

LEGAL PRACTICE RIGHTS OF DOMESTIC AND FOREIGN LAWYERS IN THE UNITED STATES©

ROGER J. GOEBEL*

IN the post-World War II international economy, with its enormous growth in transnational trade and investment, multinational legal practice has become a functional reality.¹ Within the last two decades, the volume of trans-border legal practice has grown enormously in fields such as trade law, international banking and finance, international arbitration and litigation, international contractual and joint venture arrangements, transborder acquisitions and mergers, international antitrust, international tax planning, and foreign investment counselling. Domestic law firms within the leading commercial nations have not only grown substantially in size, often by merger, they have also increasingly created networks of foreign branch offices, or entered into international association or joint venture relationships with firms in other countries.²

A decade ago in a longer article, "Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap",³ I surveyed this growth in transborder legal practice and outlined the legal regimes regulating it in the United States, the European Community and other leading commercial jurisdictions. That article maintained that transnational legal practice not only responded to domestic clients' needs for effective service by lawyers familiar with their methods of doing business and their specific business requirements, but, more importantly, helped to bridge the "cultural gap" of barriers to international business and trade that are created by differing cultural, social, political and economic systems.⁴ My personal viewpoint is therefore apparent. Although I recognise the legitimate

* Professor of Law, Director of the Center on European Union Law, Fordham Law School. This article is based upon a paper delivered at the World Congress of Comparative Law Bristol, 28 Jul. 1998. My thanks to my then assistant, Roger Gold.

1. The US Department of Commerce estimated that US law firms collected \$1.4 billion from foreign clients in 1992. G. Taylor, "US firms are Export Machines" (30 May 1994) Nat'l L.J. 6. A current and comprehensive survey of rules in the United States, the European Community and selected major national jurisdictions governing the trans-boundary international practice of law is Sydney Cone, III, *International Trade in Legal Services* (1997). For a comparative analysis of international practice rules and ethics in Europe and the United States, see Mary Daly & Roger Goebel, *Rights, Liability and Ethics in International Legal Practice* (1995).

2. For a detailed survey of international law firms with branch offices in the United States, Europe and other commercial centres, see Richard Abel, "The Future of the Legal Profession: Transnational Law Practice", (1994) 44 Case W.Res.L.Rev. 737.

3. (1989) 63 Tulane L.Rev. 443.

4. *Ibid.*, at pp.447-454.

concern for consumer protection that may require a nation to regulate carefully transborder legal practice, such regulation should be both narrowly limited and objectively justified and should not represent disguised economic protection of domestic lawyers. In the main, transborder legal practice substantially benefits interstate and international trade and investment and significantly advances legitimate client interests.

A rapid and important evolution in legal practice rules promoting transborder law practice has occurred within the last decade. The pre-eminent example is in the European Union, whose recent legislation and case law have dramatically augmented the recognition of the right of transborder practice, both for individual lawyers and for law firms.⁵ Within the United States and elsewhere there has been a heightened appreciation of the merits of the foreign legal consultant regime as one well suited to the needs of transborder transactional practice. The North American Free Trade Agreement (NAFTA) promotes the use of legal consultant rules within Canada, Mexico and the United States.⁶ The International Bar Association has been engaged for several years in efforts to develop and promote generally accepted standards for such legal consultant rules on a worldwide basis.⁷

This short article's purpose is to survey the current rules regulating legal practice rights for domestic and foreign lawyers within the United States. Part I sets out the basic regime governing law practice within the American federal system, which largely permits the states to set the regulatory standards. This section then describes the state rules regulating inter-state practice within the United States context for the rules governing foreign lawyers. Part II reviews the extent to which persons educated in foreign legal systems (usually, but not always, foreign lawyers) may qualify as lawyers in US States. Part III then describes the status of foreign legal consultants in New York and a growing number of US States.

5. For a comprehensive analysis of European Community rules up to 1992, see Roger Goebel, "Lawyers in the European Community: Progress Toward Community-Wide Rights of Practice" (1992) 15 *Fordham Int'l L.J.* 556; Gregory Siskind, "Freedom of Movement of Lawyers in the New Europe" (1992) 26 *Int'l Law* 899. The leading recent European Court of Justice judgment is *Case C-55/94 Gebhard v. Milan Bar Council*, [1995] E.C.R. I-4165, noted by Professor Julian Lonbay (1996) 33 *C.M.L.R.* 1073.

6. See Julie Barker, "The North American Free Trade Agreement and the Complete Integration of the Legal Profession" (1996) *Houston J. Int'l L.* 95.

7. The IBA's final text is the "Statement of General Principles for the Establishment and Regulation of Foreign Lawyers", approved by the IBA Council in Vienna in June 1998. See the text at n.155 *infra*.

I. THE REGULATION OF LEGAL PRACTICE IN THE UNITED STATES

A. State Regulation within the Federal Constitutional System

In the United States, rules governing the practice of law are almost entirely state measures, sometimes legislative, more often in the form of court rules.⁸ Geoffrey Hazard, a leading expert on professional ethics, has accurately described this as “a simple result of our nation’s history. . . . Regulation of the legal profession [remains] with the States as a matter of tradition and by default [of federal regulation].”⁹ Although the Congress presumably has the power to regulate the interstate aspects of practice of law on a nation-wide basis under the Interstate Commerce Clause of our Constitution, it has never attempted to do so. Some commentators have recently urged the creation of a national bar under some system of federal minimum rules,¹⁰ but this is presently quite unlikely. The American Bar Association does not even have the subject under active review, and state bar associations would almost certainly vigorously oppose any form of a national bar.

State regulation of legal practice is however subject to constitutionally imposed limits. In a leading nineteenth century case, *Dent v. West Virginia*, the Supreme Court upheld a state law requiring a licence to practise medicine against a challenge under the Due Process Clause of the Fourteenth Amendment, because the professional licence system was necessary “for the protection of society”,¹¹ but the court noted that the licence should be based upon reasonable educational qualifications and an examination, applied in a non-arbitrary manner. These principles undoubtedly also govern the state regulation of legal practice. In *Shware v. Board of Bar Examiners*,¹² the Supreme Court held that a state’s bar application standards must not violate the Due Process and Equal Protection Clauses of the Constitution.

8. Erica Moeser, “The Future of Bar Admissions and the State Judiciary”, (1997) 72 Notre Dame L.Rev. 1169. Ms Moeser is the current President of the National Conference of Bar Examiners.

9. Geoffrey Hazard, Jr., “State Supreme Court Regulatory Authority over the Legal Profession” (1997) 72 Notre Dame L.Rev. 1177.

10. See Marvin Comisky & Philip Patterson, “The Case for a Federally Created National Bar by Rule or by Legislation” (1982) 55 Temp.L.Q. 945; Eric Williams, “A National Bar—*Carpe Diem*” (1996) 5 Kansas J.L. & Pub. Pol’y 201; Fred Zacharias, “Federalizing Legal Ethics” (1994) 73 Texas L.Rev. 335. For a critical review and rejection of a national bar approach, see Charles Wolfram, “Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transnational Lawyers” (1995) 36 S. Tex.L.Rev. 666, at pp.701–707.

11. *Ibid.*, at 122.

12. 353 U.S. 232 (1957) (New Mexico Bar cannot exclude an application with current moral fitness credentials merely because he had been a Communist party member prior to World War II).

In the landmark 1973 judgment, *Application of Griffiths*,¹³ the Supreme Court, seven–two, held that the Equal Protection Clause of the Fourteenth Amendment prevented a state from demanding US citizenship as a pre-condition for admission to the bar. Justice Powell’s majority opinion stressed that resident aliens should have equal professional and employment rights in view of their economic contributions to society, and that there was no reason to doubt their loyalty or their capacity to fulfil ethical and professional obligations as “officers of the court”.¹⁴ *Griffiths* has had the practical consequence that many foreign-educated law students and lawyers are now qualifying as lawyers in New York and other states (see part II below). *Griffiths* may have influenced the European Court of Justice’s famous judgment in *Reyners*,¹⁵ which held that Belgium could not require an *avocat* to have Belgian citizenship, because this implicitly violated the EC Treaty Article 52’s right of professional establishment.

In 1985, the Supreme Court held, eight–one, in *New Hampshire v. Piper*¹⁶ that the Privileges and Immunities of Citizens Clause in Article IV of the Constitution prevented a State from requiring a lawyer to be resident within the State, observing that “the opportunity to practice law should be considered a ‘fundamental right’”,¹⁷ and that state rules must not constitute “economic protectionism”.¹⁸ The court did recognise that the non-resident lawyer must comply with the State’s ethical rules and be subject to the state Supreme Court’s disciplinary rules.¹⁹ However, in a later case, *Virginia v. Friedman*,²⁰ while striking down a residence requirement, the Supreme Court mentioned the Virginia rule obliging its lawyers to engage in full-time legal practice within the State without any suggestion that such a full-time practice obligation was invalid.

It is important to note that practice before federal courts is regulated independently of any state rules. The federal district and circuit courts set their own standards for litigation in their courtrooms, usually admitting lawyers who are already authorised in any state court. Thus, in *Murphy v. Egan*,²¹ a federal district court in Pennsylvania admitted to practise before the district court a lawyer who was qualified in California, but whom Pennsylvania had refused to admit to its bar. There also exists a *de facto* bar of lawyers specialising in specific areas of federal law—patents, trademarks, copyright, tax, social security, securities regulation, banking,

13. 413 U.S. 717 (1973).

14. *Ibid.*, at 722–724.

15. *Reyners v. Belgium Case 2/74*, [1974] E.C.R. 631, analysed in Roger Goebel, *Lawyers in the European Community*, *op. cit.*, *supra* n.5 at pp.570–572.

16. 470 U.S. 274 (1985); accord, *Barnard v. Thorstenn*, 489 U.S. 546 (1989).

17. 470 U.S. 274 at 281.

18. *Ibid.*, at 285.

19. *Ibid.*, at 286.

20. 487 U.S. 59 (1998) 69–70.

21. 498 F.Supp. 240 (E.D. Penn. 1980).

etc. Federal agencies set their own standards for lawyers appearing in administrative proceedings before them.²² In general, a lawyer may engage in the practice of these federal law specialities before administrative agencies or before federal courts without being admitted to the bar of the State in which the agency or federal court is located.²³

B. State Regulation of the Legal Profession

As Professor Hazard has remarked, the US states “regulated the [legal] profession very loosely until well into the twentieth century”.²⁴ In most states, the courts regulate the legal profession under the supervision of the State’s highest court, but in a few, such as California, the legislature has set the basic standards.²⁵ State regulation has two aspects: 1) determination of those certified to act as lawyers, in a process customarily called the admission to the bar; and 2) the establishment of professional and ethical standards, together with disciplinary procedures for the enforcement of the standards.

Although the States set the standards and the procedure for admission to the bar, in practice the American Bar Association exerts a strong influence over the nature of those standards. (The American Bar Association’s influence stems from the fact that its membership includes most American lawyers, although membership is entirely voluntary—in contrast to many national bar associations or councils in other countries, in which membership is obligatory.) James White, the ABA’s Consultant on Legal Education, describes the ABA’s role as commencing at its annual meeting in 1921. At that time the ABA’s House of Delegates adopted a Report endorsing the principle that the ABA should accredit law schools which meet minimum standards of legal education, and that bar admission should require passage of a state examination as well as graduation from an approved law school.²⁶

Although a few States, notably California, permit graduates of law schools that have not been accredited by the ABA to take the state bar examination, the vast majority require graduation from an ABA accredited law school.²⁷ Moreover, even though California, New York

22. See Charles Wolfram, “Sneaking Around in the Legal Profession”, *op. cit.*, *supra* n.10, at pp.674–676.

23. *Sperry v. Florida*, 373 U.S. 379 (1963) (a patent agent with a Florida office need not be a Florida lawyer).

24. Hazard, *op. cit.*, *supra* n.9, at p.1177.

25. Moeser, *op. cit.*, *supra* n.8, at p.1169.

26. James White, “State Supreme Courts as Regulators of the Profession” (1997) 72 *Notre Dame L.Rev.* 1155, at pp.1156–1157. It is noteworthy that William Howard Taft, then Chief Justice of the US Supreme Court, seconded the motion to adopt this Report.

27. 39 States require a degree from an ABA-accredited law school. See American Bar Association, *Comprehensive Guide to Bar Admission Requirements* (1996–1997), pp.16–18.

and five other states continue to permit the traditional system of “reading law” for a period of years with a practising lawyer, a sort of legal apprenticeship, in lieu of law school graduation, this mode is rarely used today.²⁸ Thus, virtually all lawyers in the US today are graduates from an ABA-approved law school.

The ABA Accreditation Standards have become much more detailed over the years, but they essentially require a three-year course of legal studies, to be undertaken after an initial college or university degree.²⁹ The law school must meet qualitative and quantitative standards with regard to its full-time faculty, course of study, administration, library, facilities and student services. The ABA’s Council on Legal Education and Admission to the Bar supervises the accreditation process, which includes a detailed review of each accredited school every seven years. There are currently around 160 accredited law schools.³⁰

All States require the successful passage of a bar examination in order to qualify as lawyers. Until the 1960s, most state bar examinations concentrated on state law, but today 46 States and the District of Columbia have adopted the Multistate Bar Exam and virtually the same number require the Multistate Professional Responsibility Exam as part of the examination process.³¹ These tests are prepared by the National Conference of Bar Examiners, a body representing the state officials responsible for regulating admission to the bar. The conference also provides the correct answers to the national tests. The fields covered by the Multistate Bar Exam are constitutional law, contracts, criminal law, evidence, real property and torts. Although most States supplement these national tests with essay questions, it is clear that the bar examination process has become largely national in character. As former Nebraska Chief Justice Norman Krivoska has said, “while we have resisted establishing a national bar examination *de jure*, we have in fact accepted a national bar examination *de facto*, at least in part.”³²

28. Robert Jarvis, “An Anecdotal History of the Bar Exam”, (1996) 9 Geo. J. Legal Ethics 359, at pp.366–367. See also Daniel Hansen, “Note, Do We Need the Bar Examination”, (1995) 45 Case W. Res.L.Rev. 1191.

29. American Bar Association, *Standards for Approval of Law Schools*.

30. American Bar Association, *A Review of Legal Education in the United States* (Fall 1997).

31. Eric Williams, *op. cit., supra* n.10, at p.202. See also the valuable App. A survey of all states’ examination requirements.

32. Norman Krivoska, “The Case for a National Bar Examination—Seeing How It’s Broke, How Come We Aren’t Fixing It” (Sum. 1987) Amer.Corp. Counsel Ass’n Docket 6, at 7.

Thus, without any federal legislation comparable to the European Community's 1989 Diploma Directive,³³ law students with a degree from an ABA-accredited law school anywhere in the United States can take the bar examination in any state with a reasonable likelihood of passage. Although 30 years ago many law schools still emphasised the study of local state law, today virtually all law school courses of study concentrate on federal law and the prevailing views among the states on legal issues.

Furthermore, state regulation of lawyers' professional rules and standards of ethics has become both more uniform and sophisticated.³⁴ The American Bar Association has again played a major role in this development. Its first 1908 Canons of Ethics influenced rules in many states, although, generally speaking, they were not absolutely binding. The ABA's 1969 Code of Professional Responsibility (the CPR) and its more recent and more detailed 1983 Model Rules of Professional Conduct (the MRPC) have been adopted in virtually all States, although not with total uniformity. A large majority of States have adopted rules based upon the 1983 Model Rules of Professional Conduct, although often with some local variation, while a minority (including New York) continue to adhere to the Code of Professional Responsibility, although usually with some amendments reflecting part of the MRPC approach. These rules are mandatory in state court and bar association disciplinary proceedings.

Moreover, the American Law Institute completed work in 1998 on its Third Restatement of the Law Governing Lawyers,³⁵ which is intended to give guidance to courts not only in ethical proceedings, but also in all litigation involving lawyers' rights and duties (notably malpractice litigation). In view of the strong influence exerted by other Restatements, this one is apt also to become authoritative on a national level, thus promoting greater uniformity in state court resolution of cases involving lawyers' rights and duties.

Thus, the regulation of lawyers' professional rules and ethics is much more uniform in character in the United States, even though carried out by state courts and bar associations, than is the case in the European

33. Council Directive 89/48/EEC on a general system for the recognition of higher education diplomas, O.J. L19/16 (24 Jan. 1989). The Directive's impact on the legal profession is analysed in Roger Goebel, *Lawyers in the European Community*, *op. cit.*, *supra* n.5, at pp.595–601, and in Bernhard Schloh, "Freedom of Movement of Lawyers Within the EEC" (1990) 9 St. Louis U.Pub.L.Rev. 83, at pp.95–98.

34. Any review of lawyers' professional rules in the US is beyond the scope of this short article. For an overview, see Professor Charles Wolfram's valuable study, *Modern Legal Ethics* (1986).

35. The Third Restatement's complete text was approved by the ALI at its May 1998 meeting and a final edited text is scheduled for publication in 2000. Proposed Final Draft No.1 (1996), Proposed Final Draft No.2 (1998), and Tentative Draft No.8 (1997) contain the current text.

Community. The 1988 Code of Conduct for Lawyers in the European Community,³⁶ adopted by the Council of Bars and Law Societies of the European Community (the CCBE), and now in force in all Community states, is certainly a valuable effort to harmonise some minimum concepts and rules, but is frankly rather modest in scope and approach. The Code of Conduct is certainly far less uniform and detailed than the state rules on professional regulation and legal ethics in the United States have become under the influence of the Code of Professional Responsibility and the Model Rules of Professional Conduct.³⁷

C. The Mobility Factor: The Extent of Lawyers' Ability to Become Admitted in Other States

Many lawyers, once admitted to the bar of one State, need or desire, for personal or professional reasons, to be permitted to practise on a permanent basis in another State. In particular, in-house counsel must often relocate to one or more different states in the course of their career. Unfortunately, this is not usually an easy process. Once a lawyer has been practising for several years, it is difficult to devote the time and the study necessary to pass the bar examination in a second State. Moreover, as Professor Wolfram has validly noted, a lawyer's exam-taking skill may atrophy with the passage of time, while any failure in taking a second bar exam may have harmful reputational consequences.³⁸

About half the states (including New York) and the District of Columbia will waive the bar examination and accept lawyers from other jurisdictions in a procedure commonly known as admission on motion.³⁹ Usually this procedure is open only to lawyers who have practised for at least five years.⁴⁰ Moreover, a majority of the states permitting admission on motion limit this possibility to lawyers from States that also admit on

36. The CCBE Code of Conduct text, together with an authoritative appraisal by a former CCBE President, is in John Toulmin, "A Worldwide Common Code of Professional Ethics?", (1992) 15 *Fordham Int'l L.J.* 673, reprinted in Mary Daly & Roger Goebel, *op. cit.*, *supra* n.1, at p.207. The Code of Conduct was amended on 28 Nov. 1998 to provide somewhat more detailed rules, which are in the course of adoption by national bar associations.

37. For a comparison of the Code of Conduct with prevailing US state rules, see Laurel Terry, "Introduction to the EC's Legal Ethics Code" (1993) 7 *Geo. J. Legal Ethics* 1, and (1993) 7 *Geo. J. Legal Ethics* 345.

38. Charles Wolfram, *op. cit.*, *supra* n.10, at p.680.

39. ALI, Restatement of the Law Governing Lawyers, Proposed Final Draft No.2, s.2, comment 6. For an analytical discussion of admission on motion, see Charles Wolfram, *op. cit.*, *supra* n.10, at 680-684. Eric Williams, *op. cit.*, *supra* n.10, lists the states permitting admission on motion in Appendix A. Illinois, Michigan, New York and Pennsylvania are among the important commercial states that admit lawyers on motion.

40. See the list in Eric Williams, *op. cit.*, *supra* n.10, Appendix A.

motion, i.e., require reciprocal treatment.⁴¹ Some States further require the newly-admitted lawyer to practise full-time and maintain an office within the state.⁴²

The other half of the States require a lawyer admitted elsewhere to take their state bar examination, although nine States (including California) will provide a modified and shorter version to lawyers who have practised for several years.⁴³ Professor Wolfram suggests that possible motives for this stricter approach include the fear of inundation by waves of lawyers from adjacent States with easier bar examinations, or the fear that lawyers, especially those near retirement, may be attracted by the warmer climate and seek to practise in "Sunbelt" states, such as Arizona, California and Florida.⁴⁴

The overall picture in the United States is therefore one of greater limitations on lawyer mobility for the purpose of permanent practice than is the case in the European Community. One consequence of the Diploma Directive,⁴⁵ read in conjunction with the 1991 European Court of Justice judgment in *Vlassopoulou*,⁴⁶ is that the member States must take into consideration the prior practice experience in another State of an applicant for admission to the local bar, and accordingly must offer a shorter and easier bar examination.⁴⁷ Moreover, the newly adopted Directive on Lawyers' Establishment Rights,⁴⁸ when fully effective, will enable lawyers who have qualified in one member State to practise under their Home State title on a permanent basis in any other member State,

41. Charles Wolfram, *op. cit. supra* n.10, at pp.681–682. South Carolina's reciprocal treatment obligation was upheld as constitutional in *Hawkins v. Moss*, 503 F.2d 1171 (4th Cir. 1974), *cert. den.*, 420 U.S. 928 (1975).

42. Some states require the lawyer to be practising within the state for a substantial period of time. *In re Arthur*, 415 N.W.2d 168 (Iowa 1987); *In re Sackman*, 448 A.2d 1014 (N.J. 1982). New York is more lenient, permitting a mail address and answering service to suffice. *Austria v. Shaw*, 542 N.Y.S.2d 505 (N.Y. Sup. Ct. 1989).

43. Eric Williams, *op. cit., supra* n.10, at p.202 and App. A. California, Florida, Massachusetts, New Jersey and Washington are among the larger States requiring an examination, although in California and Massachusetts the examination may be a shorter one than the usual bar examination.

44. Charles Wolfram, *op. cit., supra* n.10, at 680–681.

45. *Supra* n.33.

46. Case C-340/89, *Vlassopoulou v. Baden-Wurtemberg Ministry of Justice* [1991] E.C.R. 2357.

47. See Roger Goebel, "Lawyers in the European Community", *op. cit., supra* n.5, at pp.599–600.

48. European Parliament and Council Directive 98/5/EC to facilitate practice of the profession of lawyer on a permanent basis in a member state other than that in which the qualification is obtained, O.J. L77 16 Feb. 1998 p.36. The Directive's text was substantially influenced by the famous Court of Justice judgment, Case C-55/94, *Gebhard v. Milan Bar Council*, [1995] E.C.R. I-4165, in which the court indicated that a lawyer's right of establishment could only be limited by state rules properly protecting an important public interest.

albeit restricted to a certain extent as to fields of practice.⁴⁹ Such a liberal approach to the mobility of practising lawyers is unlikely in the United States. Law firms which establish branch offices outside the State of their head office must have partners who are admitted to the bar of the state in which the branch office is located.

D. Extrajurisdictional Legal Practice

Lawyers sometimes seek to appear in courtroom litigation in a state other than that in which they are admitted. In that event, they usually are permitted to do so by the local court in a procedure called *pro hac vice* admission. This procedure dates to colonial times and exists in all States.⁵⁰ Although the decision whether or not to permit the out-of-state lawyer to appear in litigation is discretionary, courts will usually grant admission if the client so desires and the lawyer is in good standing.⁵¹ *Pro hac vice* counsel are particularly desirable when the client has a long-standing relationship with the out-of-state lawyer, or when the latter is a renowned trial lawyer with particular expertise in the subject-matter of the trial (e.g. securities rules, criminal conspiracy, mass torts). The Supreme Court has, however, decided that our Constitution's right to counsel provision does not require a court to grant *pro hac vice* admission to an out-of-state lawyer if the court considers this unjustified or unnecessary.⁵²

The principal operational restraint upon *pro hac vice* appearances stems from the requirement in many states that the out-of-state counsel be associated with a local lawyer.⁵³ The purpose of requiring local counsel to be involved is to ensure knowledge of, and compliance with local court procedure, but difficulties may arise in allocating responsibilities between the associated counsel. In any event, this approach significantly increases the cost to the client. In some cases, the client may not then be able to afford the out-of-state counsel.⁵⁴

49. Member states have the option of forbidding the lawyers established under their Home State title from regular appearance in court or administrative litigation, from executing real estate transactions, and from handling decedents estates. See Art.5.

50. ALI, Proposed Final Draft No.2, s.3, Comment e. For a detailed analysis, see Thomas Canfield, "Note, The Criminal Defendant's Right to Retain Counsel *Pro Hac Vice*" (1989) 57 Fordham L.Rev. 785.

51. See, e.g. *Enquire Printing & Publishing Co. v. O'Reilly*, 477 A.2d 648 (Conn. 1984); *State v. Von Bulow*, 475 A.2d 995 (R.I. 1984).

52. *Flynt v. Leis*, 439 U.S. 438 (1979) (*per curiam*).

53. E.g. *Duncan v. St. Romain*, 569 So. 2d 687 (Miss. 1990); *In re Smith*, 272 S.E.2d 834 (N.C. 1981).

54. In *Ford v. Israel*, 701 F.2d 689 (7th Cir.), *cert. denied*, 464 U.S. 832 (1983), the court held that the client's right to counsel was not violated when the client could not afford out-of-state counsel as well as a local lawyer.

Far more important in extrajurisdictional legal practice in the United States is the involvement of lawyers in out-of-state contracts or transactions. At one extreme, a lawyer may draft contracts or other instruments for use in another State, or provide opinions based on the law of another State, without ever leaving the State in which he or she is admitted to practise. At the other extreme, a lawyer may engage in such transactional practice in another State while permanently residing there, often on an in-house counsel staff, or while working in a branch office of his or her law firm. In between are the instances in which a lawyer travels to other States in order to assist in negotiations, draft contracts or other instruments, or provide legal advice. As Nebraska Chief Justice Krivosha has well said: "Overwhelming evidence suggests that one may engage in the interstate practice of law without first being admitted to practice in a particular State so long as the individual does not appear in court."⁵⁵

The ALI's Third Restatement on the Law Governing Lawyers takes the position that a lawyer may engage in such out-of-state transactional practice so long as "[t]he lawyer's activities in the matter arise out of or are otherwise reasonably related to the lawyer's practice."⁵⁶ Although there is no clearly prevailing legislative or case law support for this view, its policy rationale is that "the need to provide effective and efficient legal services to persons and businesses with interstate legal concerns requires that jurisdictions not erect unnecessary barriers to interstate legal practice."⁵⁷

The ALI Restatement takes the view that all extrajurisdictional transactional practice conducted without leaving the lawyer's home state, through the use of correspondence, telephone or electronic communication, is "clearly permissible", even if it involves a formal opinion on another state's law.⁵⁸ With regard to legal work done while a lawyer is physically present in another state, the Restatement view is that a variety of factors may justify such extrajurisdictional practice, such as the client's desires, links to home state practice, the federal character of the legal field involved, the lawyer's special expertise in the legal issues or field, etc.⁵⁹ With regard to in-house legal counsel, they should normally be entitled to conduct transactional practice both in the state of their office, as well as throughout the United States, provided the legal activity is always for the employer or its affiliate.⁶⁰

55. Norman Krivosha, *op. cit.*, *supra* n.32, at p.8.

56. ALI, Proposed Final Draft No.2, at s.3(3).

57. *Ibid.* at Comment b.

58. *Ibid.* at Comment e.

59. *Ibid.*

60. *Ibid.* at Comment f. Florida, Idaho and Missouri have adopted rules of practice that specifically exempt in-house counsel from passing a state bar examination in order to be admitted, or otherwise authorising their local transactional practice.

All US states forbid the unauthorised practice of law. Although the Restatement view has some support, especially where the extrajurisdictional transactional practice does not involve any travel, or only short-term travel,⁶¹ there have been a number of court judgments holding that extraterritorial practice constitutes the unauthorised practice of law. These judgments have resulted in injunctive relief against any further such practice within the state in which the practice occurred,⁶² or in a court order prohibiting the collection of fees from the client in the matter.⁶³

In the well known 1998 *Birbrower, Montalbano* case, the California Supreme Court, 6–1, held that a New York law firm could not recover over \$1m in fees from a California corporate client, because its attorneys had spent several days working in California in negotiations in a dispute concerning a contract governed by California law and in the preparation of a complaint for arbitration in California.⁶⁴

Professor Charles Wolfram, the principal Reporter for the ALI Restatement, has vigorously argued in a valuable analytical article that “professional discipline for out-of-state unauthorised practice is minimal” and that there has been “a fair amount of pointless rigor in applying the prohibition against unlicensed local law practice”.⁶⁵ He urges courts to be more sympathetic “to the needs of the national economy and its inevitable interstate implications”,⁶⁶ permitting interstate transactional practice on a much more liberal basis.

Nonetheless, it must be said that the picture in the United States is one in which interstate transactional practice is often not regarded as appropriate, and may on occasion result in significant risks for the lawyer engaging in it. In the European Community, the 1977 Lawyers’ Services Directive⁶⁷ has long settled the issue: lawyers can carry out transborder transactional services throughout the Community (although member States can forbid them from engaging in real estate transactions and the

61. E.g. *Appell v. Reiner*, 204 A.2d 146 (N.J. 1964); *Condon v. Superior Court*, Cal.Rpt.2d (Cal.Ct.App. 922); *El Gemayel v. Seaman*, 533 N.E.2d 245 (N.Y. 1988); *Fought & Co. v. Steel Engineering*, 951 P. 487 (Haw. 1998).

62. E.g. *Kennedy v. Bar Ass’n. of Montgomery County*, 561 A.2d 200 (Md. 1989) (out-of-state lawyer forbidden to operate local office even for practice of federal law); accord, *Ginsburg v. Kovrak*, 139 A.2d 889 (Pa. 1958).

63. The most recent prominent example is *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1 (Cal. 1998). Earlier instances are *Martin & Martin v. Jones*, 541 So. 2d 1 (Ala. 1989); *Perlah v. S.E.I. Corp.*, 612 A.2d 806 (Conn.Cir.Ct. 1992); *Spivak v. Sachs*, 211 N.E.2d 329 (N.Y. 1965).

64. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, *supra* n.63.

65. Charles Wolfram, *op. cit.*, *supra* n.10, at pp.684 and 693.

66. *Ibid.* at 707.

67. Council Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services, (1997) O.J. L78/17. For a description of the directive and the related Court of Justice case law, see Roger Goebel, “Lawyers in the European Community”, *op. cit.*, *supra* n.5, at pp.576–585.

handling of decedents estates), and can even litigate in court on an occasional basis. Similar federal legislation in the United States would be extremely helpful, but is quite unlikely.

II. ADMISSION OF FOREIGN LAWYERS OR LAW STUDENTS TO THE BAR

A. *A General Survey of State Rules*

A growing number of foreign lawyers, or students who have completed their legal education in a foreign country, would like, for personal or professional reasons, to become admitted to a US state bar. Many emigrants from Eastern Europe or Latin America fall into this category. Other foreign lawyers, frequently from Western Europe, seek to work for large multinational law firms or on in-house counsel staffs within the United States, either permanently or for a substantial period of time.

About half the States have procedures that enable either foreign lawyers, or persons who have received a diploma for law studies in other countries, to take the state bar examination, or to qualify for admission to the bar on motion. Several of these States, notably New York, California, Massachusetts and Pennsylvania, are states with large commercial centres that tend to attract foreign lawyers or persons who have completed their legal education abroad. Accordingly, the overall picture is one of a fairly liberal attitude toward enabling foreign lawyers and law students to become US lawyers in the states in which they are most apt to want to reside and practise.

Moreover, since the 1973 Griffiths judgment,⁶⁸ citizenship cannot be required for admission to the bar. As a consequence, a substantial number of aliens who are permanently resident in the United States obtain the usual J.D. law degree and pass a state bar examination. Statistics are not available, but anecdotal evidence from law schools in New York and California, states that have large numbers of permanent resident aliens, suggest that the aggregate number is a significant one.

A tradition in some States dating back to the nineteenth century gives preferential treatment to lawyers or graduated law students from common law systems, especially Canada and the United Kingdom, whose legal education is deemed similar to that in the United States. Massachusetts and a few other States even permit lawyers trained in certain common law jurisdictions or educated in designated Canadian, English and other law schools, to be admitted on motion without a bar examination, usually after proving that they have five years of practice experience in their home country.⁶⁹ The more common approach, that of California, New York and several other states, is to examine the nature of

68. *Supra* n.13.

69. Sydney Cone, *op. cit.*, *supra* n.1, at s.4.3.4.

the common law legal education to determine whether it is sufficiently equivalent to US legal education and, if so, to permit law school graduates from that common law jurisdiction, or from designated law faculties within it, to take the state bar examination.⁷⁰

Of greater importance is a development that has largely occurred within the last 20 years. Today, a large and growing number of commercially important US States permit persons with foreign law degrees to take the state bar examination either upon receipt of an LL.M. degree from an accredited US law school (e.g. California and Michigan),⁷¹ or upon the successful completion of a stated number of credit hours (usually 24) at an accredited US law school (e.g. New York, Pennsylvania and the District of Columbia).⁷² Since not many law schools will permit students to register for only one year's study in their J.D. programme in order to take a bar examination, the usual approach taken by foreign lawyers or foreign law school graduates is to obtain an LL.M. degree.⁷³ The number of law schools that offer LL.M. degrees has increased substantially in the last decade,⁷⁴ even though the American Bar Association has heightened its review of such degree programmes. A large majority of LL.M. degrees (except in specialised programmes, such as those for tax, environmental law or maritime law studies) are awarded to foreign law students. A reasonable estimate would be that around a quarter to a third of all foreign LL.M. students take the bar examination in California, New York, Washington, D.C. and other commercially

70. The Rule of the Court of the New York Court of Appeals is Rule 520.6(b)(1)i which prescribes that the law degree come from a "country whose jurisprudence is based upon the principles of the English Common Law [whose] program and course of law study ... were the substantial equivalent of the legal education provided by an approved law school in the United States. ..." 22 N.Y.Ct.App.R. Part 520 (1998). Sydney Cone, *op. cit., supra* n.1, summarises the California regime at s.4.3.3.2, and lists eight other states with a similar approach in s.4.3.2.

71. Sydney Cone, *op. cit., supra* n.1, at ss.4.3.3.1 and 4.3.3.2, lists Arizona, California, Kansas, Kentucky, Michigan and Wyoming as the states which permit foreign recipients of US LL.M. degrees to take their state bar examination. Technically, the American Bar Association only "acquiesces" in an accredited law school's offering of an LL.M. degree, rather than separately accrediting the degree, but the practical effect is the same.

72. Pennsylvania requires 30 credit hours at an ABA-accredited law school, the District of Columbia requires 26 credit hours, and seven other States require one year of full-time law studies, sometimes including specified subjects. Sydney Cone, *op. cit., supra* n.1, at ss.4.3.2 to 4.3.3.

73. For a review of American legal education for foreign students as of 1988, see Roger Goebel, "Professional Qualification and Educational Requirements for Law Practice in a Foreign Country", *op. cit., supra* n.3, at pp.460-462. For an update, see David Clark, "Transnational Legal Practice: The Need for Global Law Schools", 46 *Am.J.Comp.L.* 261 (1998 Supp.).

74. Almost half of all accredited law schools now offer an LL.M. degree. For a complete list, school by school, see American Bar Association, *A Review of Legal Education in the United States* (Fall, 1998).

important jurisdictions, and that slightly less than half of these are able to pass the examination.⁷⁵

B. New York's Rules

Because New York City is the largest centre of international commercial law practice and has for many years been a magnet for foreign lawyers and law firms, it is appropriate to review specifically the relevant New York rules, which are laid down by its highest court, the New York Court of Appeals.

In 1980, the New York Court of Appeals amended its rules in Part 520 to permit admission based on the study of law in foreign countries.⁷⁶ For the first time, New York permitted a legal education in a foreign country (other than a country whose legal system is based on the common law) to be treated as equivalent to education at an approved American law school. The foreign law school must be one "recognized by the competent accrediting agency of the government" of the foreign country, and the applicant for the state bar examination must have completed "a period of law study at least substantially equivalent in duration" to the three years required in the United States.⁷⁷ An applicant is automatically eligible to take the New York Bar examination if he or she comes from a common-law jurisdiction where the education and the period of studies are considered the substantial equivalent of that in an American law school.⁷⁸ If the applicant comes from a civil-law or other legal system, then he or she must complete a programme of 24 semester hours (with no specifically required courses) at an approved American law school.

The initial Court of Appeal Rule permitted foreign law students to take the state bar examination as soon as they had been admitted for study by an accredited US law school for its LL.M. or S.J.D. degree. Because some applicants then took the bar examination without in fact actually pursuing an LL.M. or S.J.D. degree, a 9 February 1988 New York City Bar Association report recommended the deletion of this provision, a recommendation which the Court of Appeals acted upon through an amendment of 31 January 1990.⁷⁹

75. The author is unaware of any statistics. These estimates are based on contacts with a representative sample of directors of graduate programmes within the American Association of Law Schools Section on Graduate Programs for Foreign Lawyers, of which the author is a former chairman.

76. N.Y.Ct.App.R. Part 520, s.520.6 (1980).

77. N.Y.Ct.App.R. Part 520 s.520.6(b).

78. *Supra* n.70. See also Sydney Cone, *op. cit.*, *supra* n.1, at s.3.5.2.

79. The initial rule is described in Roger Goebel, *op. cit.*, *supra* n.3, at p.474, especially n.80. The revised rule is described in Sydney Cone, *op. cit.*, *supra* n.1, at s.3.5.3.

The Court of Appeals Rule has recently been amended again, on 7 May 1998.⁸⁰ On the one hand, the required course of studies in an approved US law school was reduced from 24 to 20 credit hours, a change undertaken because some highly regarded LL.M. programmes only require 20 credit hours of study. On the other hand, the course of studies must now include "basic courses in American law".⁸¹ The intent presumably is to ensure that foreign law students will be better qualified to take the bar examination, but the vague wording leaves unclear which courses are "basic" and how many such courses are necessary.

The New York Rule has permitted a surprisingly large number of foreign lawyers and law students to become members of the New York bar. Sydney Cone reports that 3,729 foreign lawyers passed the New York bar examination in 1985–1995, and that 45.5 per cent of all foreign candidates who took the examination succeeded in passing it.⁸² Presumably many of these individuals have obtained employment with New York law firms, usually those with a reputation for international practice, but others have simply returned to practise in their country of origin, where their status as members of the New York bar obviously enhances their reputation in attracting and dealing with clients.

III. FOREIGN LEGAL CONSULTANTS

A. *The Development of Foreign Legal Consultant Rules in the United States*

As noted previously,⁸³ a lawyer who provides legal advice or assistance in legal transactions while physically present in a State in which he or she has not been admitted to the bar is apt to be deemed to be engaged in the unauthorised practice of law and subject to sanctions. The risk of injunctive or other proceedings against foreign lawyers who seek to provide legal advice under similar circumstances is particularly great.⁸⁴

Perhaps the best-known precedent involving unauthorised practice by a foreign lawyer is in *In re Roel*,⁸⁵ a 1957 opinion of the New York Court of Appeals. The case arose during the 1950s when New York divorce laws were strict and New York residents frequently sought foreign divorces.

80. N.Y.Ct.App.R. Part 520, §.520.6(b), as amended by Court Order, 7 May 1998.

81. *Ibid.*, at §.520.6(b)(1)ii.

82. Sydney Cone, *op. cit.*, *supra* n.1, at s.3.6, based upon enquiries made with the responsible New York State officials administering the bar examination.

83. *Supra*, nn.62 and 63.

84. Charles Wolfram, *op. cit.*, *supra* n.10, at p.687, refers to "vigorous application of the disciplinary rules [against] disbarred lawyers, ... lawyers who have not completed the process of passing the bar exam ... and lawyers admitted only in a foreign country".

85. 3 N.Y.2d 224, 144 N.E.2d 24 (1957), appeal dismissed, 335 U.S. 605 (1958). See generally Mark Janis, "The Lawyer's Responsibility for Foreign Law and Foreign Lawyers" (1982) 16 *Int'l Law*. 693; Robert Lutz, "Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners" (1992–93) 16 *Fordham Int'l L.J.* 53.

Roel, a Mexican lawyer, maintained an office in New York City where he gave advice on Mexican divorce law, as well as other areas of Mexican law, and drafted papers for use in Mexico. He specifically disclaimed any intention of advising on New York law and urged the consultation of New York lawyers for this purpose. Nevertheless, the New York County Lawyers Association obtained an injunction against his supply of legal services to the general public.

On appeal, the injunction order was affirmed. The majority opinion (five–two) by Judge Froessel held notably that “[w]hether a person gives advice as to New York law, Federal law, the law of a sister state, or the law of a foreign county, he is giving legal advice”.⁸⁶ Judge Froessel went on to argue that it was necessary to bar a foreign lawyer from giving advice on the law of his own country because of the repercussions that any foreign legal act (in this instance, a Mexican divorce) could have on New York property, family, or other interests. Basically, Judge Froessel’s opinion was founded upon the idea that the lay public required protection when obtaining such foreign legal advice, and that a New York lawyer should be held responsible for the advice of the foreign lawyer. He stated further that only the legislature should decide whether foreign lawyers should be licensed in New York.

The growth of transborder legal practice made it extremely desirable, arguably essential, for a new type of lawyer’s status to be created in order to enable clients to obtain legal services from permanently established foreign lawyers within a relatively secure regulatory framework. This first happened in New York in 1974, when combined legislative and court action produced rules creating and governing the status of legal consultants, more commonly called foreign legal consultants. The pioneering initiative of New York, coupled with growing pressures for reciprocal treatment of multinational law firms in several European and Asian countries, as well as certain specific provisions in NAFTA, has led to the spread of the legal consultant concept. Today, 21 US States and the District of Columbia, comprising virtually all the jurisdictions which contain commercial centres of international interest, have adopted rules authorising practice by legal consultants.⁸⁷

New York’s innovation of the legal consultant status was both inspired by and, to some degree, modelled upon France’s recognition of the status

86. 3 N.Y.2d 224, 229, 144 N.E.2d 24, 26.

87. The States are: Alaska, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Texas, Utah and Washington. American Bar Association, *Comprehensive Guide to Bar Admission Requirements* (1999). For citations to their respective rules, see the valuable article by Professor Carol Needham, “The Licensing of Foreign Legal Consultants in the United States”, (1998) 21 *Fordham Int’l L.J.* 1126, at n.2, and the detailed description of each State’s regime in Sydney Cone, *International Trade in Legal Services* § 4.2 (1997).

of *conseil juridique international* (international legal adviser) as part of the formal regulation of its *conseil juridique* profession in 1971. Prior to that date, for over a century there existed in France a large but unregulated body of professional advisers on legal services who assisted clients in a variety of civil and commercial transactions. These persons used the title, *conseil juridique*, to distinguish themselves from the regulated profession of courtroom lawyers, the *avocats*. When, prior to 1971, American, English and other foreign law firms established branch offices in Paris, they customarily gave legal advice while using the title of *conseil juridique*.⁸⁸

By a law of 30 December 1971, France comprehensively regulated the profession of *conseil juridique*.⁸⁹ In response to the request of foreign law firms to be covered by the new regulations, the French Ministry of Justice included a specific chapter that not only accorded the status of *conseil juridique international* to previously established foreign lawyers and law firms, but also created a procedure for on-going admission to the status.⁹⁰ However, the ability of future applicants from foreign countries to be registered as *conseils juridiques* was made subject to a requirement of reciprocal treatment for French lawyers in their country of origin.⁹¹

Concerned by this reciprocity provision, and doubtless also motivated by the feeling that New York's role as an international finance centre would benefit from foreign legal expertise, the New York City Bar Association first studied the issues and then proposed the text for rules to create the title and role of legal consultant. Francis T. Plimpton, former president of the New York City Bar Association, chaired the advisory committee and led in the efforts to create the legal consultant rules.⁹² After considerable debate, and despite substantial opposition,⁹³ the New York State legislature amended the Judiciary Law to enable rules to license "as a legal consultant, without examination and without regard to citizenship . . . a person admitted to practice in a foreign country as an attorney or counsellor or the equivalent".⁹⁴

88. For a more detailed discussion, see Roger Goebel, *op. cit.*, *supra* n.3, at pp.464–465.

89. Titre 11, chap.1, Loi No.71–1130 du 31 Dec. 1971, J.O. 131, 5 Jan. 1972; 1972 Gazette du Palais 39, at 44. See Herzog & Herzog, "The Reform of the Legal Professions and of Legal Aid in France" (1973) 22 I.C.L.Q. 462.

90. See Roger Goebel, *op. cit.*, *supra* n.3, at pp.465–467.

91. *Ibid.*, at pp.465–466.

92. Justice Ruth Bader Ginsburg, then a law professor, chaired an ABA committee study that endorsed the draft proposal. Major multinational law firms (such as Baker MacKenzie; Cleary Gottlieb; Coudert Brothers; and Debevoise Plimpton) lobbied energetically for the new rules.

93. Sydney (Terry) Cone III, a retired senior partner at Cleary Gottlieb and professor at New York Law School, worked actively in the adoption efforts in 1971–1974. He describes this period in Sydney Cone, *op. cit. supra* n.1, at ss.3.2 and 3.3.2.

94. N.Y.Jud. Law s.53(6) (McKinney).

Pursuant to this enabling act, the Court of Appeals adopted Part 521 of its Rules to create the new profession of legal consultants, often called foreign legal consultants.⁹⁵ The qualifications required by the initial Rule for registration as a legal consultant were: (1) admission to practise as an attorney or counsellor in a foreign country; (2) actual practice of the law of that country for five of the last seven years; and (3) evidence of “educational and professional qualifications, good moral character and general fitness”.⁹⁶ The applicant was not required to take any examination prior to acquiring the status, but had to be a resident of New York. By becoming a registered legal consultant, a foreign lawyer acquired the right to give advice on his or her own law, or upon international law, as well as to some degree on New York or federal law, subject to limitations discussed in detail in section B, below.

For a long time, the New York legal consultant rules stood alone. The picture began to change in the mid-1980s, when the Uruguay Round trade negotiators began seriously to discuss liberalisation of trade in services, including to some extent legal services, and when multinational American law firms were actively engaged in efforts to open, or to keep open, several important European and Asian commercial centres for their branch offices. When Japan adopted its Foreign Lawyers Law on 23 May 1986, its provisions were obviously modelled on the 1971 French *conseil juridique* law and the 1974 New York legal consultant rules.⁹⁷ However, Japan’s rules contained a reciprocity requirement, and this clearly acted as a stimulant to the further adoption of legal consultant rules in a number of US states, particularly those on the Pacific rim.

After New York, the first State to adopt legal consultant rules was Michigan in 1985,⁹⁸ followed in 1986 by the District of Columbia, which acted only after several years of debate because the opposition had been particularly strong.⁹⁹ By 1989, Alaska, California, Hawaii, New Jersey, Ohio and Texas had all adopted rules creating a legal consultant status, while in 1990–1993, Connecticut, Florida, Georgia, Illinois, Minnesota, Oregon and Washington did so.¹⁰⁰

Although modelled on New York’s rules, all of these jurisdictions made some modifications, frequently to reduce the scope of practice of legal consultants or to mandate some form of reciprocity. In order both to spur other states to action and also to create greater uniformity in the state

95. N.Y.Ct.App.R. Part 521.

96. *Ibid.*, at s.521.2(3).

97. See Roger Goebel, *op. cit.*, *supra* n.3, at pp.483–485.

98. See Sydney Cone, *op. cit.*, *supra* n.1, at s.4.2.2.1.

99. *Ibid.*, at s.4.2.1.

100. The rules in each State are described in Sydney Cone, *op. cit.*, *supra* n.1, at s.4.2, as well as organised in patterns of different approaches to issues by Carol Needham, *op. cit.*, *supra*, n.87.

legal consultant rules, the ABA House of Delegates approved a Model Rule for the Licensing of Legal Consultants on 11 August 1993. An ABA Committee, chaired by Professor Louis Sohn, prepared a report to explain and endorse the Model Rule, emphasising the importance of promoting legal consultant rules in order to facilitate the negotiating posture of the United States in global or trade in legal services, as well as to assist in private dealings of American law firms with the authorities or bar groups in particular foreign countries.¹⁰¹ The New York Court of Appeals almost immediately amended its Rules on 17 November 1993 to conform more precisely to the ABA Model.¹⁰² Since then six more states—Arizona, Indiana, Louisiana, Missouri, New Mexico and North Carolina—have created a legal consultant profession largely following the ABA model.¹⁰³

The North American Free Trade Agreement, signed 12 August 1992,¹⁰⁴ has promoted the adoption of legal consultant rules in states particularly interested in trade with Canada and Mexico. Chapter 12 of NAFTA covers cross-border trade in services, and Annex 1210.5 specifically deals with foreign legal consultants. The general approach of Annex 1210.5 is to create a sort of best-efforts obligation on the part of the United States to promote state enactment of legal consultant rules that may be employed by Canadian and Mexican lawyers, in counterpart to obligations by Canada and Mexico to modify their legal profession rules in order to enable US lawyers to give advice and engage in legal transactions in a parallel manner in their jurisdictions.¹⁰⁵ The three countries have been consulting on how to implement these Annex 1210.5 provisions, and accordingly in 1996 a committee of advisers produced a draft Model Rule on Foreign Legal Consultants, clearly influenced by the ABA Model Rule, but somewhat less liberal in specific provisions.¹⁰⁶ Whether the draft model rule will be formally approved by the three governments, and what might be the subsequent impact of any such model rule, remains presently uncertain.

Before discussing the practical value and impact of foreign legal consultant rules in the United States, it is essential to have a precise idea of their nature. Because New York was the pioneering jurisdiction and its rules served as the model for most other states, it is most sensible to

101. The ABA Model Rule and the Report are reproduced in (1994) 28 *Int'l Law*. 207.

102. The amendment is summarised in Sydney Cone, *op. cit., supra* n.1, at §.3.2.

103. *Ibid.*, at §.4.2.5.4 to 4.2.5.9.

104. (1992) 32 *I.L.M.* 297.

105. The somewhat complicated provisions are described in Julie Barker, *op. cit., supra* n.6, at pp.100–103, in Michael Chrusch, "The North American Free Trade Agreement: Reasons for Passage and Requirements to Be a Foreign Legal Consultant in a NAFTA Country" (1996) 3 *ILSA J. Int'l & Comp.L.* 177, and by Sydney Cone, *op. cit., supra* n.1, at §.6.4–6.6.

106. Sydney Cone, *op. cit., supra* n.1, at §.6.5.3.

review its rules to detail, with some comparisons to the ABA Model Rule and those in other jurisdictions.

B. *The New York Rules on Legal Consultants*

For greater clarity, this section first describes the mode of qualification as a legal consultant; secondly, the scope of the legal consultant's right to practise; and thirdly, the application of New York professional responsibility and disciplinary rules.

1. *Qualification as a Legal Consultant*

The crucial qualification element is that an applicant for the status of legal consultant must have been admitted to practise and be "in good standing" as an attorney or legal counsellor in a foreign country's "recognised legal profession", which is one "subject to effective regulation and discipline by a duly constituted professional body or a public authority",¹⁰⁷ and must have actually practised the law of the foreign country for a minimum period. The initial 1974 Rules set the prior practice period at five of the seven years immediately preceding the application. The 17 November 1993 amendment lowered this to three out of the five years preceding application,¹⁰⁸ in order to facilitate applications by younger lawyers. Moreover, a prior amendment of 15 February 1985 had accepted an applicant's practice of the foreign country's law while working outside the foreign country,¹⁰⁹ in order to accommodate applicants who practised in a branch office of their firm outside their country of admission (e.g. a UK solicitor practising in a Brussels or Paris branch office of his or her firm).

It should be noted that the ABA Model Rule recommended the five out of the preceding seven years formula, which is the prevailing approach among the States with legal consultant rules.¹¹⁰ Presumably consumer protection is the underlying purpose of any sustained prior practice obligation—the States want to ensure that a new legal consultant is experienced in providing advice to clients. The requirement also parallels the common provision in states that permit other State lawyers to be admitted on motion only if they can demonstrate that they have five years of prior practice experience.

The initial 1974 New York Rule required that a legal consultant be "an actual resident". The 1994 amendment replaced this with an obligation

107. N.Y.Ct.App.R. s.521.1(a)(1). The applicant must also be 26 and possess a "good moral character and general fitness". *Ibid.*, at (a)(3) and (4).

108. *Ibid.*, at (a)(2). See the discussion in Sydney Cone, *op. cit.*, *supra* n.1, at s.3.3.1.

109. *Ibid.*, see the discussion in Sydney Cone, *op. cit.*, *supra* n.1, at s.3.3.1.

110. Prof. Needham lists 15 jurisdictions following this rule, while California and Ohio use four of the prior six years, and other States have varying approaches. Carol Needham, *op. cit.*, *supra* n.87, at pp.1132–1134.

that the consultant “intends to practice . . . and to maintain an office in this State for that purpose”.¹¹¹ The amendment adopted the recommendation of the ABA Model Rule, whose Report explaining this section observed that a residence requirement could impose unnecessary hardships both for foreign lawyers who wanted to qualify quickly without the time lapse necessary to prove residence, as well as for foreign law firms with branch offices that rotate legal personnel for short periods of time.¹¹²

The New York Rule requires that legal consultants be registered with one of the four New York Appellate Division Departments and to pay initial application and annual renewal fees, just as New York attorneys must do.¹¹³ This is the approach generally taken in other States.¹¹⁴

A reciprocity obligation did not exist in the initial New York Rule, but when the idea of creating legal consultant rules began to spread to other states, they often either flatly required reciprocity,¹¹⁵ or made it a factor in the court’s discretionary review of an applicant’s credentials.¹¹⁶ The intent behind some form of reciprocity formula is to enable American law firms practising in foreign countries to exert a degree of lobbying pressure on the authorities in those countries in order to achieve a recognised right of practice in some pragmatically suitable form. The ABA Model Rule recommended as the best approach that courts exercise some form of “discretionary” review of the extent of reciprocal treatment. The ABA Report endorsing the Model Rule argued that this approach represents “the most effective incentive to foreign jurisdictions to participate in . . . an open system”.¹¹⁷ A 14 January 1993 amendment to the New York Rule adopted this “discretionary” form of reciprocity, enabling the Appellate Division to review whether a New York lawyer would have “a reasonable and practical opportunity to establish an office for the giving of legal advice to clients in the applicant’s country”.¹¹⁸

2. *Scope of the Legal Consultant’s Right of Practice*

Manifestly, a legal consultant could not be permitted to exercise the unlimited rights of practice enjoyed by a New York attorney who has satisfactorily completed legal education in the United States and passed the state bar examination. The extent to which legal consultants should be allowed to practise was the most difficult “bread and butter” issue that

111. N.Y.Ct.App.R. s.521.1(a)(5).

112. See (1994) 28 Int’l Law. 207, at pp.223–224.

113. N.Y.Ct.App.R. s.521.2. New York does not, however, require legal consultants to maintain any level of professional liability or malpractice insurance.

114. See Carol Needham, *op. cit.*, *supra* n.87, at pp.1136–1138.

115. E.g. New Mexico and North Carolina.

116. See Carol Needham, *op. cit.*, *supra* n.87, at pp.1134–1136, listing eight States and the District of Columbia as adopting this approach.

117. (1994) 28 Int’l Law. 207, at p.225.

118. N.Y.Ct.App.R. s.521.2(b). See Sydney Cone, *op. cit.*, *supra* n.1, at s.3.2.

had to be resolved in adopting the initial 1974 rules.¹¹⁹ The resolution can be appraised as a highly functional one, enabling legal consultants to carry out a varied and broad transactional practice, without however creating undue risks to clients. It is interesting to note that the Rule's basic approach parallels some of the rules in the 1977 European Community Directive regulating lawyers' rights to engage in transborder services, as well as in the recent 1998 Directive on the right of permanent establishment for lawyers.¹²⁰

The most obvious limitation upon a legal consultant's scope of practice is that he or she may not appear in any New York court on behalf of a client (except under the rules governing *pro hac vice* admission).¹²¹ Since attorneys admitted in other US States are permitted to appear in New York courts only on a *pro hac vice* basis, certainly foreign legal consultants cannot expect greater rights to do so. New York does not, however, forbid legal consultants from appearing before New York administrative agencies, which set their own rules in this regard. Generally speaking, the other US states likewise forbid legal consultants to appear in court, except on a *pro hac vice* basis, and some also exclude administrative agency practice as well.¹²² Restricting courtroom practice to locally admitted attorneys who at least have had the opportunity to be educated and trained in the state court procedure appears to be a solid public policy motive for these rules.

New York further forbids legal consultants from engaging in three types of practice, presumably because malpractice might well pose serious risks to major personal interests of clients, as well as to society at large: 1) preparation of title registration or title documents concerning real estate located in the United States; 2) preparation of wills or trusts concerning the disposition on death of property within the United States and owned by a US resident, or of instruments required for the administration of decedents' estates in the United States; and 3) preparation of instruments concerning marital or parental rights and obligations of US residents, or concerning the custody of children of such residents.¹²³ The ABA Model Rule and almost all US States have basically the same list of legal services which are closed to legal consultants.¹²⁴

119. See Sydney Cone, *op. cit.*, *supra* n.1, at s.3.3.2.

120. *Supra* nn.67 and 48 respectively.

121. N.Y.Ct.App.R. s.521.3(a). However, a legal consultant may prepare papers and documents for use in a court proceeding by virtue of the 1993 amendment.

122. For a review, see Carol Needham, *op. cit.*, *supra* n.87, at pp.1131-1132.

123. N.Y.Ct.App.R. s.521.3(b)-(d).

124. See Carol Needham, *op. cit.*, *supra* n.87, at pp.1131-1132, noting that Connecticut, Missouri and New Mexico do not list these areas of restricted practice, but that Illinois also forbids legal consultants to pursue personal injury claims, or to handle customs, trade or immigration matters.

The most important scope of practice issue is whether a legal consultant should be restricted to giving advice on his or her own country's law and upon international law, or should also be permitted to give advice on the law of the host state. After long debate, New York found a satisfactory middle ground: the legal consultant may "render professional legal advice" on New York law, or US law, but only provided it is based upon advice from a duly qualified New York attorney.¹²⁵ In terms of practical operations, it is frequently the case that a legal consultant is in partnership or other association with one or more New York lawyers, either within a New York law firm or the branch office of a foreign law firm, so that the obtaining of initial advice from a New York lawyer can be achieved easily and functionally. Moreover, there is no obligation that the client be informed of the identity of the New York lawyer concerned, or even know of the procedure. The New York approach can be appraised as both pragmatic and functional, and does not seem to have posed any significant difficulties in practice.

The ABA Model Rule follows the New York approach. Its supporting Report contends that the rendering of legal advice in complex commercial and financial transactions is increasingly synthetic, comprising aspects of different laws, so that the approach is pragmatically justified.¹²⁶ About half the US states follow the New York model in this regard, while the other half (including however, important commercial states such as California, Florida and Texas) restrict the legal consultant to giving advice on the law of his or her country of admission to the bar, and on international law.¹²⁷ While it may be hoped that these States will ultimately amend their rules to follow the recommendation of the ABA Model Rule, this has not happened to date.

Linked to limitations on the foreign legal consultant's scope of practice is the issue of professional title. The New York Rule permits a legal consultant to use that title, as well as his or her title from the country in which he or she is admitted to practise (e.g. *avocat*, *Rechtsanwalt*, solicitor).¹²⁸ Obviously, a legal consultant may not misrepresent his or her status to clients or convey the impression that he or she is a New York attorney.¹²⁹ The legal consultant may also practise under the name of a domestic or foreign law firm—an important reputational concern both for

125. N.Y.Ct.App.R. §521.3(e). For a description of its origin, see Sydney Cone, *op. cit.*, *supra* n.1, at §.3.3.2.3. He regards the Rule's negative language, followed by "except" as drafted for "cosmetic reasons", since the overall text is "properly read as permissive".

126. (1994) 28 Int'l Law. 207, at pp.226–229.

127. See Carol Needham, *op. cit.*, *supra* n.87, at pp.1129–1130. Sydney Cone, *op. cit.*, *supra* n.1, at §.4.2, describes the debate on this issue in the adoption of rules in several of the States concerned.

128. N.Y.Ct.App.R. §521.3(g).

129. *Ibid.*, at §.521.3(f).

the lawyer and for the law firm. The ABA Model Rule provisions parallel those in New York. Its Report notes that the legal consultant's ability to include a reference to his or her law firm name is of great operational importance, and that some foreign jurisdictions (notably Japan) have attempted to prohibit or restrict such references.¹³⁰

The initial 1974 New York Rule never mentioned the subject of affiliations between legal consultants and New York attorneys. Almost immediately, however, New York law firms engaged legal consultants as employees, consultants or in of counsel arrangements, while English, Dutch, French, German, Italian and other large foreign law firms opened branch offices in New York City staffed partly by legal consultants and partly by New York attorneys. When in either context legal consultants became partners with New York attorneys, questions were raised as to whether this complied with New York's CPR Rule 3-103, which forbids lawyers to be partners with non-lawyers when the partnership engages in law practice. Although several New York State Bar Association ethics opinions approved of such partnerships,¹³¹ a clarification stated directly in the legal consultant rules was clearly advisable.

The 1993 amendments to the New York Rule expressly authorise legal consultants to form partnerships or professional corporations with New York attorneys, or to employ or be employed by New York attorneys.¹³² An ABA Model Rule provision parallels this language.¹³³ The ABA Report underlines the importance of the provision, not because it makes any substantive change (the Report was aware of no instance of a challenge to the partnership of legal consultants with American lawyers), but because of its psychological impact in foreign countries that have tried to restrict or forbid US lawyers from partnership or employment in their law firms.¹³⁴

3. Professional Responsibility and Disciplinary Rules Applicable to Legal Consultants

From the outset, the New York Rule stated the principle that legal consultants were fully subject to New York professional responsibility and ethical obligations and to court disciplinary procedures. Other States quite naturally followed the same policy in adopting legal consultant rules.

Professional responsibility rules provide rights as well as obligations, notably the right to hold privileged communications with clients. This

130. (1994) 28 Int'l Law. 207, at p.228.

131. See Carol Needham, *op. cit., supra* n.87, at pp.1144-1145; Sydney Cone, *op. cit., supra* n.1, at s.3.3.3.

132. N.Y.Ct.App.R. s.521.4.

133. ABA Model Rule, s.5 Rights and Obligations.

134. (1994) 28 Int'l Law. 207, at pp.231-232.

topic was not specifically mentioned in the 1974 Rule, but the 1993 amendment inserted an express statement that legal consultants would have the same rights and obligations as do New York attorneys with regard to "attorney-client privilege, work product privilege and similar professional privileges".¹³⁵ The ABA Model Rule contains the same express reference, although its Report notes that only California's rules previously contained such a statement.¹³⁶

The ALI Third Restatement on the Law Governing Lawyers takes the position in section 122 that the attorney-client privilege applies to foreign lawyers or anyone functioning in the professional capacity of lawyers,¹³⁷ and there have been a few court decisions to this effect.¹³⁸ The New York amendment and the ABA Model Rule provision were inserted not because of any doubt in the United States on the issue, but more as a sort of affirmation to foreign jurisdictions that this is the correct policy.¹³⁹ American lawyers have never ceased to protest the 1982 European Court of Justice judgment in *A M & S Europe v. Commission* that held that the attorney-client privilege in EC competition proceedings did not cover client communications with lawyers admitted to practise outside the European Community.¹⁴⁰

The New York Rule contains a specific provision on disciplinary proceedings, stating that a legal consultant "shall be subject to professional discipline in the same manner and to the same extent as members of the bar",¹⁴¹ with jurisdiction in the Appellate Division with which the legal consultant is registered. The ABA Model Rule has essentially the same provision.¹⁴² Very few ethical complaints have been filed against legal consultants and only two cases are worthy of note. A Peruvian lawyer's legal consultant status was revoked in *In re Pinto* following a disciplinary proceeding brought because his advertisements for his services conveyed the impression that he was a New York attorney (through use of the words "attorney" and "abogado") and because he conveyed the same impression to a prospective partner in a law practice.¹⁴³ In a 1995 case, a Hungarian lawyer was denied the recovery of

135. N.Y.Ct.App.R. s.521.4(b)ii.

136. (1994) 28 Int'l Law. 207, at p.233 n.64.

137. ALI, Proposed Final Draft No.1 of the Law Governing Lawyers s.122 Comment c (29 Mar. 1996).

138. E.g. *Mendenhall v. Barber-Greene Co.*, 531 F.Supp. 951 (N.D.Ill. 1982); *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442 (D.Del. 1982).

139. (1994) 28 Int'l Law. 207, at p.232.

140. Case 155/79, [1982] E.C.R. 1575. The American Bar Association House of Delegates formally protested the court ruling. For further discussion of the case and its aftermath, see Roger Goebel, *op. cit.*, *supra* n.3, at pp.502-503.

141. N.Y.Ct.App.R. s.521.5.

142. ABA Model Rule s.6, commented upon in the Report, (1994) 28 Int'l Law. 207, at pp.232-233.

143. 546 N.Y.S.2d 886 (N.Y.App.Div. 1989).

fees from a client in a customs proceeding on public policy grounds, because the lawyer had never registered as a legal consultant.¹⁴⁴

C. *Practical Value of the Legal Consultant Rules*

The idea that foreign legal consultants can constitute a legal profession functioning independently of the traditional profession of attorneys, yet often working with attorneys in co-operative relations, is one that has great functional utility. On the one hand, too easy admission of foreign lawyers or law students into the bar of a US State can produce risks to clients inasmuch as the foreign lawyers will not usually have as broad or intensive an American legal education or training. On the other hand, the needs of modern international commercial affairs make undesirable a rigid application of the principle that a foreign lawyer can provide legal advice or assist in transactions in the United States only at the risk of being deemed engaged in the unauthorised practice of law.

The use of foreign legal consultants represents a pragmatic and functional middle road. Acting in accordance with the New York Rule, or with those rules adopted in many other states, foreign legal consultants can engage in virtually all transactional legal practice appropriate to a leading commercial and financial centre. Their inability to engage in court litigation appears justified by a valid policy concern for efficient court administration and protection of clients from inexperienced or incompetent litigators. Moreover, it is obvious that many international commercial and financial disputes are resolved by international arbitration rather than litigation, and foreign legal consultants are quite free to engage in such arbitration.

As a matter of fact, New York State has a solid majority of all registered legal consultants in the United States as a whole—not surprisingly, since New York City is the world's leading financial centre and the New York City metropolitan region houses an unusually large number of multinational corporate headquarters. There are currently around 250 legal consultants registered in New York.¹⁴⁵ Only Washington, D.C., as the capital and centre of lobbying, regulatory practice, and international trade practice, comes close to New York City in international importance—and, not surprisingly, Washington, D.C. has around 30 registered legal consultants.¹⁴⁶ No other State has a large number—California, Florida and Hawaii have around 10 each, while most of the other states

144. *International Customs Assoc. Inc. v. Bristol-Myers Squibb, Inc.*, N.Y.L.J. at 26 (1995).

145. Carol Needham states that there were 249 legal consultants in New York in mid-1997, based on contacts with the New York Bar. Carol Needham, *op. cit.*, *supra* n.87, at p.1139.

146. Sydney Cone compiled figures in Oct. 1995, based on contacts with the state courts. He indicates that 28 legal consultants were registered in the District of Columbia. Sydney Cone, *op. cit.*, *supra* n.1, at App. II-C.

have either none or only a handful.¹⁴⁷ However, it should be remembered that the legal consultant rules are quite recent in most jurisdictions, so that these figures may change significantly in the next decade.

The exact number of foreign law firms with branch offices in New York is unknown, but there are certainly more than 60, of whom around 50 are listed in the Martindale-Hubbell Law Directory.¹⁴⁸ There is no question but that these firms have been able to use registered legal consultants as key partners and associates in order to maintain a permanent presence in New York. In 1997, 154 legal consultants were registered in the First Appellate Division, or Manhattan,¹⁴⁹ and the large majority appear to be affiliated with such branch offices. The number of legal consultants might be considerably higher but for the fact that some branch offices are opting to register only one or two partners or senior associates as legal consultants, while the majority of their foreign lawyer personnel rotate in and out of New York in several-year terms. This operational practice may be justified when only junior associates who stay for a year of training are involved, but it is somewhat dubious, and may give rise to abuse, when foreign lawyers, especially at the partner level, are based in a New York branch office without registering as a legal consultant.¹⁵⁰

Legal consultant rules appear eminently suitable for use in trans-border legal practice. Although, somewhat ironically, the French profession of *conseil juridique* (and consequently that of international legal consultants) disappeared when the profession was merged with that of the *avocat* in 1991,¹⁵¹ a variety of legal consultant professions continue to exist in other European countries. More importantly, the 1998 European Community Directive on the right of permanent establishment for lawyers¹⁵² will provide an operational structure that is closely analogous, both in terms of the extent of rights, the limitations on the scope of practice, and the application of host country professional rules and disciplinary procedures, to the New York Rule on Legal Consultants. Drawing the parallels is, however, beyond the scope of this paper.

147. Sydney Cone listed nine legal consultants for California, 11 for Florida and 10 for Hawaii. *Ibid.*, Carol Needham's contact with the California Bar showed 11 as registered in Jul. 1997. Carole Needham, *op. cit.*, *supra* n.87, at p.1139 n.145.

148. The Council of Legal Consultants, a body informally grouping many legal consultants for co-ordination among themselves and with the New York City Bar, provided the figure of over 60 foreign law firm branches to Sydney Cone. *Ibid.*, at s.3.6.

149. Carol Needham, *op. cit.*, *supra* n.87, at p.1139 n.144.

150. Sydney Cone, *op. cit.*, *supra* n.1, at s.3.3.1, criticises this practice as "lethargic" and perhaps an "abuse both of the licensing process and of New York's policy" behind the creation of legal consultants.

151. For a review of the 1991 rules, see Christian Raoul, "Regulation of the Profession: The French System", in Mary Daly & Roger Goebel, *op. cit.*, *supra* n.1, at p.53. A very detailed analysis is provided in Sydney Cone, *op. cit.*, *supra* n.1, at Ch.9 France.

152. *Supra* n.48.

Mentioned previously is the NAFTA Annex 12's promotion of the legal consultant concept for use by Canada, Mexico and the United States.¹⁵³ If GATS ever seriously turns its attention to legal services (they did not receive a high priority during the Uruguay Round negotiations, which only marginally created some level of protection under the general Most Favoured Nation provisions¹⁵⁴), the legal consultant regime is likely to receive serious consideration. In a less formal approach, the International Bar Association attempted for over five years to draw up some form of statement of principles or guidelines for the regulation of permanently established foreign lawyers. The IBA's 1998 "Statement of General Principles for the Establishment and Regulation of Lawyers" recommends as one policy alternative a "Limited Licensing Approach" that follows the essential ideas of the legal consultant status as it operates in New York and other US States.¹⁵⁵

IV. SUMMARY AND CONCLUSION

THIS paper has presented a general picture of the rules governing the interstate practice of law by domestic lawyers, and the extent to which foreign lawyers can practice in the United States. The first part described the general system of regulation of legal practice in the United States in order to indicate the structure within which these rules were developed. As the United States is a federal system, it is not surprising that rules governing the practice of law are almost entirely state measures. Part I indicated that the Supreme Court has held that some federal constitutional provisions govern state rules, notably to forbid any rules that require citizenship or residence within the state as a prerequisite for admission to the bar. A State may however require a lawyer to maintain an office or practise regularly within the state.

Although each State sets its own standards for admission to the bar, the American Bar Association and the culturally uniform system of American legal education has made it relatively easy for persons educated in one state to become admitted in another. The ABA sets the accreditation standards for about 160 approved law schools, whose courses of study are essentially similar. The state bar examinations today are also similar in many respects, due to the general adoption of national bar examination tests. Finally, the state professional responsibility and ethical rules are also quite similar in nature and approach, because the states have adopted either the 1983 Model Rules of Professional Conduct or the 1969 Code of Professional Responsibility. Moreover, the American

153. See text at nn.104–106 *supra*.

154. Sydney Cone, *op. cit.*, *supra* n.1, at Ch. 2 GATS, provides a detailed review of the relevant Uruguay Round negotiations and their rather limited outcome in the field of legal services.

155. *Supra* n.7.

Law Institute's recent Third Restatement of the Law Governing Lawyers is bound to have a further influence in promoting substantial uniformity in this field.

Although it is relatively easy for students educated in US law schools to pass state bar examinations in any State, after a lapse of several years it is definitely hard for lawyers admitted in one State to pass examinations in other states. Unfortunately, the system of admission on motion, waiving the state bar examination, exists only in about half the States, and is usually open only to lawyers who have practised for five years. This means that the mobility of lawyers who wish to change their State of practice is subject to more serious legal restrictions than is now the case for lawyers within the European Union.

Litigation before courts in States other than that in which a lawyer is admitted is customarily achieved fairly easily through the *pro hac vice* admission process. However, courts have broad discretion in applying the procedure, and mandatory association with a local counsel (with the concomitant cost to the client) is generally required. Extrajurisdictional legal practice in consultation, negotiation and transactions is commonplace, and supported by legal commentary based upon a few court judgments. However, based on several prominent precedents in California, New York and elsewhere, there always exists a risk that the courts of the State in which such practice is conducted may conclude that the legal work constitutes the unauthorised practice of law, potentially subject to a variety of sanctions. No federal rule authorising occasional transborder practice exists—there is no counterpart to the 1977 European Community Directive on lawyers' freedom to provide transborder services.

Part II of this paper reviewed the extent of ability of foreign lawyers, or persons who have completed their legal education abroad, to become admitted to the bar of a US State. Although only about half the states have a procedure covering this, they represent virtually all the States with important commercial and financial centres. Thus, in effect, the United States is fairly liberal in permitting foreign lawyers to become American attorneys. Naturally, foreign lawyers from common law jurisdictions are favoured—some States permit them to take the state bar examination, others even extend the possibility of admission on motion. For lawyers trained in other legal traditions, the approach in many States is to permit them to take the state bar examination after they have obtained an LL.M. degree or the equivalent of a year's study in an approved American law school.

New York, undoubtedly the State that attracts the largest number of foreign lawyers and law students, has had since 1980 relatively liberal rules in this regard. As amended in May 1998, the rules permit the graduates of foreign law schools to take the state bar examination once

they have successfully completed 20 course hours of study in an accredited US law school, provided that study includes “basic courses in American law”. During 1985–1995, over 3700 foreign lawyers thus passed the New York State bar examination, and their success rate in taking the bar was a creditable 45 per cent.

Part III dealt with foreign legal consultant rules, perhaps the most important recently developed mode for the satisfactory conduct of trans-border international legal practice, especially by larger multi-national law firms. The idea originated in the 1971 French *conseil juridique* rules and has been quite successfully transplanted to the United States. Nearly half of all states—and certainly nearly every State that has significant international commerce—have now adopted legal consultant rules, as has also the District of Columbia.

Although the pioneering 1974 New York Rule is the basic model, the American Bar Association’s 1993 Model Rule for the Licensing of Legal Consultants represents an authoritative endorsement of this professional modality. The ABA’s promotion of legal consultants comes within the context of its efforts to urge the United States to encourage liberalisation of legal services within GATS and NAFTA, and also within the context of private dealings with European and other foreign bar groups or regulatory authorities to try to achieve satisfactory rights of practice for American law firms in particular foreign centres.

The New York Rules are by far the most important, since around 250 legal consultants practise in New York, by far the largest number in the United States (although around 30 practise in the District of Columbia, and the number of legal consultants registered in California, Florida and other states may be expected to grow). Many of the 60 foreign law firms with branch offices in New York City depend upon the legal consultant mode in order to staff their offices.

Qualification for the legal consultant status is naturally based upon prior qualification as a lawyer in a foreign country, coupled with a relatively low record of actual practice experience, set in 1993 in New York as three out of the five years preceding application (although most other states require five out of the seven years preceding application). For qualification, an applicant must register with a designated New York court and maintain an office (often as part of a law firm’s larger office) in New York. The court may consider whether reciprocal treatment for New York lawyers exists in the foreign country concerned as an element in deciding upon the application.

The scope of practice limitations imposed by the New York Rule leave legal consultants free to carry out virtually all commercial and financial transactional legal practice. Thus, a legal consultant cannot litigate before a New York court, but may do so before an administrative agency or an arbitration tribunal. A legal consultant may provide legal advice on New

York or US law issues, provided the advice is founded upon that initially given by a New York lawyer—easy to arrange within a larger firm composed of both New York lawyers and legal consultants. A legal consultant is essentially excluded from real estate title transfers, decedent estate practice, and marital and family law practice—fields of manifest social sensitivity, but also fields that are not usually of great interest in international commercial legal practice.

The current New York Rule expressly authorises partnerships between New York lawyers and legal consultants, as well as an employment relationship going either way. Although a legal consultant naturally cannot misrepresent himself or herself as a New York attorney, a legal consultant may use his or her home country professional title, as well as make use of a foreign law firm's name. Naturally also, the New York professional responsibility rules and disciplinary procedures apply to foreign legal consultants.

The overall picture accordingly is that the United States is quite liberal in enabling foreign lawyers and persons educated in foreign law schools to practise either as attorneys or as legal consultants. While it is true that only about half the States provide a regulatory mechanism either for full admission to the bar, or for qualification as a legal consultant, these are essentially the States with commercial and financial centres that are apt to draw foreign lawyers. In particular, New York State has adopted extremely liberal rules that have enabled over 3000 foreign lawyers to become New York attorneys and an additional 250 to become legal consultants. New York may well serve as a model, not only for other US States, but also for many foreign jurisdictions.

It is, ironically, with regard to inter-state practice opportunities for US lawyers that we might well look to the European Union. The 1977 Directive on lawyers' right to provide transborder services and the 1998 Directive on the right of permanent practice as established lawyers could both well serve to induce reflection on whether similar federal legislation might be appropriate, or at least on whether the states ought to be more generous in permitting transborder inter-state practice.