

1994

Model Rule for the Licensing of Legal Consultants

Recommended Citation

Model Rule for the Licensing of Legal Consultants, 28 INT'L L. 207 (1994)
<https://scholar.smu.edu/til/vol28/iss1/14>

This Section Recommendation and Reports is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

SECTION RECOMMENDATION AND REPORT

American Bar Association Section of International Law and Practice Report to the House of Delegates Model Rule for the Licensing of Legal Consultants†

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association approves the “Model Rule for the Licensing of Legal Consultants” consisting of ten sections as set forth below;

BE IT FURTHER RESOLVED, that the American Bar Association recommends that each State not presently having a rule for the licensing of legal consultants adopt such a rule conforming to the Model Rule and that those States and the District of Columbia having such rules conform them to the Model Rule; and

BE IT FURTHER RESOLVED, that the text of the Model Rule shall read as follows:

†This Recommendation and Report was adopted by the House of Delegates in August 1993. The Recommendation and Report was based on the work that former Section Chair Steven C. Nelson has done on these issues over the past several years.

MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS

§ 1. General Regulation as to Licensing

In its discretion, the [name of court] may license to practice in this State as a legal consultant, without examination, an applicant who:

- (a) is a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;
- (b) for at least five of the seven years immediately preceding his or her application has been a member in good standing of such legal profession and has actually been engaged in the practice of law in the said foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the said foreign country;*
- (c) possesses the good moral character and general fitness requisite for a member of the bar of this State;
- (d) is at least twenty-six years of age;** and
- (e) intends to practice as a legal consultant in this State and to maintain an office in this State for that purpose.

§ 2. Proof Required

An applicant under this Rule shall file with the clerk of the [name of court]:

- (a) a certificate from the professional body or public authority in such foreign country having final jurisdiction over professional discipline, certifying as to the applicant's admission to practice and the date thereof, and as to his or her good standing as such attorney or counselor at law or the equivalent;
- (b) a letter of recommendation from one of the members of the executive body of such professional body or public authority or from one of the judges of the highest law court or court of original jurisdiction of such foreign country;
- (c) a duly authenticated English translation of such certificate and such letter if, in either case, it is not in English; and
- (d) such other evidence as to the applicant's educational and professional qualifications, good moral character and general fitness, and compliance with the requirements of Section 1 of this Rule as the [name of court] may require.

*Section 1(b) is optional; it may be included as written, modified through the substitution of shorter periods than five and seven years, respectively, or omitted entirely.

**Section 1(d) is optional; it may be included as written, modified through the substitution of a lesser age than twenty-six years, or omitted entirely.

§ 3. Reciprocal Treatment of Members of the Bar of this State

In considering whether to license an applicant to practice as a legal consultant, the [name of court] may in its discretion take into account whether a member of the bar of this State would have a reasonable and practical opportunity to establish an office for the giving of legal advice to clients in the applicant's country of admission. Any member of the bar who is seeking or has sought to establish an office in that country may request the court to consider the matter, or the [name of court] may do so sua sponte.

§ 4. Scope of Practice

A person licensed to practice as a legal consultant under this Rule may render legal services in this State subject, however, to the limitations that he or she shall not:

- (a) appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this State (other than upon admission pro hac vice pursuant to [citation of applicable rule]);
- (b) prepare any instrument effecting the transfer or registration of title to real estate located in the United States of America;
- (c) prepare:
 - (i) any will or trust instrument effecting the disposition on death of any property located in the United States of America and owned by a resident thereof, or
 - (ii) any instrument relating to the administration of a decedent's estate in the United States of America;
- (d) prepare any instrument in respect of the marital or parental relations, rights or duties of a resident of the United States of America, or the custody or care of the children of such a resident;
- (e) render professional legal advice on the law of this State or of the United States of America (whether rendered incident to the preparation of legal instruments or otherwise) except on the basis of advice from a person duly qualified and entitled (otherwise than by virtue of having been licensed under this Rule) to render professional legal advice in this State;
- (f) be, or in any way hold himself or herself out as, a member of the bar of this State; or
- (g) carry on his or her practice under, or utilize in connection with such practice, any name, title or designation other than one or more of the following:
 - (i) his or her own name;
 - (ii) the name of the law firm with which he or she is affiliated;
 - (iii) his or her authorized title in the foreign country of his or her admission to practice, which may be used in conjunction with the name of such country; and

- (iv) the title “legal consultant,” which may be used in conjunction with the words “admitted to the practice of law in [name of the foreign country of his or her admission to practice]”.

§ 5. Rights and Obligations

Subject to the limitations set forth in Section 4 of this Rule, a person licensed as a legal consultant under this Rule shall be considered a lawyer affiliated with the bar of this State and shall be entitled and subject to:

- (a) the rights and obligations set forth in the [Rules] [Code] of Professional [Conduct] [Responsibility] of [citation] or arising from the other conditions and requirements that apply to a member of the bar of this State under the [rules of court governing members of the bar]; and
- (b) the rights and obligations of a member of the bar of this State with respect to:
 - (i) affiliation in the same law firm with one or more members of the bar of this State, including by:
 - (A) employing one or more members of the bar of this State;
 - (B) being employed by one or more members of the bar of this State or by any partnership [or professional corporation] which includes members of the bar of this State or which maintains an office in this State; and
 - (C) being a partner in any partnership [or shareholder in any professional corporation] which includes members of the bar of this State or which maintains an office in this State; and
 - (ii) attorney-client privilege, work-product privilege and similar professional privileges.

§ 6. Disciplinary Provisions

A person licensed to practice as a legal consultant under this Rule shall be subject to professional discipline in the same manner and to the same extent as members of the bar of this State and to this end:

- (a) Every person licensed to practice as a legal consultant under these Rules:
 - (i) shall be subject to control by the [name of court] and to censure, suspension, removal or revocation of his or her license to practice by the [name of court] and shall otherwise be governed by [citation of applicable statutory provisions]; and
 - (ii) shall execute and file with the [name of court], in such form and manner as such court may prescribe:
 - (A) his or her commitment to observe the [Rules] [Code] of Professional [Conduct] [Responsibility] of [citation] and the [rules of court governing members of the bar] to the extent applicable to the legal services authorized under Section 4 of this Rule;

- (B) an undertaking or appropriate evidence of professional liability insurance, in such amount as the court may prescribe, to assure his or her proper professional conduct and responsibility;
 - (C) a written undertaking to notify the court of any change in such person's good standing as a member of the foreign legal profession referred to in Section 1(a) of this Rule and of any final action of the professional body or public authority referred to in Section 2(a) of this Rule imposing any disciplinary censure, suspension, or other sanction upon such person; and
 - (D) a duly acknowledged instrument, in writing, setting forth his or her address in this State and designating the clerk of such court as his or her agent upon whom process may be served, with like effect as if served personally upon him or her, in any action or proceeding thereafter brought against him or her and arising out of or based upon any legal services rendered or offered to be rendered by him or her within or to residents of this State, whenever after due diligence service cannot be made upon him or her at such address or at such new address in this State as he or she shall have filed in the office of such clerk by means of a duly acknowledged supplemental instrument in writing.
- (b) Service of process on such clerk, pursuant to the designation filed as aforesaid, shall be made by personally delivering to and leaving with such clerk, or with a deputy or assistant authorized by him or her to receive such service, at his or her office, duplicate copies of such process together with a fee of \$10. Service of process shall be complete when such clerk has been so served. Such clerk shall promptly send one of such copies to the legal consultant to whom the process is directed, by certified mail, return receipt requested, addressed to such legal consultant at the address specified by him or her as aforesaid.

§ 7. Application and Renewal Fees

An applicant for a license as a legal consultant under this Rule shall pay an application fee which shall be equal to the fee required to be paid by a person applying for admission as a member of the bar of this State under [rules of court governing admission without examination of persons admitted to practice in other States]. A person licensed as a legal consultant shall pay renewal fees which shall be equal to the fees required to be paid by a member of the bar of this State for renewal of his or her license to engage in the practice of law in this State.

§ 8. Revocation of License

In the event that the [name of court] determines that a person licensed as a legal consultant under this Rule no longer meets the requirements for licensure set forth

in Section 1(a) or Section 1(c) of this Rule, it shall revoke the license granted to such person hereunder.

§ 9. Admission to Bar

In the event that a person licensed as a legal consultant under this Rule is subsequently admitted as a member of the bar of this State under the provisions of the Rules governing such admission, the license granted to such person hereunder shall be deemed superseded by the license granted to such person to practice law as a member of the bar of this State.

§ 10. Application for Waiver of Provisions

The [name of court], upon application, may in its discretion vary the application of or waive any provision of this Rule where strict compliance will cause undue hardship to the applicant. Such application shall be in the form of a verified petition setting forth the applicant's name, age and residence address, the facts relied upon and a prayer for relief.

REPORT

I. The Need for Legal Consultant Rules

The last several years have witnessed an explosive growth in the volume of international economic activity, and more particularly in the transnational flow of goods, services, labor and investment. It is a familiar cliché that the United States now finds itself in a relationship of global interdependence with the rest of the world. This has, not surprisingly, been reflected in a corresponding increase in the volume of transnational legal issues and problems, resulting in a need for more effective means of delivering legal services across national boundaries and for better means of integrating lawyers trained in different legal systems into the same law firms.

Beginning in the early part of this century, a small number of American law firms, most of them based in New York, began to establish offices abroad, principally but not exclusively in London and Paris, with a view to providing better service to their clients carrying on business outside the United States. In so doing, they benefitted from relatively open systems of professional regulation which did not confer upon members of the bar, to use American terminology, a monopoly on the giving of legal advice. During the three decades following the end of the Second World War, the number of American lawyers and law firms carrying on practice in foreign countries increased at a steady pace.

In the early 1970's, foreign lawyers began to call attention to the fact that, while American lawyers enjoyed broad rights of practice in their respective coun-

tries, the reverse was not true. Even after the decision of the United States Supreme Court in *In re Griffiths*,¹ the only way in which a foreign lawyer could engage in the practice of law in the United States, even if limited to the giving of advice on the law of his or her own country, was, with certain limited exceptions, to attend an accredited American law school, sit for the bar examination and become a full member of the bar.²

As a result of these developments, and principally with a view to ensuring New York's position as an international legal center, in 1974 the New York legislature authorized and the New York Court of Appeals adopted a rule proposed by the New York State Bar Association, the New York County Lawyers' Association and the Association of the Bar of the City of New York under which, for the first time, members of foreign legal professions could be licensed without examination to engage in the practice of law in New York, subject to certain restrictions.³ In concept, the New York Rule is very similar to the rule for admission on motion of lawyers admitted in other jurisdictions of the United States. Thus, it requires that the applicant have completed a certain number of years practicing the law of the jurisdiction in which he or she is admitted to practice and meet the criteria of good moral character and general fitness required of a member of the bar of New York. Once licensed, legal consultants are fully subject to professional discipline by the cognizant New York authorities, including censure, suspension, removal or revocation of license. The principal differences between a legal consultant in New York and a lawyer admitted to the New York bar are that the legal consultant is subject to certain restrictions on the scope of his or her practice of law⁴ and may not hold himself or herself out as a member of the bar of New York

1. 413 U.S. 717 (1973). In *Griffiths*, the Court held unconstitutional under the Equal Protection Clause of the Fourteenth Amendment a Connecticut court rule under which only citizens of the United States could be admitted to the practice of law in Connecticut.

2. The New York rules for admission upon examination permit persons who have satisfied the educational requirements for admission to the practice of law in a foreign country to qualify to take the New York State bar examination, provided that the foreign country is one whose jurisprudence is based upon the principles of the English Common Law or that the applicant has completed a program consisting of 24 semester hours of credit at an approved law school in the United States. New York Rules of Court, Rules of the Court of Appeals, § 520.5.

3. New York Rules of Court, Rules of the Court of Appeals, Pt. 521 [hereinafter cited as the "NEW YORK RULE"].

4. Under the New York Rule, a legal consultant may not: (a) appear for a person other than himself or herself as an attorney in any court, or before any magistrate or other judicial officer, other than upon admission *pro hac vice*, or prepare pleadings or any other papers or issue subpoenas in any action or proceeding brought in any such court or before any such judicial officer; (b) prepare any deed, mortgage, assignment, discharge, lease or other instrument affecting title to real estate within the United States; (c) prepare (i) any will or trust instrument effecting the disposition on death of any property located in the United States and owned by a resident of the United States or (ii) any instrument relating to the administration of a decedent's estate in the United States; (d) prepare any instrument in respect of the marital relations, rights or duties of a resident of the United States or the custody or care of the children of such a resident; (e) render professional legal advice on the law of the State of New York, or on United States federal law, except on the basis of advice from a person duly qualified and entitled (other than by reason of having been licensed under the Rule) to render professional legal advice in the State of New York. NEW YORK RULE, § 521.3(a)-(e).

or use any title other than those of "legal consultant" and his or her authorized title in the country of admission.⁵ Where the legal consultant is affiliated with a foreign law firm, he or she may also use the name of the firm.

It is fair to say that the system established under the New York Rule has operated successfully and without significant problems since its inception over 18 years ago. There are now some 170 foreign lawyers registered as legal consultants in the State of New York, almost all of them concentrated in New York City and many of them representing large foreign firms. Many New York practitioners have found that the possibility of local access to foreign lawyers, either as independent counsel or as associates or partners in their own firms, has enhanced their ability to render effective legal services to their clients in connection with the burgeoning volume of international transactions and disputes and has resulted in a strengthening of New York as a center of international legal practice, to the benefit of all concerned.

Throughout the late 1970's and the 1980's, as the need for access to foreign legal expertise increased and became more widespread geographically, other jurisdictions began to consider and adopt Rules. The first of these was the District of Columbia which, as noted above, adopted in 1986 a Rule that was patterned closely on the New York Rule.⁶ The District was followed in relatively short order by California,⁷ Hawaii,⁸ Michigan⁹ and Texas,¹⁰ some of which states appear to have been moved to action at least partially by the reciprocity requirement imposed under a 1986 Japanese law which, for the first time, permitted practice by foreign legal consultants in Japan.¹¹ Rules have since been adopted in Alaska,¹² Connecticut,¹³ Florida,¹⁴ Geor-

5. NEW YORK RULE, § 521.3(f), (g).

6. District of Columbia Rules of Court, Rules of the Court of Appeals, R. 46 (1986) [hereinafter cited as the "DISTRICT OF COLUMBIA RULE"].

7. California Rules of Court, R. 988 (1987) [hereinafter cited as the "CALIFORNIA RULE"].

8. Rules of the Supreme Court of the State of Hawaii, R. 14 (1986) [hereinafter cited as the "HAWAII RULE"].

9. Rules of the Michigan Board of Bar Examiners, R. 5(E) (1986) [hereinafter cited as the "MICHIGAN RULE"].

10. Rules Governing Admission to the Bar of Texas, Rule XVI (1988) [hereinafter cited as the "TEXAS RULE"].

11. *Gaikoku Bengoshi ni yoru Horitsujimu no Toriatsukai ni kansuru Tokubetsusochi Ho* (Law Providing Special Measures for the Handling of Legal Business by Foreign Lawyers), Law No. 66 of 1986. The Law requires only that Japanese lawyers, or *bengoshi*, be accorded substantially similar treatment in the foreign country in which the applicant is admitted to practice. *Id.*, § 10.2. This was, however, interpreted administratively to mean, in the case of a lawyer admitted to practice in the United States, not only that the jurisdiction of his or her admission must accord such reciprocity but also that reciprocity must be accorded by the five United States jurisdictions that the Japanese purportedly viewed as being of greatest importance to them, namely, New York, the District of Columbia, Michigan, California and Hawaii.

12. Rules of the Alaska Bar Association, R. 44.1 (1989) [hereinafter cited as the "ALASKA RULE"].

13. Connecticut Practice Book 1978, Rules for the Superior Court §§ 24B-24E (1991) [hereinafter cited as the "CONNECTICUT RULE"].

14. Rules of the Florida Supreme Court Relating to Admission to the Bar, Ch. 16 (1992) [hereinafter cited as the "FLORIDA RULE"].

gia,¹⁵ Illinois,¹⁶ New Jersey,¹⁷ Ohio,¹⁸ Oregon,¹⁹ and Washington,²⁰ bringing to fifteen the total number of United States jurisdictions with Rules in force.

With the proliferation of Rules has come an increasing variety of conditions and restrictions that have departed from the liberal spirit of the original New York Rule. Some of these restrictions are intended to deal with practical problems that the drafters of the Rules appear to have anticipated, or at least feared, in their administration, notwithstanding the absence of any evidence of such difficulties in New York or in any of the other states having Rules, while other restrictions appear to be essentially protectionist in nature. Whatever their underlying motivations, these restrictions have tended to undermine the effectiveness of some of the Rules in achieving their original objective, which was to afford to foreign lawyers a reasonable and practical opportunity to carry on an international legal practice in the United States and, in doing so, to grant to them the functional equivalent of the rights sought by United States lawyers in other countries. Regrettably, unnecessary restrictions in Rules adopted by some United States jurisdictions have been seized upon as justification for the inclusion of similar restrictions in foreign laws and rules. This "mirror image" phenomenon has become increasingly evident as the importance of legal services to United States foreign trade has come to be understood and as the United States government has joined the United States legal profession itself in pushing for access to additional geographic markets.

Of equal importance is the fact that many of the restrictions that have been included in Rules adopted by some states, while generally well-intentioned, have the unintended effect of interfering with the development of smooth and effective professional interaction between legal consultants and members of the bar in the provision of services to clients. At a time when the legal profession is under the most extreme pressure to achieve efficiencies in the delivery of services, artificial and unnecessary restrictions can only impair the ability of American lawyers to remain responsive to the requirements of the international economy.

II. The Context: Ongoing Developments and Discussions Relating to Transborder Legal Services

The enactment of the 1986 Japanese law permitting the licensing of legal consultants resulted in large part from overtures by the United States government in the

15. Supreme Court of Georgia, Rules Governing Admission to the Practice of Law, Pt. D (1992) [hereinafter cited as the "GEORGIA RULE"].

16. Illinois Supreme Court Rules, Rules on Admission and Discipline of Attorneys, R. 712 (1990) [hereinafter cited as the "ILLINOIS RULE"].

17. New Jersey Rules of Court, Rules of General Application, R. 1:21-9 (1989) [hereinafter cited as the "NEW JERSEY RULE"].

18. Supreme Court Rules for the Government of the Bar of Ohio, R. XI (1989) [hereinafter cited as the "OHIO RULE"].

19. Oregon State Bar Rules of Admission, R. 10.05 (1990) [hereinafter cited as the "OREGON RULE"].

20. Washington Rules of Court, Admission to Practice Rules, R. 14 (1990) [hereinafter cited as the "WASHINGTON RULE"].

context of United States-Japan trade negotiations.²¹ The United States government made legal services a priority in those negotiations, not because the volume of trade involved was perceived as financially important in itself, but because the availability in Japan of United States lawyers who are also knowledgeable about the law and business culture of Japan was considered critical in enabling United States providers of *other* kinds of services, particularly in such sectors as financial services which are especially law-intensive, to enter the Japanese market.²²

The Japanese law came into effect in 1987. Since then, neither the continued negotiations between the governments nor the occasional inter-bar discussions that have taken place have resulted in the removal of restrictions put into the law, evidently at the urging of the Japanese Federation of Bar Associations, *Nichibenren*, that are manifestly unnecessary and irrelevant to the legitimate purposes of professional regulation.²³ In defense of the restrictions in the Japanese law, Japanese bar representatives and government negotiators have been assiduous in identifying all of the most restrictive features of the legal consultant rules adopted in the various states of the United States, relying on them as justification for what amounts to a "lowest common denominator" approach to the regulation of legal consultants.

American lawyers have more recently encountered similar problems in France, where laws that once permitted American and other foreign lawyers to qualify as legal consultants with relative ease have now been completely changed to require foreign lawyers who wish to establish in France to be admitted to full membership in the French bar, subject to examination and other requirements to be established on the basis of reciprocity;²⁴ in Germany, where a new law permits foreign lawyers to be licensed as foreign legal consultants provided that their home jurisdictions accord reciprocal treatment to German lawyers;²⁵ and in the negotiation of the North American Free Trade Agreement, where the Mexican government insisted that United States lawyers establishing in Mexico be subject to the same conditions and restrictions as would apply to Mexican lawyers qualifying as legal consultants under the rule of the United States jurisdiction in which such lawyers are admitted to practice.²⁶ In each case, elements of the indigenous legal profession that fear the competition of American firms have used restrictive provisions in the Rules of some

21. See R. Goebel, *Professional Qualifications and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 *TULANE L. REV.* 443, 483 (1989).

22. For a discussion of this role of the international lawyer, see *id.* at 444-54; and see Warren, Monahan & Duhot, *Role of the Lawyer in International Business Transactions*, 58 *A.B.A.J.* 181 (1972).

23. In our view, those purposes are twofold: first, the protection of the public, as consumers of legal services, against the risks of unknowingly relying upon legal advice rendered by those who are not competent to render such advice and, second, the preservation of the integrity of, and public respect for, the legal profession as a whole.

24. See R. Goebel, *Lawyers in the European Community: Progress Towards Community-Wide Rights of Practice*, 15 *FORDHAM INT'L L.J.* 556, 563 (1992).

25. *Id.* at 562-63.

26. North American Free Trade Agreement, Final Draft, Annex VI, Schedule of Mexico, Description ¶ 1(a).

American states as a justification for similar restrictions upon United States lawyers and law firms wishing to establish a practice in their countries.

The inherent difficulty in applying absolute reciprocity requirements to dissimilar situations is aggravated when the increasing diversity of legal consultant rules is combined with the fact that large law firms increasingly include lawyers admitted to practice in several different United States jurisdictions. This raises the possibility of lawyers in the same overseas office of an American firm having to operate under different rules or, what is worse, in some of the firm's lawyers being disqualified altogether from working in such an office because their jurisdictions of admission have no legal consultant rules or have rules that are, at least arguably, less favorable than those of the country in which the office is located.

The problems inherent in the lack of uniformity of legal consultant rules in the United States have presented themselves in bold relief in the context of the ongoing Uruguay Round of trade negotiations under the aegis of the General Agreement on Tariffs and Trade (the "GATT"). In those negotiations, the United States government has attempted, among other things, to broaden the coverage of the GATT to include services as well as goods. Among the services our government has sought to bring into the GATT are legal services. The GATT negotiating process involves a procedure of "offer and request" whereby the governments offer to "bind" or freeze tariffs or restrictions on goods and services at their present levels and request "bindings" or other measures on the part of other countries. In order to comply with this procedure with respect to legal services, the United States government has had to identify the restrictions imposed by the legal consultant rules of the various states and offer to "bind" them at their present levels, state by state. This, of course, has simply highlighted the patchwork and, in many cases, restrictive nature of the legal consultant rules in the United States and stimulated demands, primarily from the Commission of the European Community (the "EC"), for geographically broader, as well as less restrictive, rights of access to legal markets in the United States as the tradeoff for more effective access by American lawyers to those of the key countries in the EC.

The final contextual element for consideration of this issue is the on-going evolution of the rules relating to the integration of the legal profession within the EC itself. The Treaty of Rome, which is the fundamental charter of the EC, contains provisions guaranteeing the free flow of goods, services, and persons within the common market.²⁷ Pursuant to those provisions, the EC Commission promulgated

27. Of particular relevance in the present context are Article 52 of the Treaty, which provides for the abolition of restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State, and Article 59, which provides for the progressive abolition of restrictions on the provision of services by nationals of Member States who are established in a Member State other than that of the person for whom the services are provided. 2 CCH COM. MKT. REP. ¶¶ 1302, 1502.

in 1977 a directive²⁸ under which a lawyer admitted to practice in any EC member state must be given broad rights of practice in any other member state, including the right to appear before administrative and judicial authorities provided only that he or she does so "in conjunction" with a lawyer admitted in the second member state. As it has been construed by the European Court of Justice,²⁹ this directive accords rights that go well beyond that of a United States lawyer admitted in one jurisdiction to be admitted *pro hac vice* in another.³⁰

For the last 14 years an organization of the European legal professions known as the Council of the Bars and Law Societies of the European Community (and more generally referred to as the "CCBE," an acronym for the French version of the

28. Directive to Facilitate the Exercise by Lawyers of Freedom to Provide Services, Council Directive 77/249, 20 O.J. L78/17 (1977) [hereinafter referred to as the "Legal Services Directive"].

29. In *Commission v. Federal Republic of Germany*, Case No. 427/85, [1988] ECR 1123, [1989] 2 CEC 522, the EC Commission challenged certain features of the German legislation implementing the Legal Services Directive. The Court upheld the Commission's contention that the German legislation violated the provisions of Articles 59 and 60 of the Treaty of Rome in three respects:

First, the legislation required that a lawyer of another Member State appearing as a representative or counsel in a German proceeding always act in conjunction with a German lawyer. Although this was generally consistent with the language of Article 5 of the Legal Services Directive, the Court held it exceeded the intent of the Directive insofar as it imposed the requirement in cases where, under German law, representation by a non-lawyer was not prohibited.

Second, the Court found that the legislation, in requiring (i) that the German lawyer also be given full powers as representative or counsel of the client, (ii) that the non-German lawyer not participate in hearings unless accompanied by the German lawyer, (iii) that proof of involvement of the German lawyer be given in all written submissions, and (iv) that all correspondence with a detained criminal defendant take place only through the German lawyer, also exceeded what was permissible under Article 5 of the Legal Services Directive.

Third, the Court agreed with the Commission that, by subjecting non-German lawyers to the requirement that all lawyers appearing before certain courts be admitted to practice before those courts, thus extending to lawyers from other Member States the geographical restrictions applicable to German lawyers, the German legislation also violated the requirements of Articles 59 and 60 of the Treaty of Rome. The Court drew a distinction between the regulation of German lawyers, based on the place where they maintained chambers in Germany, and the regulation of non-German lawyers, temporarily providing services in Germany, who by definition had no establishment in that country. See also *Commission v. France*, Case C-294/89 (Eur. Ct. J. July 10, 1991) (not yet reported).

30. There is another existing Directive pertaining to legal services which should be mentioned for the sake of completeness. The Directive on the Mutual Recognition of Diplomas, Council Directive No. 89/48, O.J. L19/16 (1989), establishes procedures whereby lawyers who have completed degree and other requirements for admission to practice in one member state can be admitted to full membership in the legal profession of another member state upon satisfaction of a requirement of "adaptation" which may be met either through an abbreviated period of practical training or through the satisfactory completion of a limited examination designed to cover those areas in which the laws of the two countries differ so materially that the lawyer's original training can be said to be "deficient" in those areas. While the precise contours of this requirement will be developed only through years of practice and, possibly, court decisions, it is clearly the intent that lawyers be enabled to move with relative ease throughout the EC, and be readily admitted to full membership in the legal professions of other member states, notwithstanding the substantial differences in legal systems. Thus, in *Vlassopoulou v. Ministerium für Justiz Baden-Württemberg*, Case 340/89, [1991] ECR _____ (not yet reported), the Court of Justice held that the prior education and training of a lawyer in his or her home state must be carefully taken into consideration in partial fulfillment of requirements to become a licensed lawyer in another member state. See generally, R. Goebel, *Lawyers in the European Community: Progress Toward Community-Wide Rights of Practice*, 15 FORDHAM INT'L L.J. 556, 595-601 (1992).

name by which it was originally known) has been working on, among other things, a draft of a new "Directive on the Right of Establishment for Lawyers" to be issued by the EC Commission. At its semi-annual meeting in late October, 1992, the CCBE finally adopted the draft directive, which has now been forwarded to the Commission for its review and action. In light of the extended period of gestation of the CCBE draft and the fact that the CCBE has consulted frequently with the Commission in the course of its development, it is not expected to take the Commission long to act on the CCBE proposal. Once adopted, the directive would require the twelve member states of the European Community, as well as those new members whose admission is expected within the next few years, to accord to members of the legal professions of other member states an automatic right to establish in their territories and to carry on practice as "registered lawyers," *i.e.*, as foreign lawyers entitled to carry on the practice of law subject only to restrictions similar to, but less stringent than, those proposed in the recommended Model Rule.

The promulgation by the EC Commission of a directive based on the CCBE draft will confront the United States legal profession very squarely with a potentially serious problem, because lawyers admitted to practice in countries other than EC member states will not automatically enjoy the benefit of the liberal rules of the directive. What this means is that, unless we find some way of achieving an agreement with the Europeans which accords to United States lawyers substantially equivalent treatment, American lawyers and law firms are at risk of being put in a position of significant competitive disadvantage *vis-à-vis* British and other European firms, both within Europe and globally. There have been indications from the CCBE and from the Commission itself that there is indeed room for an agreement. However, they have made it clear that this will necessarily entail some liberalization on the American side, particularly the elimination of the more restrictive provisions in the legal consultant rules of some states. The Association's proposed endorsement of the Model Rule, and active efforts on its part to encourage adoption of that rule by state regulatory authorities, would respond to the legitimate concerns of the European legal professions and strengthen our ability to negotiate favorable treatment in the EC member states and elsewhere.

III. The Model Rule

The proposed Model Rule follows the New York Rule very closely. The following summary identifies those few areas in which it departs from the New York Rule, as well as from certain of the provisions contained in Rules adopted in other states, and sets forth the policy reasons for the approaches taken.

A. GENERAL REGULATION AS TO LICENSING

Section 1 of the Model Rule makes it discretionary with the court responsible for licensing whether or not to license an applicant to practice as a legal consultant, without examination. This does not mean that the discretion may be exercised in

arbitrarily—like all other judicial discretion, it must be exercised soundly—but merely reflects the fact that the criteria for licensing, and the evidence of compliance therewith, are of such a nature as inevitably to call for the exercise of the court's judgment based on a fair appreciation of all the circumstances. Given the wide variety of individual cases that may arise, it is considered essential that legal consultant rules be cast in broad terms allowing wide latitude to the licensing authority in the exercise of such discretion, rather than attempting to provide in detail for every circumstance that may conceivably arise.³¹

1. *Foreign Admission*

Subsection 1(a) requires that an applicant for a license to practice as a legal consultant be a member in good standing of a recognized legal profession in a foreign country, the members of which are admitted to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority. This is a somewhat more elaborate requirement than that utilized in the New York Rule and most other existing Rules, which generally require that the applicant have been "admitted to practice and [be] in good standing as an attorney or counselor at law or the equivalent in a foreign country."³² The reason for the Model Rule's elaboration upon this usage is to make it clear that there are certain aspects of the applicant's legal profession that are essential prerequisites to his or her licensing as a legal consultant, namely, that it be recognized as a legal profession and that it be subject to effective professional regulation and discipline.³³ The licensing of foreign lawyers as legal consultants presupposes, not only that they have the necessary knowledge, but also that they are generally subject to the same kinds of ethical and legal requirements and professional discipline as members of the legal profession in the United States.

31. This discretionary approach is followed in all of the existing Rules; see ALASKA RULE, R. 44.1(b)(1)(A); CALIFORNIA RULE, R. 988(a)(1); CONNECTICUT RULE, § 24B(a); DISTRICT OF COLUMBIA RULE, R. 46(4)(A)(1); FLORIDA RULE, R. 16-1.2(a), (b); GEORGIA RULE, § 3(a); HAWAII RULE, R. 14.1(a)(1); ILLINOIS RULE, R. 712(a)(1); MICHIGAN RULE, R. 5(E)(a)(1); NEW JERSEY RULE, R. 1:21-9(b)(1); NEW YORK RULE, § 521.1(a); OHIO RULE, § 1(A); OREGON RULE, R. 10.05(2)(a)(i); TEXAS RULE, R. XVI(a)(1); WASHINGTON RULE, R. 14(b)(1)(i).

32. See NEW YORK RULE, § 521.1(a); see also ALASKA RULE, R. 44.1(b)(1)(A); CALIFORNIA RULE, R. 988(a)(1); CONNECTICUT RULE, § 24B(a); DISTRICT OF COLUMBIA RULE, R. 46(4)(A)(1); FLORIDA RULE, R. 16-1.2(a), (b); GEORGIA RULE, § 3(a); HAWAII RULE, R. 14.1(a)(1); ILLINOIS RULE, R. 712(a)(1); MICHIGAN RULE, R. 5(E)(a)(1); NEW JERSEY RULE, R. 1:21-9(b)(1); OHIO RULE, § 1(A); OREGON RULE, R. 10.05(2)(a)(i); TEXAS RULE, R. XVI(a)(1); WASHINGTON RULE, R. 14(b)(1)(i).

33. While the Rules of other jurisdictions assume that the legal profession to which the applicant is admitted has a system of professional discipline comparable to those in the United States, the Florida Rule is unique in requiring that an applicant for licensing as a legal consultant be "admitted to practice in a foreign country whose professional disciplinary system for attorneys is generally consistent with that of the Florida Bar." FLORIDA RULE, R. 16-1.2(c).

2. Experience Requirement

Subsection 1(b) sets forth a minimum experience requirement under which the applicant for licensing under the Model Rule must have been qualified as a member of a recognized legal profession of a foreign country for at least five of the seven years immediately preceding his or her application for such licensing. This requirement is substantially the same as the experience requirement set forth in the New York Rule, where it was used in order to conform the legal consultant rule to the parallel rule in New York for the admission on motion of lawyers from other United States jurisdictions³⁴ and even from common-law jurisdictions outside the United States.³⁵ The experience requirement imposed upon sister-state and foreign lawyers applying for admission to the bar on motion is a substitute for the evidence of legal expertise otherwise afforded by the bar examination. As incorporated in the Model Rule, it is not intended to discriminate against younger foreign lawyers who, having achieved the level of experience required for admission to their own legal professions, are by definition fully entitled to advise on the law of the jurisdiction in which they are qualified. Rather, it reflects the relatively broader scope of practice that would be permitted under Section 4 of the Model Rule and the particular importance of experience as an element of the international lawyer's training. At the same time, it is recognized that experience over time may lead to the conclusion that the requirement can be shortened or even eliminated. Accordingly, this particular provision of the Model Rule has been made optional.

The Rules of some jurisdictions require not only that the applicant have practiced the law of his or her jurisdiction of admission but also that he or she have practiced *within* that jurisdiction for the requisite period.³⁶ Here again, the drafters of the Rules have drawn on the rules for admission on motion of lawyers admitted in other United States jurisdictions.³⁷ In this case, however, the appearance of analogy is misleading, because in an international commercial practice it is entirely conceivable that, for example, a New York lawyer might practice for years in one or more foreign offices of a New York firm without ever practicing in New York or, for that matter, anywhere else in the United States. American law firms have objected to geographic restrictions on experience qualifications imposed by certain foreign rules on precisely these grounds. At the same time, notwithstanding the fact that a modern international practice requires a broad knowledge of, and involves the

34. See New York Rules of Court, Rules of the Court of Appeals § 520.9(a)(1).

35. See *ibid.*, which also provides for the admission on motion, as full members of the bar of New York, of lawyers who are admitted to practice in foreign jurisdictions whose jurisprudence is based on the English Common Law.

36. See ALASKA RULE, R. 44.1(b)(1); CONNECTICUT RULE, § 24B(a); DISTRICT OF COLUMBIA RULE, R. 46(4)(A)(1); HAWAII RULE, R. 14.1(a)(2); TEXAS RULE, R. XVI(a)(1); MICHIGAN RULE, R. 5(E)(a)(1); NEW JERSEY RULE, R. 1:21-9(b)(1); OREGON RULE, R. 10.05(2)(a)(ii); cf. WASHINGTON RULE, R. 14(b)(1)(i) (applicant must be admitted to practice in a foreign jurisdiction and have five years' practice in a foreign jurisdiction).

37. See, e.g., New York Rules of Court, Rules of the Court of Appeals § 520.9(a)(2)(i).

rendering of advice concerning or affected by, the laws of many countries as well as international law, it is recognized that an experience requirement of the kind embodied in the New York Rule, if it is to be meaningful, should ensure that the applicant has in fact devoted a substantial part of his or her time to the rendering of advice regarding the law of the jurisdiction in which he or she is admitted to practice. Accordingly, Section 1(b) of the Model Rule requires that the applicant have been engaged in a "practice of law in the said foreign country or elsewhere substantially involving or relating to the rendering of advice or the provision of legal services concerning the law of the . . . foreign country [in which the applicant is qualified as a member of a legal profession]." ³⁸

3. Character and Fitness Requirement

Subsection 1(c) of the Model Rule incorporates *verbatim* the requirement of the New York Rule, which is mirrored in nearly all of the other Rules, that the applicant possess the good moral character and general fitness requisite of a member of the bar of the State in which the application is made. ³⁹ This provision is similar to provisions relating to the admission of lawyers from other United States jurisdictions ⁴⁰ and in effect incorporates by reference the applicable provisions of the laws of each State relating to the character and fitness of members of the bar. It is not believed that there has been any problem in the application of this provision to foreign lawyers applying for licensing as legal consultants or, conversely, in the application of corresponding provisions to United States lawyers seeking to practice abroad.

4. Minimum Age Requirement

The New York Rule, as well as the Rules of several other jurisdictions, establishes a minimum age for legal consultants of 26 years. ⁴¹ This minimum, which has

38. The New York Rule, which has been followed in this respect by a number of other jurisdictions, requires that the applicant, while admitted to the practice of law in a foreign country, have "practiced the law of such country." See NEW YORK RULE, § 521.1(a); see also CALIFORNIA RULE, R. 988(b)(1); FLORIDA RULE, R. 16-1.2(b); GEORGIA RULE, § 3(b); ILLINOIS RULE, R. 712(a)(1). The language of the Model Rule is believed to incorporate the substance and intent of the New York, California, Florida, Georgia and Illinois Rules in a formulation that will be more readily understood abroad.

39. NEW YORK RULE, § 521.1(b); see also CALIFORNIA RULE, R. 988(b)(2); CONNECTICUT RULE, § 24B(b); DISTRICT OF COLUMBIA RULE, R. 46(4)(A)(2); GEORGIA RULE, § 3(b); HAWAII RULE, R. 14.1(b); ILLINOIS RULE, R. 712(a)(2); MICHIGAN RULE, R. 5(E)(a)(2); NEW JERSEY RULE, R. 1:21-9(b)(2); OHIO RULE, § 1(B); OREGON RULE, R. 10.05(2)(b); TEXAS RULE, R. XVI(a)(2); WASHINGTON RULE, R. 14(b)(1)(ii); cf. ALASKA RULE, R. 44.1(b)(2).

40. For example, § 520.10(a) of the Rules of the New York Court of Appeals provides in pertinent part as follows:

Every applicant for admission to practice must file with a committee on character and fitness appointed by the Appellate Division of the Supreme Court affidavits of reputable persons that applicant possesses the good moral character and general fitness requisite for an attorney- and counselor-at-law as required by section 90 of the Judiciary Law

41. See NEW YORK RULE, § 521.1(d); and see CONNECTICUT RULE, § 24B(c); DISTRICT OF COLUMBIA RULE, R. 46(4)(A)(4); FLORIDA RULE, R. 16-1.2(h); HAWAII RULE, R. 14.1(d); MICHIGAN RULE, R. 5(E)(a)(2); TEXAS RULE, R. XVI(a)(4); cf. OHIO RULE, § 1(E) (21 years); OREGON RULE, R. 10.05(2)(d) (18 years).

been carried over from the rules governing admission on motion from other United States jurisdictions, is related to the five-year experience requirement, which was also carried over from those rules. Subsection 1(d) of the Model Rule adopts the 26-year rule but makes it optional for each jurisdiction to determine whether to use a lower age or to include a minimum age requirement at all.⁴²

5. Residence Requirement

The New York Rule contains a requirement, echoed in the Rules of a few other jurisdictions, that the applicant must be "an actual resident of this State."⁴³ Several other jurisdictions, however, have adopted a less stringent requirement that the applicant have a prospective intent to practice as a legal consultant in the jurisdiction and to maintain an office within the jurisdiction for that purpose.⁴⁴ Whether or not a residency requirement in this context is constitutionally valid,⁴⁵ a requirement that a foreign lawyer actually establish residence before he or she can apply for licensing, with the attendant delay before the license can be granted and the lawyer can in fact begin to practice, imposes a hardship which is unreasonable in relation to any arguable purpose of such a requirement.⁴⁶ Many foreign law firms maintaining offices in the United States rotate their personnel frequently from their home offices, as do American firms with offices abroad, and a current-residency requirement obviously complicates this process without any commensurate benefit. It was thus considered preferable to adopt the approach of those jurisdictions that require only that the applicant intend to practice as a legal consultant and to maintain an office within the jurisdiction for that purpose, and Subsection 1(e) of the Model Rule provides accordingly. It is believed that the cognizant court can, in the sound exercise of its discretion, require such evidence of *bona fide* intent as it may con-

42. The Rules adopted in Alaska, California, Illinois, Georgia, New Jersey and Washington contain no minimum-age requirements.

43. See NEW YORK RULE, § 521.1(c); see also TEXAS RULE, R. XVI(a)(3); WASHINGTON RULE, R. 5(e)(a)(4) (applicant must be a resident of the United States).

44. See ALASKA RULE, R. 44.1(b)(3); DISTRICT OF COLUMBIA RULE, R. 46(4)(A)(3); HAWAII RULE, R. 14.1(c); ILLINOIS RULE, R. 712(a)(4); OHIO RULE, § 1(D); NEW JERSEY RULE, R. 1:21-9(b)(3); cf. FLORIDA RULE, R. 16-1.2(i) (applicant must currently maintain an office in Florida); OREGON RULE, R. 10.05(2)(c) (applicant must intend to practice as a legal consultant in Oregon). The Rules of California, Connecticut, and Georgia contain no requirements as to residence or offices, either actual or intended.

45. The United States Supreme Court has held that residency requirements for admission to the bar violate the Privileges and Immunities Clause of Art. IV, § 2 of the federal Constitution, see *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). While the direct applicability of the Privileges and Immunities Clause to foreign nationals is doubtful, the principles enunciated in *Griffiths*, *supra* note 1, taken together with those underpinning *Friedman* and *Piper*, might produce a similar result in relation to foreign nationals.

46. The residency requirement, like the age and experience requirements, appears to have been borrowed from rules for admission on motion from other United States jurisdictions. However, no counterpart of the residency requirement, as set forth in the New York Rule, now remains in that State's rule regarding admission on motion. Compare NEW YORK RULE, § 521.1(c) and New York Rules of Court, Rules of the New York Court of Appeals, § 520.9(a).

sider necessary in order to deal with any potential abuses that might arise in respect of residency or lack thereof.

The requirement in Section 1(e) that the applicant intend to "maintain an office" for the purpose of practicing as a legal consultant is not intended to require anything more than that the applicant intend to have and to utilize, at premises he or she intends to own or lease either individually or together with others, or at the premises of an employer, a permanent place of business from which to function as a legal consultant. An associate in a law firm would be considered to "maintain an office" at the premises of his or her employing law firm regardless of the fact that the physical portion of such premises assigned to such person by the employing law firm might, from time to time, be changed. The same would be true of an applicant who was employed by an entity other than a law firm if such person intended to perform for his or her employer the services normally provided by a lawyer. A person who intended to designate an area in his or her personal residence to qualify as a "home office" for purposes of the Internal Revenue Code would similarly be considered to intend to maintain an office within the meaning of Section 1(e).

B. PROOF REQUIRED

Section 2 of the Model Rule specifies the documentation that an applicant will normally be required to produce as a means of satisfying the court as to the qualifications and good standing of the applicant as a member of a recognized legal profession of a foreign country and as to his or her character and fitness. These requirements do not vary materially from one Rule to the next and are substantially similar to the documentation required for admission on motion of an applicant who is a member of the bar of another United States jurisdiction.⁴⁷

C. RECIPROCITY

Section 3 of the Model Rule *permits* the court, in deciding whether to license an applicant as a legal consultant, to take into account *in its discretion* whether a member of the bar of the state in which the court sits would have a "reasonable and practical" opportunity to establish an office for the giving of legal advice to clients in the applicant's country of admission. This provision is patterned after the District of Columbia Rule;⁴⁸ identical or highly similar provisions are also included in the Rules of six other jurisdictions.⁴⁹ The New York Rule contains no provision relating

47. See NEW YORK RULE, § 521.2(a); see also ALASKA RULE, R. 44.1(c); CALIFORNIA RULE, R. 988(c); CONNECTICUT RULE, § 24C(a); DISTRICT OF COLUMBIA RULE, R. 46(4)(B)(1); FLORIDA RULE, R. 16-1.4(a); GEORGIA RULE, § 4(a); HAWAII RULE, R. 14.2(b); ILLINOIS RULE, R. 712(c); MICHIGAN RULE, R. 5(E)(c)(1); NEW JERSEY RULE, R. 1:21-9(c)(2); OHIO RULE, § 2(A); OREGON RULE, R. 10.05(3)(b); TEXAS RULE, R. XVI(b); WASHINGTON RULE, R. 14(b)(1)(v)-(vii).

48. DISTRICT OF COLUMBIA RULE, R. 46(c)(4)(C).

49. ALASKA RULE, R. 44.1(c)(4); HAWAII RULE, R. 14.2(d); ILLINOIS RULE, R. 712(b); MICHIGAN RULE, R. 5(E)(b); OHIO RULE, § 4; OREGON RULE, R. 10.05(3)(d).

to the reciprocal treatment accorded New York lawyers in the applicant's country of admission, nor do the Rules of California, Connecticut, Florida, Georgia, New Jersey and Washington. At the other extreme, the Texas Rule until recently contained a provision⁵⁰ under which it was an absolute condition of licensure that the foreign jurisdiction in which the applicant is admitted allow a member of the bar of the state in which the application is made to render services as a legal consultant under the same circumstances as are provided for under the applicable Rule; however, this provision was recently removed from the Rule.

The strict, or non-discretionary, form of reciprocity requirement has created significant problems in the intergovernmental negotiations relating to trade in legal services, to the point that the United States Trade Representative, Ambassador Carla Hills, wrote to the Supreme Courts of Texas and Florida in December, 1991 urging them to drop such requirements from their Rules, which they subsequently did. The approach taken by the Model Rule, which, in addition to being discretionary, utilizes the "reasonable and practical" standard rather than strict reciprocity, is less objectionable from an international trade standpoint.⁵¹ It focuses, not on the question whether complete symmetry exists between the two countries in question, but on whether it is reasonable and practical, from both the economic and the professional standpoints, for a lawyer or law firm to establish an office and carry on a practice as international legal advisors. A strict reciprocity standard creates unwarranted obstacles to such practice based on immaterial differences in systems of professional regulation, as well as in the detailed provisions of rules relating specifically to practice by foreign lawyers, which may result in relatively minor dissimilarities in treatment but do not substantially impair the ability of lawyers and law firms to carry on their practices in either of the jurisdictions involved. The principal objective of legal consultant rules is to foster an open system which makes the conduct of a transnational practice possible *as a reasonable and practical matter*, and a strict reciprocity requirement is neither necessary nor useful to the achievement of that end.

On the other hand, the inclusion of discretionary reciprocity provisions in Rules adopted in the District of Columbia and elsewhere reflects a recognition that such provisions may provide the most effective incentive to foreign jurisdictions to participate in such an open system. As foreign law firms have begun to develop substantial international practices of their own, either alone or, particularly in the European

50. TEXAS RULE, R. XVI(a)(7).

51. The principal objection to reciprocity provisions, from the standpoint of trade policy, is that they are inconsistent with a fundamental tenet of international trade law under the GATT, namely the principle that each GATT Contracting State must accord to the products (and, assuming the success of the Uruguay Round, services) of the other Contracting Parties treatment known as "unconditional most-favored-nation" treatment. This means the United States cannot in principle discriminate among the sellers of goods or providers of services from various other Contracting States even on grounds of reciprocity, *i.e.* where the treatment accorded by those Contracting States to United States firms is widely divergent.

Community, through transborder mergers, they have become much more interested in establishing offices in New York and elsewhere in the United States. Given the increasingly competitive nature of international law practice and the corresponding need to preserve a "level playing field," it has been considered appropriate to include the proposed reciprocity provision in the Model Rule.

D. SCOPE OF PRACTICE

Section 4 of the Model Rule defines the permitted scope of the legal practice in which licensed legal consultants may engage. It is this set of provisions which principally distinguishes legal consultants from members of the bar of the licensing jurisdiction.

1. *Court Appearances*

Subsection 4(a) prohibits a licensed legal consultant from appearing for any person other than himself or herself or as an attorney before any court, magistrate or judicial officer, other than upon admission *pro hac vice* pursuant to the applicable rule of the courts of the licensing jurisdiction. The effect of this provision is to put legal consultants on the same footing as lawyers admitted in other United States jurisdictions for purposes of any involvement in judicial proceedings. The exception permitting admission *pro hac vice* is not only consistent with current practice but reflects the increasing need for participation by foreign-trained lawyers in cases before United States courts which involve significant issues or elements of foreign law. Since matters of foreign law are now regarded as questions of law and not of fact,⁵² it is no longer sufficient or appropriate for foreign counsel in such cases to participate solely as expert witnesses.

2. *Advice on Matters of Local Law*

Subsections 4(b) through 4(d) prohibit the legal consultant from preparing certain types of legal instruments which by their nature require an independent knowledge of local law. Subsection 4(e) prohibits the legal consultant from advising on the law of the licensing state or on federal law except on the basis of advice from a person duly qualified and entitled to render such advice in the licensing jurisdiction. All of these sections follow closely the structure and language of the New York Rule.⁵³ The exclusions in subsections 4(b) through 4(d) are common to all of the existing Rules, with slight variations in the language, although a few Rules contain additional exclusions.⁵⁴ With respect to the limitation on the nature of the advice

52. See R. 44.1, Fed. R. Civ. Proc.; and see A. Wright & A. Miller, 9 FEDERAL PRACTICE AND PROCEDURE § 2443 (1971); H. Baade, *Proving Foreign and International Law in Domestic Tribunals*, 18 VA. J. INT'L L. 619 (1978).

53. NEW YORK RULE, § 521.3(b)-(e).

54. See CALIFORNIA RULE, R. 988(o)(2)-(4); DISTRICT OF COLUMBIA RULE, R. 46(4)(D)(2), (3); FLORIDA RULE, R. 16-1.3(a)(2)(B)-(D); GEORGIA RULE, § 2; HAWAII RULE, R. 14.4(b), (c); NEW JERSEY RULE, R. 1:21-9(e); OHIO RULE, § 5(B); OREGON RULE, § 10.05(5); TEXAS RULE, R.

that may be given, the Rules in some of the other jurisdictions follow the general approach of the New York Rule, prohibiting the giving of advice on the law of the licensing jurisdiction as well as federal law *except* on the basis of advice from a person duly qualified to give same and extending that prohibition to the giving of advice on the law of any other United States jurisdiction as well, but then go further to require that, where advice on such law is given on the basis of the advice of a person qualified to give such advice, that person must have been consulted in the particular matter at hand and have been identified to the client by name.⁵⁵ The Rules that are most restrictive in this respect provide that the legal consultant may render legal advice only on the law of the foreign country in which he or she is admitted to practice.⁵⁶ Still other Rules impose restrictions that are somewhat idiosyncratic.⁵⁷

The scope of practice is a critical issue for American lawyers practicing abroad. Practice at the transnational level inevitably involves advice on transactions, disputes and other matters that are, or may be, affected by the laws of several national jurisdictions, as well as by the growing body of international law that applies directly to private transactions and legal relationships. As a practical matter, it is simply not feasible to break that advice down into independent elements to be advised upon separately by different lawyers. Rather, the rendering of such advice is an inherently synthetic process, involving close collaboration among lawyers with the requisite experience and qualifications in dealing with the various bodies of law that are actually or potentially involved. Lawyers advise on transactions and disputes, not on laws in the abstract; indeed, part of the task of the international practitioner is the determination as to which country's (or countries') laws will in

XVI(f)(2)-(4); cf. ILLINOIS RULE, R. 712(e)(2)-(8) (list of prohibited activities includes rendering of professional legal advice with respect to a personal injury occurring within the United States or with respect to United States immigration, customs and trade laws).

55. See DISTRICT OF COLUMBIA RULE, R. 46(c)(4)(D)(5); HAWAII RULE, R. 14.4(e); NEW JERSEY RULE, R. 1:21-9(e)(5); OHIO RULE, § 5(C); OREGON RULE, R. 10.05(5)(f).

56. See ALASKA RULE, R. 44.1(e)(5); CALIFORNIA RULE, R. 988(o)(5); CONNECTICUT RULE, § 24D; FLORIDA RULE, R. 16-1.3(a)(1); GEORGIA RULE, § 2; TEXAS RULE, R. XVI(f); cf. MICHIGAN RULE, R. 5(E)(d). The Illinois Rule, after restricting the legal consultant to the rendering of legal advice only on the law of the country in which the legal consultant is admitted to practice, then somewhat inconsistently prohibits the legal consultant in giving such advice from quoting from or summarizing advice concerning the law of Illinois *or any other jurisdiction* by an attorney licensed under the laws of the State of Illinois *or any other jurisdiction, domestic or foreign*; see ILLINOIS RULE, R. 712(e).

57. See ALASKA RULE, R. 44.1(e)(5) (where matter requires legal advice from a person admitted to practice in any jurisdiction (not limited to United States jurisdictions) other than that in which legal consultant is admitted to practice, legal consultant is required to consult an attorney or counselor at law in such jurisdiction on the particular matter and to obtain written legal advice and transmit same to the client); FLORIDA RULE, R. 16-1.3(a)(2)(F) (legal consultant required to utilize a written retainer agreement specifying in bold type that the legal consultant is not admitted to practice in the state of Florida or licensed to advise on the laws of the United States or any political subdivision thereof and is limited to the laws of the foreign country where the legal consultant is admitted to practice); WASHINGTON RULE, R. 14(d)(5) (legal consultant not permitted to advise on the laws of Washington, or of any other state or territory of the United States or the District of Columbia, or of the United States, even where such advice is based on advice of a person admitted to practice in such jurisdiction).

fact apply to a given matter. Thus, when the Japanese government in its 1986 law concerning practice by foreign lawyers in Japan limited the scope of practice of such lawyers to the giving of advice on the laws of the jurisdictions in which they were admitted to practice,⁵⁸ the Association registered its strong opposition to that restriction. In this and other contexts, the Association has generally taken the position that foreign lawyers should be entitled to advise on international law, as well as the law of the jurisdiction of their admission.⁵⁹ It has also argued that foreign lawyers should not be subject to prohibitions concerning the rendition of advice on the law of third countries except if and to the extent that members of the local legal profession are so restricted. There is no self-evident policy reason for discrimination in this respect between local and foreign lawyers, particularly where the foreign lawyer is required to satisfy certain experience requirements before being licensed as a legal consultant.

The foregoing having been said, it must be recognized that certain restrictions upon the scope of practice permitted to legal consultants are necessary and appropriate for the protection of the public against the risks of being advised on matters of law by persons not qualified to render such advice. At the same time, it is important to bear in mind that legal advice is frequently rendered by lawyers practicing in firms and other cooperative relationships in which it is neither necessary nor practicable to segregate the different elements of the advice being given or even to identify the original author of many of such elements. Particularly in the context of international transactions, the advice thus rendered takes on the aspect of a seamless web, extending over several months and involving many lawyers and client personnel. For this reason, a requirement, like that contained in several of the Rules of the various States, that the advice be based on the advice of a qualified local lawyer who is consulted in the particular matter at hand and identified to the client by name is, as a practical matter, unworkable.

Moreover, such a far-reaching requirement is unnecessarily restrictive. The need for protection of the public against incompetent advice on matters of local law is effectively met by a requirement that a legal consultant rendering advice on matters which may be affected by the laws of a United States jurisdiction do so only

58. The Japanese law afforded a striking example of the way in which this kind of restriction can operate to the disadvantage of American lawyers; the law was initially interpreted as meaning that the practice of American lawyers in Japan was to be limited to the giving of advice on the laws of the *respective American states in which they were admitted to practice*.

59. There is a special problem in this connection with respect to advice concerning the laws of the European Community. American firms, many of whom have invested substantial resources over the years in the development of expertise in this area and are in some cases well ahead of most European firms in this regard, view EC law as international law, since it flows from the rights and obligations of the member states under the Treaty of Rome. Some European firms, having themselves, albeit somewhat belatedly, also made a substantial commitment of resources to this area, now argue that EC law is analogous to federal law in the United States and should therefore be off-limits to American firms. While the example is unique, it illustrates both the difficulty of coming up with useful "bright line" tests for the delineation of permitted areas of practice and the point that transnational law is essentially a seamless web.

on the basis of advice from a person properly qualified to render such advice in the jurisdiction in which the legal consultant is so licensed. As a general proposition, considerations of professional liability would afford so powerful an incentive to seek local advice that even this requirement is probably unnecessary as a practical matter.⁶⁰ Moreover, under Sections 5(a) and 6(a)(ii)(A) of the Model Rule, as under nearly all of the existing Rules,⁶¹ the legal consultant is bound by rules of professional responsibility which, among other things, prohibit the giving of legal advice outside the lawyer's area of professional competence. However, it is recognized that there is always a potential for abuse of any right, and the inclusion of a provision of the kind that is contained in the New York Rule provides a well-defined basis for intervention by professional regulatory bodies in the event that the status of legal consultant were ever abused in this respect.

3. *Holding Oneself Out as a Member of the Bar*

Consistent with the foregoing discussion, Section 4(c) strictly prohibits legal consultants from holding themselves out as members of the bar of the licensing jurisdiction. The need to protect the public against unqualified purveyors of legal advice clearly militates in favor of such a provision. There is no reason whatever that legal consultants should have the right to misrepresent their professional status or qualifications. It as an essential premise of all of the Rules that legal consultants make clear in their use of stationery and business cards, and in all other means through which they hold themselves out to the public, that their status is a special one, distinct from that of members of the local bar.

4. *Use of Firm Names and Titles*

Closely related to the "holding out" problem is the issue of the names and title under which a legal consultant may practice. Section 4(d) prohibits the use of any

60. It seems clear from discussions with foreign lawyers carrying on practice in New York and elsewhere in the United States that the principal limitation on the scope of the advice they are prepared to give is that of the professional liability potentially attendant upon giving advice outside their respective fields of competence. In this connection, it should be noted that the Model Rule, like most of the Rules currently in existence, requires that the applicant provide an undertaking or appropriate evidence of adequate professional liability insurance. See Model Rule, § 6(a)(ii)(B); see also ALASKA RULE, R. 44.1(f)(2)(B); CALIFORNIA RULE, R. 988(p)(3)(ii); CONNECTICUT RULE, § 24E(a)(2)(ii); DISTRICT OF COLUMBIA RULE, R. 46(4)(E)(1)(b)(ii); HAWAII RULE, R. 14.5(b)(2); ILLINOIS RULE, R. 712(f)(3); NEW YORK RULE, § 521.4(a)(2)(ii); OHIO RULE, § 7(A)(2); OREGON RULE, R. 10.05(6)(b)(ii); TEXAS RULE, R. XVI(b)(7); cf. FLORIDA RULE, R. 16-1.3(b) (legal consultant must advise clients in writing of the extent of professional liability insurance coverage). The imposition of such a requirement has been objected to on the grounds that coverage in a significant amount may be impossible for a foreign lawyer not practicing in a substantial firm to obtain; while this may be an appropriate issue for consideration by the licensing court or authority in the exercise of its discretion, it is believed that this requirement is an appropriate trade-off for the relatively non-restrictive scope-of-practice provisions.

61. See ALASKA RULE, R. 44.1(f)(1); CALIFORNIA RULE, R. 988(p)(1); CONNECTICUT RULE, § 24E(a)(1); DISTRICT OF COLUMBIA RULE, R. 46(4)(E)(1)(a); FLORIDA RULE, R. 16-1.6(a); GEORGIA RULE, § 7(a); HAWAII RULE, R. 14.5(a); ILLINOIS RULE, R. 712(f)(1); NEW JERSEY RULE,

name or title other than the individual's name, the name of the law firm with which he or she is affiliated, his or her authorized title in the foreign country in which he or she is admitted to the practice of law, and the title "legal consultant."

The specific authorization to legal consultants to practice under the name of their law firms, while no longer controversial in this country, is extremely important on a "mirror image" basis to United States law firms established abroad, where foreign governments and bars have in some cases attempted to prohibit the carrying on of their practice under any name other than that or those of the lawyers resident in the foreign office.⁶² Such a requirement manifestly goes beyond what is objectively justified to achieve the only apparent purpose of such a requirement, namely that of ensuring that consumers of legal services can readily determine the identity of the lawyers in the branch office. While a requirement for disclosure of that information is reasonably related to protection of the public, that objective can be achieved just as effectively, and possibly more so, in other ways which do not create the possibility of confusion in the public mind as to whether the firm's foreign branch offices are in fact part of the same firm or separate entities.

Name recognition is an extremely important asset of firms which carry on an international practice, and from the standpoint of consumers of legal services certainty as to the identity of the firm with which they are dealing, and knowledge that the responsibility of the entire firm is engaged, may well be at least as material to a potential client as the identity of the individuals involved. Indeed, it may be seriously misleading to the public to create confusion as to the relationship between a firm and its own branch offices.

E. RIGHTS AND OBLIGATIONS

The intent of the Model Rule, which reflects current practice under existing Rules, is that licensed legal consultants have all rights and obligations of members of the bar, subject only to the limitations and restrictions set forth in the Rule. This recognition of their status as members of the legal profession is appropriate in light of the fact that they are, by definition, admitted to practice in a foreign country and is in all respects parallel to the treatment accorded by United States jurisdictions to lawyers admitted in other United States jurisdictions. Section 5 of the Model Rule makes this intent explicit.

1. *Rules of Professional Responsibility*

Section 5(a) makes it clear that a licensed legal consultant is subject to the same rules of professional responsibility as are applicable to a member of the bar. How-

R. 1:21-9(f)(1); NEW YORK RULE, § 521.4(a)(2)(i); OHIO RULE, § 7(A)(1); OREGON RULE, R. 10.05(6)(a); TEXAS RULE, R. XVI(d)(3); WASHINGTON RULE, R. 14(e). Only the Michigan Rule contains no provision to this effect.

62. This was one of the restrictions in the Japanese Law to which the Association objected in its resolution of August, 1986.

ever, it is recognized that, as a member of a foreign legal profession, the legal consultant will also be subject to the rules of professional conduct and responsibility of that legal profession, and there may occasionally be conflicts between the two sets of rules by which he or she is governed. These conflicts can ordinarily be resolved by reference to appropriate conflicts-of-laws rules depending upon, among other factors, the place in which the conduct occurred and the nationality and place of domicile of the client. In the event that a legal consultant should become the subject of disciplinary proceedings, the court or other authority charged with the conduct of such proceedings should normally consider any relevant differences between the rules of professional conduct and responsibility of the two jurisdictions concerned, as well as any factors that might influence the choice between those rules. If appropriate, such court or other authority should permit an authorized representative of the disciplinary authority in the legal consultant's jurisdiction of primary qualification to provide an explanation or interpretation, or both, of the relevant professional rules of that jurisdiction.

2. *Partnership and Employment*

A specific issue relating to the status of foreign lawyers which has been a significant bone of contention in the effort to open foreign countries to American and other non-indigenous lawyers and law firms has been the imposition, either on the foreign lawyers themselves or on the members of the local bar, of prohibitions against the employment by foreign lawyers of members of the bar and against the entry of members of the bar into partnership in a foreign law firm. This has proven to be perhaps the most serious obstacle to the creation of foreign offices and law firms with truly multinational capabilities.

While the rules of professional conduct in most states generally prohibit members of the bar from carrying on the practice of law in partnership with persons who are not members of the bar,⁶³ this has not been interpreted as prohibiting interstate partnerships, nor is it believed that such rules have ever been invoked to challenge the admission of duly qualified foreign lawyers to partnership in an American law firm, notwithstanding evidence to the effect that there are in fact many such partners. There are no prohibitions in the United States upon the employment of members of the bar by non-lawyers or *vice versa*.

63. Rule 5.4 of the Model Rules of Professional Conduct provides, *inter alia*, that a lawyer or law firm shall not share fees with a non-lawyer, with certain exceptions; that a lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership shall consist of the practice of law; and that a lawyer shall not practice with or in the form of a professional corporation authorized to practice law for profit, if a non-lawyer owns any interest therein. It has been authoritatively determined by at least one Committee on Professional Ethics that a duly-qualified foreign lawyer is not a "non-lawyer" within the meaning of this rule, and there is no known precedent to the contrary; nor is there any valid policy reason for a contrary interpretation so long as the foreign lawyer is subject to professional regulation and discipline comparable to those imposed upon members of the bar of the jurisdiction in question. This would, of course, automatically be true of all legal consultants licensed in that jurisdiction under a Rule conforming to the Model Rule.

Accordingly, Section 5(b)(i) of the Model Rule would produce no substantive change in American law or practice. It is, however, extremely important that the principle be stated in this affirmative fashion in order to demonstrate unambiguously to the rest of the world that neither employment of members of the bar by foreign lawyers nor their entry into law partnership with foreign lawyers is prohibited or in any way restricted in this country.

3. *Attorney-Client Privilege*

Another problem which has arisen abroad but not in the United States is that of the applicability of attorney-client and work-product privilege to lawyers not admitted to practice in the jurisdiction in which privilege is claimed.⁶⁴ The most notorious example of the difficulties encountered by American lawyers abroad in this respect is the decision of the European Court of Justice in *AM & S Europe Ltd. v. Commission*,⁶⁵ wherein it was held that attorney-client privilege applied only to communications with members of the legal professions of the member states of the European Community. Future efforts to persuade the European Community institutions, as well as foreign governments, to take a more global view of the legal profession will be strengthened by an express recognition in the Model Rule that foreign lawyers are covered by professional privilege to the same extent as other United States lawyers.

Accordingly, Section 5(c) of the Model Rule makes it clear that the attorney-client privilege, and the related work-product doctrine, apply to communications between legal consultants and their clients, and to the work product of legal consultants, respectively. These aspects of privilege are fundamental to the attorney-client relationship. The privilege belongs to the client, and there is no reason whatever to exclude from the operation of that privilege communications with, or the work product of, a licensed legal consultant. By application of the rules of professional conduct of the licensing jurisdiction, as well as under the corresponding rules of the foreign legal profession of which he or she is a member, the legal consultant will have a corresponding duty to preserve the confidentiality of client communications and information.

F. DISCIPLINARY PROVISIONS

Section 6 of the Model Rule makes it clear that a person licensed to practice as a legal consultant will be subject to professional discipline in the same manner and

64. Several decisions recognize that the attorney-client privilege applies to foreign legal practitioners. See *Renfield Corp. v. E. Remy Martin & Co.*, 90 F.R.D. 442 (D. Del. 1982) (privilege recognized as to German patent agent); *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951 (N.D. Ill. 1982) (privilege recognized as to British and Canadian patent agents). The draft ALI Restatement of the Law Governing Lawyers § 122 recognizes the attorney-client privilege as applying as to anyone functioning in the professional capacity of a lawyer, whether domestically qualified or not. Of the existing Rules, however, only that of California explicitly recognizes that professional privileges apply to legal consultants as well as to members of the bar; see CALIFORNIA RULE, R. 988(p)(2).

65. Case No. 155/79, [1982] ECR 1575, [1982] CMLR 264 (ECJ).

to the same extent as members of the bar. Section 6(a)(i) provides that a legal consultant shall be subject to the control of the court having responsibility for attorney discipline and, in particular, to censure, suspension, removal or revocation of his or her license. Subsection 6(a)(ii) requires the legal consultant to file with the court a written undertaking to observe the applicable rules of professional conduct, appropriate evidence of professional liability insurance in such amount as the court shall prescribe, a written undertaking to advise the court of any change in circumstances affecting the legal consultant's eligibility for licensure as such and a duly acknowledged instrument designating the clerk of such court as his or her agent upon whom process may be served. Section 6(b) contains detailed provisions for service upon the clerk.

Taken together, the provisions of Section 6 are designed to ensure that the legal consultant will be subject not only to the disciplinary powers of the court having responsibility for same but also to private civil suit in a United States court for any failure to observe established standards of professional responsibility. These provisions are, of course, supplemental to the foreign rules of professional conduct which apply to the legal consultant as a member of a foreign legal profession.

G. APPLICATION AND RENEWAL FEES

Rules adopted in most jurisdictions contain no provisions regulating fees to be paid at the time of application for a license as a legal consultant or upon renewal, annual or otherwise, of a legal consultant's license, leaving the determination of such fees in the discretion of various authorities or entities, named or unnamed.⁶⁶ Of those which address the amount of the fee, some specify a particular amount⁶⁷ and others establish the fee by reference to those paid by applicants for admission to practice,⁶⁸ in the case of application fees, and those paid by members of the bar of the licensing state, in the case of renewal fees.⁶⁹ While most of these are reasonable, at least one state has established multiple fees that appear far higher than would appear to be required to cover any conceivable processing costs and bearing no

66. The California Rule, for example, leaves the determination of renewal fees for determination by the State Bar; *see* CALIFORNIA RULE, R. 988(i).

67. *See* CONNECTICUT RULE, § 24C(a)(2) (application fee of \$500); DISTRICT OF COLUMBIA RULE, R. 46(c)(4)(B)(1)(b) (application fee of \$350); OHIO RULE, § 2(A)(1) (application fee of \$500); TEXAS RULE, R. XVI(e)(1), (2) (application and renewal fees equal to amounts charged by jurisdiction of admission of applicant for Texas lawyers in reverse situation, but in no event less than \$700 for application and \$150 for renewal).

68. *See* WASHINGTON RULE, R. 14(b)(1)(viii) (admission fee equal to that paid by person applying to take bar exam). The Hawaii Rule provides simply that the cost of a report or character investigation, if any, shall be borne by the applicant; *see* HAWAII RULE, R. 14.2(a).

69. *See* FLORIDA RULE, R. 16-1.4(b) (legal consultant required to pay annual renewal fee equivalent to annual dues paid by members of the Florida Bar); WASHINGTON RULE, R. 14(c)(1)(ii), (f)(2) (legal consultants required to pay annual dues to the integrated Washington Bar at the rate applicable to members having practiced more than 3 years).

relation to the fees charged to persons applying for admission to the bar or renewing their licenses as such.⁷⁰

This kind of provision undermines the ability of United States lawyers to object to the establishment of excessive fees for registration as a legal consultant, which is one device that has been used to deter American lawyers from seeking foreign practice rights.⁷¹ To make it clear what is expected by way of reciprocity in this regard, Section 7 of the Model Rule makes it clear that application fees to be paid by individual foreign lawyers are not to exceed those paid by lawyers from other States seeking admission on motion, while renewal fees are to be no greater than those paid by members of the bar of the licensing State.

H. REVOCATION OF LICENSE

Rules adopted in some jurisdictions have required regular renewal of the licenses of legal consultants.⁷² To the extent that such a renewal is a purely ministerial requirement created for administrative purposes, it is not in principle objectionable. However, it would be unduly burdensome to require legal consultants to demonstrate repeatedly that they qualify for licensure under Section 1 of the Model Rule. Accordingly, the Model Rule requires that the applicant must establish his or her qualifications to the satisfaction of the court only once, at the time of initial application, and not in connection with any renewals.

Section 8 of the Model Rule is included to make it clear, nonetheless, that the license may, and indeed must, be revoked if the court determines that a legal consultant no longer meets the requirements for licensure set forth in Section 1(a) or Section 1(c), even if there are no grounds for disciplinary action in the licensing jurisdiction. This is appropriate and necessary because the licensee's qualification as a legal consultant is derivative from his or her status as a member in good standing of a foreign legal profession, and any change in that status *ipso facto* removes the basis for his or her licensure as a legal consultant. The legal consultant would be affirmatively required by reason of the undertaking referred to in Section 6(a)(ii)(C) to advise the court of any such change.

70. See GEORGIA RULE, § 4(b) (application fee for character and fitness determination to be established by Fitness Board but in no event less than \$3,000); *id.*, § 5(b) (application fee for license to be established by Board of Bar Examiners but in no event less than \$75); *id.*, § 6(b) (license to be issued upon payment of the "usual fee" to the clerk of the superior court).

71. In the United Kingdom there are no fees to be paid in connection with the obtaining of the consent of the Law Society to the issuance of the class of visa required to enable a United States lawyer to establish professional residence in London; however, if the law firm with which the United States lawyer is affiliated wishes to add a partner who is an English solicitor, *all* partners in the firm, regardless of location, must register with the Law Society and pay a substantial registration fee. The result can be annual fees for the law firm in excess of \$100,000.

72. See CALIFORNIA RULE, R. 988(i); GEORGIA RULE, § 5(d); OHIO RULE, § 8; TEXAS RULE, R. XVI(d)(1).

I. ADMISSION TO THE BAR

Section 9 makes it clear that, if a person licensed as a legal consultant is admitted to practice as a member of the bar, his or her license as a legal consultant would be superseded by the license to the practice of law as a member of the bar. This was included to negate any implication in Section 4(f) that a legal consultant would not be permitted to become a member of the bar upon satisfaction of the usual requirements for licensure as such.

J. APPLICATION FOR WAIVER OF THE RULES

Section 10 of the Model Rule permits the court responsible for licensing of legal consultants, upon application and in its discretion, to vary the application of or waive any provision of the Rule where strict compliance would cause undue hardship to the applicant. This again reflects the need for flexibility in the face of the broad range of factual circumstances that may conceivably arise, regulated by the court in the exercise of its sound discretion.

IV. Conclusion

A Model Rule for the Licensing of Legal Consultants is sorely needed, not only to provide considered guidance to those states that are now considering or may in the future consider the adoption of such Rules, but to enhance the opportunity for American lawyers and law firms to develop transnational practices on the basis of broad reciprocity and mutual respect for the qualifications of members of recognized foreign legal professions. The way in which foreign lawyers are regulated in this country has a dual impact on the competitive position of American lawyers and law firms in a global economy. First, it directly affects the ability of American firms to add to their ranks lawyers qualified to practice in other jurisdictions, which is a prerequisite to the establishment and expansion of truly multinational practices. Second, it produces an indirect effect through the "mirror image" phenomenon by which arbitrary and unnecessary restrictions in the Rules adopted by various states are seized upon as an excuse for the imposition of similar, or even more stringent, restrictions on American lawyers abroad. In order to obtain fair treatment abroad, we must be in a position to accord to foreign lawyers and law firms the possibility of carrying on their practices in the United States, subject to the same scrutiny, regulation and discipline as members of the bars of the United States but unencumbered by unnecessary and even protectionist restrictions, on a basis of full reciprocity.

The proposed Model Rule follows closely a Rule that has been in effect in New York for nearly twenty years, the operation of which has resulted in no significant problems and considerable benefit to the development of New York as a center of international legal activity. Under the Resolution, the Association would urge all United States jurisdictions to consider the adoption of rules for the licensing of legal

consultants and would commend to their use the Model Rule incorporated in the Recommendation that this Report accompanies. We believe that this is an issue upon which uniformity of approach among the states is of critical importance. We further believe that the interests of the United States legal profession are not and should not be conflicting.

After years and even decades of relative inaction and inertia on the part of the legal profession in the face of rapid changes in the structure of the global economy, the face of the legal profession is now being altered at a stunning pace, not only in the European Community but elsewhere throughout the world. We have a small window of opportunity to influence that change. If we fail to do so, the process will unquestionably go forward without us, to the great detriment of the American legal profession, which has long been the world's leader in the transnational practice of law, and to the disadvantage of United States economic interests as well as of consumers of international legal services worldwide. It is thus not only appropriate, but indeed essential, that the Association take the lead in establishing a coherent and forward-looking model for the regulation of foreign lawyers in this country.

Respectfully submitted,
Louis B. Sohn, Chair
Section of International
Law and Practice
August, 1993