Transnational Legal Practice

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The explosive growth of international business requires that legal services and lawyers be portable, and as a result the year has seen many developments of consequence in the field of transnational legal practice. Some of the more notable are set forth below.

I. ABA-Paris Bar Agreement

The Cooperation Agreement between the American Bar Association and the Barreau de Paris of November 22, 1996 is beginning to produce the results its American negotiators desired. At ABA-Paris Bar meetings in New York and Paris, the French representatives emphasized that all four American candidates who sought membership in the Paris Bar in 1997 passed the "Article 100" examination and repeated their undertaking to shepherd the dossiers of American aspirants through the application process. While one may welcome this improved environment, it is to be noted that all of the successful candidates had lived in France for extended periods and were comfortably bilingual, but even they reported formidable difficulties in preparing for and taking the test, particularly the oral examination. The ABA will continue to urge the Barreau de Paris to establish meaningful preparatory schools (such as bar review courses in this country) to adapt the exam content to the realities of Americans' anticipated practice in France and in general to make the whole process more reasonable and transparent.

A hopeful note was sounded in the address delivered by Bâtonnier Bernard Vanier to the Rentrée of the Paris Bar on November 21, 1997 (which was attended by ABA President Jerome Shestack, President-Elect Philip Anderson and the Chair of this Committee). He called attention to the adoption of the European Union Establishment Directive (see below) and then noted:

> International competition will considerably favor the export of lawyers. Discussions are under way on the status of the lawyer who emigrates outside the European Union and proposals have been made to recognize the concept of foreign legal counsel who, in the context of the reciprocity of the Marrakech agreements, could set up and practice the law of his country of origin and international law in the country he emigrates to. In 1990, the principal of the indivisibility of the profession of lawyer was recognized in France by imposing the status of lawyer on the legal counsel. We

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> feel that the establishment of a lawyer emigrating outside the European Union should be organized within the framework of bilateral agreements fixing the recognition of qualification standards and the terms of actual reciprocity between the bars.

The ABA representatives will explore with the Paris Bar whether the creation of a foreign legal consultant regime of the sort the Bâtonnier's remarks appear to contemplate is possible, whether the Barreau de Paris intends such a regime to extend to American lawyers, and whether the reciprocity requirements to which he alludes can be satisfied by the States of the American union. In doing so, they will have to take into account the less than encouraging remarks of the French Minister of Justice, Elisabeth Guigou, who spoke after the Bâtonnier:

> I am focusing particular attention to on-going work within the World Trade Organization concerning the proposed foreign [legal] consultant concept. The effects on French law and profession have to be carefully analyzed and necessary action taken to avoid deregulation and disequilibrium in favor of large Anglo-Saxon law firms.

The ABA has created a highly satisfactory professional relationship with Bernard Vatier, and there can be little doubt that that relationship will continue under the leadership of Dominique de la Garanderie, who became Bâtonnier on January 1, 1998.

One development of note during the past year is that John H. Riggs, a White & Case partner resident in Paris, was elected to the *Conseil of the Ordre des Avocats à la Cour de Paris*. It is believed that he is the second American lawyer in the roughly seven-hundred year history of the Paris Bar to have achieved that eminence.

II. The Law Society of England And Wales

In England and Wales, lawyers may become articled solicitors without attending a law school. With the exception of certain Australian states, England and Wales are virtually the only jurisdictions which have such a system. English and Welsh lawyers must, however: earn a university degree from a recognized university in some other discipline; study for, take and pass a common professional examination after a course of study which lasts at least thirty-six weeks; take a legal practice course that lasts at least thirty-four weeks; and, complete a two-year period of training with a firm of solicitors authorized to take trainees.

The Court of Appeals of New York, which is the State's rule-making body where bar admission and like matters are concerned, conducted a comprehensive study of its rules relating to qualifications for taking the bar examination, and The Law Society sought and, through the intercession of the Chair of this Committee, received a meeting with the Chief Judge of the Court and the judge who had primary responsibility for the study. At the meeting, Philip Sycamore, the president of The Law Society, and Jonathan Goldsmith, the head of its International Directorate, argued that, given all the requirements noted above, and taking into account the fact that the existing New York rules already make a distinction between lawyers trained in the common law tradition and others, members of the Law Society who have practiced for a period of years and are in good standing should be able to take the New York State bar examination without undergoing the expense, inconvenience, and, in their view, indignity of further law school study in this country. The Court has not yet acted on the Law Society's application. The Court issued an order effective May 27, 1998, which fell far short of The Law Society's expectations or, in any event, hopes. British solicitors who do not have a traditional law degree and who wish to take the New York State bar examination must now demonstrate that they have "successfully completed a full-time or part-time program consisting of a minimum

of twenty semester hours of credit, or the equivalent, in professional law subjects, which includes basic courses in American law, in an approved law school in the United States."

III. Forum on Transnational Practice For The Legal Profession

The Working Party on Professional Services (WPPS) of the World Trade Organization in Geneva is developing rules for the harmonization of national laws respecting the professions in such matters as recognition of credentials and barriers to entry, as mandated by the General Agreement on Trade in Services. In aid of the WPPS, the Organization for Economic Cooperation and Development (OECD) in Paris has conducted studies and workshops on those subjects. A February 1997 OECD workshop (where the Chair of this Committee delivered a paper on limited liability partnerships and foreign legal consultancy) was devoted to various subjects relating to the architecture, engineering, accounting and law professions, and at the conclusion of the workshop, the Japanese representatives proposed that the legal profession organize a comparable study devoted exclusively to it. Several meetings in New York and Paris between the American Bar Association, the Council of the Bars and Law Societies of the European Communities (CCBE) and the Japan Federation of Bar Associations (JFBA) ensued, and it has now been agreed that a Forum on Transnational Practice for the Legal Profession will be convened in Paris during November 1998. The participants will be the bars of the twenty-nine OECD countries and of nine other nations in Africa, Asia and South America. The subjects considered at the Forum, all of which will be dealt with in ABA, CCBE and JFBA position papers prepared and distributed in advance, will include: responsibilities of the legal profession; measures that might be taken for the reduction of impediments to the ability of lawyers to practice in jurisdictions other than that of their original licensure; and forms of licensure (e.g., membership in the host bar or foreign legal consultant).

IV. NAFTA

The United States did not subscribe to the draft joint recommendations respecting a legal services annex to NAFTA that were circulated for comment in the summer of 1996 following some two years of discussion. The reasons for American abstention included the protest by American firms already established in Mexico that the system contemplated by the joint recommendations gave them less freedom than they enjoyed under existing law. In a May 1997 letter, Steven C. Nelson, the chief American negotiator, provided his Mexican counterparts with a comprehensive explanation of the American position, and the *Comité Mexicano para la Práctica Internacional del Derecho* replied at length in October of that year. The response attributes the distress of American firms established in Mexico in association with Mexican attorneys to a "lamentable confusion" between the requirements of Mexican investment and professional laws and regulations. The American delegation has not yet responded.

V. EU Establishment Directive

On November 18, 1997, the European Union, after fifteen years of debate, adopted a European Parliament and Council Directive (Directive) to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. Member states have two years to conform their domestic laws to the directive's requirements. In brief, a lawyer in any one of the fifteen EU countries will be able to practice under the lawyer's home title (e.g., solicitor, avocat, abogado) in any other EU country and, after the passage of time,

under host country title. One consequence is that Community lawyers will no longer be required to take the Article 99 examination now required by French law, but American lawyers will still be required to take the Article 100 examination. The existing system already works to the disadvantage of American firms with Paris offices and to the advantage of British solicitors, and the competitive advantage enjoyed by the latter will be greatly strengthened by the Directive. The ABA must and will devote its attention to this matter.

VI. Multidisciplinary Practice

The Big Six (Four?) accounting firms are already the largest law firms in France and Spain, and companies like Anderson Worldwide advise their international clients that they are able to provide a full range of audit, consulting and legal services. This development is less visible in this country, but it is a matter of growing concern to foreign, particularly European, bars. The International Bar Association has organized a task force to consider an appropriate response from the legal profession, and some American bar associations, among them The Association of the Bar of the City of New York, have also formed MDP committees. The ABA has commented on the fringes of the issue, such as the ethical propriety of American firms engaging in ancillary consulting and other businesses, but it has not squarely dealt with the current manifestations of MDP. It may well be that the American bar will in due course wish to consider a unified position on the propriety and even legality of lawyer-accountant partnerships.

VII. Japan

On October 30, 1997 a Study Committee on Foreign Lawyers (Study Committee) organized by the Japanese Ministry of Justice at last released its report concerning the liberalization of the practice of foreign lawyers in Japan, including registered foreign legal consultants (*gaikoku-ho jimu bengoshi*). The Study Committee focused on three issues: (1) partnership and employment of Japanese *bengoshi* in foreign law firms; (2) the ability of *gaikoku-ho jimu bengoshi* to advise on third country law; and (3) the experience required for foreign lawyers to become registered as *gaikoku-ho jimu bengoshi.* The American Embassy in Tokyo issued a press release calling the Committee's conclusions "very disappointing." The U.S. government was "particularly disappointed with the Study [Committee's] failure to recommend any significant relaxation of the most serious regulatory hurdle facing foreign lawyers in Japan—the ban on foreign lawyers hiring or forming partnerships with Japanese *bengoshi.*" The statement noted that the U.S. government considered the recommendations concerning liberalization of the practice of third country law "generally positive" but found little else to applaud. In the American view, the liberalization of Japanese legal services must keep pace with other ongoing deregulation and market liberalization so as to ensure that both Japanese and foreign businesses are able to obtain fully integrated transnational legal services in Japan. In a November 10, 1997 submission to the Japanese government in the context of the bilateral Enhanced Initiative on Deregulation and Competition Policy, the U.S. government listed as a priority its request that the Japanese Government allow partnerships between *bengoshi* and *gaikoku-ho bengoshi* and allow foreign law firms to hire *bengoshi,* but no progress has been made in achieving those objectives and little is to be anticipated. The efforts of the U.S. government to encourage Japan to liberalize restrictions on the practice of foreign lawyers in Japan are discussed in some detail by Jean Heilman Grier, Senior Counsel for Trade Agreements, United States Department of Commerce, in *Recent Developments in Foreign Legal Services in Japan* in the Winter 1998 edition of *International Law News.*