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**DISCUSSION
PAPERS**

Presented by the American Bar
Association Section for International
Law and Practice

Donald H. Rivkin*

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Introduction

From Alexis de Tocqueville's *Democracy in America* in 1835 to the present day, American and foreign observers of American society have remarked that both law as an institution and the law as a profession have extraordinary importance and influence in our country.¹ A celebrated expression of this American reverence for law and lawyers was uttered by Oliver Wendell Holmes a century ago: "The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race. The practice of it, in spite of popular jests, tends to make good citizens and good men."² Holmes' great contemporary Benjamin Cardozo added: "Membership in the bar is a privilege burdened with conditions. [A lawyer is] received into that ancient fellowship for something more than private gain. He [is] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of Justice."³ And a Dean of the Yale Law School has defined the nineteenth century "lawyer-statesman" as someone who was "not just an accomplished technician but an estimable type of human being—a person of practical wisdom."⁴

It is not difficult to identify why the United States is such a law-intensive society:

- In a nation characterized by a homogenous citizenry and one in which the leaders of government, commerce and industry attend the same schools, belong to the same clubs and have common social backgrounds, matters can be transacted at board meetings and in council chambers by winks and nods and handshakes. In a diverse country such as ours that stretches across a continent, that encourages social mobility and whose citizens come from every culture in the world, one is well advised to formulate universally applicable and broadly accepted rules of conduct.
- Neither the legislature nor the executive is supreme in American constitutional doctrine, with the result that disputes about which branch of government has ultimate power over which governmental activity inevitably arise. The Constitution

1. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Richard D. Hefner, ed. New American Library Edition 1956) (1835).

2. OLIVER WENDELL HOLMES, *THE PATH OF LAW* (1897), *reprinted in* 110 *HARV. L. REV.* 991, 992 (1997).

3. *People ex rel. Karlin v. Culkin*, 162 N.E. 487, 489 (1928).

4. ANTHONY J. KRONMAN, *THE LOST LAWYER*, 21 (1994).

meticulously—but ambiguously—parcels out power amongst three independent branches of government, and the law, speaking through courts, mediates disputes about where the power of one branch ends and the competence of another begins.

- Our Bill of Rights is not just a declaration of principles but is rather an integral part of the Constitution which must be adapted over the centuries to the necessities of the time, and this adaptation is accomplished by litigation conducted by lawyers in courts.
- The division of power between the Federal and State governments is a source of continuing friction which courts ultimately resolve.⁵
- Americans regard access to the courts as an attribute of their democracy and do not consider it antisocial to seek judicial resolution of controversies between them. In the American system, issues of great consequence in the fields of civil rights, antitrust, product liability and corporate finance and governance are decided in litigation between private parties.
- American lawyers often describe themselves as “attorneys and counsellors” and do not regard themselves as being just advocates or draftsmen or conveyancers; they are all of those things but they are also business advisors, public servants (about half of the 535 members of Congress are lawyers) and community leaders; they typically act as participants in the formulation of a transaction and not just as scribes when the terms are set; and they serve on the boards of directors of most public and many private companies and also act as trustees of universities, churches and foundations.
- Finally, “Americans spend much time suing each other partly because their society, more than others, emphasizes individual

5. The great Chief Justice John Marshall wrote to Henry Clay on December 22, 1823 that the Constitution for all of these and like reasons is a breeding ground of litigation: “It is I think difficult to read that instrument attentively without feeling the conviction that it intends to provide a tribunal for every case of collision between itself and a law, so far as such a case can assume a form for judicial inquiry; and a law incapable of being placed in such form can rarely have very extensive or pernicious effects.” An eminent British Judge wrote a century and a half later, “the Supreme Court of the United States became and has remained a dignified cauldron in which the essentially political questions of race, civil liberties, economic regulation, abortion, contraception, freedom of speech, pornography, capital punishment and the powers of the President have been debated by lawyers and decided by lawyers.” LORD MCCLUSKEY, *LAW, JUSTICE AND DEMOCRACY* 35 (1987).

rights and allows its citizens to test them in courts; people in many countries would die for the chance to be so litigious.”⁶

We have about one lawyer for every 320 United States citizens, and they play a diversity of roles in our society:

- 72.9% are in private practice
- 3.9% are in the federal judiciary or government
- 7.0% are in the state judiciary or government
- 9.5% are employed by private organizations
- 1.1% are public defenders or in legal aid
- 1.0% are in legal education
- 4.6% are inactive or retired

There are also more law schools in the United States than in any country; 180 schools offering the Juris (J.D.) degree are accredited by the American Bar Association.

The American bar welcomes this Forum on Transnational Practice for the Legal Profession, and we look forward to the discussions over a two-day period with our colleagues from around the world. There will be temptations at the Forum to emphasize the diversity of the legal profession in various societies, but we would do well to remind ourselves as well of the remarkable degree to which both the ideals and practices of the profession converge. It is of course true that legal systems are linked to the particular requirements of particular societies, but in fact the systems are on examination much more similar than conventional wisdom allows. Nation-states differ by ratios of 100 to 1 in resources per capita; they differ in local cultural traditions; they are organized in accordance with civil law, common law or other systems. But in fact legal systems are remarkably similar and they tend to change in parallel. This is most apparent in formal legal rules about such subjects as human rights, but the convergence is equally apparent in corporate, commercial and related fields and even, it has been pointed out, in such fields as family law which are generally regarded as embodying core cultural differences.⁷

6. *ECONOMIST*, Aug. 10, 1991, 13.

7. See Elizabeth Heger Boyle and John W. Meyer, *MODERN LAW AS A SECULARIZED AND GLOBAL MODEL: IMPLICATIONS FOR THE SOCIOLOGY OF LAW*, paper delivered at a conference on “New Challenges for the Rule of Law: Lawyers, Internationalization and the Social Construction of Legal Rules” sponsored by the American Bar Foundation and others, Santa Barbara, California, Nov. 7-9, 1997.

We hope, therefore, that the participants in this Forum will welcome opportunities to dwell upon our common interests and not upon our undoubted differences.

A. Uniqueness and Responsibilities of the Legal Profession

The stated mission of the American Bar Association (“ABA”), which was founded in 1878, is “to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law.” The ABA has formulated eleven specific goals in furtherance of its conviction that the legal profession is unique and has special responsibilities:

- I. To promote improvement in the American system of justice
- II. To promote meaningful access to legal representation and the American system of justice for all persons regardless of their economic or social condition
- III. To provide ongoing leadership in improving the law to serve the changing needs of society
- IV. To increase public understanding and respect for the law, the legal process and the role of the legal profession
- V. To achieve the highest standards of professionalism, competence, and ethical conduct
- VI. To serve as the national representative of the legal profession
- VII. To provide benefits, programs and services which promote professional growth and enhance the quality of life of the members
- VIII. To advance the role of law in the world
- IX. To promote full and equal participation in the legal profession by minorities and women
- X. To preserve and enhance the ideals of the legal profession as a common calling and its dedication to public service
- XI. To preserve the independence of the legal profession and the judiciary as fundamental to a free society

The ABA is guided by these goals in its approach to all of the issues on the agenda of this Forum.

1. Ethical Issues Presented by Transnational Legal Practice

The ethical and professional conduct of lawyers in the United States is governed by the laws and rules of each of its constituent jurisdictions. Typically, such rules are adopted by the Supreme

Court of the jurisdiction which is invested with the authority to admit lawyers to practice and to sanction or disbar lawyers who misbehave by violating the rules. In some jurisdictions, these rules are adopted by the intermediate appellate court(s) as in New York State; in others, they are adopted by the state legislature as in California. In every jurisdiction they are the standards of conduct, the violation of which subjects the offending lawyer to discipline up to and including the revocation of his license to practice law. They are to be distinguished from the civil obligations which lawyers owe to their clients and third parties for the violation of which they may have civil liability for malpractice.

Historically, it has been the organized bar which has taken the lead in developing the ethical rules by which lawyers have been regulated. First the bar associations and then the courts in each jurisdiction dealt with the punishment of offending lawyers. In 1908 the American Bar Association adopted the Canons of Professional Ethics which were amended from time to time thereafter and which most American jurisdictions adopted in whole or in substantial part. In 1969 the ABA House of Delegates adopted the Model Code of Professional Responsibility which was then adopted by virtually every American jurisdiction. Only fourteen years later, after six years of study, drafting and considerable debate, the House of Delegates adopted the Model Rules of Professional Conduct. While the overwhelming majority of jurisdictions have adopted the Model Rules, a few jurisdictions, notably New York, Oregon and Virginia, have chosen to retain the Model Code format, North Carolina has adopted a format drawing on both the Model Code and Model Rules and California has adopted a Code following neither.

As a condition of granting accreditation to American law schools, the ABA has required instruction in professional responsibility for law students since 1972, and virtually all law schools in the United States include such courses in their curricula. Most law students are also obliged to pass the Multistate Professional Responsibility Examination in order to be licensed to practice law. "Thus, the three institutional overseers of the U.S. legal profession, the academy, the organized bar, and the judiciary, are in agreement: familiarity with lawyer codes of conduct and a general understanding of professional responsibility is a *sine qua non* to admission to the bar."⁸

8. Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1090

Transnational practice presents issues which are in some respects unique, and in this paper we can do no more than enumerate some of them. We note as a general comment that ethical codes and practices throughout the world cover largely the same ground and contain largely the same prescriptions for lawyer conduct; they should not serve as a reason for excluding foreign lawyers, but lawyers engaged in transnational practice must be scrupulous in their observance of their own and the host country's ethical norms.

Lawyers' duties with respect to the avoidance of conflicts of interest vary in some measure from jurisdiction to jurisdiction. The rules of professional conduct in the United States in this regard are among the strictest in the world; in the American view, conflicts of interest are not just a matter of personal ethics but also of law and hence conflicts rules can be and are enforced by the courts. Indeed, "of all the ethical norms in the United States governing lawyer conduct, those relating to conflicts of interest have triggered the most judicial oversight."⁹ In American practice the lawyer's duty is to inform the client fully as to the actual or potential conflict, and it is then up to the client to waive or consent to the conflict. The CCBE Code of Conduct for Lawyers in the European Community makes no reference to the possibility of waiver.¹⁰ Both the Model Rules of Professional Conduct and the CCBE Code cautions lawyers to avoid conflicts between their own and their clients' interests and also proscribes the representation of clients with conflicting interests. Avoidance of the latter variety of conflicts is no doubt complicated when a clients' business is conducted on an international scale and the lawyer's practice similarly extends to many jurisdictions.

The concept of "incompatible professions," which places limitations on attorneys' activities in many jurisdictions, is foreign to American jurisprudence. As noted above, American lawyers often serve on boards of directors of business corporations—which is forbidden in some countries—and while some have cautioned that such service could compromise professional independence and

(1997). We are indebted to Professor Daly, James H. Quinn Professor of Law and Director of the Stein Institute of Law and Ethics at Fordham University School of Law, for her guidance in the preparation of this section on ethical issues.

9. Mary C. Daly, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 FORDHAM INT'L L.J. 1239, 1290 (1998).

10. Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code*, 7 GEO. J. LEGAL ETHICS 1-87, 276-345 (1993).

even jeopardize the attorney-client privilege, the practice is widely sanctioned. The CCBE code attempts to reconcile the American and European systems by providing that the “incompatibility” relates to the lawyer and not to his firm and by requiring lawyers to respect the rules relating to incompatible occupations of the jurisdiction where litigation is taking place.

The scope of the attorney-client privilege is a further area in which the law and practice of various jurisdictions diverge. In the United States, corporate or “inside” counsel are treated as lawyers who enjoy all the privileges and are subject to all of the disciplines of the profession. The attorney-client privilege, accordingly, attaches to advice given by corporate counsel to corporate officers. In other parts of the world, there are both cultural and structural biases against in-house lawyers, and the privilege is not ordinarily respected with respect to their communications. In *Australian Mining & Smelting Europe Ltd. v. Commission*,¹¹ the Court of Justice of the European Community upheld a fine against a company for refusing to disclose documents which included communications to and by an in-house lawyer because the attorney-client privilege is limited to communications emanating from “an independent lawyer. . . based on a conception of a lawyer’s role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interest of that cause, such legal assistance as the client needs”; salaried lawyers, the Court held, did not have the requisite independence and hence their communications with clients were not protected by the attorney-client privilege.

Contingency fees do not violate American canons of ethics and a number of countries permit a form of fee linked to success in a particular engagement, but others believe that such fees have the capacity to compromise the independence of a lawyer’s judgment. The CCBE Code provides that the general prohibition on contingency fees does not operate when there is an agreement with the client that the fee to be charged is in proportion to the value of the matter handled and is in accordance with an approved fee scale or is under the supervision of the authority having jurisdiction over the lawyer.

Other issues present themselves in the transnational setting: lawyer advertising; the handling of clients’ money and professional indemnity insurance; responsibility for the fees of a lawyer who has been replaced; the particular problems presented by “networks”;

11. Case 155/79, [1982] E.C.R. 1575, [1982] 2 C.M.L.R. 264

the reach of *secret professionnel*; referral fees; disciplinary procedures; lawyers' responsibilities with respect to foreign corrupt practices; and the congeries of considerations which affect lawyers' conduct in transborder litigation.¹² We are not able to discuss and much less to make recommendations respecting all such issues. We do express the hope that at the Forum and in the discussions which will ensue the international bar will consider the possibility of creating a transborder code of ethical conduct consisting of an agreed set of principles to which individual jurisdictions would be invited to subscribe. In this respect, it would be analogous to the CCBE Code, which was voluntarily adopted throughout the European Union.¹³

2. *Consumer Protection Issues Presented By Transnational Legal Practice*

Consumers of legal services, like consumers of all products and services, benefit from choice, and the International Bar Association Statement of General Principles for the Establishment and Regulation of Foreign Lawyers correctly states that the "regulation of foreign lawyers should promote access to competent legal advice on foreign law in the host jurisdiction." Operating restrictions on foreign lawyers and other professionals are often justified, however, on the basis of consumer protection, but it must be acknowledged that "the use of the consumer interest defence to justify restrictions on foreign professionals is very often little more than a smokescreen for protection."¹⁴

The undoubted need to protect consumers in the transnational legal practice setting can be accomplished by requirements of disclosure and provisions for redress.

With respect to disclosure, the foreign lawyer who is not a member of the host bar should be required clearly to reveal that fact and also to disclose the identity of his home licensure as well as the fields of practice in which he is not authorized to engage. This is accomplished in some countries by immigration procedures, in others by the creation of a "B" list or the equivalent, and in the United States by Section 4(g) of the Model Rule for the Licensing

12. Michael J. Maloney and Allison Taylor Blizzard, *Ethical Issues in the Context of International Litigation: Where Angels Fear to Tread*, 36 S. TEX. L. REV. 933 (1995).

13. John C. Toulmin, *A Worldwide Common Code of Professional Ethics*, in RIGHTS, LIABILITY AND ETHICS IN THE INTERNATIONAL LEGAL PRACTICE, 207-218 (Mary C. Daly and Roger J. Goebel, eds. 1995).

14. *Id.*

of Legal Consultants which provides that a foreign legal consultant may not:

- (g) carry his or her practice under, or utilize in connection with such practice, any name, title or designation other than one or more of the following:
 - (i) his or her own name;
 - (ii) the name of the law firm with which he or she if affiliated;
 - (iii) his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country; and
 - (iv) the title "legal consultant," which may be used in conjunction with the words "admitted to the practice of law in [name of the foreign country of his or her admission to practice]."

The consumer should also have the same rights of redress against foreign lawyers that he possesses with respect to domestic counsel. The Model Rule provides in this regard that a licensed foreign legal consultant is subject to all of the obligations set forth in the rules of professional conduct of the host state to the same extent as is a member of the bar of that state (Section 5). To like effect is the IBA Statement of General Principles which provides that it is permissible to require of the foreign lawyer that he "agrees to submit to the Code of Ethics, or its equivalent, of the Host Authority." The European Union Establishment Directive for Lawyers is equally clear (Article 6.1):

Irrespective of the rules of professional conduct to which he is subject in his home Member State, a lawyer practicing under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practicing under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory.

Such codes of professional conduct contain disciplinary provisions, and the foreign lawyer must be in all respects subject to them and, it goes without saying, to whatever civil or criminal penalties that might be visited upon a member of the host bar. That being the case:

If a consumer can gain access to effective redress, it is irrelevant if the service provider is a citizen of the same country or not. Provided that mechanisms exist that allow a consumer to get a refund, be awarded damages or even bar an individual from further

practice, where that individual comes from is a moot point.¹⁵

Another commentator¹⁶ has made essentially the same point: “Foreign lawyers who misbehave are subject to disciplinary action in their home [and also in the host] jurisdictions, and transnational clients are fully capable of filing grievances. Efforts should be made to harmonize national schemes for malpractice insurance and compensation funds, and contributions to both should be experience-rated. In general, however, the clients of transnational lawyers are capable of looking after themselves financially. . . .” One need not necessarily agree with the author’s further prescription that “caveat emptor should apply here, if anywhere” to acknowledge that consumers of transnational legal services should not be denied choice of counsel in order to serve the, usually spurious, needs of client protection. On the contrary, the cartelization of domestic legal markets has a tendency to make local lawyers unresponsive to the demands of legal consumers. Particularly in the fields of transnational transactions, the presence of foreign lawyers creates a powerful incentive for domestic lawyers to enhance their capabilities, knowledge and service.

3. *Social Responsibility and Independence of the Legal Profession*

The very intimacy of American lawyers’ relationship to their clients carries with it a unique social responsibility. A former Chairman of the Securities and Exchange Commission has written:

... Because of [lawyers’] role as architects of the corporate structure, the blame for perceived corporate irresponsibility is not likely to be directed solely at the businessmen who run our large private economic institutions. Lawyers are likely to share in the spotlight of public scrutiny and—whether it is fair or not—to be touched by the legislative constraints which are almost certain to emerge if a consensus develops that business, by itself, will not take the steps necessary to insure that the power it wields over our national life is exercised with due regard for our public and social aspirations and expectations.¹⁷

15. Evans, *op. cit.* at 121.

16. Richard L. Abel, *The Future of the Legal Profession: Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 762 (1994).

17. Harold M. Williams, *Corporate Accountability and the Lawyers’ Role*, 34 BUS. LAW. 7 (Nov. 1978).

Until quite recently, the American bar had the exclusive province to call lawyers to account for delinquencies in discharging their societal obligations. Increasingly, however, the governmental roll in policing lawyers' conduct has expanded. Lawyers who practice in some fields of law are thought to have particular social responsibilities, and those who represent financial institutions are held to especially exacting standards. In our recent history, for example, large numbers of so-called savings and loan associations made improvident loans and became insolvent. Because the loans were insured under a Federal program, the assets securing the loans were appropriated by the Federal government which thereupon sued the persons whose conduct brought about the insolvencies. Included in that group were not only the officers of the banks but also the lawyers who advised them. Under a statute enacted in 1989,¹⁸ lawyers are treated as "institution-affiliated parties" if they "participated in the conduct of the affairs" of a banking institution and are negligent in performing their duties. The fact that the lawyer undertook the representation notwithstanding the fact he had no bank regulatory expertise is itself evidence of negligence.

Equally charged with a social responsibility are lawyers who represent firms in the securities industry. Ever since the enactment of Federal securities laws in 1933 and 1934, lawyers who practice in this field have had a duty to protect the investing public; for example, lawyers can incur liability if they are "control persons" of the issuer of the securities or fail properly to supervise a violator of the securities acts. A 1990 statute¹⁹ obliges lawyers to comply, and to cease rendering services to clients who do not comply, with the Federal securities laws. A lawyer who is found to have failed in his duties to the investing public may, among other things, be subject to a permanent cease-and-desist order.

It has been suggested that, on the analogy of the regulation of banking and securities lawyers, other "areas of practice, such as communications, trade, tax, and labor provide ample opportunity for enhanced lawyer monitoring because they are already subject to extensive Federal regulation." Members of our profession who represent clients with environmental problems are thought to have a special social responsibility and hence amenability to regulation because:

18. Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 103 Stat. 183 (1989).

19. Securities Enforcement Remedies and Penny Stock Reform Act of 1989, 104 Stat. 931 (1990).

First, compliance with environmental laws implicates the classic “moral hazard” problem that arises when decision makers do not bear the full costs of their actions. As in the banking and securities context, the public often bears most of the cost of an environmental violation. Federal agency regulation of lawyers could decrease the likelihood of environmental disasters by encouraging lawyers to counsel strict compliance with environmental laws and to cooperate with regulators.

Second, environmental law, like banking and securities law, is among the most sophisticated areas of legal practice. Compliance with technical requirements of environmental laws typically requires the advice of counsel. In preparing documents for their clients to submit to Federal regulators, lawyers play a crucial role in the interaction between clients and Federal regulators. Finally, especially because they are situated between clients and their environmental consultant auditors, lawyers are likely to possess information about their clients that is difficult and costly for Federal regulators to obtain independently. Thus, environmental law practice is particularly suited for gatekeeper and whistleblower enforcement strategies.²⁰

These and comparable statutes that enlist lawyers as law enforcers no doubt enhance compliance and deter potential violators. There can be little doubt, however, that they also have the capacity to erode lawyers’ independence and imperil a client’s right to zealous advocacy.

The social responsibility of lawyers extends to a duty to promote the rule of law. American counsel must, among other things: encourage law reform; foster confidence in the judicial system; promote minority and human rights; advance legal education; participate in bar association activities; and secure access to justice by all citizens.

The rule of law and respect for the courts are imperilled in any society in which only the well-to-do have access to legal services. This fact is recognized in the Code of Professional Responsibility:

A lawyer has an obligation to render public interest and pro bono legal service. A lawyer may fulfill this responsibility by providing professional services at no fee or at a reduced fee to individuals of limited financial means or to public service or charitable groups or organizations, or by participation in programs and organizations specifically designed to increase the availability

20. *Developments in the Law, Lawyers’ Responsibilities and Lawyers’ Responses*, 107 HARV. L. REV. 1547, 1627 (1994).

of legal services. In addition, lawyers or law firms are encouraged to supplement this responsibility through the financial and other support of organizations that provide legal services to persons of limited means.²¹

This provision and other like dictates of the Code of Professional Responsibility codify American lawyers' duty to perform legal services *pro bono publico*. Lawyers are encouraged to render services to persons who need professional help but cannot afford to pay fees. They are also urged to support charitable, religious, community and educational organizations that provide such services. There are hundreds of autonomous organizations providing legal services in the United States. Also, the Legal Services Corporation, established by Act of Congress in 1974, furnishes legal services for the poor in areas where such services had not previously been available and also provides guidance and funding.

4. *Particular Problems Presented By Multidisciplinary Practice*²²

It has been axiomatic in American practice that a lawyer is categorically prohibited from sharing fees with a non-lawyer²³ and that a lawyer is forbidden to form a partnership with a non-lawyer "if any of the activities of the partnership consist of the practice of law."²⁴ The Model Rules added a provision dealing with the recent emergence of the professional corporation and professional association as a business form for law firms. Model Rule 5.4(d) prohibits a lawyer from practicing in either form if "(1) a nonlawyer owns any interest therein [omitting exception not here relevant]; (2) a nonlawyer is a corporate director or officer thereof, or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer."

The rationale supporting this imperative is that the professional independence and judgment of the lawyer must be unimpaired and unencumbered. An uncompromising principle in our practice is undivided loyalty and devotion to the client and the

21. Lawyer's Code of Professional Responsibility, Ethical Considerations EC-25 (New York State Bar Association, Sept. 1, 1990).

22. The discussion in this section incorporates much of an opinion prepared in January 1997 by Seth Rosner, a member of the ABA Board of Governors and a former Chair of the ABA Committees on Professionalism and Lawyer Competence.

23. Model Code DR 3-102; Model Rule 5.4(a).

24. Model Code DR 3-103; Model Rule 5.4(b); the language is identical in both provisions.

client's cause. There are of course limits to this mandate; e.g., a lawyer may not participate in a client's criminal conduct, but the principle remains entirely intact.

The Rule reflects the concern of both the organized bar and the courts that non-lawyer partners, not subject to all of the disciplinary constraints which protect clients, third parties and the administration of justice, could involve their law firms and lawyer partners in actions and conduct which would offend the canons of ethics. Were a nonlawyer partner to have economic dominance, his ability to exert pressure on lawyer partners to engage in unacceptable conduct vis-a-vis clients, e.g., to ignore client conflict of interest and client confidentiality rules, would pose risks which every United States jurisdiction has been unwilling to accept.

It is true that there are many services formerly thought to be legal services rendered only by lawyers affiliated to the bar which are today routinely performed by nonlawyers: e.g., real estate title services and closings, tax services, appearances before many administrative bodies. Indeed, in August 1995 the American Bar Association published a major Report on nonlawyer practice which was the result of a three-year study. The Report detailed the development of nonlawyer practice in the United States and evinced a benign approach to nonlawyer practice in areas where the risks to client users of services are not great.

The ABA Commission on Evaluation of Professional Standards, known and hereafter referred to as the "Kutak Commission," recommended in its proposed final draft of the Model Rules, submitted to the ABA House of Delegates in 1982, the adoption of a Model Rule 5.4 which would have permitted a lawyer to work in an organization owned or managed by nonlawyers. The ABA Section of General Practice introduced an amendment which deleted this recommendation; the General Practice recommendation was approved by the House of Delegates despite the fact that the Kutak recommendation provided, among other things, that in the arrangements which Model Rule 5.4 would have sanctioned, "(a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; (b) information relating to representation of a client is protected as required by Rule 1.6 [the client confidentiality Rule]."

The Kutak Commission acknowledged that its proposal would permit Sears Roebuck, a very large chain of retail stores, to hire lawyers and offer legal services to customers at store locations. Indeed, the debate in the House of Delegates noted that the Kutak proposal would authorize the big eight (at that time) accounting

firms and anyone else in the business world to get into the “law business.”

The opponents of the proposed rule stated that it was clear to them that who controlled the purse would control the operation of the “legal clinic” at the store and therefore the manner in which employee-lawyers would represent their clients. It was equally clear that nonlawyer owners would be free from the admonitions and prohibitions of the ethical rules intended to protect clients. The Kutak proposal provided no method of ensuring that client conflicts of interest would be avoided nor a method of ensuring the preservation of client confidences and secrets. Finally, the opponents expressed serious concern with the probability that profit motives of nonlawyer owners would directly control the amount of time an individual lawyer would spend on a case, the manner in which the case would be handled and, indeed, who would be a client.

The purpose of the amended Model Rule 5.4 which was adopted was to protect the interests of clients and not those of lawyers. A major Kutak Commission argument was that American constitutional law required the rule it had proposed, but in the fourteen years since the adoption of the Rule no court in the United States has held that its limitations offend American constitutional law requirements.

Washington, D.C. is the only jurisdiction in the United States which has adopted a rule analogous to the original Kutak Commission proposal.²⁵ Washington Rule 5.4(b) provides:

- (b) A lawyer may practice in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:
 - (1) The partnership or organization has as its sole purpose providing legal services to clients,
 - (2) All persons have such managerial authority or holding a financial interest undertake to abide by these rules of professional conduct;
 - (3) The lawyers who have financial interest or managerial authority in the partnership or organization undertake to be

25. Washington, D.C. Rules of Professional Conduct, Rule 5.4(b).

- responsible for the lawyer participants to some extent as if nonlawyer participants were lawyers under Rule 5.1.
- (4) The foregoing conditions are set forth in writing.

The drafters of the Washington rule and the District of Columbia Court of Appeals which has adopted it have intended to permit nonlawyers to have financial interests and to exercise managerial authority in law firms for the purposes of (1) giving nonlawyer professional service providers financial incentives and (2) allowing law firms to hire and compensate on a performance basis professional managers who are not lawyers. It is clear that they intend to hold all lawyer participants with financial interests or managerial authority personally and professionally responsible for the behavior of the nonlawyer participants. It is equally clear that in adopting this Rule 5.4(b) they did not have in mind permitting lawyers in the District of Columbia to participate in multidisciplinary professional partnerships or other organizations such as were beginning to appear in Europe and Australia.

The critical rationales underlying these rules are the need to assure independence of professional judgment, avoid client conflicts of interest and maintain client confidences and secrets. Large American multistate and, of course, multinational law firms have already faced serious difficulties in dealing with conflicts issues in their practices. The United States has experienced during the past decade a substantial increase in litigation seeking to disqualify large law firms from continuing to represent an adverse party on the basis of an impermissible conflict of interest. The clients making these claims do so because they fear the disclosure to an adversary of confidential information they have imparted to their former or even present counsel. They are also apprehensive about the perceived loyalty of counsel where the law firm seeks to continue both representations.

Over fourteen years have passed since the adoption of Model Rule 5.4, a period which has witnessed some extraordinary changes in the legal profession in our country and in the world. In that time, only one jurisdiction has adopted a more permissive rule and even that rule would prohibit multidisciplinary professional partnerships in the forms in which they are presently being proposed. The likelihood of a change in our rules in this regard appears to be remote.

This is true notwithstanding the contentions of some American scholars and practitioners that American lawyers and law firms will be at a serious competitive disadvantage in the global legal

marketplace if the existing rules prohibiting multi-disciplinary partnerships are not repealed or relaxed.

In order to understand the quandary in which American lawyers may find themselves, consider Ropes & Arps, an imaginary New York City law firm with aspirations to compete for the business of global clients. Micro Corporation, a global enterprise, has been a long-time client of Ropes & Arps, but its management has recently been considering placing a large part of its non-U.S. legal business with the London office of Cost-Waterhouse, a (also fictional), global consulting company. Cost-Waterhouse was originally an accounting company, but it recently "acquired" a London firm of solicitors. Micro Corporation primarily seeks professional services for its international program of acquiring new business through mergers or similar arrangements. Traditionally, Micro Corporation hired separate firms of lawyers, accountants, investment bankers, and possibly other consultants to handle the work involved. But Cost-Waterhouse now offers an integrated and multi-disciplinary team of lawyers, accountants, financial advisers and allied professionals to handle, among other things, mergers and acquisitions. Micro Corporation finds the package very attractive, both because of its multidisciplinary approach through a single management team and at a single price and because of significantly lower overall cost.

. . . the only choices for American Law firms in the position of my fictional firm are either to accept what must be a substantial fall-off in the share of international legal business for which they are eligible to compete or in some way to change the restrictions under which they practice. The former choice is what now confronts American firms. Changing the rules, although clearly an available option, is both beyond the effective control of any single law firm or group of them and would involve clearing important hurdles of the bar's own creation. Recall that a purportedly bedrock principle of regulation of the American legal profession is that courts, and only courts, are empowered to regulate. It would seem then that relief, if relief is forthcoming, must come through the tortuous process of amending the relevant ethical rules, perhaps to add a Rule 5.7 along the lines of Kutak Commission's original proposal. If internationally-oriented American firms were empowered by a new rule to offer multi-disciplinary services, presumably the same rule would permit an American firm to provide similar services to purely domestic clients as well. Accordingly, one can confidently predict a reprise of the 1991-1992 battles between lawyers and law firms who might wish to gain the

advantages of such arrangements and those lawyers and law firms (as well as potential non-lawyer competitors) who would imagine themselves losers in such a more competitive contest for clients. With the twin hurdles of bar association and supreme court to transcend, it is by no means clear that lawyers favoring MDP arrangements would be able to obtain the amendments to the ethical codes they must have to compete.²⁶

These concerns are genuine, and they attract considerable interest in the United States. Nonetheless, it seems unlikely that the ethical rules which govern the American bar will be amended any time soon to accommodate multidisciplinary partnerships. The reasons for this have been eloquently stated by Philip S. Anderson, President of the ABA in 1998-99:

“The issue of client protection should be foremost among considerations when assessing the delivery of legal services by accounting firms. Law firms are . . . bound by the Model Rules of Professional Conduct. All states have some form of conflict of interest rules. Accounting firms are not bound by the same rules. Law firms are also bound by rules of confidentiality regarding a client’s business and the client’s confidences. Accounting firms are not. The Model Rules of Professional Conduct prohibit a lawyer engaged in delivering legal services from being directed by a non-lawyer. There are good reasons for the rules. They are not useless relics from the Nineteenth Century as some critics allege.”²⁷

It is to be observed that the Professional Standards of the American Association of Certified Public Accountants contain general exhortations to fulfill the responsibilities of the profession (Article I), to serve public interest (Article II), to observe standards of integrity (Article III), to maintain objectivity and independence (Article IV) and to exercise due care (Article V), but the Standards nowhere speak of confidentiality requirements or of the necessity to avoid conflicts of interest.

26. Charles W. Wolfram, Charles Frank Reavis Professor, Cornell Law School, “‘Multi-Disciplinary Partnerships’ in the Global and Domestic Law Practice of European and American Lawyers,” unpublished paper, 1997.

27. Philips Anderson, Address at the Fellows of the Virginia Law Foundation, (Jan. 22, 1998).

B. Measures that Might be Taken for the Reduction of Impediments to the Ability of Lawyers to Practice in Jurisdictions Other than that of Their Original Licensure²⁸

1. *Role of the American Bar Association*

The American Bar Association is a voluntary organization, the membership of which includes the bar associations of all the States, the District of Columbia and Puerto Rico, and also some 345,000 individual lawyers, or just under half of all members of the bars of the United States. The state bar associations are generally, although not in all cases, voluntary organizations as well. Lawyers in the United States are admitted to the practice of law on a State-by-State basis and are regulated by the highest court in each State, usually with the assistance of a State Board of Law Examiners or similarly designated public body. The profession in the United States, unlike that in most of the rest of the world, is hence not self-regulating, although the ABA and State Bar Associations play important advisory roles in the processes of admission and regulation of lawyers.

The ABA has no authority to adopt rules binding on the American legal profession. However, because it represents the majority of practicing lawyers throughout the United States, it is uniquely placed to speak for the American legal profession in international discussions on transborder legal services and to bring its considerable influence to bear with a view to the adoption by the States of agreed rules designed to facilitate the provision of such services in the United States. Accordingly, it serves as the principal interlocutor between the American legal profession and the US government in matters of international trade policy as they affect the legal profession.

2. *Institutional and Commercial Structure of the Legal Profession*

Lawyers in the United States are regulated by the State regulatory authorities mentioned above in accordance with detailed codes of professional conduct and responsibility, in the development and application of which the ABA and state bar associations play a major role. In the course of bilateral discussions

28. The discussion in this section incorporates much of a presentation by Steven C. Nelson, then Chairman of the American Bar Association Transnational Legal Practice Committee, to the Organization for Economic Co-Operation and Development in Oct. 1995.

with the CCBE and other foreign bar organizations, the ABA has identified very few significant differences between the American rules and those that exist in other countries.

Licensed lawyers in the United States have a monopoly on the practice of law, including the giving of legal advice. An applicant for a license must generally have received a LL.B. or J.D. degree from an ABA-accredited law school, which requires three years of post-graduate study following the normal four-year university undergraduate degree, and must have passed the bar examination of each State in which he or she wishes regularly to carry on the practice of law. Michel Gout, President of the CCBE, has pointed out that:

... in the United States of America the problem (for the profession treated as one entity) of the co-existence of different legal systems within one national territory seem to have been surmounted by the conjunction of two interacting elements:

- Teaching that turns toward the practical and towards the acquiring of good legal reasoning in view of the general common law principles
- A harmonization of this teaching according to common criteria of quality but without any compulsory framework²⁹

While the number of American lawyers practicing abroad on a permanent basis is somewhat larger than the number of European and Asian lawyers doing so, it is very small in relation to the total number of practicing American lawyers, probably amounting to no more than 1,000 lawyers abroad. Most of the foreign offices of American law firms are concentrated in a very few places: London, Paris, Brussels, Frankfurt, Hong Kong, Singapore and Tokyo account for some 95% of the total number of American lawyers based abroad.

An important distinguishing feature of the international practices of many American law firms is that they have brought substantial numbers of non-American lawyers into their organizations, initially as young employed lawyers, generally known as "associates," but increasingly as partners, both in their American offices and in their offices abroad. One of the principal objectives of the adoption in certain States of rules permitting the licensing of foreign lawyers to practice as foreign legal consultants ("FLC's")

29. "Quality harmonisation: the current situation and the ways forward," Conference of Presidents, Vienna, Feb. 20, 1998.

was to enable the firms to gain expertise in foreign law in order to meet the increasing demands of their clients for integrated, multinational legal advice.

3. *Barriers to Practice in Host Countries*

The single most important barrier to practice outside the lawyer's country of qualification is the fact that the very subject of the lawyer's expertise is, at least by current definition, the laws and legal system of the country of qualification. However, the severity of this unavoidable barrier is unduly exacerbated by the fact that the educational and training requirements in most countries have not been designed in such a way as to facilitate the mobility of the profession. Indeed, they are generally based on a territorial concept that presumes, and to some extent requires, that the lawyer will operate from a single fixed establishment within a relatively narrowly-defined area. Many of the practical barriers to practice in host countries are rooted in this ancient preconception.

Although American laws prohibiting the practice of law without a license do not generally distinguish between established and cross-border provision of legal services, they are not in practice applied in such a way as to affect cross-border services except in those extremely rare instances where those services are being offered and rendered on a regular basis to host State residents without benefit of a local establishment. Lawyers have always moved freely from one State to another for purposes of advising their clients, and it is highly unlikely that any attempt by a State to regulate that kind of cross-border practice would withstand constitutional challenge. The rules of State and Federal Courts in the United States require that a lawyer appearing in a matter being heard by them be admitted to practice before them. Lawyers not admitted to the bar of the State in which the Court sits, including lawyers qualified in foreign countries, may at the discretion of the Court be admitted *pro hac vice* for purposes of a given case, but they must be joined by co-counsel admitted to the bar of that State.

The conditions of eligibility for the issuance of a license to practice law in the individual States are generally non-discriminatory. More than twenty-five years ago, the Supreme Court of the United States held unconstitutional requirements contained in some State rules limiting eligibility for admission to the bar to United States nationals.³⁰ In another decision, the

30. *In re Griffiths*, 413 U.S. 717 (1973).

Supreme Court struck down residency requirements in the rules of some States that effectively prevented residents of other States from being licensed to practice law.³¹

Rules permitting the licensing of foreign lawyers as FLC's in virtually all major commercial States contain discretionary reciprocity provisions that permit the licensing authority, which is usually the highest court of the State in question, to take into consideration in deciding whether to grant an FLC license the question whether the country in which the applicant is qualified affords to members of the bar of that State a "reasonable and practical opportunity" to carry on the practice of law in that country. However, so far as we are aware no State has ever denied a license on this ground and, since no exemption was taken by the United States in this respect from the unconditional most-favored-nation requirements of the General Agreement on Trade in Services (GATS), such provisions cannot now be invoked without violating the GATS.

There are two principal barriers to established practice that are the consequence of non-discriminatory regulations and procedures. Efforts to deal with those barriers have sometimes resulted in the creation of certain ancillary barriers.

The first of the two principal barriers to the rendition of established legal services by lawyers qualified in other countries is to be found in the education and examination requirements imposed as a condition to admission to the practice of law, even by persons who have already qualified in another country. In the United States, certain commercially important States, such as New York, have made it relatively easy for lawyers qualified in other countries to become full members of the host State bar through the completion of a one-year Master of Laws (LL.M.) degree program and passage of the bar examination, and many foreign lawyers have become members of the New York bar in this way.

The vast majority of countries generally do not permit a foreign lawyer to qualify as a member of the local legal profession without completing the same educational requirements as someone with no prior education or training. In the United States, this means that most States require foreign lawyers to obtain a full three-year degree at an ABA-accredited American law school before they are permitted to sit for the bar examination. All current ABA-accredited law schools are in the United States. The length of the full-time educational requirement imposed in most of the United

31. Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985).

States and, for that matter, throughout the rest of the world renders it impractical for most practicing lawyers to interrupt their careers long enough to qualify in another country.

The second principal barrier is the prohibition found in many countries against the entry by lawyers of that country into partnership with anyone other than another lawyer of that country. This barrier results from a very strict application of the rule, common to substantially all codes of professional ethics, that a lawyer must not share fee income with another person who is not a lawyer. This barrier does not exist in the United States, where foreign lawyers, whether or not licensed as FLC's, are recognized as lawyers for these purposes. All of the States, whether or not they have FLC rules, allow members of their respective bars to carry on practice in partnership with foreign lawyers, and there are no limitations on foreign ownership of law firms. It is accordingly possible in all States for a foreign law firm to establish and operate under its own name by associating with lawyers admitted to practice in that State. However, the widespread existence of this kind of prohibition elsewhere in the world is a major obstacle to the formation of multinational partnerships, which in the final analysis and in the long term offer the best overall solution to the problems posed by the education/examination barrier.

There are at least three different ways of dealing more directly with the education/examination barrier. The first is the approach followed in the United Kingdom and Belgium, where the professional giving of legal advice as such is simply not regulated under domestic law. This has made it relatively easy for lawyers qualified in other countries to establish in London and Brussels, which they have done in substantial numbers. Concerns that members of the public dealing with an established foreign lawyer or law firm might be misled into believing that they are in fact dealing with locally-qualified lawyers have been removed through requirements, imposed by means of immigrations procedures and more recently through reciprocal agreements between professional bodies, that foreign lawyers establishing in one of those countries undertake to abide by the rules applicable to host country lawyers and not to hold themselves out as members of the host country legal profession. Professional bodies in both the United Kingdom and Belgium have also relaxed their earlier prohibitions on the establishment of multinational partnerships.

The second approach, and the one upon which the ABA's policy in this area is based, is the adoption of FLC Rules³² permitting the licensing as FLC's of foreign lawyers without examination predicated upon their being members in good standing of recognized foreign legal professions that have effective systems of professional regulation and discipline. The Model Rule on the Licensing of Legal Consultants adopted by the ABA in August 1993 (the "ABA Model Rule") makes an experience requirement optional, reflecting the ABA view that this is not an essential element where foreign lawyers are concerned. In some States and certain other countries that have adopted this kind of requirement, it has been formulated or applied in a more restrictive manner to require that the applicant have practiced in his or her home country for the requisite period. This substantially limits lawyer mobility, and the ABA Model Rule accordingly requires only that the lawyer's experience involve substantial practice of the law of his or her home country.

The limitation of the scope of the practice in which an FLC is permitted to engage is perhaps the most difficult and controversial aspect of the FLC concept. Some jurisdictions in the United States and elsewhere have adopted rules that limit the practice of the FLC to advice on the law of his or her home country. This is a faulty approach for several reasons, the most important of which is that it does not correspond to the way in which lawyers actually work. Lawyers advise, not on pure questions of law as such, but on transactions, disputes and relationships, all of which may be affected in one way or another by the interaction of two, three or even more legal systems. Frequently the question of which law or laws apply is itself one of the main issues, to which there may be conflicting answers depending on the *forum* or *fora* in which the matter arises.

We believe that the approach taken in the ABA Model Rule is the most efficacious. It permits the FLC to advise on any matter as to which he or she is consulted, subject only to the requirement that any advice concerning matters of United States State or Federal law be based on the advice of a lawyer fully licensed to give such advice in the relevant jurisdiction. This, together with requirements that the FLC not hold himself or herself out as a member of the host country legal profession, affords ample protection to the public against being misled without creating rigid rules with which lawyers cannot, as a practical matter, comply. There is no objective

32. See the discussion of the subject in Section C.2 of this paper, *infra*.

justification for a rule that restricts the ability of an FLC to advise on the law of third countries, since there is no apparent risk of the public's being misled as to the qualifications of the FLC relative to those of members of the host country legal profession in this regard. Of course, this is subject to the overarching principle, which is a fundamental tenet of all codes of professional responsibility, that a lawyer must not advise on any matter as to which he or she is not competent, as well as to the ultimate sanction of malpractice liability.

Unnecessary complications may result from a failure to regard the FLC as a lawyer for purposes of host country law protecting privileged communications between lawyer and client, as well as the lawyer's work product created in the process of advising the client, against compelled disclosure in the context of official investigations and judicial or administrative proceedings. The denial of that privilege can have a substantial deterrent effect on the retention of FLC's as legal advisers in certain circumstances. The only known example of an apparent limitation of that privilege to communications with host state lawyers (though not specifically in the context of FLC practice) is to be found in the practice of the European Commission and the jurisprudence of the European Court of Justice; *see* Case 155/79 *AM&S v. Commission*, [1992] ECR 1575. The ABA Model Rule makes it clear that the FLC is subject to the rules of professional conduct and responsibility of the host State in the same manner as a member of the host State bar and, correspondingly, is to be treated in the same manner for purposes of attorney-client and related privileges.

4. Governmental and Non-Governmental Efforts to Reduce Formal and Informal Barriers

Experience to date indicates that progress toward the elimination of barriers can only be made through effective cooperation between governments, on one hand, and the legal professions, on the other. The liberalizations effected in the European Union through the issuance and implementation of the Legal Services Directive and the Diplomas Directive were accomplished only by reason of the determined efforts of the European Commission to remove barriers tempered by the constructive intervention of the CCBE, without which much damage might have been done to the fabric of the legal profession and consequently to that of the legal system on which it relies. A converse example is to be found in the GATS, where much more

useful results might have been accomplished through a more effective cooperation between governments and the professions. The need for close cooperation of this kind is recognized in the text of the North American Free Trade Agreement, in which the Contracting Parties have provided for consultation by each government with its relevant professional bodies and for consultations among the relevant professional bodies of the three NAFTA countries with a view to the development of joint recommendations.

In substantive terms, the ABA considers that the only effective, workable and transparent solution to the education/examination barrier at the present time is the widespread adoption of FLC Rules based upon the principles set forth in the ABA Model Rules adapted to the technical structure of the system of professional regulation in effect in the host country. The adoption of FLC Rules should be coupled with the complete elimination of the partnership barrier, which, in our view, serves no purpose whatever other than that of protectionism.

C. Forms of Licensure

1. *Membership in the Host Bar*

At its meeting in Vienna on June 6, 1998, the Council of the International Bar Association considered a Statement of General Principles for the Establishment and Regulation of Foreign Lawyers. After first enjoining Host Jurisdictions that the “[r]egulation of Foreign Lawyers should promote access to competent legal advice on foreign law in the Host Jurisdiction, subject to appropriate safeguards. . .” a proposition which the ABA finds unexceptionable, the Statement went on to provide that the Host Jurisdiction could adopt either a “Full Licensing Approach,” i.e., requiring all lawyers practicing in the Host Jurisdiction, foreign and local, to become fully licensed members of the bar, or a “Limited Licensing Approach,” i.e., licensing Foreign Lawyers as foreign legal consultants (or practitioners).

With respect to the “Full Licensing Approach,” the ABA representative at the Vienna meeting cautioned that “where a jurisdiction adopts the Full Licensing Approach instead of, and not in addition to, the Limited Licensing Approach, it bears a particular burden of demonstrating that its qualification requirements are objectively justified, due consideration being given not only to the Foreign Lawyer’s knowledge and skills but also to the nature and

scope of the Foreign Lawyer's actual practice." The ABA urges observance of those principles on the part of the participants in this Forum. For example, the contents of whatever examination is administered to foreign applicants should take account of the education, knowledge, skills and experience which the applicant has acquired in the home jurisdiction and which accordingly do need not be re-learned and re-tested in the host jurisdiction. Equally, the examination should take account of the intended fields of practice of the foreign applicant; the applicant should not have to prove, for example, knowledge of the family law of the host jurisdiction if his practice is limited to corporate and commercial matters.

It is equally the responsibility of the host jurisdiction to provide meaningful training and study courses to enable the applicant to prepare for whatever examinations, written or oral, are administered by the host jurisdiction. These courses, and the examinations as well, should be scheduled at regular intervals and all the procedures respecting them should be transparent and readily accessible.

2. Foreign Legal Consultant (or Practitioner)

In 1974, the State of New York adopted a rule under which, for the first time, members of foreign legal professions could be licensed without examination to engage in the practice of law in New York with certain limited exceptions. The legislature of the State and the Court of Appeals took this course, at the urging of the organized bar, in order to ensure New York's position as an international legal center and as a center of finance and commerce.

The rule requires that the applicant have completed a certain number of years practicing the law of the jurisdiction in which she or he is admitted and meet the same criteria of good moral character and general fitness as are required of a member of the bar of New York. Most significant, Section 521.4 of the Rule provides:

Subject to the limitations set forth in section 521.3 of the Part [relating to scope of practice], a person licensed as a legal consultant under this Rule shall be considered a lawyer affiliated with the bar of this State and shall be entitled and subject to:

- (a) the rights and obligations set forth in the applicable Lawyer's Code of Professional Responsibility or arising from the other conditions and requirements that apply to a member of the bar of this State under the rules of court governing members of the bar; and

- (b) the rights and obligations of a member of the bar of the State with respect to:
- (1) affiliation in the same law firm with one or more members of the bar of this State, including by:
 - (i) employing one or more members of the bar of this State;
 - (ii) being employed by one or more members of the bar of this State or by any partnership or professional corporation which includes members of the bar of this State or which maintains an office in this State; and
 - (iii) being a partner in any partnership or shareholder in any professional corporation which includes members of the bar of this State or which maintains an office in this State; and
 - (2) attorney-client privilege, work product privilege and similar professional privileges.

There are few limitations on the scope of practice of a licensed foreign legal consultant; most of the limitations, indeed, respect fields of practice—e.g., appearances in court and preparation of instruments relating to marital or parental relations—in which a foreign lawyer would not wish to venture in any event. Additionally, the legal consultant may not render an opinion on New York or Federal law except on the basis of advice from a member of the New York bar.

The courts, citizens and bar of New York consider the nearly quarter-century experience with licensed foreign legal consultants to be an unqualified success. Hundreds of foreign lawyers have been licensed, most of them in New York City, and they are in every respect full participants in the life of the profession. The licensed consultants participate in bar association work and in every other respect are welcomed by New York lawyers as colleagues. The rule facilitates the ability of foreign-based law firms to rotate lawyers in and out of New York and in this and other ways fulfills the hopes of those who formulated the rule to preserve the status of New York as an eminent and respected international legal center.

The ABA took note of this success in 1993 when the House of Delegates passed a Model Rule for the Licensing of Legal Consultants.³³ It is official ABA policy to encourage States to

33. 28 INT'L L. 207-237 [a publication of the ABA Section on Legal Education

adopt the Model Rule, and twenty-two States, comprising most of the nation's principal commercial centers, have adopted the Rule or versions of it. The ABA believes that the foreign legal consultant regime is vastly to be preferred over systems which require foreign lawyers to be fully licenced members of the host bar and that it conforms with the realities and requirements of global business, finance, commerce and law.

Under no circumstances, as we have said above, is it permissible for host jurisdictions to prohibit foreign lawyers from being employed by, employing or entering into partnership with members of the host bar. We consider such prohibitions to serve no purpose other than impermissible preservation of the monopoly of the host bar.

3. *Other Forms of Licensure*

We do not believe that codes or standards respecting the accounting profession promulgated by the Working Party on Professional Services of the World Trade Organization should serve as a precedent or a guide to international regulation of the legal profession, whose unique role in society is discussed above. Nonetheless, some of the criteria set forth in the WPPS "Disciplines on Domestic Regulation in the Accountancy Sector" (Eight Revision, May 20, 1998) do in our view provide guidance for the appropriate licensing of foreign lawyers, whatever form the licensure might take. For example:

"Members shall ensure that such measures are not more trade-restrictive than necessary to fulfill a legitimate objective," such as "the protection of consumers . . . , the quality of the service, professional competence, and the integrity of the profession." (Article II)

With respect to transparency, Members are enjoined to make publicly available, among other things, "the names and addresses of competent authorities," "requirements and procedures to obtain, renew or retain any licenses or professional qualifications," "the rationale behind domestic regulatory measures" and "details of procedures for the review of administrative decisions." (Article III)

"Licensing requirements Y shall be pre-established, publicly available and objective" (Article IV), and licensing procedures should also have those characteristics and, in addition, "should not

in themselves constitute a restriction on the supply of the service.” (Article V)

“A Member shall ensure that its competent authorities take account of qualifications acquired in the territory of another Member, on the basis of equivalency of education, experience and/or examination requirements.” (Article VI)

“Examinations shall be scheduled at reasonably frequent intervals, in principle at least once a year, and shall be open for all eligible applications, including foreign and foreign-qualified applicants.” (Article VII)

These standards and criteria are consistent with those contained in the Ethical Considerations (EC) embodied in the ABA Code of Professional Responsibility. EC 8-3 states, for example, that “Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.” To similar effect is EC 3-9, which provides: “In 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, including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.”

4. *Use of Home or Host Title*

In 1998, the European Union adopted a Directive “to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.” (Council Directive 98/5, O.J. L. 77/36 (1998)). This Establishment Directive operates only within the Community, of course, but its provisions are so intelligent and flexible in relation to practice under home or host country title that it might well serve as a model for international practice.

The preamble to the Directive recites that the system it prescribes is desirable because “by enabling lawyers to practice under their home-country professional titles on a permanent basis in a host Member State, it meets the needs of consumers of legal services who, owing to the increasing trade flows resulting, in particular, from the internal market, seek advice when carrying out cross-border transactions in which international law, Community

law and domestic law often overlap.” The Directive accordingly provides (Article 2) that “Any lawyer shall be entitled to pursue on a permanent basis, in any other Member State under his home-country professional title the activities specified in Article 5” (which Article provides in essence that the guest lawyer’s permitted scope of practice is the same as that of a member of the host bar). As is the case with American foreign legal consultant rules, the foreign lawyer practicing under his host title “shall be subject to the same rules of professional conduct as lawyers practicing under the relevant professional title of the host Member State in respect of all the activities he pursues in its territory” (Article 6). After a migrant lawyer has “effectively and regularly” pursued the practice of law in the host jurisdiction for a period of three years, he may become a full-fledged member of the host bar. (Article 10)

A system which allows the foreign lawyer to practice his under home title but requires him to identify himself as such and also requires him to subject himself to the ethical rules of the host jurisdiction is one which serves the interests of consumers and the interests of international commerce and investment as well.

D. Conclusion

The legal profession should not endeavor to immunize itself from the contemporary revolution which has propelled the worldwide diffusion of information, capital, technology, wealth and ideas. It should instead embrace that revolution and devise structures and procedures which serve the interests of clients and of the profession itself. Efforts of national bars to place hermetic seals around their exclusive provinces will not in the long term succeed, nor should they.

The American transnational legal practice system, for all its acknowledged imperfections, has these virtues, among others: it is utterly transparent as to both substance and procedure; foreign lawyers have a right guaranteed by the American Constitution to take all state bar examinations; graduates of foreign law schools are eligible to take the bar examination under the rules of twenty-five states, and those rules typically provide for a reduced requirement of study in an ABA-accredited school; foreign lawyers who wish instead to practice as foreign legal consultants may attain that status in New York and twenty-one other states without examination, without the payment of any fees, and in perpetuity; the official policy of the ABA is to encourage all states to adopt the Model Rule for the Licensing of Legal Consultants; and last, but

emphatically not least, all foreign lawyers are free to enter into partnerships with American lawyers in every state in the Union.

We conclude this discussion where it began: there are more characteristics which unite the international legal profession than divide it. We hope that during our discussions in Paris this November we will celebrate our unity rather than dwell upon our differences.