

# A Tale of Two (Bar Exam) Sittings

## The UBE and Reciprocity

By Amy S. Flanary-Smith

South Carolina's administration of the Uniform Bar Examination (UBE) beginning with the February 2017 bar exam reflected the state bar's acknowledgement of a multi-jurisdictional future. South Carolina bar examinees now acquire a portable UBE score that can be submitted to any UBE jurisdiction as part of an applicant's request for admission.<sup>1</sup> Law students no longer must choose a single jurisdiction to which to seek admission upon graduation. Graduates of the University of South Carolina School of Law and Charleston School of Law who sit for South Carolina's bar exam may use their UBE scores for admission to South Carolina and any of the 30 other UBE jurisdictions without need for additional bar exam sittings.

While adoption of the UBE facilitates the next generation of South Carolina lawyers entering the multi-jurisdictional future, the change had an additional, perhaps unforeseen, consequence: the South Carolina bar now has two

distinct groups of licensed attorneys, one with robust cross-jurisdictional opportunities and one with very few such options. Moreover, adoption of the UBE has crystallized a philosophical inconsistency between the bar's admissions standards and Rule 5.5's prohibition of the unauthorized practice of law.

### The UBE in general

On January 21, 2016, South Carolina joined a majority of states when the South Carolina Supreme Court announced it would utilize the Uniform Bar Exam (UBE) in granting admission to the bar beginning in 2017.<sup>2</sup> The UBE is a "uniformly administered, graded, and scored bar exam"<sup>3</sup> designed to test "knowledge of general principles of law, legal analysis and reasoning, factual analysis, and communication skills to determine readiness to enter legal practice in any jurisdiction."<sup>4</sup> The two-day test has three parts: the Multistate Performance Test (MPT), the Multistate Essay Examination (MEE) and the

Multistate Bar Examination (MBE).<sup>5</sup>

Similar to examinees taking the LSAT or the GRE, the UBE test-taker receives an exam score that is a numeric value rather than simply a "pass" or "fail" notification.<sup>6</sup> The test-taker can then request the National Conference of Bar Examiners (NCBE) send his or her score to any of the UBE jurisdictions as part of the application process for admission to those states' bars. UBE scores are accepted generally for two to three years after a testing date; the precise length of life for a score varies by state.<sup>7</sup> NCBE score transfer and payment of a transfer fee<sup>8</sup> are the applicant's first steps to jurisdictional admission.<sup>9</sup> Adoption of the UBE did not change South Carolina's character and fitness, professional responsibility or academic credential requirements, which have governed bar admission for decades.

### How UBE adoption benefits students and new lawyers

UBE proponents have identi-

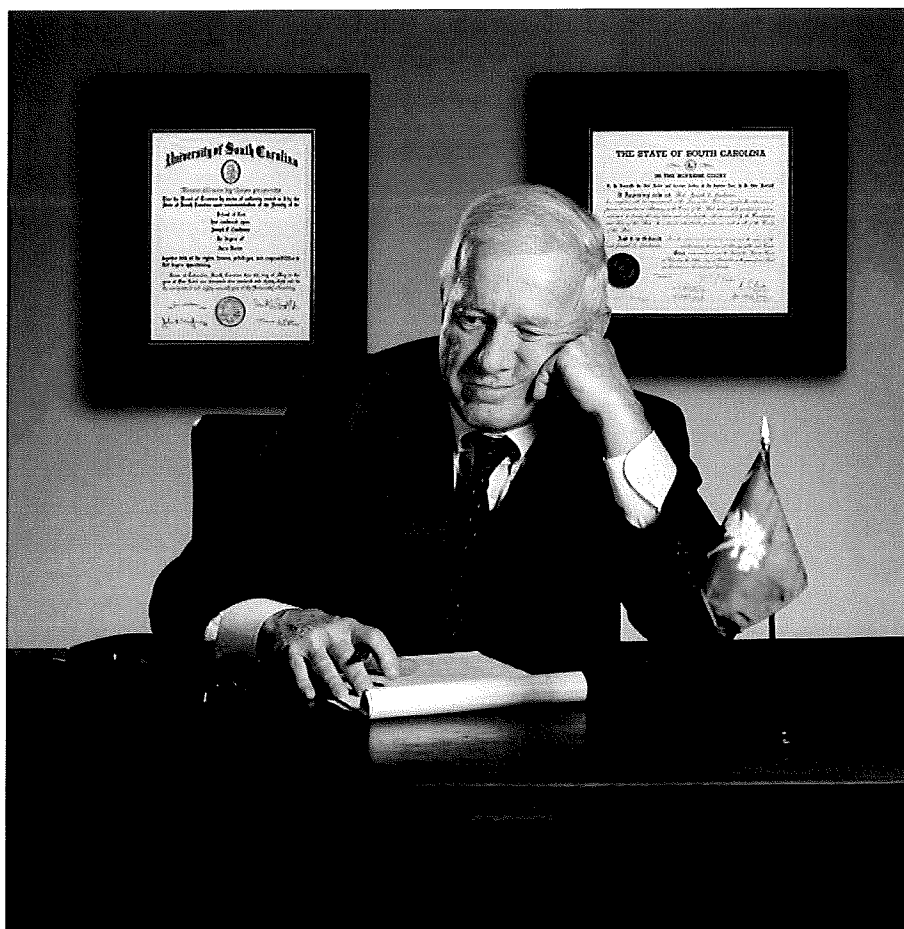


fied three significant benefits to law students: (1) the UBE increases consistency in subjects tested on the bar exam; (2) the UBE allows an applicant that may have failed in one jurisdiction to nonetheless seek admission to another jurisdiction that has a lower score requirement; and (3) the UBE reduces both the actual and opportunity costs of taking examinations in multiple jurisdictions.<sup>10</sup> South Carolina's current law students have 31 potential employment markets immediately upon graduation—rather than just one, as was the case with the prior bar exam. A law student is free to tailor her program of study to match a practice area that is more prevalent in another UBE jurisdiction without a state-specific bar examination penalizing this career plan. South Carolina law schools can recruit students based on academic offerings and quality of education without need to justify practice opportunities limited to only one state.<sup>11</sup>

South Carolina consciously intended to place its bar at the “vanguard of evolving standards and norms which reflect the reality of modern law practice” while maintaining robust local control over bar admissions criteria.<sup>12</sup> Evolving standards necessarily require reevaluation of progress, though, and the connectivity of modern communication means that “a balkanized approach to the regulation of the legal profession, including particularly the restrictions imposed by individual states on the free movement of lawyers across the nation in the rendering of services to their clients, is no longer rational or workable.”<sup>13</sup> The intersection of the UBE with Rule 5.5 in South Carolina epitomizes the difficulty.

#### UBEs and reciprocity<sup>14</sup>

Adopting the UBE is not equivalent to granting reciprocity (sometimes called comity or admission on motion) to lawyers licensed in other jurisdictions. Indeed, UBE admission and reciprocal admission co-exist as parallel paths to a multi-jurisdictional practice in



many states. However, South Carolina's unique decision to adopt the UBE but deny reciprocity to all out-of-state lawyers produces inequitable results for South Carolina's own attorneys.

South Carolina has long maintained significant barriers to entry for out-of-state attorneys seeking to practice in South Carolina.<sup>15</sup> South Carolina,<sup>16</sup> along with 12 other states or territories, allows no admission by motion to out-of-state attorneys.<sup>17</sup> Among UBE states, though, South Carolina stands alone in taking this hard line position of refusing all reciprocity.<sup>18</sup> As a result of the closed nature of the South Carolina bar, the 26 states and territories that offer reciprocal reciprocity (that is, “if you let our lawyers in, we will let your lawyers in”) are closed to South Carolina lawyers.

However, the UBE has altered the playing field for a subset of South Carolina lawyers—specifically for the newly licensed attorneys who sat for the UBE—who might

seek admission in the reciprocal reciprocity jurisdictions. Nineteen of the 26 reciprocal reciprocity jurisdictions have adopted the UBE, so those 19<sup>19</sup> are now open to new graduates taking South Carolina's current bar exam. Thus, new graduates may be fully admitted in 19 jurisdictions that remain closed to South Carolina lawyers who were licensed prior to 2017. As such, the UBE provides significant career flexibility to new lawyers that cannot be obtained by seasoned South Carolina attorneys because of current rules.<sup>20</sup>

South Carolina lawyers are able to be admitted by motion, though, in some jurisdictions. Most states have a practice requirement for admission on motion—several years of active, sanction-free experience must be had by the comity-seeker—that would be a requirement likely met only by experienced attorneys.<sup>21</sup> Seventeen jurisdictions would allow an upstanding experienced South Carolina attorney to join their bars by comity: D.C.,

Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, North Dakota, Ohio, Tennessee, Texas, Vermont, Washington and Wisconsin. Of these 17, almost two-thirds are also UBE jurisdictions,<sup>22</sup> meaning the experienced lawyer and the new admittee have equal opportunity to be admitted into the jurisdiction. There are six states that the seasoned attorney can join by comity that are likely unavailable to a newly-licensed UBE taker: Illinois, Indiana, Michigan, Ohio, Texas and Wisconsin. For those keeping score, that is 19 states available to the newly-licensed attorney; six available to the seasoned attorney but not the new graduate; and 11 available equally to both groups. Thus, due to South Carolina's persistent no reciprocity stance, South Carolina lawyers who are brand new to the profession are able to obtain licensure in almost twice as many states as seasoned members of the bar. Moreover, adoption of the UBE effectively means that new admittees from other UBE jurisdictions

are welcome—but the experienced attorneys from out-of-state need not apply.

#### The UBE and the unauthorized practice of law

Adoption of the UBE is arguably philosophically inconsistent with Model Rule 5.5, and the two interacting may have additional unintended consequences. Model Rule 5.5 was drafted in response to a 1998 California Supreme Court decision<sup>23</sup> and first promulgated to the states by the ABA in 2002. South Carolina adopted the rule in 2005; out-of-state attorneys may independently represent "existing" clients in "pending" matters only on a "temporary" basis in this state.<sup>24</sup>

Clearly, much has changed in communications, connectivity and the flow of knowledge and research since the early 2000s, though. While some states doggedly retain the limitations that arose "in an era when most legal matters were in fact 'local,' ... and when transportation and communications technology were limited,"<sup>25</sup> other

states have addressed the evolution of attorneys' work environments head-on. North Carolina, Arizona and New Hampshire, for example, each tweaked Rule 5.5 to say that an out-of-state lawyer can establish an office to provide out-of-state legal services to out-of-state clients pursuant to her out-of-state license without committing the unauthorized practice of law. The change appears in Rule 5.5(d)<sup>26</sup> and is essentially a "stay in your lane" provision for new residents.

Far from embracing the future of law practice, South Carolina's traditional Rule 5.5 codifies an anachronistic old-time practice model, where all lawyers' files are in redwells and corner cabinets, and all lawyers' offices are brick-and-mortar storefronts downtown. The result is that a licensed attorney who relocates to South Carolina from another state and wishes to continue representing her out-of-state clients in that other state's courts may not do so on anything other than a temporary basis. By contrast, that same licensed

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attorney could relocate to North Carolina from another state and continue her out-of-state practice unimpeded.

### Examples

The disparity between the two groups of South Carolina attorneys, and the inconsistent result when Rule 5.5 is overlaid, is perhaps best understood with examples. Julia is a 2006 graduate of the University of South Carolina School of Law who has been licensed in South Carolina for 12 years. Julia developed an expertise in a particular industry located primarily in the southeastern United States, and her largest client in that particular industry, a South Carolina corporation, recently referred several additional clients to Julia. The referred companies are in Alabama, but they are participants in an industry that relies on remote communications and cloud technology on a regular basis. Though South Carolina and Alabama are both UBE states, they do not grant reciprocity to one another. If Julia wants to take on

the Alabama clients, who have requested her services and in whose industry she has expertise, without violating Rule 5.5, she needs an Alabama license. Julia has no choice but to take the UBE.<sup>27</sup>

Jacqueline is a recent graduate of the University of Missouri who passed the South Carolina bar exam in 2017. Jacqueline works for a South Carolina firm whose market share has been steadily growing within Alabama. Since South Carolina and Alabama are both UBE jurisdictions<sup>28</sup> and Jacqueline possesses a current portable score, Jacqueline—unlike Julia—will not need to take another bar exam to accept the Alabama representations. Jacqueline can simply transfer her score to Alabama, pay her fees and apply for admission.

Joanne is a 2002 graduate of Duke University School of Law, a member of the Oregon bar since 2003 and owner of a small private practice, which she operates from her home office. Joanne's spouse has been offered a leadership role in one of South Carolina's largest

private employers, and the family is considering moving to South Carolina. Joanne's clients are eager to retain her knowledge and have asked to retain her counsel despite the physical separation. Although Oregon and South Carolina are both UBE states, they do not share reciprocity. Moreover, South Carolina's Rule 5.5 will allow Joanne to provide legal services to her existing Oregon clients on matters of Oregon (and federal) law only as a "temporary" arrangement under Rule 5.5(c)(4). If Joanne's family relocates to South Carolina, Joanne will be committing the crime<sup>29</sup> of the unauthorized practice of law in South Carolina when she advises her existing Oregon clients on new questions of Oregon and federal law. Interestingly, the prohibition stands even though Joanne is not taking clients from South Carolina attorneys. Should Joanne and her family choose to live in Charlotte instead, however, the North Carolina bar specifically allows her to continue to represent her Oregon clients under Oregon law from her

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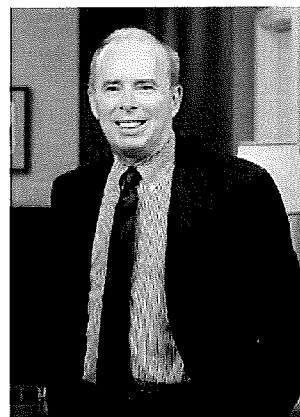
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North Carolina home office.<sup>30</sup>

Prior to South Carolina's adoption of the UBE, Attorney Joanne might have simply decided to move to Charlotte and keep her practice. South Carolina's adoption of the UBE however, is a ray of progressive light in the regulation of legal practice. Joanne may decide to move to Fort Mill after all, sit for the UBE, and obtain a passing, portable score. Now, Joanne can continue to represent her Oregon clients, she can solicit and represent additional clients in South Carolina, and she can be admitted by score transfer in 30 other states. Attorney Joanne has the longevity to seek comity for years of experience (like a non-UBE South Carolina lawyer), and she has the portable UBE score to gain admission in more than half of the country's jurisdictions (like a new graduate). What was originally a protectionist stance by the state catapulted Attorney Joanne into a position of relative strength—she can now go more places than most South Carolina lawyers can go. In short, she

is really ready to compete.

### Why it is time to reconsider Rule 5.5 and reciprocity

The practice of law will continue to progress towards multi-jurisdictional practice, and an attorney's ability to be mobile will be integral to participating in that future.<sup>31</sup> South Carolina—especially post-UBE adoption—should reevaluate its rules to ensure all attorneys can participate in the multi-jurisdictional future.

Many of the rules governing practice are premised on a bygone era of lawyering.<sup>32</sup> Today, it is unlikely that an attorney solely practices in his city, county or state, as the internet and telecommunication advancements such as Skype, GoToMeeting and DocuSign are widely available.<sup>33</sup> At the same time that lawyer education has become mostly congruent across the nation,<sup>34</sup> leading to uniformity of admissions testing, practice specialization has made it likely that an "experienced real estate lawyer from New York for example,

is more likely to be able competently to handle a complex real estate financing project in Chicago than a family law practitioner who happens to be licensed in Illinois."<sup>35</sup> Clients leverage technology to find the lawyer whose skill set best matches their need, and physical location of the lawyer is less likely than at any time in history to be the critical consideration. Clients and attorneys alike value non-traditional work environments,<sup>36</sup> but South Carolina's rules, as currently constructed, mean that a lawyer who wants to telecommute across state lines a few days per week risks violating Rule 5.5 on a regular basis.<sup>37</sup> And finally, the traditional stance of no reciprocity, coupled with the adoption of the UBE, disadvantages South Carolina's seasoned attorneys compared to their newly-admitted peers.

South Carolina's UBE adoption was a good step towards positioning a subset of South Carolina attorneys to practice multi-jurisdictionally. South Carolina should consider amending its approach to

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reciprocity and Rule 5.5 to ensure that it has not created a fork in the road where one path facilitates multi-jurisdictional practice for UBE-licensed attorneys and the other forecloses it for experienced practitioners.

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### Endnotes

- <sup>1</sup> See National Conference of Bar Examiners, *UBE Score Portability*, <http://www.ncbex.org/exams/ube/score-portability/> (last visited May 31, 2018).
- <sup>2</sup> See S.C. Supreme Court Order 2016-1-21-01 (“the Court will replace the current format of the South Carolina Bar Examination with the Uniform Bar Examination (UBE)”); S.C. Supreme Court Order 2016-06-24-02 (amending Rule 402 to incorporate UBE administration details). The National Conference of Bar Examiners lists thirty-one states and U.S. Territories that have adopted the UBE as of this writing. See National Conference of Bar Examiners, *Jurisdictions that Have Adopted the UBE*, <http://www.ncbex.org/exams/ube/> (last

visited May 31, 2018).

- <sup>3</sup> National Conference of Bar Examiners, *Understanding the Uniform Bar Examination* at 2, available at <http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F209>.
- <sup>4</sup> *Id.* at 3.
- <sup>5</sup> *Id.* at 4. Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Real Property, and Torts are tested. *Id.*
- <sup>6</sup> *Id.* at 17.
- <sup>7</sup> *Id.* at 18. States independently decide how recent a score must be for admission to their individual bars. For example, South Carolina, North Carolina, New York, and Wyoming all accept a UBE score for three years after the examination. *Id.* Alabama accepts scores only for twenty-five months after the test was taken, while Washington accepts scores for forty months after the exam. *Id.*
- <sup>8</sup> See National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements 2018* at 36, available at <http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html>. States independently set the application fee charged to applicants seeking admission on a transferred UBE score. *Id.* In South Carolina, incoming applicants who have taken the UBE in another state are charged a \$1,000 non-refundable score transfer fee. *Id.* The non-refundable score transfer fee increases to \$1,750 for incoming applicants who have practiced law in another state for more than one year. *Id.* Montana charges a licensed attorney seeking admis-

sion by transfer of UBE score \$410, while North Carolina charges that same attorney \$1,500. *Id.*


- <sup>9</sup> Rule 402(d)(2), SCACR.
- <sup>10</sup> National Conference of Bar Examiners, *Understanding the Uniform Bar Examination* at 11, available at <http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F209>; see also Diane F. Bosse, *Assessing Minimum Competence in a Changing Profession: Why the UBE is Right for New York*, 87 N.Y. St. B.A. J. 39, 44 (2015).
- <sup>11</sup> See generally Gregory W. Bowman, *The Future is Here and It's the Uniform Bar Exam*, 2017 W. Va. Law. 10 (Autumn 2017) (discussing how the UBE thwarts the perception that law graduates may be stuck in a particular jurisdiction).
- <sup>12</sup> Costa Pleiocones, *From the Chief Justice*, 2016 S.C. Lawyer 5, 8 (July 2016).
- <sup>13</sup> James W. Jones, et al., *Reforming Lawyer Mobility – Protecting Turf or Serving Clients?*, 30 Geo. J. Legal Ethics 125, 129-30 (2017).
- <sup>14</sup> For purposes of this article, I consider reciprocity to be admission that would allow practice of law in an equivalent manner to all admittees. So, for example, reciprocity that permits an out-of-state lawyer to be hired as an in-house employed lawyer, but that does not allow him to practice law otherwise, is not considered reciprocity.
- <sup>15</sup> Throughout the 1990's, for example, South Carolina required counsel admitted to the bar by examination to observe eleven full trials in South Carolina courts prior to independently appearing on behalf of a client. Law students were eligible to begin

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these mandatory observations in South Carolina courtrooms upon completion of half of their law school credits. See Rule 403(a), SCACR (1999); see also *In re Curry*, 373 S.C. 620, 647 S.E.2d 179 (2007).

<sup>16</sup> The Office of Bar Admissions website explains straightforwardly, "South Carolina does not have any form of reciprocal admission with any other jurisdiction." Supreme Court of South Carolina Office of Bar Admissions, *Admission to Practice Law in South Carolina*, <https://barapplication.sccourts.org/admissionToPractice.cfm> (last visited May 31, 2018).

<sup>17</sup> The other "none" states within this framework are California, Delaware, Florida, Hawaii, Louisiana, Maryland, Nevada, Rhode Island, Guam, N. Mariana Islands, Palau, and Puerto Rico. See National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements 2018* at 40, available at <http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html>. Maryland announced on November 21, 2017, that it will begin administering the UBE in 2019, though it has not announced a minimum score or maximum score age yet. Five states in the no reciprocity category (California, Maryland, Rhode Island, Guam, and N. Mariana Islands) offer "attorney exams" to out-of-state attorneys which may result in licensure. *Id.* at 43.

<sup>18</sup> If Maryland implements the UBE without changing reciprocity rules, it will have a similarly incongruous position to South Carolina's.

<sup>19</sup> Alabama, Alaska, Arizona, Colorado, Connecticut, Idaho, Kansas, Kentucky, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oregon, Utah, West Virginia, Wyoming, and the Virgin Islands. See National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements 2018* at 21-22, available at <http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html>.

<sup>20</sup> South Carolina lawyers' access to admission in the other seven states (Arkansas, Georgia, Mississippi, Oklahoma, Pennsylvania, South Dakota, and Virginia) remains unchanged by South Carolina's adoption of the UBE, as they are reciprocal reciprocity states that have not, as yet, adopted the UBE.

<sup>21</sup> For example, Ohio requires a showing of full time practice "for at least five years out of the last ten years prior to the applicant's submission of an application. . . ." Oh. Sup. Ct. Bar Gov. Rule 1, Section 9 (2018). Similarly, Texas requires a comity applicant to prove that his principal business for five of the last seven years has been the practice of law. See Rules Governing Admission to the Bar of Texas, Rule 13, available at <https://ble.texas.gov/rule13>.

<sup>22</sup> See National Conference of Bar Examiners, *Comprehensive Guide to Bar Admission Requirements 2018* at 21-22, available at <http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html> (listing D.C., Iowa, Maine, Massachusetts, Minnesota, Montana, Nebraska, North Dakota, Vermont, and Washington). Addi-

tionally, Tennessee has announced it will begin administering the UBE in 2019. See National Conference of Bar Examiners, *Jurisdiction Information*, [www.ncbex.org/jurisdiction-information/jurisdiction/tn](http://www.ncbex.org/jurisdiction-information/jurisdiction/tn) (last visited June 4, 2018).

<sup>23</sup> See Jones et al., *supra*, at 130 (discussing *Birbower, Montalbano, Condon & Frank P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998)).

<sup>24</sup> See Rule 5.5, RPC, Rule 407, SCACR.

<sup>25</sup> See Jones et al., *supra*, at 141.

<sup>26</sup> 27 N.C.A.C. 02 Rule 5.5(d); Ariz. Rev. Stat. Sup. Ct. Rules, Rule 42, ER 5.5; N.H. R.P.C. 5.5(d).

<sup>27</sup> Julia's South Carolina license will allow her to be admitted on motion in D.C., as D.C. has open reciprocity with all jurisdictions, but Julia would not be able to use her D.C. status to submit a second admission on motion to Alabama. Alabama's admission rules, like those of most states, include requirements specifically designed to prevent this tactic of "leapfrogging." An evaluation of leapfrogging admission strategies is beyond the scope of this article.

<sup>28</sup> See National Conference of Bar Examiners, *Jurisdictions That Have Adopted the UBE*, <http://www.ncbex.org/exams/ube/> (last visited June 1, 2018).

<sup>29</sup> See S.C. Code Ann. § 40-5-310 (2011) (providing "[n]o person may either practice law or solicit the legal cause of another person or entity in this State unless he is enrolled as a member of the South Carolina Bar pursuant to applicable court rules, or otherwise authorized to perform prescribed

legal activities by action of the Supreme Court of South Carolina. The type of conduct that is the subject of any charge filed pursuant to this section must have been defined as the unauthorized practice of law by the Supreme Court of South Carolina prior to any charge being filed. A person who violates this section is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years, or both").

<sup>30</sup> Oregon's rules of professional conduct would also be in play here, but the point is that Joanne's new home state, North Carolina, will not prevent her from practicing Oregon law.

<sup>31</sup> See American Bar Association, *Report on Resolution 109* (Feb. 8, 2016) [https://www.americanbar.org/news/reporter\\_resources/midyear-meeting-2016/house-of-delegates-resolutions/109.html](https://www.americanbar.org/news/reporter_resources/midyear-meeting-2016/house-of-delegates-resolutions/109.html).

<sup>32</sup> See Jack A. Guttenberg, *Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straightjacket: Something Has to Give*, 2012 Mich. St. L. Rev. 415, 417 (2012).

<sup>33</sup> *Id.* at 484.

<sup>34</sup> *Id.* at 485.

<sup>35</sup> See Jones et al., *supra*, at 142.

<sup>36</sup> David Lat, 4 *Trends Shaping the Future of the Legal Profession*, Above the Law (Oct. 5, 2017), <https://abovethelaw.com/2017/10/4-trends-shaping-the-future-of-the-legal-profession/>.

<sup>37</sup> See Jones et al., *supra*, at 133.

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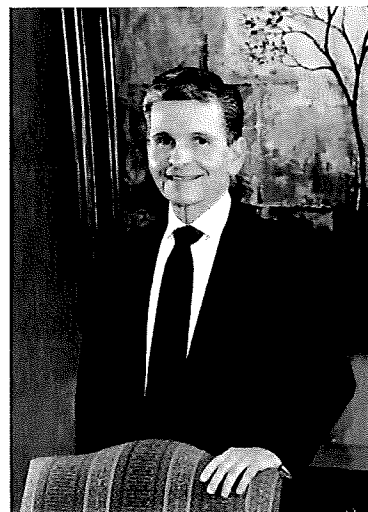
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