extent that the services did not violate section 6125.[65]

IV. EXCEPTIONS TO SECTION 6125

With over one million dollars at stake, Birbrower understandably attempted to satisfy one of the exceptions to the general rule articulated in section 6125. It additionally advanced reasons why new exceptions should be recognized. Part IV.A examines some recognized exceptions to section 6125, while Part IV.B discusses the exceptions which Birbrower unsuccessfully urged the court to adopt.

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out-of-state attorneys—particularly transactions attorneys—as to whether they are violating section 6125. This problem, as well as a proposed solution, will be explored in more detail *infra* Part V.

60. *See Birbrower II*, *supra* note 3, at 6.

61. *See supra* Part II.A.

62. *See Birbrower II*, *supra* note 3, at 7. The dissent did not address the issue of what constitutes the practice of law "in California" but, rather, focused attention solely on the issue of what constitutes the practice of law. *See generally id.* at 13-18 (Kennard, J., dissenting).

63. *Birbrower I*, *supra* note 3, at 863 (emphasis omitted); *see supra* note 33 and accompanying text.

64. *See Birbrower II*, *supra* note 3, at 11-13. California's version of the doctrine of severability provides that "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." CAL. CIV. CODE § 1599 (West 1982).

65. *See Birbrower II*, *supra* note 3, at 12-13.

A. California's Recognized Exceptions to Section 6125

California recognizes several exceptions to the general rule prohibiting individuals from violating the unauthorized practice of law provision embodied in section 6125, a few of which the Supreme Court addressed.

1. The Pro Hac Vice Exception: California Rule of Court 983

California Rule of Court 983[66] provides:

> A person who is not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or the highest court in any state . . . and who has been retained to appear in a particular cause pending in a court of this state, may in the discretion of such court be permitted upon written application to appear as counsel pro hac vice, provided that an active member of the State Bar of California is associated as attorney of record. No person is eligible to appear as counsel pro hac vice pursuant to this rule if (1) he is a resident of the State of California, or (2) he is regularly employed in the State of California, or (3) he is regularly engaged in substantial business, professional, or other activities in the State of California. Absent special circumstances, repeated appearances by any person pursuant to this rule shall be a cause for denial of an application.[67]

Birbrower could not avail itself of this exception for a number of reasons. First, Birbrower had not "been retained to appear in a particular cause pending."[68] Indeed, Birbrower had been retained, inter alia, to file an arbitration demand.[69] Thus, the firm could not have been retained to appear in a pending action. This is because it appeared when it filed the action, which necessarily precedes an action being considered "pending." Second, the action was not "pending in a court of this state."[70] Granted, the action had been filed in the San Francisco office of the American Arbitration Association. Assuming arguendo that the arbitration association's tribunal is a "court," an argument can be made that the action was pending in a court "in" California. However, this argument is specious for the obvious reason that the provision is intended to regulate California state courts. Indeed, the American Arbitration Association is a private, nonprofit organization[71] and its

66. CAL. R. CT. 983.
67. *Id.* 983(a).
68. *Id.*
69. *See Birbrower II*, *supra* note 3, at 14.
70. CAL. R. CT. 983(a).
71. *See* JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION WITH FORMS § 1.52, at

tribunals are not bound by the California Rules of Court.[72]

Lastly, Birbrower did not associate an active member of the State Bar of California as attorney of record.[73] This fact no doubt weighed heavily on the outcome of this case not only within the pro hac vice context—which did not command considerable attention from the court because Birbrower obviously did not satisfy the requirements—but also throughout the entire litigation.[74]

2. *The Federal Court Exemption*

The court recognized the fact that the State Bar does not regulate the practice of law in California federal courts.[75] Thus, an out-of-state attorney could, in theory, make an appearance in a federal court without

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15 (2d ed. 1997).

72. At the risk of professing the obvious, the California Rules of Court apply only to California courts. *Cf.* Blanton v. Womancare Inc., 696 P.2d 645, 648-49 (Cal. 1985). In *Blanton*, the Supreme Court of California declared that

> [p]rivate arbitration occurs only pursuant to agreement, and it is the agreement which determines the details of the process. The parties are themselves responsible for payment of the arbitrator and associated costs.... While [California law] provides mechanisms for judicial enforcement of the agreement and confirmation of the award both mechanisms are extraneous to the process and, ordinarily, to the contemplation of the parties. Typically, those who enter into arbitration agreements expect that their dispute will be resolved without necessity for any contact with the courts.

Id. at 648 n.5 (citations omitted).

73. *See Birbrower II*, *supra* note 3, at 4 & n.3.

74. The court of appeal mentioned this fact several times. *See Birbrower I*, *supra* note 3, at 862-64. The supreme court, by contrast, was of the opinion that association with local counsel would have been neither necessary nor sufficient to save Birbrower from the hammer of section 6125. *See Birbrower II*, *supra* note 3, at 4 n.3 ("Contrary to the trial court's [and the court of appeal's] implied assumption, no statutory exception to section 6125 allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar."). This "association of local counsel" issue will be explored *infra* Part V.

75. *See Birbrower II*, *supra* note 3, at 6-7. Although the State Bar of California technically does not regulate attorneys who appear in federal court, all federal districts in California require attorneys to be members of the State Bar of California in order to be admitted to practice in those districts. *See* N.D. CAL. CIV. LOCAL R. 11-1(b) ("[A]n applicant for admission to membership in the bar of this court must be an attorney who is an active member in good standing of the Bar of the State of California."); E.D. CAL. CIV. LOCAL R. 83-180(a) ("Admission to and continuing membership in the Bar of this Court are limited to attorneys who are active members in good standing of the State Bar of California."); C.D. CAL. CIV. LOCAL R. 2.2.1 ("Admission to and continuing membership in the Bar of this Court is limited to persons of good moral character who are active members in good standing of the State Bar of California."); S.D. CAL. CIV. LOCAL R. 83.3(c)(1)(a) ("Admission to and continuing membership in the bar of this court is limited to attorneys of good moral character who are active members in good standing of the State Bar of California."). Thus, these local rules amount to a de facto State Bar regulation of the federal bar. Accordingly, this is a rather hollow exception for out-of-state attorneys.

being a member of the State Bar of California.[76] However, the exception did not apply because there was no action pending in a federal court. Indeed, Birbrower did not even attempt to invoke this exception.

3. *Arbitration and Conciliation of International Disputes: A Limited Arbitration Exception*

The court recognized that there is an exception to section 6125 when parties arbitrate an international commercial dispute.[77] This exception provides that, when applicable, "[t]he parties may appear in person or be represented or assisted by any person of their choice. A person assisting or representing a party need not be a member of the legal profession or licensed to practice law in California."[78] The pertinent issue, then, was whether the exception covered any of Birbrower's activities and, if so, to what extent.

As a threshold issue, the exception applies only "to *international* commercial arbitration and conciliation."[79] An arbitration agreement is "international" if, inter alia, "[t]he parties to an arbitration or conciliation agreement have, at the time of the conclusion of that agreement, their places of business in different *states*."[80] At the time ESQ-New York and Tandem executed their software development and marketing agreement, ESQ-New York's and Tandem's places of business were New York and California, respectively.[81] Thus, ESQ-New York and Tandem arguably had, at the time of the conclusion of their agreement, their places of business in different "states."

However, California's international arbitration provision is an almost verbatim copy of the United Nations' model provision.[82] This model provision is intended to provide various sovereign nations with a uniform method for resolving commercial disputes.[83] There is no

76. This theoretical ability to make an appearance, however, does not normally translate into a practical reality. *See supra* note 75 and accompanying text.

77. *See Birbrower II*, *supra* note 3, at 7; CAL. CIV. PROC. CODE § 1297.351 (West Supp. 1999).

78. CAL. CIV. PROC. CODE § 1297.351 (West Supp. 1999)

79. *Id.* § 1297.11 (emphasis added).

80. *Id.* § 1297.13(a) (emphasis added).

81. ESQ-California was not incorporated until after ESQ-New York and Tandem had executed their software development and marketing agreement. *See Birbrower II*, *supra* note 3, at 14.

82. *See* United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration, 24 I.L.M. 1302 (1985).

83. *See generally id.*; *cf.* Andre J. Brunel, Note, *A Proposal to Adopt UNCITRAL's*

indication that the California provision should be interpreted differently than the United Nations' model provision, which uses the term "international" in its ordinary context.[84] Accordingly, Birbrower was unable to satisfy the requirements of this exception. Indeed, the Supreme Court of California tersely assumed without discussion that the exception did not apply.[85]

4. No California Exception Applicable to Birbrower's Case

In sum, then, the court flatly rejected the notion that Birbrower satisfied any of California's recognized exceptions to the general rule prohibiting the unauthorized practice of law. Given such rejection, Birbrower turned its attention to the task of attempting to convince the court to adopt a new exception. Birbrower advanced a number of arguments in favor of crafting new exceptions to the general unauthorized practice of law provision.

B. Birbrower's Proffered Exceptions

1. The "Out-of-State Attorney" Exception

Birbrower argued that section 6125 is not intended to prohibit out-of-state attorneys from limited practice in California; rather, it is intended to prohibit nonattorney imposters from practicing law.[86] Birbrower further contended that applying section 6125 to out-of-state attorneys does not further the underlying policy rationale of the provision, which Birbrower articulated as providing protection to Californians from incompetent legal advice and representation.[87] The court responded by looking to the language of the statute, which the court deemed to be unambiguous. The court concluded that "[t]he statute does not differentiate between attorneys and nonattorneys, nor does it excuse a

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Model Law on International Commercial Arbitration as Federal Law, 25 TEX. INT'L L.J. 43, 62 (1990) ("After the final drafting of the Model Law in 1985, the United Nations General Assembly recommended its adoption by countries, not by their political subdivisions.").

84. *See* Albert S. Golbert & Daniel M. Kolkey, *California's Adoption of a Code for International Commercial Arbitration and Conciliation*, 10 LOYOLA L.A. INT'L & COMP. L.J. 583, 584 (1988) ("Under the [International Commercial Arbitration and Conciliation C]ode, an arbitration or conciliation is international if . . . the parties to the arbitration or conciliation agreement have their places of business in different countries . . . .").

85. *See Birbrower II*, *supra* note 3, at 9.

86. *See id.* at 7.

87. *See id.* at 8.

person who is a member of another state bar."[88] Moreover, the policy underpinnings of section 6125, so stated the court, are not furthered by adopting Birbrower's proffered application for "the obvious fact that other states' laws may differ substantially from California law. Competence in one jurisdiction does not necessarily guarantee competence in another."[89] The court further observed that "a decision to except out-of-state attorneys licensed in their own jurisdictions from section 6125 is *more* appropriately left to the California Legislature."[90]

2. *The "Private Arbitration" Exception*

Birbrower alternatively argued that the court should extend the international commercial arbitration exception to all work incident to private arbitration.[91] The underlying policy of section 6125—to protect Californians from receiving incompetent legal representation and advice—is not furthered by failing to recognize an arbitration exception, argued Birbrower, because there are fundamental differences between private arbitration and legal proceedings.[92] These differences include "procedural differences relating to discovery, rules of evidence,

88. *Id.* at 7.
89. *Id.* at 8.
90. *Id.* (emphasis added). One might wonder whether such an exception is "more" appropriately left to the Legislature. The Legislature undoubtedly has the authority to amend its own statute. However, the Supreme Court of California, in an opinion crafted the same year as the *Birbrower II* decision, declared that "the power to regulate the practice of law, including the power to admit and to discipline attorneys, has long been recognized to be among the inherent powers of . . . courts." *In re* Attorney Discipline System, 967 P.2d 49, 54 (Cal. 1998). Additionally, the court observed that "'[i]n each state it is the supreme court, *with or without the legislative approval*, that dictates the standards for education, admission and discipline of attorneys.'" *Id.* (emphasis added) (quoting Robert J. Martineau, *The Supreme Court and State Regulation of the Legal Profession*, 8 HASTINGS CONST. L.Q. 199, 202 (1981)). Moreover, "[a]dmission to the bar is a judicial function, and members of the bar are officers of the court, subject to discipline by the court. Hence, under the constitutional doctrine of separation of powers, the court has inherent *and primary* regulatory power." *Id.* at 55 (emphasis omitted) (emphasis added) (citations omitted). In other words, while the Legislature has the power to decide *what* will happen to individuals who engage in the unauthorized practice of law, the Supreme Court has the "primary regulatory" power, even "without Legislative approval," to decide *who* is a member of the Bar and, thus, who is subject to the proscription of section 6125. Accordingly, it seems to be a slight overstatement to assert that the Legislature is the "more" appropriate body to remedy this problem. In any event, the author proposes a possible legislative solution in the form of an out-of-state attorney exception to section 6125. *See infra* Part V.
91. *See Birbrower II*, *supra* note 3, at 8-9.
92. *See id.* at 8.

compulsory process, cross-examination of witnesses, and other areas."[93] Indeed, the dissent was receptive to Birbrower's argument, stating that "arbitration proceedings are not governed or constrained by the rule of law; therefore, representation of another in an arbitration proceeding, including the activities necessary to prepare for the arbitration hearing, does not necessarily require a trained legal mind [and, thus, does not necessarily violate section 6125]."[94]

The court, while recognizing a strong public policy in favor of encouraging and facilitating arbitration, replied by stating that there is an equally strong public policy "favoring the practice of law in California by licensed State Bar members."[95] This countervailing interest, coupled with Legislative silence regarding the issue of private arbitration, sufficiently outweighed the perceived need to craft an ad hoc arbitration exception to section 6125.[96] Accordingly, the court concluded that "[a]ny exception for arbitration is best left to the Legislature, which has the authority to determine qualifications for admission to the State Bar and to decide what constitutes the practice of law."[97]

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93. *Id.*
94. *Id.* at 17 (Kennard, J., dissenting).
95. *Id.* at 9.
96. *See id.*
97. *Id.* at 9; *but see supra* note 90. The court's treatment of the arbitration issue caused quite a stir. Prior to *Birbrower II*, California law provided that "[a] party to . . . arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration." CAL. CIV. PROC. CODE § 1282.4 (West 1982), *amended by* CAL. CIV. PROC. CODE § 1282.4 (West Supp. 1999). Prior to *Birbrower II*, "the common understanding of practitioners and arbitrators ha[d] always been that attorneys are not required to be admitted to practice in [California]" because "attorneys who represent non-resident corporate clients in arbitration [frequently] are not admitted formally to practice in California." *Arbitration Exception for Out-of-State Lawyers, Hearing on A.B. 2086 Before Assembly Judiciary Comm.*, 1997-98 Cal. Legis. Sess. (May 8, 1998), *available at* The California State Assembly, Bill Information (visited Oct. 6, 1999) <http://www.assembly.ca.gov/acs/acsframeset2text.html> (intrasite search required to access hearing information). This practice was not perceived as problematic because "arbitration is a non-judicial forum to resolve disputes." *Id.* Thus, the California Legislature "t[ook] up the Court's invitation [to craft an arbitration exception to section 6125] and declare[d] that non-California attorneys may represent parties in arbitration" because *Birbrower II* "threaten[ed] to chill the promising use of arbitration in California." *Id.* at 1, 2.

In taking up the Court's invitation to create an arbitration exception, the Legislature passed the following amendment:

> Notwithstanding any other provision of law, including Section 6125 of the Business and Professions Code, an attorney admitted to the bar of any other state may represent the parties in the course of, or in connection with, an arbitration proceeding in this state, provided that the attorney, if not admitted to the State Bar of California, timely files the certificate described in subdivision (c) and the attorney's appearance is approved by the arbitrator, the arbitrators, or the arbitral forum.

CAL. CIV. PROC. CODE § 1282.4(b) (West Supp. 1999). The Legislature clarified its intent in stating that

3. *The "Federal Preemption" Exception*

Birbrower raised a belated, half-hearted contention that federal arbitration law preempted California's section 6125 and, as such, the court should recognize a federal preemption exception. Thus, Birbrower argued, it should not be precluded by section 6125 from collecting all of its fees under the fee agreement with ESQ-New York.[98] In light of the fact that the ESQ-New York/Tandem agreement contained a California choice of law clause, the court found Birbrower's reliance upon federal law to be somewhat disingenuous.[99] Additionally, the court concluded that Birbrower had not carried its burden of showing that California law conflicted with federal law.[100] Moreover, the court held that, in any event, federal law did not preempt California's arbitration provisions.[101] Accordingly, the Court found the contention to be without merit.[102]

4. *The "Interstate Nature of the Practice of Law" Exception*

Birbrower urged the court to recognize the fact that the legal profession is evolving into an increasingly interstate profession, such that "[m]ultistate relationships are a common part of today's society and are to be dealt with in commonsense fashion."[103] Birbrower further asserted that "[i]n many situations, strict adherence to rules prohibiting the unauthorized practice of law by out-of-state attorneys would be 'grossly impractical and inefficient.'"[104] Hence, Birbrower contended,

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> [i]n enacting the amendments to . . . section [1282.4] . . . it is the intent of the Legislature to respond to the holding in [*Birbrower II*] to provide a procedure for nonresident attorneys who are not licensed in this state to appear in California arbitration proceedings. . . . Except as otherwise specifically provided in . . . section [1282.4], it is the Legislature's intent that nothing in . . . section [1282.4] is intended to expand or restrict the ability of a party prior to the decision in [*Birbrower II*] to elect to be represented by any person in a nonjudicial arbitration proceeding, to the extent those rights or abilities existed prior to [*Birbrower II*]. To the extent that [*Birbrower II*] is interpreted to expand or restrict that right or ability pursuant to the laws of this state, [*Birbrower II*] is hereby abrogated except as specifically provided in . . . section [1282.4].

CAL. CIV. PROC. CODE § 1282.4(i)(1), (3) (West Supp. 1999).

98. *See Birbrower II*, *supra* note 3, at 9.
99. *See id.*
100. *See id.*
101. *See id.*
102. *See id.*
103. *Id.* at 10 (quoting *In re* Estate of Waring, 221 A.2d 193, 197 (N.J. 1966)).
104. *Id.* (quoting *Waring*, 221 A.2d at 197).

section 6125 should be inapplicable to the case at bar. Although the court purported to "recognize the need to acknowledge and, in certain cases, accommodate the multistate nature of law practice," it ultimately rejected Birbrower's invitation to carve out an exception on the facts before it.[105]

5. *The "Full Disclosure" Exception*

Birbrower asserted that ESQ-California had actual knowledge that the Birbrower attorneys were not licensed to practice in California.[106] Thus, Birbrower argued, California should follow some other jurisdictions in recognizing an exception to the unauthorized practice of law proscription when the "out-of-state attorney 'makes a full disclosure to his [or her] client of his [or her] lack of local license and does not conceal or misrepresent the true facts.'"[107] The court declined to recognize such an exception, however, because such an exception contravened the plain language of section 6125.[108]

6. *No Judicially Crafted Exception to Section 6125 for Birbrower*

Birbrower raised numerous arguments in support of its contention that the court should adopt an exception allowing Birbrower to collect its fees. Granted, Birbrower is not the most sympathetic "victim" of section 6125's application. After all, most observers would probably deem Birbrower, a law firm consisting of about fourteen attorneys,[109] to be on notice that it might have been violating California's unauthorized practice of law provision. Thus, few can seriously fault the Supreme Court of California for failing to carve out an ad hoc exception to section 6125. Birbrower could have avoided this litigation simply by informing its client that it needed to retain California counsel. In this regard, the court's decision not to create an exception is defensible. However, the facts in *Birbrower II* raise serious questions as to the long-term viability of California's seemingly antiquated unauthorized practice of law provision, particularly in light of the reality that it is becoming

105. *Id.* Birbrower's argument illustrates the need for unauthorized practice of law provisions to recognize the interstate nature of the legal profession. Accordingly, this countervailing interest will be addressed within the context of a proposed amendment to section 6125. *See infra* Part V.

106. *See Birbrower II*, *supra* note 3, at 11.

107. *Id.* (quoting C. D. Sumner, Annotation, *Right of Attorney Admitted in One State to Recover Compensation for Services Rendered in Another State Where He Was Not Admitted to the Bar*, 11 A.L.R.3d 907, 910 (1967)).

108. *See id.*

109. *See* Birbrower, Montalbano, Condon & Frank, P.C. (visited Oct. 6, 1999) <http://www.rocklandlaw.com/martindale.htm>.

increasingly difficult for law firms to contain their practices solely within the borders of a single state.[110]

V. A PROPOSED AMENDMENT TO SECTION 6125 OF THE CALIFORNIA BUSINESS AND PROFESSIONS CODE[111]

If taken too literally, *Birbrower II* interprets section 6125 as prohibiting a broad spectrum of activities undertaken by out-of-state attorneys on a daily basis. On the other hand, section 6125, while rarely enforced criminally,[112] gives courts a powerful weapon as a means of

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110. The drafters of the *Model Code of Professional Responsibility* recognized this dilemma.

> Much of clients' business crosses state lines. People are mobile, moving from state to state. Many metropolitan areas cross state lines. It is common today to have a single economic and social community involving more than one state. The business of a single client may involve legal problems in several states.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-9 n.8 (1980) (quotations omitted). Accordingly, the *Model Code* provides that

> [i]n furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters.

Id. EC 3-9. The drafters of the *Model Rules of Professional Conduct* continue this theme, providing that "[t]he legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." MODEL RULES OF PROFESSIONAL CONDUCT Preamble ¶ 11 (1983).

111. A copy of this Casenote will be sent to the appropriate California Assembly members and Senators for consideration. It is worth noting that California has a unique opportunity to set a trend for other states to follow. Indeed, no other state has adopted the type of provision proposed in this Casenote. A *Birbrower II*-type argument calling for a judicial ad hoc exception has been raised and rejected in a few courts. *See, e.g.*, Ranta v. McCarney, 391 N.W.2d 161, 163-66 (N.D. 1986); *In re* Peterson, 163 B.R. 665, 672-75 (Bankr. D. Conn. 1994).

The drafters of the *Model Rules of Professional Conduct* have attempted to create a streamlined method for determining which state's disciplinary provisions apply when an attorney is potentially subject to more than one state's rules of professional conduct. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.5 (amended 1993). Rule 8.5 has no bearing on the California issues presented in this Casenote for two reasons. First, California has declined to adopt the *Model Rules*, which undoubtedly provides additional ammunition for those who perceive the State Bar of California as arrogant. Second, Rule 8.5 addresses only disciplinary matters. Section 6125, by contrast, is a criminal provision. Thus, section 6125 would have to be amended even if California chose to adopt the *Model Rules*.

112. Violation of section 6125 is a criminal misdemeanor. *See* CAL. BUS. & PROF. CODE § 6126(a) (West 1990).

minimizing the number of instances where Californians receive incompetent legal advice. Given that section 6125 was drafted in 1939,[113] it is not surprising that the drafters did not envision the evolving interstate nature of the legal profession. Accordingly, section 6125 should be amended in such a fashion as to balance the competing interests of Californians' need for competent legal advice and the nearly invisible geographic boundaries of states vis-à-vis today's business and technological climate. In light of the Court's position that "a decision to except out-of-state attorneys licensed in their own jurisdictions from section 6125 is more appropriately left to the California legislature,"[114] the following is a proposed legislative amendment to section 6125.

Section 6125 currently provides that "[n]o person shall practice law in California unless the person is an active member of the State Bar."[115] It is submitted that section 6125 should be amended to read as follows:

(a) No person shall practice law in California unless the person is an active member of the State Bar.
(b) Notwithstanding subsection (a), an attorney admitted to the bar of any other state may represent a party, the representation of which would otherwise violate subsection (a), provided that the attorney timely files the certificate described in subdivision (c) and the certificate is approved by the State Bar of California, the approval of which shall not be denied unreasonably. If the application is approved by the State Bar, the attorney may represent the party named in the application for a period not exceeding one year.
(c) Prior to the representation described in subsection (b), the attorney described in subsection (b) shall serve a certificate on the State Bar of California. The certificate shall state all of the following:
    (1) The attorney's residence and office address.
    (2) The client's name and business or residence address.
    (3) A general description of the nature of the representation.
    (4) The courts before which the attorney has been admitted to practice and the dates of admission.
    (5) That the attorney is currently a member in good standing of, and eligible to practice before, the bar of those courts.

113. *See* State Bar Act of 1939, ch. 34, sec. 1, § 6125, 1939 Cal. Stat. 347, 359.
114. *Birbrower II*, *supra* note 3, at 8.
115. BUS. & PROF. CODE § 6125 (West Supp. 1999).

(6) That the attorney is not currently on suspension or disbarred from the practice of law before the bar of any court.
(7) That the attorney is not a resident of the State of California.
(8) That the attorney is not regularly employed in the State of California.
(9) That the attorney is not regularly engaged in substantial business, professional, or other activities in the State of California.
(10) That the attorney agrees to be subject to the jurisdiction of the courts of this state with respect to the law of this state governing the conduct of attorneys to the same extent as a member of the State Bar of California.
(11) Whether the attorney has ever applied for:
(A) A temporary exemption under this section;
(B) A pro hac vice exemption under California Rule of Court 983;
(C) An exemption under section 1282.4 of the California Code of Civil Procedure; or
(D) Any other exemption from the unauthorized practice of law provision of subsection (a).

For each exemption the attorney has applied for under subsection (c)(11), the attorney shall state the date of each application, a description of the circumstances prompting the application (including the name and location of the court, arbitral forum, and the like, if applicable), and whether the application was granted or denied. Absent special circumstances, repeated applications seeking any type of exemption referred to in subsection (c)(11) shall be a reasonable cause for denial of an application.
(12) The name, address, and telephone number of the active member of the State Bar of California who has agreed in writing to be counsel of record.

(d) The active member of the State Bar of California who agrees to be counsel of record as described in subsection (c)(12) shall be subject to professional discipline and civil liability for any and all acts or omissions by the out-of-state attorney

described in subsection (b) to the same extent as if the active member of the State Bar had committed the act or omitted the act himself.

(e) An attorney who files a certificate containing false information or who otherwise fails to comply with the standards of professional conduct required of members of the State Bar of California shall be subject to the disciplinary jurisdiction of the State Bar.

(f) An applicant for permission to represent a party under this section shall pay a reasonable fee not exceeding $50 to the State Bar of California. The amount of the fee shall be fixed by the Board of Governors of the State Bar of California:

(1) To defray the expenses of administering the provisions of this rule which are applicable to the State Bar and the incidental consequences resulting from such provisions; and

(2) Partially to defray the expenses of administering the board's other responsibilities to enforce the provisions of the State Bar Act relating to the competent delivery of legal services and the incidental consequences resulting therefrom.

(g) This section neither enlarges nor restricts the applicability of California Rule of Court 983, section 1282.4 of the California Code of Civil Procedure, or any other judicial or legislative provision exempting individuals from subsection (a).

As is perhaps readily apparent, this proposed amendment to section 6125 is an amalgamation and metamorphosis of California Rule of Court 983 and section 1282.4 of the California Code of Civil Procedure.[116] Subsection (a) states the general unauthorized practice of law rule as it currently exists. This rule, as the *Birbrower II* decision makes abundantly clear, is absolutely essential in order to minimize the risk that Californians will receive incompetent legal representation and advice. Subsection (b) provides out-of-state attorneys with an escape hatch from subsection (a). This "out-of-state attorney" exception would allow out-of-state attorneys to continue representations that are currently prohibited under section 6125. In order to qualify for the exception, however, the out-of-state attorney must satisfy the somewhat onerous requirements proposed as amendments to section 6125.

116. *See* CAL. R. CT. 983; CAL. CIV. PROC. CODE § 1282.4 (West Supp. 1999).

Subsection (c) requires the out-of-state attorney to file a certificate with, and be approved by, the State Bar of California prior to commencing the representation. It further limits the exemption to one year. The filing contains various disclosure requirements, most of which are required for obvious reasons. However, some of the disclosure requirements are worthy of discussion.

For example, subsection (c)(2) requires the attorney to give the name and address of the client. Subsection (c)(3) requires a general description of the nature of the proposed representation. The purpose of this subsection is not to force the attorney to divulge potentially privileged information; rather, the "general description" language is designed to protect client confidences while simultaneously giving the State Bar sufficient information to determine whether the exception sought is appropriate.[117]

Subsection (c)(7) requires that the attorney not be a resident of the state of California. This provision is designed to prohibit individuals who wish to practice in California from taking another jurisdiction's bar examination—which, in all likelihood, will be less difficult to pass than the California bar examination—then enlisting a California lawyer to help her circumvent the general requirement that individuals practicing law in California take the California bar examination.[118] Subsection

117. For example, the State Bar may determine, based on the information given, that the out-of-state attorney desires to represent the client in a pending proceeding. In such a case, the State Bar will be able to inform the attorney that the exception is inapplicable to pending proceedings and that she should follow the procedures set forth in California Rule of Court 983.

118. This out-of-state residency requirement raises constitutional concerns. The Constitution of the United States provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. "The Privileges and Immunities Clause . . . imposes a direct restraint on state action in the interests of interstate harmony. . . . It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause . . . ." United Bldg. and Constr. Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 220 (1984) (citations omitted). Thus, the Supreme Court of the United States has held that a state violates the Privileges and Immunities Clause when it requires residency as a prerequisite to gaining admission to that state's bar by examination or by motion. *See* Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 288 (1985); Supreme Court of Virginia v. Friedman, 487 U.S. 59, 70 (1988). One of the primary reasons why the Privileges and Immunities Clause exists is to protect those who are disadvantaged by a particular state practice and who have no recourse at the ballot box. *See United Bldg. and Constr. Trades Council*, 465 U.S. at 217. Indeed, "[t]he Clause exists to protect against those classifications that a State's political process cannot be relied on to prevent . . . , not those that it can [be relied on to prevent]." *Id.* at 232-33 n.14 (Blackmun, J., dissenting).

(c)(8) prohibits an individual from regularly working in California. This provision ensures that the individuals seeking the exemption are the individuals which the exemption is intended to benefit: out-of-state attorneys who regularly practice in their own jurisdiction. Subsection (c)(9) largely overlaps (c)(8), although it prohibits the attorney from regularly engaging in conduct which technically may not be "working" in California and, thus, may not fall under (c)(8).

Subsection (c)(10) requires the attorney to subject herself to the jurisdiction of California courts. This provision is essential, for it is the vehicle through which the courts may punish the individual for acts which would be punishable if the individual were a member of the State Bar of California. Subsection (c)(11) requires the out-of-state attorney to list all of the prior instances where the attorney has sought an exemption to practice in California. The purpose of this subsection is to provide the State Bar with information regarding the frequency of the out-of-state attorney's contacts with California. Frequency of contacts, in turn, tends to establish whether the attorney regularly works or engages in professional activities in California and, hence, whether the exemption should be granted.

Subsection (c)(12) forces the out-of-state attorney to affiliate local counsel. This provision addresses the concern of subsection (a), which is to minimize the number of instances where Californians receive incompetent legal advice or representation.[119] This provision further requires the out-of-state attorney to obtain a written agreement of her affiliation with local counsel. This subsection puts the burden on the out-of-state attorney to establish the existence of an affiliation agreement with local counsel. Those who are unable to establish such an agreement risk a *Birbrower II*-type outcome, including a possible inability to collect fees and a theoretical criminal prosecution.

The proposed amendment to section 6125 discriminates, if at all, against residents—not out-of-state residents. Thus, the Privileges and Immunities Clause is not implicated. The Northern District of California has held that the Privileges and Immunities Clause is not violated when an in-state resident is at a disadvantage vis-à-vis an out-of-state resident. *See* Paciulan v. George, 38 F. Supp. 2d 1128, 1142 (N.D. Cal. 1999) (holding that the Privileges and Immunities Clause does not bar a state from granting out-of-state residents limited privileges not offered to in-state residents). In fact, the *Paciulan* court held that California Rule of Court 983—which requires that pro hac vice applicants *not* be a resident of California—does not violate the Privileges and Immunities Clause. *See id.* Thus, the proposed amendment, which is modeled after California Rule of Court 983, is likewise constitutional.

119. Adopting an out-of-state attorney exception to section 6125 creates an additional collateral benefit. Out-of-state clients of out-of-state attorneys will no longer be required to retain California counsel on their own because the out-of-state attorneys will be taking those steps in securing local counsel. Thus, there will be continuity of representation as far as the clients are concerned. This benefit will impact California clients if and when other states adopt an out-of-state attorney exception.

Subsection (d) provides that an active member of the State Bar of California who agrees to act as local counsel for an out-of-state attorney assumes the risk of the out-of-state attorney's acts and omissions. This provision reallocates some of the burden of policing the out-of-state attorney from the State Bar to the member of the State Bar, who risks professional discipline and civil liability for the acts and omissions of the out-of-state attorney. Subsection (e) provides that the out-of-state attorney shall be subject to disciplinary action of California courts if she files a certificate containing false information or if she fails to comply with California's standards of professional conduct. Subsection (f) allows the State Bar to collect a reasonable fee. This pragmatic provision allows the State Bar to defray the administrative cost associated with determining whether the out-of-state attorney's exemption should be granted.

Finally, subsection (g) provides that the new section 6125 is not intended to change existing law except as specifically provided in the amendment. Thus, the exemption would not alleviate the necessity of seeking a pro hac vice exemption under California Rule of Court 983, where necessary. Likewise, the exemption does not relieve the out-of-state attorney of her duty to seek an exemption under section 1282.4 of the California Code of Civil Procedure, when applicable. Rather, the amendment to section 6125 is solely intended to provide an out-of-state attorney with an avenue for representing a client on a limited basis when it would otherwise be unclear whether the representation would violate the unauthorized practice of law provision in section 6125(a).

VI. CONCLUSION

Birbrower, an out-of-state law firm with no attorneys licensed to practice in California, was unable to collect the majority of its fairly substantial legal fees because the Supreme Court of California concluded that some of its attorneys had engaged in the unauthorized practice of law.[120] At the time *Birbrower II* was decided, California did not recognize an exception to section 6125, which would have saved Birbrower from the ramifications of section 6125. Subsequent legislation has provided an exception for some arbitration proceedings,[121] but many out-of-state attorneys not involved in litigation or arbitration

120. *See Birbrower II*, *supra* note 3, at 7, 13.
121. *See* CAL. CIV. PROC. CODE § 1282.4 (West Supp. 1999).

are left in limbo as to whether they are engaging in the unauthorized practice of law. Accordingly, an "out-of-state attorney" exception to section 6125, if carefully tailored to serve the dual interests of Californians and the interstate nature of the legal profession, is a laudable aspiration. Moreover, the California Legislature will be making great strides toward expunging the State Bar's "arrogant" label, while simultaneously reclaiming this state's status as a legislative and judicial trailblazer.

JACK BALDERSON, JR.